CNMC
COMISIÓN NACIONAL DE LOS MERCADOS Y LA COMPETENCIA

GUIDE ON PUBLIC PROCUREMENT AND COMPETITION

IN-HOUSE PROCUREMENT AND HORIZONTAL COOPERATION

REF. G-2020-01

Date: 14 February 2023

www.cnmc.es

CONTENTS

(Revised version, April 25, 2023)

1. INTRODUCTION

As part of its 2021-22 Action Plan (actions 141 and 202), the CNMC plans to continue updating its Guide on Public Procurement and Competition. This process has been planned in phases, corresponding to the different stages of the public procurement cycle: 1) procurement planning, 2) procurement alternatives, 3) preparation and design of tendering processes, 4) contract award, 5) contract performance and 6) ex-post evaluation. In December 2020, the CNMC completed the first phase of the update with the publication of its the Guide on Public Procurement Planning[1].

This guide focuses on the determination of the best procurement method, understood as the choice of the alternative that best meets the need demanded by a public sector entity (supplies, services or works) in terms of cost-benefit.

Although turning to the market through **public procurement** is usually the most frequent option, the legal system provides for alternative ways for satisfying public needs, through **cooperation between public sector entities**. This cooperation can take place through **agreements between contracting authorities** (horizontal cooperation) and through **in-house procurement**[2] (vertical cooperation) (see Text box 1).

Text box 1. Forms of cooperation: vertical and horizontal

In-house procurement – vertical cooperation.

Entities belonging to the public sector may directly perform services inherent to works, supplies, services, concessions of works and services through instrumental legal entities with whom they have a relationship of dependence and control (**controlled entities**). The relationships between them are hierarchical and are instrumented through **direct awards (in-house transactions)**, in exchange for monetary compensation.

From the point of view of competition, the main characteristic of vertical cooperation is that **in-house entities shall be required to carry out specific works, supplies, services with which they are entrusted by the public administration (controlling entities).** In-house relationships are not subject to the principles and procedures of public procurement (they are

[1] All CNMC activity promoting competition in the field of public procurement is available at the following link: https://www.cnmc.es/ambitos-de-actuacion/promocion-de-la-competencia/contratacion-publica.

[2] A mechanism different from the transfers of public tasks regulated in article 11 of Law 40/2015, of October 1 (LRJSP) as an instrument of inter-administrative cooperation. This mechanism will not be analysed in this Guide, nor will other methods for the transfer of competences.

directly awarded), although they must comply with several legal requirements aimed at preventing improper or abusive use[3].

Public sector cooperation agreements – horizontal cooperation.

This kind of cooperation mechanism corresponds to agreements between different public sector entities, possibly with the participation of private parties, in order to achieve common public interest objectives[4]. It is a relationship between equals, without there being any dependence or control between the parties.

From the perspective of competition, this type of cooperation is also characterised by the fact that **it is awarded directly**, and consequently, it does not require a competitive tendering. The cooperation agreements must also meet a number of legal requirements[5].

Source: owned elaboration.

Due to the limitations of the available data, it is not easy to determine the relevance of these cooperation mechanisms in quantitative terms.

As regards **in-house providing**, its importance was already reflected in the CNC report on in-house procurement: implications of it use from a competition advocacy perspective (2013)[6]. At that time, there were 37 controlled entities in the General State Administration, with an aggregate turnover of more than €2.5 billion, and more than 110 controlled entities in the autonomous communities. These entities operated in a wide variety of sectors (technical consultancy, execution of civil, military, agricultural or forestry works, electronic certification services, foreign promotion or publishing of written media, among others).

[3] This mechanism and its conditions are regulated in EU Directive 2014/24 (recitals 5, 31 and 34 and Article 12, paragraphs 1 to 3), in Law 9/2017, of November 8, on public sector contracts (articles 31 to 33) and Law 40/2015, of October 1, on the public sector legal framework (RJSP) (article 86.2). The regulation derives from the abundant case law of the CJEU (Rulings of November 18, 1999, subject C-107/98, Teckal; of January 11, 2005, C-26/03, Stadt Halle and RPL Lochau; of October 13, 2005, C-458/03, Parking Brixen; of May 11, 2006, C-340/04, *Carbotermo and Consorzio Alisei,* amongst others).

[4] Article 6.2 of Law 9/2017, of November 8, on public sector contracts (LCSP).

[5] Established by European case law (amongst others, Judgement of June 9, 2009, subject C-480/06 Commission/Germany and June 13, 2013, C-386/11, Piepenbrock) and incorporated into EU Directive 2014/24/, *ex* article 12.4, in the LCSP in articles 6 and 31 and in the LRJSP in articles 47 et seq. Also see the Work document of the European Commission on the application of EU public procurement regulations on relations between contracting authorities (cooperation in the public sector) (SEC (2011) 1169, of October 4, 2011).

[6] National Competition Commission (CNC, current CNMC), Report on In-house providing in Spain: Implications of its use from a competition advocacy perspective (2013).

At present, the General Comptroller of the State Administration (IGAE) considers that **the use of controlled entities has become widespread**[7]. Between March 2018 and April 2019, the five largest state-controlled entities (TRAGSA, TRAGSATEC, FNMT-RCM, ISDEFE and INECO) had a total turnover of €1.02 billion and carried out contracts worth more than €800 million[8].

The latest annual report on the supervision of public procurement in Spain, produced by OIRESCON in 2022, identifies more than 150 controlled entities active in 2021, which were awarded 2,107 contracts worth nearly €2 billion[9]. With regard to the type of work being awarded, the provision of services is the most common (over 70%), followed far behind by the execution of construction work (10%) and a residual unspecified category (15%).

With respect to **horizontal cooperation agreements**, the data analysis is equally complex due to the wide variety of agreements and their widespread use. The Report of the Commission on the Reform of Public Administrations (CORA report) notes their extensive use: in 2012 there were more than 7,100 agreements in force between contracting authorities, most of them (64%) being non-financial in nature. In terms of economic importance, the most significant cooperation agreements are those with entities subject to private law (more than 50% of overall expenditure), followed by inter-administrative agreements, particularly those signed with autonomous communities and local authorities (more than 25% of funds). For example, a total of 417 State-local authorities cooperation agreements were signed in 2018[10].

The CNMC has had the opportunity to analyse the use of public cooperation agreements and in-house procurement from a competition perspective on several occasions (see Text box 2 at the end of this section). In addition to the CNMC,

---

7 Report regarding the main results of control in terms of public procurement in accordance with article 332.11 of the LCSP (IGAE; 2020): *"Practically all ministerial departments and a large part of public bodies resort to this legal transaction, so the initial specificity of this mechanism has disappeared and been placed on the board of options for the public administrator in a very significant way*."

8 *Ibid*.

9 Including new orders, modifications and extensions carried out in 2021.

10 Report on State-Local Entities cooperation agreements signed in 2018.

the regional competition authorities have also analysed these public cooperation mechanisms in different competition advocacy actions[11].

Public cooperation mechanisms can offer certain **advantages over public procurement**, for example, in terms of flexibility and control over the execution of services. At the same time, the use of these alternatives may entail **risks for competition and efficiency** by reducing the size of the public procurement market and potentially favouring certain providers[12]. The freedom to use these alternatives is therefore not unlimited[13].

In recent years, there have been advances in the regulations governing these alternatives (or exceptions to public procurement rules), which have outlined in greater detail the legal requirements for their use. However, their use continues to entail risks for competition and efficiency[14]. Incorrect use of public cooperation agreements has a cost in economic terms, in the form of inefficiencies in the management of public funds.

---

[11] Without being exhaustive, it is worth mentioning the reports issued in application of article 97.2 Royal Legislative Decree 781/1986, of April 18, which approves the Consolidated Text of the legal provisions in force in matters of local regime (Catalan Competition Authority); the Report of the Basque Competition Council (currently the Basque Competition Authority) in relation to the consultation carried out by the General Meetings of Bizkaia regarding the participation in public tenders for Euskotren in competition with private companies (File. I-3/2012, 2013). On a more general level, the recommendations to facilitate access and promote competition in the field of Andalusian public procurement (Agencia de Defensa de la Competencia de Andalucía -current Agencia de la Competencia y de la Regulación Eficiente de Andalucía-, 2011).

[12] Conclusions of the General Counsel M. Campos Sánchez Bordona presented on January 29, 2020 (Case C-796/18), sections 31 to 33.

[13] The case law has clarified that the choice of the procurement method may affect the fundamental freedoms of the TFEU and is subject to requirements that go beyond those provided for in the public procurement regulations. For example, in its Ruling of 03.10.2019, case C-285/18 *Irgita*, the CJEU has declared that "*The freedom available to the Member States in terms of choosing the management method they consider most appropriate for the execution of works or the provision of services cannot, however, be unlimited. On the contrary, it must be exercised respecting the fundamental rules of the Treaty on the Functioning of the EU (TFEU), in particular, the free movement of goods, the freedom of establishment and the freedom to provide services, as well as the principles that derive from these, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency*". (section 48).

[14] As the CJEU has declared, compliance with the requirements set forth in the public procurement regulations does not ensure, by itself, the compatibility of agreements between contracting authorities and in-house contracts with EU Law (see Judgement of 10.3.2019, case C-285/ 18 *Irgita*, sections 60 to 64).

Good practice in the use of public cooperation exceptions is especially relevant given the challenge posed by European recovery funds in terms of management[15]. The effectiveness of such recovery mechanism depends on the proper use of these cooperation agreements for projects financed by the EU Next Generation Funds[16].

The purpose of this document is not to propose any amendments on the regulation governing these public procurement exceptions, nor to establish a legal interpretation criterion for their application, but rather to provide guidance to public entities to better understand the risks to competition and, within the possibilities of the current regulations, to act as pro-competitive as possible.

This document has been prepared on the basis of a public consultation and a conference held in June 2021[17]. The responses received confirmed that the CNMC should provide relevant guidance on the appropriate use of these cooperation mechanisms from the perspective of the principle of free competition enshrined in the Spanish Constitution.

This Guide is divided into five sections. After this introduction, the guide explains, firstly, the risks of public cooperation for competition an efficiency and, secondly, the regulation applicable to public cooperation agreements and in-house procurement. Thirdly, it analyses and provides recommendations on in-house providing (vertical cooperation). Finally, it studies and provides guidance on public cooperation agreements (horizontal cooperation).

---

15 It contemplates for Spain more than 140,000 million of total investment in 2021-2026 (about 70,000 will be in the form of direct transfers and the other 70,000 will be in the form of credits). The Recovery, Transformation and Resilience Plan focuses on the first phase of implementation, detailing the investments and reforms corresponding to the period 2021-2023 in order to seek the mobilisation of the first 70,000 million euros.

16 Accordingly, the Royal Decree Law 36/2020, of December 30, which approves urgent measures for the modernisation of Public Administration and for the execution of the Recovery, Transformation and Resilience Plan, highlights administrative self-provision as the appropriate channel for managing European funds.

17 The public consultation was open from May 31 to July 9, 2021. 26 contributions were received that can be consulted on the CNMC website . The session, about in-house procurement and public cooperation agreements through the lens of competition advocacy, was held on June 11, 2021. In the following link you can consult the summary of the Conference, the programme and access the recording of the same. https://blog.cnmc.es/2021/06/21/ayudanos-a-actualizar-la-guia-de-contratacion-publica-y-competencia/

Text box 2. Reports from the Spanish Competition Authority on public-public cooperation from the perspective of promoting competition.

Guide on public procurement and competition (2011). The Guide recommends avoiding excessive use of in-house procurement and public-cooperation agreements, advising a restrictive interpretation of the legal requirements for the use of both types of cooperation mechanisms. In relation to in-house providing, the guide recommends assessing the extent to which the market provides or can provide the relevant supplies or services and at what price and advises to avoid in-house procurement if the market offers lower prices. Similarly, concerns are raised about systematic subcontracts by controlled entities.

Report on in-house proving in Spain: Implications of their use from the perspective of competition advocacy (2013). This report is a comprehensive study of the legal framework, the economic and institutional characteristics and the use of in-house awards in the Spanish public administration. The study revealed: (i) the lack of information and publicity on the use of this mechanism; (ii) the widespread use of in-house procurement at all administrative levels; (iii) the significant volume of public funds and economic sectors affected; (iv) the losses in terms of efficiency given the lack of competitive pressure, and (v) the impact on market supply in terms of competition.

Report on the Draft Law on Public Sector Contracts (IPN/CNMC/010/15) (2015). In relation to agreements between public entities, the report recommended strengthening the requirements established by European case law. Regarding public cooperation agreements with private legal entities, the report considered that such agreements should be even more exceptional and should be converted, where possible, into a public procurement procedure subject to effective competition. Moreover, the report warned, on the one hand, that in-house procurement can be used for avoiding competition under the public procurement rules in order to award a contract in situations where it could ensure better value for money; on the other hand, it pointed out that there is no obligation to use them.

Recommendations to public authorities for pro-competitive market intervention and inclusive economic recovery (G-2021-01) (2021). This document contains three decalogues of recommendations on better regulation, State aid and public procurement. The CNMC aims to promote pro-competitive public intervention to foster a strong, inclusive, sustainable, and innovative economic recovery. In terms of public procurement, it recommends restricting the use of alternatives to public tendering processes, such as in-house providing and public cooperation agreements, to instances where they have been proven to be more efficient. In this regard, it points out that the use of these types of cooperation mechanisms implies a waiver of competitive tendering procedures and, therefore, of the efficiency gains arising from competitive pressures between tenderers. Therefore, their use should be subject to a restrictive interpretation, on a case-by-case basis, following an appropriate analysis of their possible effects on competition.

Source: owned elaboration.

2. REGULATION OF IN-HOUSE PROCUREMENT AND PUBLIC COOPERATION AGREEMENTS

Public authorities are free to decide which is the best manner to manage and perform their functions or provide the public services entrusted to them[18]. However, this freedom of choice is not unlimited and must be exercised in compliance with all the applicable provisions of both European and Spanish legal framework[19].

From the point of view of **EU law**, the rules deriving from the Treaty on the Functioning of the European Union (TFEU) must be respected, in particular the free movement of goods, freedom of establishment and freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency, as catalysts of the internal market.

This has been emphasised in European case law, both in the case of horizontal cooperation, which must not end up distorting competition with respect to private economic operators, and in the case of in-house procurement, where the burden of proving the existence of exceptional circumstances justifying the derogation or exception lies on the person seeking to rely on those circumstances[20].

From the point of view of **Spanish law,** it is worth mentioning the constitutional commitments, which, on the one hand, promote the defence and protection of free competition and, on the other hand, require an efficient expenditure of public funds by public entities, linking their execution to efficiency and economy criteria[21].

---

[18] Article 2.1 of EU Directive 2014/23/ and Recital 5 of EU Directive 2014/24/: To carry out their public interest functions with their own resources or in collaboration with other authorities or entrust them to economic operators.

[19] On the tension between the will not to interfere with the Member States in the organisation of their internal administration and that the exclusion does not lead to the infringement of the principles that govern public procurement in EU law and go to the detriment of the objective of establishing an internal market in this field (the more contracts are excluded, the less room for the creation and development of the internal market for public bidding) see sections 29 et seq. of the Conclusions of the General Advocate, C-796/18 ISE-Cologne .

[20] Ruling of the CJEU of January 11, 2005, Stadt Halle, (section 46) and of October 13, 2005, *Parking Brixen* (sections 63 and 65). The Court of Auditors has also ruled in this vein, in the inspection report issued on April 30, 2015 (number 1197) .

[21] Articles 31 and 38 of the 1978 Spanish Constitution.

According to current legislation on budgetary stability and financial sustainability, the following should be borne in mind[22]:

> "*1. Public expenditure policies shall be framed within a multiannual planning, programming and budgeting framework, taking into account the economic situation, economic policy objectives and compliance with the principles of budgetary stability and financial sustainability.*
>
> *2. The* ***management of public resources shall be guided by effectiveness, efficiency, economy and quality****, to which end policies to rationalise spending and improve public sector management shall be applied.*
>
> *3. The legal and regulatory provisions, in their drafting and approval phase, the administrative acts,* ***contracts and cooperation agreements****, as well as any other action by the subjects within the scope of application of this Act that affect present or future public expenditure or revenue,* ***shall assess their repercussions and effects, and shall be strictly subject to compliance with the requirements of the principles of budgetary stability and financial sustainability****".*(emphasis added).

Therefore, although it is not compulsory for contracting authorities to meet public needs through public procurement rules, when public entities evaluate the different procurement alternatives available to them (public contracts, agreements between contracting authorities, in-house providing), they must consider not only the formal requirements of each of these alternatives but also assess their comparative impact in terms of effectiveness, efficiency, economy, quality, budgetary stability and financial sustainability. Considering these criteria, contracting authorities should choose the procurement alternative that best meets their needs in accordance with these principles.[23].

One of the effects of alternative cooperation mechanisms to public procurement, which may negatively affect the objectives of effectiveness, efficiency, economy, quality, budgetary stability, and financial sustainability, is the impact on

---

[22] Article 7 of Organic Law 2/2012, of April 27, on budgetary stability and financial sustainability.

[23] Of special interest in this sense is the framework contained in art. 85 of Law 7/1985, of April 2, Regulating the Bases of the Local Regime . This standard prioritises among the different forms of direct management: gives preference to direct management by the local entity itself or by a dependent autonomous body, and only contemplates the use of public business entities or local commercial companies when they are a more sustainable and efficient form of direct management than the previous ones, taking into account the criteria of economic profitability and investment recovery, duly accredited. It should also be noted that article 97.2 of the Royal Legislative Decree 781/1986, of April 18, which approves the consolidated text of the legal provisions in force on the local regime and even determines the direct intervention of the competition authorities in the decision-making procedures of local entities relating to the provision of certain local services under a monopoly regime.

competition. Agreements between public entities and in-house procurement mean not using the market as a supplier of supplies and services and can lead to public needs being met under worse price and quality conditions. Moreover, it could result in negative dynamic effects on competition in the markets (see section 2), especially when the frequency and use of these mechanisms increase at different administrative levels[24].

Therefore, the Spanish Supreme Court stressed that "*the requirements for in-house procurement must be interpreted strictly, and the burden of proof that the exception is justified by special circumstances lies with the party seeking to benefit from it* […] *and the impact on the principle of free competition must be taken into account"*[25].

2.1. Requirements set out in sector-specific regulation

In accordance with the foregoing, a number of material and formal requirements must be met in order to exclude certain legal transactions for the supply of

[24] IGAE report regarding the main results of control in terms of public procurement in accordance with article 332.11 of the LCSP regarding in-house procurement in the field of the state public sector in the period March 9, 2018 to April 30, 2019:*"Practically all ministerial departments and a large part of public bodies resort to this legal transaction, so the initial specificity of this figure has disappeared to be placed on the board of options for the public administrator in a very significant way*."

[25] Decision of the Supreme Court of September 20, 2018 (FD 9º): "*Consequently, the requirements for the use of controlled undertakings must be subject to a strict interpretation, and the burden of proof that the special circumstances that justify that the exception really exist falls on the person who intends to benefit from it, as has been highlighted in the judgments of the CJEU of January 11, 2005, Stadt Halle, (section 46) and of October 13, 2005, Parking Brixen (sections 63 and 65). And the limit of not affecting the principle of free competition must be taken into account (this is stated in the Report of the National Competition Commission «In-house procurement and transfer of public tasks: implications of its use from the perspective of promoting competition", of July 2013 and Report no. 1003 of the Court of Auditors on transfers of public tasks*)." In the same way, Decision of the Superior Court of Justice of Catalonia of December 17, 2020: *"This poses an additional problem insofar as it supposes an exception to the bidding for the service, so that the requirements for the use of in-house procurement must be subject to a strict interpretation, and in any case must respect the limit of not affecting the principle of free competition, in compliance with the legally established requirements to apply the public tenders exception* " (FJ 4º) and Decision of the Superior Court of Justice of Catalonia of April 22, 2021 (FJ 4º) by which it is declared contrary to law and affects the principle of free competition, an agreement that adopts a direct associative management system that does not meet the requirements to use in-house procurement and consequent exclusion from the application of public procurement rules.

products, provision of services and execution of works from public procurement rules.

As these are exceptional cooperation mechanisms that are not governed by the principles of public procurement (publicity, freedom of access, transparency, equal treatment, non-discrimination and, especially, the principle of free competition), requirements and conditions have been imposed on them in sectoral regulations.

2.1.1. In-house entities and in-house transactions

In accordance with Articles 32 and 33 of Law 9/2017 of 8 November 2017 on Public Sector Contracts (hereinafter, LCSP as per its acronym in Spanish) with specificities depending on whether the concerned entities are contracting authorities or not, in order to exclude in-house cooperation from public procurement regulations, the following requirements must be met:

a) The contracting authority exercises over the legal entity concerned (in-house provider) a control which is similar to that which it exercises over its own departments.

b) More than 80 % of the activities of the controlled legal entity are carried out in the performance of tasks entrusted to it by the controlling contracting authority.

c) There is no direct private capital participation in the controlled legal entity.

d) The controlled undertaking must be expressly recognised as such in its Statutes or regulation[26].

With regard to its purpose, in-house procurement may contain supplies, services and works typical of public contracts[27].

In accordance with Article 86.2 of Law 40/2015 on the Legal Regime of the Public Sector (hereinafter, LRJSP as per its acronym in Spanish), for a legal entity to be a State-controlled undertaking, it must *have* ***sufficient and appropriate***

[26] In similar terms, it is worth making a reference to Article 25 of Royal Decree-Law 3/2020, of February 4, on urgent measures by which various EU directives are incorporated into the Spanish legal system in the field of public procurement in certain sectors; private insurance; pension plans and funds; in the tax field and tax litigation. As far as public procurement is concerned, these are the sectors of water, energy, transport, postal services, including concession contracts.

[27] Article 86 of Law/40/ 2015 of October 1, on the Legal Regime of the Public Sector.

resources *to perform services in the sector of activity corresponding to its corporate purpose, in accordance with its Statutes*. Furthermore, *at least one of the following circumstances* must be met:

1. it *is a more efficient option* ***than public procurement*** *and* is ***sustainable and effective****, based on economic profitability criteria*; or
2. it *is necessary for* ***public security reasons*** *or* ***urgent*** *need for the goods or services supplied by the controlled undertaking*.

Furthermore, Article 86.3 of the LRJSP adds that the following is required for the creation of a new controlled undertaking: i) *a* ***justification report*** *proving that the above circumstances are met must be drawn up, and* ii) *it must be audited by the IGAE*[28] *(General Comptroller of the State Administration).* All of this must be accompanied by other formal requirements: the company's status of controlled undertaking must be publicly disclosed on the Public Procurement Platform, the undertaking's personal and material resources must be verified as appropriate for performing the contracts in accordance with its corporate purpose, the execution orders made by its controlling public entities must be formalised and publicised, the rules and limits on subcontracting part of the in-house procurement and those relating to its content, justification and publicity, among others.

2.1.2. Public cooperation agreements

In accordance with Article 47 et seq. of Law 40/2015 of 1 October on the Legal Regime of the Public Sector (LRJSP as per its acronym in Spanish), agreements between entities within public sector, dependent public law entities and public universities or with entities subject to private law, **for the achievement of a purpose of common interest have legal effects**. These agreements may not have as their object services inherent to contracts.

In accordance with Article 6 of the LCSP, in order to be excluded from public procurement rules, entities **must cumulatively prove that they do not operate on the market** (which will be presumed if they carry out at least 20% of the activities subject to cooperation in the open market), that the purpose of the cooperation is to guarantee that the public services for which they are responsible are provided in such a way as to achieve **the objectives they have in common** and that the cooperation is guided solely by considerations related to the public interest.

[28] See, in this sense, the Resolution of the IGAE of May 16, 2019 approving the Instruction for the preparation of the report to be issued under Article 86.3 of the LRJSP.

Other requirements should also be mentioned, such as the rules concerning the content, justification, and publicity of the agreements.

Likewise, in accordance with the regulations governing the legal regime of the public sector, agreements between public entities must improve the efficiency of public management, facilitate the joint use of public resources and services, contribute to the performance of activities of public utility and comply with the legislation on budgetary stability and financial sustainability[29].

2.2. Principles of better regulation and good administration

Compliance with sector-specific requirements does not in itself ensure that alternative instruments to public procurement (vertical and horizontal cooperation) are the most efficient and proportionate way of meeting public needs and that there are no restrictions on competition[30].

The use of cooperation agreements as opposed to a competitive tendering is **optional**, even when the formal and material requirements described in the previous section are fulfilled. Therefore, when evaluating the different possibilities for action, public authorities must assess determine which solution best achieves the set objectives in the public interest.

Specifically, in terms of *public sector cooperation agreements,* the LRJSP establishes that the agreement must be supported by a justifying report analysing, among other things, its necessity and opportunity, as well as its

[29] Article 48.3 of the LRJSP.

[30] In the Ruling of the CJEU of October 3, 2019, subject *Irgita* (C-285/18), sections 60 to 64, clarifies that the fact that an internal cooperation operation meets the requirements of Article 12 of EU Directive 2014/24 does not release contracting authorities from respecting the principles of equal treatment, non-discrimination , proportionality and transparency and of not distorting competition with regard to private economic operators . Therefore, even if an internal transaction meets the requirements of the Directive, it is not itself in accordance with EU law. In similar terms, Conclusions of the General Advocate, C-796/18 ISE-Cologne , sections 90 et seq. which recalls that in the case of self-supply, provided certain requirements are met, it is not necessary to resort to the rules and procedures of EU law on public procurement; however, they continue to be subject to other rules, including those relating to free competition of article 106.2 TFEU. For this reason, article 18.1 of EU Directive 2014/24 declares "the contract shall not be conceived with the intention of excluding it from the scope of application of this Directive or of artificially restricting competition". Therefore, it considers that the limitation imposed by the rules on free competition therefore also affects horizontal cooperation between contracting authorities.

economic impact[31]. This law also states that these *cooperation agreements* must improve the efficiency of public management, facilitate the joint use of public resources and services, contribute to the performance of activities of public utility and comply with the legislation on budgetary stability and financial sustainability[32].

Therefore, in addition to the formal and material requirements, the use of public-public cooperation must comply with the principles of good regulation and administration in force in the Spanish legal system (efficiency, necessity, proportionality, and non-discrimination, among others)[33].

Under the principle of **necessity**, any public measure restricting competition or economic activity must be justified by a reason of general interest, be based on a clear identification of the aims pursued and be an appropriate instrument to ensure their achievement.

Under the principle of **proportionality**, it must be demonstrated that there are no other measures which are less restrictive of rights or impose fewer obligations on the addressees from among those which are suitable to satisfy an overriding reason relating to the public interest.

The principle of **efficiency** requires public authorities to assess which is the best possible relationship between the expected results and the resources used to achieve them[34].

---

31 Article 50 of the LRJSP.

32 Article 48.3 of the LRJSP.

33 These principles were glimpsed in an embryonic way in Law 17/2009, of November 23, on free access to service activities and their exercise, and were later included more formally in Law 20/2013, of December 9, on the guarantee of market unity, as well as more recently in Law 39/2015 of October 1, on the common administrative procedure of public administrations and Law 40/2015 of October 1, on the legal regime of the public sector.

In accordance with article 9 of Law 20/2013, public authorities must ensure that the following provisions and acts comply with the aforementioned principles: a) The general provisions that regulate a specific economic activity or have an impact on it. b) Authorisations, licenses and administrative concessions [...].c) Documentation relating to public contracts, including the specifications and clauses of public contracts. d) The acts dictated in application of the provisions, requirements and conditions mentioned in the previous letters, as well as the procedures associated with them. […] f) Any other acts, resolutions and administrative procedures that affect economic operators.

34 Efficiency is a guiding principle of public administration: Article 41 of the Charter of Fundamental Rights of the European Union; Articles 31.2 and 103 of the Spanish Constitution

The use of public-public cooperation must comply with European and Spanish competition regulations, including those on State aid[35].

However, **the above does not result in a prohibition on the use of these cooperation mechanisms**, although it is important to rigorously apply the requirements that the legislation establishes for resorting to their use. The use of these mechanisms is a possibility, never an imposition.

Their use must be interpreted strictly and must be subject to compliance with the aforementioned double test: on the one hand, scrupulous respect for the material and formal requirements established to fall outside the scope the application of public procurement rules; on the other hand, the necessary adjustment to the principles of good regulation and administration so as to ensure, among other things, that the supplies and services concerned cannot be provided by the market under better quality and price conditions.

and Article 3.1 h) and j) of the LRJSP. As set out in the IPN/CNMC/010/15 *" It is also a very useful instrument to reduce the margin of discretion of public entities to the extent that it implies the use of management techniques that ensure maximum rationality and profitability in the use of public resources. However, the degree of demand and the practical implications of breaching the principle of efficiency present notable shortcomings. Despite the normative references, the management of public procurement is mostly legal and little time is given in practice to economic considerations from that perspective. Formal compliance with the rules is prioritised over obtaining quantifiable goals of a final nature, such as the evaluation of whether the best value for money has really been obtained (efficiency test) in the case in question.".*

[35] Article 106 of the TFEU, which requires EU Member States to respect and enforce the rules of free competition (Articles 18 and 101-109) with respect to their public companies and those companies to which they grant special or exclusive rights, without imposing restrictions on their operation nor any advantages that may be derived from the origin of its capital.

3. THE RISKS TO COMPETITION RESULTING FROM IN-HOUSE PROCUREMENT AND PUBLIC COOPERATION AGREEMENTS

Public-public cooperation may offer **advantages for contracting authorities** in terms of agility, predictability, flexibility, and control, although the **risks for competition** arising from these mechanisms justify that their use is restricted by law to strictly limited cases.

Firstly, public-public cooperation entails fewer formalities for the contracting authority than a call for tenders and the possibility of starting supplies, services, and works performance in a shorter period (**agility**). Secondly, the cost of carrying out an in-house procurement can be better anticipated than a tendering process, as it is subject to pre-established tariffs in the case of in-house providing and pre-established financial contributions in the case of agreements (**predictability**)[36]. Third, the design of in-house procurement, especially as regards public cooperation agreements, allows for negotiation or dialogue between the participating entities, and their modification is subject to fewer limitations than in the case of public contracts (**flexibility**). Finally, control over the performance of works, supplies and services is more direct, especially in the case of in-house procurement since there is a hierarchical relationship with the controlled undertaking (**control**).

At the same time, the use of these mechanisms **poses certain risks** for competition and efficiency, especially when they are used more intensively. The main competitive risks are listed below:

3.1. Loss of efficiency in the provision of supplies or services

In a contract, the efficiency of the provision of goods or services (price, quality, suitability to needs, etc.) depends on the degree of competition in the market and the tender. On the other hand, in an in-house procurement or a public cooperation agreement, the conditions of provision depend on compliance with legal requirements and the self-imposed standards between the entities participating in the cooperation. Even though the use of this mechanism can lead to obtaining efficient outcomes in specific cases, these tend to be worse than those of a competitive market, especially when there are rigidities (organisational or in the

[36] Article 47. 6 of the LRJSP: "The financial contributions that the signatories commit to make may not exceed the expenses derived from the execution of the agreement.".

terms of cooperation[37]), information asymmetries[38] or inefficiencies in the internal processes of the entity providing the goods or services due to a lack of competitive pressure ("X-inefficiency")[39]. Thus, **in general, the supplies and services provided by public entities tend to be worse than those provided by a competitive market**, in terms of higher prices, lower quality or poorer adaptation to public needs.

However, **cooperation agreements** (through an agreement between public entities or an in-house relationship) **may be structurally more efficient than a public contract in non-competitive markets**, either because of market failures or anti-competitive behaviour by companies **or because of poorly designed public contracts**, which reduce competition between the companies in the tender.

In addition to the improvements that can be introduced to correct these situations, public-public cooperation can provide greater efficiency than public contracts, as long as the strict legal requirements for their use are met, due to their advantages in terms of **agility, flexibility and control**, as discussed above. For example, when faced with needs subject to uncertainty (e. g. a need that depends on future events that are difficult to foresee), public-public cooperation may have advantages over contracts through tenders, where it may be difficult to foresee all possible eventualities.

It should be noted that many of the advantages of public-public cooperation derive from its very nature (undertakings that essentially serve the purposes of the administration and shared objectives between two public entities) and that using a public procurement procedure may entail high procedural and time costs until the supplies or services are procured or available. Although this document does not address these difficulties, the CNMC plans to analyse the operation of

---

37 For example, by setting rates objectively and *ex ante* by the entity that awards the in-house contract.

38 If the entities that participate in an agreement between contracting authorities or an in-house contract do not have an adequate reference of market conditions, it is more likely that the service will be carried out in worse conditions than those of the market. In particular, the more agreements between contracting authorities or in-house contracts are used as opposed to the use of public contracts, the more likely it is that their conditions will deviate from those of the market.

39 The term "x-inefficiency" refers to an economic concept that refers to the lower efficiency in the production processes of public or private entities when they face less external competition. See Leibenstein, H., *Allocative efficiency vs "X-efficiency"* (1966).

public procurement in the following phases of the process of updating the Guide on Public Procurement and Competition, which this document is a part of.

Text box 3. Efficiency advantages and disadvantages of the use of public-public cooperation versus public procurement from the contracting authority's perspective

Efficiency advantages of public-public cooperation versus public procurement	Efficiency disadvantages of public-public cooperation versus public procurement
Greater agility in determining and specifying the obligations and actions of the parties (fewer formalities, faster procedure). Flexibility in the design of the terms of cooperation (negotiation and dialogue between the cooperating entities). Flexibility in modifying the terms of cooperation when faced with unforeseen circumstances. Greater likelihood of being a better alternative to public procurement in non-competitive markets or in poorly designed tenders. Greater control capacity in the case of in-house contracts due to the hierarchical relationship between entities.	Lower productive efficiency of the implementing entities due to the lack of external competitive pressure ("X-inefficiency"). Inability of the cooperating entity to provide the goods and services directly (need to outsource to third parties). Organisational rigidities of the participating entities (e. g. limitations on outsourcing to third parties). Rigidity in the determination of the conditions (e. g. pre-fixed rates in the case of in-house relationships with controlled undertakings). Information asymmetries (e.g., lack of knowledge of the market or of the real costs of provision).

Source: owned elaboration.

In view of the above, the contracting authorities, before opting for a public tendering process, public cooperation agreements and in-house procurement, may try to identify whether the preconditions make one form of procurement more advisable than others. Some of the questions that may be key in this regard are:

- **Is the market competitive?** The existence of a monopoly or a shortage of operators may be indicative of a lack of competition. However, this is not always the case, as other potential competitors may exist. It is therefore important to consider barriers to market entry. Alongside the analysis of structural elements, it is important to analyse performance indicators, such as market prices or business margins.
- **Is it possible to develop a well-designed tender that stimulates competition among bidders?** Contracting authorities are obliged to ensure that tenders are well designed, although it may sometimes be necessary to establish participation requirements that reduce competition

with respect to the relevant market or it may be difficult to establish objective and incentivising selection criteria.

- **Under what conditions could the market provide the desired product or service?** An analysis of tenders for similar contracts can provide an approximate idea of the market response and the effective conditions of price, quality, or innovation.
- **Is there a public sector entity that can efficiently meet the public need? What advantages does it offer compared to market alternatives? What rigidities can cooperation with this entity involve?** It is important to assess a priori the competence and specialisation of the entity that will provide the service, the extent to which it has its own capacity or needs to rely on third-party services (in which case, double margin problems may occur[40]), its organisational strengths or weaknesses, its rigidities, etc.
- **Is it likely a modification of the terms of provision will arise? Can these circumstances be foreseen and how best to deal with each of them? How much are these changes likely to affect the final outcome?**
- **Is it necessary to start providing the products or services in a very short period of time? Are there sufficiently flexible mechanisms for public contracts?**
- **Is it possible to establish effective performance controls under a public contract? What about in the case of in-house providing or public cooperation agreements?**

However, all these issues presuppose a static behaviour of markets and entities. The more widespread public-public cooperation becomes and the more frequently it is used to address public needs, the more dynamic effects may appear that alter the initial efficiency of these mechanisms as opposed to public contracts. These effects are analysed in the following sections.

[40] When the company itself or the entity that carries out the provision in an agreement needs to subcontract the performance of certain tasks to third parties, it is possible that the cost of carrying out the cooperation agreement or in-house procurement may become more expensive. In addition, in these contractual subcontracting relationships the same type of problems can appear as in the public contract, so the advantages of agreements between contracting authorities or in-house procurement are reduced.

3.2. Loss of efficiency of the in-house entity

Productive efficiency refers to the way in which entities carry out their internal processes to produce products and services and covers aspects such as the effectiveness of their internal organisation, the incentives for managers and workers or the flexibility of their relationships with third parties. This efficiency is not static but can change over time. One of the aspects that can have the greatest impact on its dynamics is the external pressure generated by competition.

When entities are deprived of the external pressure of competition because they have a captive or guaranteed demand or customer, they are more likely to increase their operating costs, invest less in improving production processes or incorporate technological advances more slowly, provide goods and services of lower quality and less aligned with the needs of their customers, or increase their prices.

For public sector entities that perform services, especially controlled undertakings, the lack of competitive pressure can lead to a gradual loss of productive efficiency (known as “X-inefficiency”).

3.3. Lower market efficiency

The use of public-public cooperation reduces demand by taking the provision of products and services to the public sector out of the market, thereby generating a **crowding-out effect** on market suppliers. In extreme cases, this effect can lead to the **disappearance of supply** from the market[41].

In addition, when the entities involved in public-public cooperation can also compete in the market[42], there may be risks to competition due to the existence of **cross-subsidies** (overcompensation to public providers, improving their competitive position in the market)[43] or other **exclusive advantages** derived from their public nature, not replicable by the private sector (e. g. advantages in terms

[41] On the complaints of operators for the loss of markets caused by in-house procurement, see the Ruling of the CJEU of April 19, 2007, C-295/05, and STS of January 30, 2008.

[42] The regulations allow for controlled undertakings to make at most, 20% of its turnover in the market.

[43] See, for example, the Ruling of the CJEU of October 25, 2001, Ambulanz Glöckner, case C-475/99.

of access to infrastructure, financing or bankruptcy rules)[44]. This may result in **reduced competitive pressure** in the market.

Reduced market supply and loss of competitive pressure may lead to the public sector experiencing **supply difficulties** in the medium and long term, **disincentivise investment, innovation and productivity improvements** in the market, and lead to **efficiency losses among the contracting authorities and controlled undertakings**. In addition, markets may no longer provide **valid benchmarks** for the quality, variety, or pricing of goods and services. These effects not only affect the public sector but may also **have a negative impact on other buyers** in the market and thus on the economy as a whole.

All these risks are, in principle, greater the more widespread and frequent the use of public-public cooperation mechanisms, the greater the weight of public entities as demanders in the market, and the more specialised the demand for goods and services by the public sector. The combination of these elements may lead to potential competitors deciding not to enter the market or operators that have been participating in the market exiting it permanently.

[44] OECD Council Recommendation on Competitive Neutrality (OECD/LEGAL/0462) of May 31, 2021. It is also recalled that Article 106 of the TFEU requires Member States to respect and enforce the rules of free competition with respect to their public companies and those companies to which they grant special or exclusive rights, without imposing restrictions on their operation or giving advantages that can be derived from the origin of its capital. You can also consult the IPN/CNMC/035/21 on the APL of reform of the Consolidated Text of bankruptcy law (pages 9 and 10), and the problems collected with respect to public business entities.

4. RECOMMENDATIONS ON IN-HOUSE PROVIDING

Three situations of special interest will be analysed separately:

- The creation of or categorisation as an in-house entity (controlled undertaking).
- The in-house transactions.
- The revision of the status of in-house entity.

All of them are subject to the fulfilment of a series of formal and material requirements and must also be linked to certain specific reasons of public interest.

The following is an overview of all of these requirements, with a series of interpretative recommendations based on the one hand, on the demand for rigorous compliance with the requirements (taking into account, where appropriate, the decisions and rulings cited by administrative and judicial audit and supervisory bodies) and, on the other hand, on the principles of good regulation and administration in force in Spain's legal system.

4.1. Creation of in-house entities

The determination of when an entity can be a controlled undertaking, as well as what products and services it can provide according to its corporate purpose, are crucial for the proper use of in-house relationships.

4.1.1. Justification for the creation of an in-house entity

In general terms, **the two alternative circumstances provided for in Article 86.2 of the LRJSP** (greater efficiency than public procurement and sustainability and effectiveness or necessity for reasons of public safety or urgency) **are difficult to interpret**, both because they are based on legal concepts that are somewhat indeterminate and because they are difficult to verify at the moment of creating the controlled undertaking.

On the other hand, these precepts must be read in the light of the provisions in the Spanish Magna Carta related to public intervention in economic activity (Article 128 of the Spanish Constitution, hereinafter “CE” as per its acronym in Spanish), efficiency in the management of public funds (Article 31.2 of the CE) and freedom of enterprise within the framework of the market economy (Article 38 of the CE). These provisions require an **in-depth analysis of the legal and**

economic foundations underpinning the creation and survival of public entities and, in particular, of controlled undertakings[45].

The Spanish Supreme Court, in its ruling of 20 September 2018 (RJ 2018\4409), stated the following: *"The Law on the Legal Regime of the Public Sector requires the use of this mechanism to be motivated by an economic (and, therefore, quantifiable) reason or by a reason of general interest. In this need to motivate in-house procurement, the necessary delimitation of its purpose is also implicit".*

Text box 4. Creation of public entities.

In the case of State-level companies, Article 114 of the LRJSP states that their creation must be authorised by an Agreement of the Council of Ministers, which must be supported by a proposal of its corporate Statutes and an action plan containing at least:

a) Reasons justifying the creation of the company on the grounds that these tasks cannot be assumed by another existing entity, as well as the non-existence of duplication. To this end, a record should be made of the analysis of the existence of bodies or undertakings that carry out similar activities in the same territory and population and the reasons why the creation of the new company does not entail duplication with existing entities.

b) An analysis justifying that the proposed legal form is more efficient than the creation of a public body or other organisational alternatives that have been discarded; and

c) Annual objectives and indicators to measure them.

Source: owned elaboration.

Prior to the creation of the controlled undertaking or the in-house transaction, certain aspects must be taken into account regarding the correct identification of needs that will be part of the controlled undertaking's corporate purpose.

The needs are not specific products or services or single solutions, but rather aspects or functionalities directly linked to the functions of the public body. These functionalities must be directly linked to its internal (e. g. cleaning of public buildings) or external (e. g. taxpayer information on tax management) performance.

Proper planning makes it possible to identify future needs, prioritise them based on different factors (e. g. their urgency, economic value, recurring nature, identified risks, strategic nature) and adjust them to available resources. In

[45] Articles 31.2 and 128 of the 1978 Constitution.

addition, it allows decisions to meet those needs to be strategic, pro-efficiency and pro-competitive[46].

This decision is not neutral, as the choice between the direct execution of activities or their outsourcing and between in-house contracts, public tenders, agreements between contracting authorities or other forms of cooperation has repercussions on the applicable legal regime, the cost of services, the control of their management and execution, the principle of free competition and the market itself. The use of any of these options must be sufficiently justified as a necessary and indispensable requirement[47].

In view of the above, the following **recommendations are made**:

Recommendation 1. Identifying in a reasoned manner the reasons for the existence of the in-house entity

- In line with the recommendations contained in the document entitled Phase I of the update of the Guide on Public Procurement and Competition, which focuses on the planning of procurement, public administrations should correctly **identify their needs** so that they know which are permanent, structural and strategic.
- It is not sufficient to merely mention the reasons for which the in-house entity is to be created. **A reasoned explanation must be given**, supported by the appropriate studies and documentation, of the advantages of the existence of the controlled undertaking as opposed to obtaining public procurement on the market, whether these are reasons of efficiency, public safety, or urgency.
- The reasoning must be reflected in the **justification report** attached to the proposal for the declaration of an in-house entity.

[46] For a more detailed analysis, see G-2019-02: GUIDE ON PUBLIC PROCUREMENT AND COMPETITION. PHASE I – PLANNING. With respect to possible in-house providing, their integration into a plan to be carried out in a specific time frame would distort the frequently alleged reasons of urgency for not resorting to competitive bidding procedures; on the other hand, the recurring use of in-house transactions to provide a specific need should lead to the question of whether said need, especially if it is of a strategic nature for the in-house entities, should not be provided in the medium term through another procurement mechanism (strengthening of human resources). In this regard, the Court of Auditors in its Motion (nº.1198) of January 2017 considers the advisability of strategically planning the use of in-house procurement by those entities or bodies that use them as a regular form of management support -despite their exceptional nature- linking it to planning of its own human resources. With this, the decapitalisation of its own specialist technical personnel would be avoided.

[47] See in this regard, Court of Auditors Motion (nº.1198). It is indicated that otherwise the entities that carry out said in-house transactions run the risk of causing the underutilisation of their own material and personnel resources, in the loss of direct control of the activity that is the object of the transactions and in the decapitalisation of their own technical resources.

- This justification should be subject to **periodic review** because the characteristics of the affected market may change over time. This means that this verification should be carried out not only for *new* controlled undertakings but also for existing ones[48].

Recommendation 2. Assessing the appropriateness of creating the in-house entity in light of what the market is capable of providing.

- If there are already **operators (public or private) capable of providing the products and services required by the public sector under adequate conditions** (in terms of price, quantity, quality, speed, regularity and security of supply, among others), or if new operators can be expected to appear or the supply can be adapted to public needs within a reasonable period of time, the creation of the in-house entity can lead to displacing supply from the market without generating value for the public sector.
- When the motivation for creating the in-house entity is for reasons of urgency, it must be borne in mind that public procurement regulations provide mechanisms for urgent and emergency procurement in cases where the situation requires a rapid response by public entities[49].
- Thus, it is advisable that the analysis prior to the creation of an in-house entity assesses the following aspects:
  - Whether there are *other operators* (public or private) that provide the products and services that the controlled undertaking would provide.

[48] According to the IGAE (General Intervention Board of the State Administration) (IGAE report article 332.11 LCSP (2020), in November 2020, 24 report requests had been sent corresponding to 21 entities of the state institutional public sector. In 13 of the 21 entities, the report had been favourable, in 7 cases unfavourable and 1 case was pending. According to INVENTE records , in November 2020 there were 35 state-owned controlled undertakings, and in November 2020, only 37% had a favourable report from the IGAE. It should be noted that, currently, the obligation to submit the report justifying the proposal for the declaration of controlled undertakings only applies to those that are created and not to existing ones (article 86.3 of the LRSJP originally provided that it would apply to those that will be created in the future and to existing ones, but for the latter the obligation has been eliminated through the modification introduced in the aforementioned precept by Law 11/2020, of December 30).

[49] For example, report from the Junta Consultiva de Contratación Pública del Estado (State Procurement Advisory Board) 14/21. Also the European Commission in its *Guidance on the use of the public procurement framework in the emergency situation related to the COVID-19 crisis* It serves as a Guide which is intended to offer "quick and intelligent solutions" for the acquisition of the goods, services and works necessary to face the COVID-19 crisis (4/1/2020). It is also worth mentioning the *Guidance on the use of the public procurement framework in the emergency situation related to the COVID-19 crisis of the EC, which* serves as a Guide which it is intended to offer "quick and intelligent solutions" for the acquisition of the goods, services and works necessary to face the COVID-19 crisis (4/1/2020).

- Whether the supply provided by these operators is *adequate to meet public needs* (in terms of, for example, price, quantity, quality, speed, regularity and security of supply, among others) under *public procurement mechanisms*.
- Whether any of the above circumstances are likely to change over time (for the better or worse). This will require an analysis of the *level of competition* in the market, including the *barriers to entry*, to assess the likelihood that new entrants will emerge, or that existing operators will adapt their supply to public sector needs.

Recommendation 3. Not ruling out more appropriate alternatives to the creation of the in-house entity.

- In application of the principles of proportionality and efficiency in the management of public funds, in order to justify the creation of a controlled undertaking it is not sufficient to identify the market failures to be addressed; it is also necessary to rule out the existence of better ways of addressing these market failures.
- Depending on the case, it may be appropriate to assess possible regulatory, fiscal or promotional reforms to facilitate the presence of operators and the alignment of supply with public needs. For example, if market research shows that supply is unsatisfactory because of significant regulatory barriers to entry into a sector, an alternative might be to revise existing regulations to remove unjustified barriers. Alternatively, instead of creating an in-house entity to guarantee the supply of products or services in situations of need, the appropriateness of establishing public service obligations or reserve or storage obligations on market operators (as is already the case in certain strategic sectors, such as energy or telecommunications) could be analysed.

Recommendation 4. Taking advantage of all the instruments available to public administrations to obtain information on market conditions.

- It is advisable that, when analysing the appropriateness of creating in-house entities, public administrations use the mechanisms available to them to obtain the most complete information possible: public consultations, preliminary market consultations, requests for information, access to data from previous public procurement processes, etc.

4.1.2. Sufficiency and suitability resources

The in-house entity must have sufficient and suitable means to provide products and services in the sector of activity corresponding to its corporate purpose. The aim is for the controlled undertaking to be a true instrumental entity specialising in the provision of certain products and services to its controlling contracting authority and, consequently, to have sufficient and necessary resources to carry out future transactions entrusted to it.

If the controlled undertaking lacks the resources necessary for its corporate purpose, there is a risk that the performance of the transactions entrusted to it will be carried out mainly through **subcontracting*** or the temporary hiring of workers.

* For the purposes of this Guide, references to the "subcontracting" of in-house transactions should be understood in a broad sense, so as to include any contract entered into by the in-house entity with third parties in execution of the in-house transaction, in the terms of Article 32.7 of the LCSP.

In the case of outsourcing, this may lead to the use of public procurement procedures with fewer safeguards, as the controlled undertaking may be subject to fewer requirements than the contracting authority. In extreme cases, an in-house entity with clearly insufficient resources to carry out the tasks assigned to it can become an instrument for carrying out public procurement with fewer controls and guarantees. This can turn the in-house entity into a mere intermediary that only makes the provision of products and services more expensive, in contravention of the principles of good regulation.

It is also advisable to use outsourcing on an exceptional basis and for marginal or ancillary parts of the contract.

At any rate, it should not be understood that there is a need to take advantage of the percentages allowed by the LCSP. The use of outsourcing must be justified in each case regardless of whether it conforms to the percentages provided for in the regulations. Similarly, it should be remembered that, if outsourcing is used, the transaction must be subject to the LCSP, in accordance with the nature of the entity entering into the legal transaction and its type and estimated value[50].

Other risks of an in-house entity operating without sufficient resources are that **it will not be able to meet its obligations on time or with the required quality**

[50] In accordance with article 36.7 of the LCSP, the contracts in which the subcontracting to third parties of part (in certain cases even the entirety) of the provision object of the in-house transaction, must be adjusted to the rules of the LCSP which vary depending on the nature of the entity that enters into the contract (contracting authority or not). In the case of entities that are not the contracting authority (for example, public business entity or commercial company), their procedures are governed by less demanding internal procurement instructions in terms of choice of procedure and preparation and publicity requirements, than for the rest of the contracting entities. In this sense, see the aforementioned CNC report on in-house providing: Implications of their use from a competition advocacy perspective (pages 33 et seq.) in which the risks of relaxing competition going forward caused by the subcontracting of tasks are analysed.

and that it will not be able to **meet its financial commitments** with third parties, which may put them in financial jeopardy (e.g., by causing them to default on their payments).

Finally, it should not be overlooked that the resources for the development of the controlled undertaking's activity are also determinants of the efficiency it can achieve. An underestimation of the necessary resources for the in-house entity to carry out its activity may wrongly lead **to the conclusion that the controlled undertaking is more efficient than the market**. Therefore, the requirement that the in-house entity be more efficient than public procurement also entails a condition of *sustainability and effectiveness* (Article 86.2 of the LRJSP).

In light of these considerations, the following recommendations are made:

Recommendation 5. Conducting a prudent assessment of the resources necessary for the development of the tasks entrusted to the in-house entities.

- The controlled undertaking must have sufficient material and human resources to carry out its tasks. This requires correctly anticipating what will be the tasks to be carried out by the in-house entity and the means necessary to carry them out.
- An underestimation of the resources necessary to carry out these tasks can lead to overestimating the efficiency of the in-house entity vis-à-vis public procurement (and thus lead to a false positive regarding the advisability of creating the controlled undertaking). This could also result in the in-house entity systematically outsourcing contracts without adding value through intermediation (or, in the worst case, failing to meet its delivery obligations and its financial obligations with third parties). It is therefore advisable to make a prudent estimate of the resources needed to carry out the tasks of the in-house entity.

Recommendation 6. Ensuring the financial sustainability of the in-house entity to be created.

- According to the IGAE, this verification should analyse the entity's foreseeable solvency (annual accounts, financial solvency ratios, degree of autonomy, financial coefficient of fixed and current assets, cash flow, liquidity, etc.) in order to verify both financial sustainability[51] and the ability to finance present and future expenditure

[51] Article 4 of Spanish Organic Law 2/2012.It should be remembered that the principle of financial sustainability is included in Organic Law 2/212 of April 27, on budget stability and financial sustainability. It will be understood by the same *"the ability to finance present and future spending commitments within the limits of deficit, public debt and default on commercial debt in accordance with the provisions of this Law, the regulations on default and European regulations. It is understood that there is sustainability of the commercial debt, when the average payment period to suppliers does not exceed the maximum term provided for in the regulations on default. In order to comply with the principle of financial sustainability, financial operations will be subject to the principle of financial prudence".*

commitments within the limits of deficit, public debt and commercial debt arrears permitted by current legislation[52].

- The information contained in the reports related to the efficiency control and financial supervision carried out on the in-house entity by audit bodies should be taken into account. This analysis should be carried out considering aspects such as the adequate use of the human and material resources available in each case or the assessment of rates, among others.

4.2. IN-HOUSE TRANSACTIONS

The elements to take into account when in-house arrangements to an in-house entity can be classified into two categories: those related to the entity (the controlled undertaking) and those related to the transaction itself.

4.2.1. In-house entity

4.2.1.1. Similar control

Articles 32 and 33 of the LCSP establish that the contracting entities must have control over the in-house entities similar to that which they have over their own departments. "Similar control" is applied with certain particularities depending on whether the contracting entity is a contracting authority or not and depending on the corporate relationship between the contracting entity and the in-house entity (see Text box 6).

Box 5. Cases of similar control provided for in the LCSP.

These are the cases of similar control provided for in the LCSP:

- Control over an undertaking by a single public sector entity that is a contracting authority (Article 32.2.a): In this case, similar control is presumed if the controlled undertaking is obliged by its Articles of association of creation to perform the tasks entrusted by the controlling contracting authority or by other contracting authorities or legal persons controlled by the former, in such a way that there is a unity of decision between them, in accordance with instructions set unilaterally.
- In-house transaction to a contracting authority by a controlling contracting authority or by another entity controlled by the latter (Article 32.3): there must be no direct private participation in the capital of the controlled undertaking.

[52] Resolution of the IGAE of May 16, 2019 approving the Instruction for the preparation of the report to be issued under Article 86.3 of the LRJSP.

- Joint control over an undertaking by several contracting authorities (Article 32.4): Three conditions must be met: 1º) All contracting authorities must be represented in the decision-making bodies of the controlled undertaking; 2º) The contracting authorities must have a direct and joint decisive influence on the strategic objectives and important decisions of the controlled undertaking; and 3º) The controlled undertaking must not pursue interests that are contrary to those of the controlling contracting authorities.
- Undertaking controlled by a single public sector entity that is not a contracting authority (Article 33.2): The same similar control rules apply as in the case where the controlling entity is a contracting authority.
- In-house providing by a public sector entity to another entity controlled by the same public sector entity as the contracting entity (Article 33.3): there must be no direct private participation in the capital of the controlled undertaking.

Source: owned elaboration.

The requirement of similar control is intended to ensure that there is a relationship of control and subordination, or unity of decision, between the contracting entity and the entity that receives the obligation to perform the supply of products, the provision of services or execution of works. When such control exists, it ensures that the in-house transaction is binding, because the in-house entity has no decision-making autonomy vis-à-vis the contracting entity, as established in its articles of association or creation[53].

This requirement also ensures that the contracting entity has greater control over the execution of the in-house transaction (which is one of the advantages of in-house providing over public procurement, see section 2.1), as there is a hierarchical relationship with the in-house entity. Hence, it is required that the contracting entity must exercise control over the in-house entity that perform the transaction entrusted to it "*in similar manner to its own departments*".

The condition of similar control is completed with the requirement, in the case of contracting authorities, that the in-house entity as a controlled undertaking with respect to the contracting authority entrusting the performance of supplies or services be expressly recognised in its articles of association or creation (Article 32.2.d) of the LCSP). This reinforces control since, on the one hand, it makes it possible to delimit the subjective scope of the entities that may use controlled undertakings through in-house procurement (and to avoid this subjective scope being determined by a unilateral declaration of the controlled undertaking) and, on the other hand, it requires the active involvement of the entities (whether

[53] Ruling C-295/05, *Asemfo/TRAGSA* section 54. Ruling of the CJEU July 21, 2005, *Pandania Acque.*

contracting authorities or not) in the determination of the parties from which a controlled undertaking may be awarded contracts. The aim is therefore to avoid the disproportionate use of in-house entities.

The regulations, and their application in case law, have intensified the obligation for controlling entities to have real control over the management of the in-house entity in order for it to be considered effective. Hence, in practice, this requirement makes it necessary to prove the existence of this decisive influence over both the strategic objectives and the relevant decisions of the controlled undertaking, thus highlighting the instrumental nature of the in-house entity[54].

Therefore, it must be demonstrated by considering any of the following circumstances, or any other circumstances that may confirm the existence of such effective control[55]: a) the composition of its highest governing body or board of directors; b) public ownership (100%) in the case of entities under private law (in the case of corporations and public foundations); c) the regulations governing the entity.

In relation to this requirement, there are two issues that deserve careful review:

On one hand, the *extent of the use of an in-house undertaking* controlled by a public authority, as it is expected that other entities under its control may entrust the provision of products or services to the in-house undertaking (indirect control). In other words, a distinction must be made between the controlling public entity and other public entities that, for practical purposes, may entrust in-house transactions to the controlled undertaking.

For example, if a controlled undertaking is created for the entire General State Administration, as well as for the bodies and entities of the State public sector, whether public or private, linked to or dependent on that Administration, it must be verified that, in practice, all the entities that entrust in-house transactions to the controlled undertaking actually exercise genuine control over it. Therefore, it is advisable to make a restrictive interpretation of this decision on the extent of the use of controlled undertakings, limiting it to cases justified for reasons of necessity and proportionality.

---

54 Rulings of the CJEU *Parking Brixen*, section 65, *Coditel Brabant*, section 28, and Sea, section 65, *Commission v Italy*, section 26.

55 Resolution of the IGAE of May 16, 2019 approving the Instruction for the preparation of the report to be issued under Article 86.3 of the LRSJP.

Text box 6. Application of the similar control requirement.

In the report *"Audit of the adaptation of existing controlled undertakings in the non-financial State-owned business sphere to the requirements of Law 40/2015 on the Legal Regime of the Public Sector and Law 9/2017 on Public Sector Contracts",* approved by the Plenary of the **Court of Auditors** on March 31, 2022, this body concludes the following with respect to two entities that are in-house entities:

- Fábrica Nacional de Moneda y Timbre (FNMT): The Court of Auditors concludes that it complies with the requirement of effective control by the General State Administration and its dependent bodies, but not by the contracting authorities belonging to the autonomous and local public sector, in respect of which it acquired the status of controlled undertaking in the Seventh Final Provision of Royal Decree-Law 11/2020, and therefore it must guarantee its participation in decision-making.

- Empresa para la Gestión de Residuos Industriales (EMGRISA): The Court of Auditors considers that the entity has only accredited the requirement of effective control by Grupo SEPI. Taking into account that it holds the status of controlled undertaking of the General State Administration and its dependent bodies and that other entities which depend on ministries other than the Ministry of Finance and which can entrust in-house transactions participate as minority shareholders in its capital, it should have a direct or indirect representation of these entities in its board of directors, in order to ensure the unity of decision-making.

Source: owned elaboration.

Furthermore, the possibility of *similar joint control* of a controlled undertaking by two or more public sector entities that are independent of each other is admitted, provided that a series of requirements that determine the existence of effective checks are met cumulatively[56] .

To do this, in accordance with existing regulations, the following is required: (i) that in the decision-making bodies of the entity that is the recipient of the in-house transaction are represented by all the entities that may entrust it transactions, each one being able to represent several of the latter or all of them; (ii) that the latter can directly and jointly exercise a decisive influence on the strategic objectives and on the significant decisions of the entity entrusted with the in-house transaction and (iii) that entity does not pursue interests contrary to the interests of the entities that may entrust the transaction[57] .

Although a minimum percentage of capital is not required for each of the entities that jointly control the controlled undertakings, it must be sufficient so that, in

[56] Decision *Coditel Brabant*, sections 46, 47 and 50. Article 32.4 of the LCSP. See also the report by the State Public Procurement Advisory Board 15/17.

[57] Article 32.4 of the LCSP.

accordance with the statutory provisions, it allows effective and real joint control to be exercised over the controlled undertakings in question. Therefore, this circumstance must be verified in each case[58].

Conversely, compliance with the requirement for similar joint control should be ruled out in cases where control rests exclusively with a majority shareholder entity in such a way that it can predetermine, by itself and in an absolute manner, the activity of the controlled undertakings of various entities, if they do not have the slightest possibility of deciding[59] .

When several entities have joint control over controlled undertakings, the decisions adopted must be taken by a majority of the participants because they are collegiate bodies[60] and, furthermore, it must be ensured that the controlled undertakings are obliged to carry out all the work that each of its controllers entrusts to it, in a similar way to if the control were held by a single entity[61] .

Therefore, the consideration of an entity as a controlled undertaking depends to a large extent on the purpose for which other entities are integrated into the capital of an in-house entity, as well as the circumstances of exercising the rights conferred by the shares in the capital of the controlled undertaking, and not so much of the percentage share. Each issue must be resolved in a manner according to the circumstances of the specific case[62]. If there is not the slightest possibility of influencing the decisions of the controlled company, the requirement of similar control cannot be assumed[63].

---

58 Decision *Econord*, section 33, and reports by the Advisory Board 2/12, section 7, and 24/12, section 6. More recently, Ruling of the CJEU of May 12, 2022, case C-719/20 , on the loss of the requirement of similar joint control by a contracting authority that did not own shares or hold representation in the company that succeeded the controlled undertaking over which it did exercise such control ab initio.

59 *Econord* Decision (section 30).

60 *Coditel* Decision, section 51, SEA Decision, paragraph 60.

61 *TRAGSA* Ruling, section 60.

62 Ruling of the CJEU of June 18, 2020 *Porin Kaupunki*, C-328/19, indicates that the requirement of similar control can be manifested by different means, so that, despite the fact that the municipality does not hold any capital in the "in house" entity, it must have the possibility of exerting a decisive influence, both on the strategic objectives, as well as on the important decisions of the successful bidder and to have, therefore, an effective, structural and functional control over it.

63 See the aforementioned report from the State Contracting Advisory Board (File 15/17 Report Classification: Possibility that a municipal company can become a controlled undertaking of other entities.).

Text box 7. Case law interpretation of joint control.

Judgement of the Superior Court of Justice (TSJ) of Catalonia on December 17, 2020 .

The TSJ of Catalonia analysed whether the order of the management of the municipal residence service for the elderly carried out by the Esparreguera City Council to SUMAR, serveis públics d'acció social de Catalunya SL (publicly owned commercial company) complied with the law, in particular, in relation to compliance with similar joint control condition for in-house procurement.

The TSJ found that the City Council held only 0.33% of the entity's capital stock, which granted it limited participation in its governing bodies.

Consequently, the Court ruled out compliance with the similar control requirement, since **there was no effective control nor influence in decision making about strategic objectives or significant decisions**. Consequently, the Court considered that the in-house transaction was a contractual relationship subject to public procurement regulations and declared it null and void.

Finally, the Court reaffirmed that the doctrine *"in-house providing"* implies a breach of the principle of free competition and is an exception to the field of action of EU Law of contracts, and for this reason it should not serve to evade the law and it must be interpreted restrictively. The Court also insisted that the in-house transaction is contrary to law as it affects the principle of free competition for adopting a direct management system that does not meet the requirements for the use of controlled undertakings and that results in restricting or distorting competition in this economic sector.

Along similar lines, the TSJ, in its Decision of May 20, 2022, annulled the order for the provision of home care services made by the Girona City Council to SUMAR.

Source: owned elaboration.

Based on all the aforementioned points, the following recommendations are made:

Recommendation 7. Make a restrictive interpretation of similar control situations.

- The control of the entity that entrusts an in-house transaction with respect to the in-house entity (controlled undertaking) serves, among other things, to guarantee the **execution** of an in-house transaction and the largest **efficiency** of vertical cooperation regarding public procurement.
- **The incremental extension of the use of controlled undertakings** by entities that do not exercise control over them must be avoided. All entities that can entrust in-house transactions to a controlled undertaking must truly exercise genuine control over it.
- Similar joint control must be analysed in the light of all the concurrent circumstances and must not be assumed when a **majority shareholder entity** can predetermine by itself and in an absolute way the activity of the controlled undertaking, preventing the rest of the shareholders from having real capacity to decide.

4.2.1.2. Carrying out the essential part of its activity with the controlling authority (80/20)

In accordance with Articles 32 and 33 of the LCSP, the controlled undertakings must carry out more than 80% of their activities for the entities of which they are controlled undertakings.

For the calculation of said percentage, in Art. 32.2.b) of the LCSP a series of parameters are addressed: (i) the average of the overall business volume, (ii) the expenses borne by the services rendered to the entity carrying out the in-house transaction in relation to all the expenses incurred by the company itself by reason of the services it has made to any entity, or (iii) another alternative indicator of activity, and all of this refers to the three years prior to the formalisation of the in-house transaction.

In any case, the indicator chosen by the controlled undertaking itself must be reliable, quantifiable, verifiable, and reasonable, taking into account that it is associated with the activity carried out by the controlled undertaking itself in the in-house transactions entrusted[64]. It must be accredited by means of a certificate indicating the percentages corresponding to each of the three previous years with reference to the indicator used[65] .

This requirement is directly related to the justification of the need for the controlled undertaking as an instrumental entity: the controlled undertaking must be, fundamentally, an internal and instrumental provider of its parent Administration. Although it may carry out other activities for other public or private clients, these must be of a marginal nature in relation to the in-house transactions.

---

64 Joint Circular of March 22, 2019, of the State Attorney and the IGAE on criteria for calculating the computation of the activity requirement, whose objective is to establish guidelines in order to cover the regulatory gap resulting from the absence of regulatory development of the LCSP in relation to the parameters to be considered for the calculation of the activity indicator. Likewise, it highlights the Technical Note of the National Audit Office 1/2021 and the Study on the treatment of controlled undertakings in financial information and audit reports (IGAE, 2020) whose purpose is to analyse the way in which the entities that with the status of controlled undertakings have complied with the information obligations on this qualification provided for in the public procurement regulations and its reflection in the audit reports of annual accounts.

65 In the event that, due to the date of creation or start of the activity of the contracting authority that awards the in-house contract, or due to the reorganisation of activities of the contracting authority, it is not possible to prove the overall turnover, or an alternative indicator of activity, it will be sufficient to justify that the calculation of the level of activity corresponds to reality, especially through business projections.

For this reason, the publicity of this indicator in the annual accounts report of the controlled undertaking is key, to be able to be verified by an auditor (public or private as appropriate) and that, in the event of non-compliance, results in the loss of the condition of controlled undertaking, since we would not be dealing with an instrumental entity but with an entity that is essentially market-orientated.

Carrying out activities through in-house procurement can suppose a financial advantage for the controlled undertakings compared to their competing companies. In the first place, carrying out in-house transactions can be an advantage for the company as it is subject to less risk and uncertainty than market activities and, thus, reduce the general financing costs of the company. Secondly, carrying out in-house transactions can be an advantage for the company itself given the risk that the rates, being fixed in advance, overestimate the real cost of carrying out the contracts. Both routes can allow the company to have certain advantages over its competitors in the markets where it competes, which can pose a problem for the competitive dynamics in these markets. The limitation to 20% of the activities that the controlled undertaking can carry out in the market reduces the problem, although it does not completely eliminate it.

A good part of the problems derived from the application of the 80/20 requirement have already been highlighted by the supervisory bodies, that have signalled both a laxity in compliance and the advisability of introducing improvements to the regulations[66].

However, it should be noted that Law 11/2020, of December 30, on the General State Budget for 2021, abolished the obligation to reflect in the annual accounts a justification of compliance with the activity requirement and its review by the external auditor and the supervening loss of the condition of controlled undertaking derived from its non-compliance. In other words, with this reform, not

[66] According to the study on the treatment of controlled undertakings in financial information and audit reports (IGAE, 2020), although 67.4% of the entities considered as controlled undertakings refer to this condition in their annual accounts report, with more or less information. In general, effective, and strict compliance with the required activity requirement is very lax since only 30.2% of them do it. The IGAE recommends developing by regulation the way to compute the activity indicator to guarantee greater legal certainty and similarity in the obligations that are assumed by all the controlled undertakings, regardless of their affiliation to the state, regional or local level and the configuration of the compensation based on real costs or, where appropriate, the effective cost supported. The Court of Auditors has stated along the same lines in its report about "supervision of the adaptation of existing controlled undertakings in the non-financial state business environment to the requirements of Law 40/2015, of the legal regime of the public sector and Law 9/2017 of public sector contracts", of 31 March 2022.

only has control over this activity requirement not been improved, but the control requirements have been greatly softened.

In any case, to verify compliance with this indicator, the market position of the entity in question must be examined, including its possible vocation for internationalisation[67].

Finally, it should be remembered that public entities that are not contracting authorities have two options when it comes to not having to go to the market for the provision of products or services: On the one hand, they will be able entrust in-house transactions to their controlled undertakings as long as they comply with the conditions established in article 33 of the LCSP, substantially similar to those of article 32 of the LCSP already reviewed; on the other, the provision contained in article 321.6 of the LCSP that enables them, under certain conditions, to enter into contracts between entities that are members of the business group[68].

The CNMC has analysed these exceptions and has recommended implementing measures that prevent the possible impact on competition in the markets in which these entities can compete with third-party operators, guaranteeing the principle of competitive neutrality, for example, through accounting separation measures. between commercial and non-commercial activities or verification that the prices charged for these services are market prices[69].

---

67 See, for example, the Judgement of the High Court of Justice of Catalonia of May 20, 2022, in which it is verified that the calculation of 80/20 in the last three years with respect to the activity of a controlled undertaking was incorrectly calculated since activities destined for public administrations other than the in-house contracts and that they should not be computed within the requirement of 80% of essential activity. After the rectification, it was found that the controlled undertaking carried out more than 20% of its activity in the free market or outside the markets, therefore the 80/20 requirement was not met. Likewise, in the Judgement of the High Court of Justice of Catalonia of December 17, 2020, it was appreciated that a controlled undertaking acted as an economic operator since the regulatory agreement for the management assignment was typical of indirect management, by including certain clauses such as the perception of fixed management fees by the controlled undertakings, which was incompatible with the condition of controlled undertakings.

68 This provision was introduced in Additional Provision 55 of the LCSP by final provision 7.2 of Royal Decree Law 11/2020, of March 31, which adopts complementary urgent measures in the social and economic field to deal with COVID -19.

69 See the reports prepared by the CNMC on Article 321.6 of the LCSP relating to certain intra-group contracts of HUNOSA (INF/CNMC/063/21), CESCE (INF/CNMC/028/21) and CORREOS (INF/CNMC/057/22). Regarding the case of HUNOSA and the possibility that it and its subsidiaries could be considered as controlled undertakings personified and technical services of the public sector for the restoration of spaces affected by mining and risks from the

Text Box 8. Concerns detected by the Court of Accounts.

In the Report *"Inspection of the adaptation of existing controlled undertakings in the non-financial state business environment to the requirements of Law 40/2015, on the Legal Regime of the Public Sector and Law 9/2017, on Public Sector Contracts",* approved by the Plenary of the Court of Accounts in its session of March 31, 2022, the Court has verified some problems with the activity indicator, for example:

- In the case of the entity MERCASA , it stands out that the figures corresponding to the three previous years are not broken down by year, that the activity requirement is not justified in the 2018 or 2019 accounts, nor is there any mention in the corresponding audit reports, and indicates incidents when calculating the rates, since there is no economic data that allows for an analysis of the basis for calculating the aforementioned rates approved by SEPI in 2015.
- In the case of entities MERCALGECIRAS and MERCABADAJOZ, it is highlighted that the activity requirement does not appear in the annual accounts of the audited period, nor has it been verified by the external auditor.

Source: owned elaboration.

Based on the aforementioned, the following recommendations are made:

Recommendation 8. Strictly apply the "80/20" activity requirement for controlled undertakings to avoid distortions of competition in their activities not carried out through in-house procurement.

- In-house transactions must be subject **to proper planning**, in such a way that legal certainty is offered to controlled undertakings and to the rest of the operators and the risk of artificial awarding of contracts to controlled undertakings is mitigated.
- It is recommended that in-house entity carry out separate **analytical accounting** that provides business information corresponding to its performance as a controlled undertaking (therefore, excluded from competition) with respect to the rest of its commercial activity. In this way, the risk that profits earned in activities excluded from competition finance others carried out in the market would be reduced (risk of cross-subsidies[70]).

perspective of the principle of competitive neutrality, it was highlighted that it should be avoided, both due to the volume of in-house contracts to be carried out and the value of the rates to be applied, that the entity would be placed in a position of competitive advantage in the free market in competition with other operators. It was recommended that measures be adopted aimed at avoiding the risk of incurring cross-subsidies between activities, those remunerated via tariffs and those subject to the free market.

[70] In this regard, for example, see the report by the Court of Auditors (2015) "Inspection of the Activity of Engineering and Transportation Economy SA -INECO- as a controlled undertaking and technical service and as an associated company within the framework of the contracting regulations applicable to state companies" and the follow up report of May 30, 2019.

4.2.1.3. Total public equity

The LCSP requires that regardless of the legal form of the controlled undertaking (public or private), all of its equity or assets must be publicly owned or contributed[71] .

The direct participation of private equity in the controlled legal entity, however minimal it may be, violates the criteria required by law, which has also been confirmed in case law[72].This measure is intended to ensure that no private operator is going to benefit from the performance of a controlled undertaking in which it may have a share. If this formal requirement is not met, the in-house transactions must be the subject of a public procurement process.

4.2.1.4. Transparency obligations and clear determination of its corporate purpose

The regulations require that the condition of a contracting authority's-controlled undertaking be expressly recognised in its statutes, indicating the contracting authority with respect to which it has that condition, in addition to specifying the legal and administrative regime of the in-house transactions that may be assigned to them.

Additionally, the controlled undertaking must publish its status as such on the corresponding Contracting Platform; with respect to which contracting authorities it holds; and the sectors of activity in which, being included in its corporate purpose, it could carry out in-house transactions[73].

These obligations of transparency and publicity discipline the use of controlled undertakings, hence the importance of strict compliance. In this sense, **the following recommendations are made:**

Recommendation 9. The corporate purpose of the in-house entity itself must precisely delimit its functions and the activities that can be entrusted to it.

[71] Article 32.2 c) of the LCSP.

[72] Ruling of the CJEU of January 11, 2005, Stadt Halle and Judgment of April 8, 2008, Commission v Republic of Italy.

[73] Article 32.6.a) of the LCSP.

- The statutory rules must include a precise, detailed, and closed delimitation of the powers to be exercised by the instrumental entity, so that the content of the in-house transactions entrusted to it corresponds to the activities included in its corporate purpose.
- The company purpose of the controlled undertaking must be precise (avoiding generic approaches that do not allow delimiting the specialisation of the controlled undertaking in specific activities) and coherent (regarding its availability of personal and technical resources).

Recommendation 10. Publicity of functions of controlled undertakings and in-house transactions.

- There must be public, up-to-date, and easily accessible lists of controlled undertakings and the in-house transactions entrusted to it, so that third parties can consult the activities that the controlled undertakings can carry out, the transactions assigned to them and their implementation status.

Text Box 9. Inadequacy of the purpose of the in-house transaction with respect to the corporate purpose of the in-house entity.

Resolution of the Central Administrative Tribunal of Contractual Appeals of February 18, 2019 (120/2019)

The Tribunal partially upheld the appeal filed by the National Construction Confederation against the in-house contract awarded by a Department of the Valencian Community, in favour of TRAGSA for the "Drafting of the project and execution of the functional adaptation works of the Superior Court of Justice of the Valencian Community". One of the reasons alleged in the appeal was the inadequacy of the in-house transaction to the corporate purpose of TRAGSA.

The Tribunal considered that in accordance with the express will of the legislator (additional provision twenty-fourth.4 of the LCSP), TRAGSA cannot (except in urgent situations, understood in its strict sense, as emergency tasks and civil protection of all types, especially, intervention in environmental catastrophes or in crises or needs of an agrarian, livestock nature) execute in-house work transactions in urban areas or centres. And in addition: *"A different solution to the one that is supported here (that is, the recognition of the possibility of granting contracts to a controlled undertaking that exceed the corporate purpose of the instrumental entity) would be contrary to the principle of competition and the restrictive interpretation that, as long as an exception to the general principles on which public contracting is based, must be applied with respect to the corporate purpose of the controlled undertakings".*

Consequently, the Tribunal considered a lack of adequacy of the services to be in-house entrusted with the corporate purpose of TRAGSA, especially, since those are not included

among the functions that can legally be required to TRAGSA, and consequently, cancelled the in-house arrangement.

Source: owned elaboration.

4.2.1.5. Impossibility of participating in public tenders called by their controlling contracting authority

The status of economic operator and, therefore, tenderer, is recognised to any person or entity regardless of whether their legal status is public or private, to the extent that they are empowered to offer products and services on the market[74]. In this sense, it is allowed that legal entities belonging to the public sector (commercial companies of public ownership, for example) can bid for public tenders.

However, since the use of controlled undertakings is an exception to the principles of public procurement rules (publicity, competition, transparency, equality and non-discrimination), the attribution of possible competitive advantages to said entities must be avoided, which would happen if, on the one hand, they received, in their capacity as controlled undertakings, in-house transactions which subject-matter coincide with those of the typical public contracts regulated in the LCSP and, on the other hand, they could also participate in the public tenders called by the entities of which they are controlled undertakings (whether they are contracting authorities or non-contracting authorities). Hence, it is expressly prohibited in the regulations[75].

At the same time, only in the cases where have been an absence of any tenderer, it is permitted that controlled undertakings can be entrusted with the execution of the activity which is the subject of the public call for tenders.

In view of the above, the following **recommendation is made**:

Recommendation 11. Participation of in-house entities in public tenders.

- It is essential that a restricted delimitation of the public entities of which they are controlled undertakings is carried out because this delimitation has consequences from the perspective of their participation through this procurement route.
- The participation of a controlled undertaking in tenders called by public entities of which they are not controlled undertakings must be carried out in accordance with the principle of

[74] Ruling of the CJEU on October 6, 2015, in case C-203/14. Article 2.1 (sections 10 and 11) on the definition of economic operator and tenderer in Directive 2014/24.

[75] Article 32.2.d) of the LCSP. AG Report 2/18.

competitive neutrality, ensuring real and effective equal treatment with respect to the rest of the bidders.

4.2.2. The content and form of the in-house transactions

The formal and material requirements related to the in-house providing are essentially included in Article 32, sections 6 and 7 of the LCSP: Basically, the suitability of its object, the publication of its formalisation, the need for authorisation, where appropriate, from the Council of Ministers, the limits to subcontracting and the duration. In addition to these, the LCSP regulates the tariffs applicable to in-house transactions entrusted by contracting authorities (Article 32, sections 2 and 4 of the LCSP).

Beyond the formal and material requirements expressly set out in the LCSP, it must be taken into account that the decision to entrust an in-house transaction to a controlled undertaking may have a cost in terms of efficiency in the supply of the product or provision of the service that is the object of the contract (see section 2.1) and have costs on the efficiency of the controlled undertaking (section 2.2) and on competition in the markets (section 2.3). For this reason, in the last paragraph of this section, the appropriateness of the decision to use the in-house procurement will be assessed, from the point of view of the principles of efficiency of public spending and competition in the markets.

4.2.2.1. Suitability of the object of the in-house transaction

The in-house providing must focus on carrying out specific activities of a material, technical or service nature within the competence of the public entities that entrust the in-house transactions. These activities must also be consistent with the corporate purpose contained in the statutes of the controlled undertaking.

It should be remembered that the use of in-house transactions to fill structural shortages of personnel (which should be solved through the adequate allocation of staff) or to carry out activities that imply the exercise of public or administrative powers would not be justified[76].

Recommendation 12. Precise delimitation of the object of the in-house transaction

[76] Court of Accounts Motion (nº.1198). Decision of the Supreme Court on September 14, 2020 (rec. no. 5442/2019).

- It is not recommended to use generic and imprecise references in the object of the in-house transaction (for example, "management support" or "technical assistance"), It must be specified with sufficient precision to correctly identify the services entrusted.

4.2.2.2. Publicity and transparency of in-house transactions

In accordance with the LCSP, the publication in the contractor's profile of the formalisation of in-house transactions for an amount greater than 50,000 euros (VAT excluded) is mandatory. The information related to in-house transactions for an amount greater than 5,000 euros (VAT excluded) must be published at least quarterly, containing information on its purpose, duration, applicable tariff rates and the identity of the controlled undertaking receiving the contract[77].

Likewise, in accordance with the transparency regulations, in-house procurement must be published, expressly indicating their purpose, budget, duration, economic obligations, and the subcontracting that is carried out, mentioning the successful bidders, procedure followed for the award and the cost of this[78]. However, it is not specified where this should take place.

In a public tender, the principles of publicity and transparency are instrumental to the principle of free competition. In the case of in-house providing, adequately complying with these principles permits a control over finding out the needs of the public sector and the way in which it has decided to solve them.

In general terms, in previous years **there has been a general breach of this obligation, although there is a trend towards greater compliance**[79].

[77] Articles 32.6 and 63.6 of the LCSP and Article 8.1 b) of Law 19/2013, of December 9, on Transparency, Access to Public Information and Good Governance. Furthermore, in the face of certain advertising exceptions for security reasons, this circumstance must be interpreted restrictively and adequately justify its occurrence.

[78] Article 8.1b) of Law 19/2013, of December 9, on transparency, access to public information and good governance.

[79] This is confirmed by both the IGAE (IGAE Report art. 332.11 LCSP), which has verified the low level of compliance with the obligations to publish in-house contracts on the public sector contract platform, and the OIRESCON (IAS 2021), which has monitored the advertising of contracts on the platforms of some Autonomous Communities and the public sector, concluding that some have not yet enabled specific search engines and that the way of publishing and identifying in-house contracts should be unified. The improving trend seems to be confirmed, with limitations, by OIRESCON in the last IAS published at the end of 2022.

However, some decisions of the Administrative Tribunals of Contractual Appeals indicate that non-publication is not cause for nullity or voidability[80] .

Failure to comply with these obligations has a double negative effect:

On the one hand, public plaintiffs are discouraged from comparing other procurement routes and accountability to the public is limited, to the detriment of the principle of efficiency in the use of public funds. The lack of transparency prevents other public entities from accessing useful information when making their own decisions (for example, when comparing the characteristics of the in-house transaction with that of the contract).

On the other hand, they make it difficult to exercise control and defence mechanisms, hindering the right to file a special procurement appeal against the in-house transaction[81]. This instrument allows, among others, the Administrative Tribunals of Contractual Appeals to know about the in-house procurement to verify that in-house entities comply with the legal requirements established for this purpose.

Recommendation 13. Transparency conditions on in-house procurement

- The essential information related to the in-house transactions (specific object, including the reference CPV, supporting report, economic amount, duration, reports from the supervisory bodies, subcontracting, modifications...) must be published prior to being put into practice.
- This information must be accessible in a digital, open, and reusable format, and must be updated each time an incident occurs that affects the file.

4.2.2.3. Tariffs

According to the LCSP (Article 32), when the entity entrusting the in-house transaction is a contracting authority, the transaction must comply with the previously approved rates (or the actual costs of the activities subcontracted by the in-house entity itself if they are lower than the approved tariffs), and such

[80] Resolution TRC (Cantabria) October 7, 2019.

[81] Article 44.2.e) of the LCSP. Although the right to file an appeal is not limited by the value of the contract, in practice, only those that are published can be challenged, that is, those that exceed 50,000 euros.

rates must represent the actual costs of producing the units by the in-house entity[82] .

The remuneration must be set with precision and adjusted to market prices. However, unlike the adjustments that are made using competitive tendering procedures, in the case of rates set for in-house undertakings, there is a greater risk of accepting inefficiencies in its management, especially if it is not accompanied by ex-ante evaluations (on the rates as a whole) and ex-post (on the performance of the execution of the activities entrusted to the in-house entity in absolute or relative terms with respect to market operators that perform similar services).

In this sense, the LCSP contemplates that, in the event that the activities that are the object of the in-house procurement are subcontracted to third parties, the rates will be set based on the effective cost borne in cases in which this cost is less than that resulting from applying the rates to subcontracted activities (as a general rule, up to 50% of services can be outsourced). This measure should serve as a reference precisely to measure the efficiency in the rates and, consequently, the remuneration for the in-house transaction.

This is without prejudice to the implications that the verification of this circumstance would have regarding the justification of the creation of the in-house entity and the in-house transactions entrusted to it, since the subcontracting would show that the market can provide part of the services object of the in-house arrangement and at lower costs than those of the in-house entity.

On the other hand, the tariff of the in-house entity must be the subject of special caution from the point of view of **state aid rules.** In the event that disproportionate benefits are generated by the activities carried out within the framework of the in-house procurement, it would be worth considering whether the undertaking is being granted an economic advantage within the meaning of Article 107 of the TFEU, precisely because of the excess compensation of the referred to costs, especially if the in-house entity carries out activities in the market in competition with other operators[83] .

---

[82] However, when the entity awarding is not a contracting authority, the rates must not comply with these rules.

[83] This possibility will depend exclusively on whether or not the four requirements of Article 107 of the TFEU are met: (i) transfer of public funds to a company –selective measure-; (ii) that this transfer grants a competitive advantage to the beneficiary; (iii) that has the capacity to distort competition and (iv) to alter commercial exchanges in the European Union) the creation

Recommendation 14. The tariffs of the in-house entity must adequately represent the value of the in-house transaction entrusted.

- The financial compensation must be adequate and proportionate to the value of the activities that, effectively, the in-house entities provide.[84] .
- The rates must not only include the real costs of providing the products or services, but also not over-remunerate the services provided, as this may confer an advantage to the in-house undertaking in the market equivalent to public aid. The rates must include the costs of an efficient operator in the market.
- When the effective cost for the activities subcontracted by the in-house entity is lower than the tariffs approved for carrying out the in-house transaction, there is an indication that the in-house procurement may be less efficient than public tendering.

4.2.2.4. Outsourcing

In accordance with current regulations, there is the possibility of subcontracting the services that are the object of the in-house transaction to third-party operators, if it does not exceed 50% of the amount of the in-house transaction, although a series of exceptions to this general rule are foreseen[85] in certain sectors and for reasons of public interest (security, greater public control and urgency)[86]. These exceptions are very heterogeneous, and greater rationality

---

of a controlled undertaking can be considered State aid, provided that it exceeds a certain threshold of funds and that the aid cannot be declared compatible with the TFEU. You can also consult the Ruling of the CJEU, of May 22, 2003, case C-462/99, *Connect Austria* (sections 92 et seq.) within the scope of Articles 102 and 106 of the CJEU.

84 See in this sense, the Report on in-house providing: Implications of their use from a competition advocacy perspective (CNC, 2013).

85 Article 32.7 of the LCSP. For the purposes of this Guide, references to the "subcontracting" of in-house transactions should be understood in a broad sense, so as to include any contract entered into by the in-house entity with third parties in execution of an in-house transaction, in the terms of Article 32.7 of the LCSP.

86 It will not be applicable if the contract is a **concession** (either works or services). Neither will it be applicable in the cases in which **the management of the public service is carried out by creating public law entities for this purpose**, nor those in which it is attributed to a **private law company whose capital is entirely publicly owned.** Neither will it be applicable to the contracts entered into by controlled undertakings that have been entrusted with the **provision of computer and technological services to the Public Administration.** Exceptionally, *the aforementioned contracting percentage may be exceeded provided that the in-house procurement* ***is based on security reasons, on the nature of the service that requires greater control in its execution, or on reasons of urgency that demand greater speed in its execution.*** *The justification that these circumstances occur will be attached to*

and exceptionality would be advisable in situations in which it is permitted not to apply the 50% subcontracting percentage. In any case, from the point of view of the principles of necessity and proportionality, it must be avoided that subcontracting is an ordinary or main way of performing the activities that are the object of the in-house transactions.

In the first place, the subcontracting of the in-house transaction can not only affect the principles of equality and concurrence, but also reduces the logic of resorting to the public contract route, since if the controlled undertaking, due to lack of sufficient personal and material resources, has to outsource a significant part of the activities of the in-house transaction with third parties, the value of it is reduced compared to public tendering for the controlling authority.

Secondly, depending on the legal nature of the controlled undertaking, subcontracting could mean relaxing the requirements of publicity and transparency applicable to Public Administrations, perverting the exceptional characteristics of the in-house undertaking, and adopting a form of evading the public procurement regulations.

Thirdly, subcontracting may entail an additional cost to carrying out the tasks by the in-house entity, which may lead to inefficient management of public funds.

Based on all the aforementioned points**, the following recommendations are made**:

Recommendation 15. Delimit the outsourcing of the activities covered in the in-house transaction. Notwithstanding the legal limit, it is recommended that the in-house transactions delimit subcontracting and limit it to those cases in which it is not possible or effective to carry it out using the in-house own resources. To this end, measures can be adopted both by the controlling entities and by the inspection bodies:

- Expressly provide in the document formalising the in-house transaction the activities likely to be subcontracted, limited to ancillary services to the object of the in-house transaction[87].
- Establish a specific procedure so that the controlling entity authorises each subcontracting that the in-house entity carries out.

the order formalisation document and will be published in the corresponding Contracting Platform.

[87] Inspection report of the management tasks of certain Ministries, Agencies and other Public Entities carried out under the Legislation that enables this instrumental form of administrative management, April 30, 2015, nº 1088 of the Court of Accounts (page 137).

- Consider in the efficiency analysis carried out to entrust an in-house transaction, the level of activities that will be carried out through subcontracting. The cost of the quotation and the amount paid by controlling authority.
- Increase the levels of control and monitoring measures for subcontracting. In particular, that compliance with the LCSP be monitored when tendering for subcontracting.
- Leave documentary evidence in the file of the contracts carried out by the in-house entity to carry out these services.

4.2.2.5. Duration

The exceptional nature of the attribution of in-house transactions to controlled undertakings necessarily entails a restrictive interpretation both of their duration and of the cases in which extensions can be made.

Regarding contracts, Article 29 of the LCSP indicates that "*The duration of public sector contracts must be established taking into account the nature of the provisions, the characteristics of their financing and the need to periodically submit their performance to competition, without prejudice to the special rules applicable to certain contracts".*

Additionally, it should be remembered that without prejudice to the solutions contemplated for each type of contract (supply and service contracts; works and service concession contracts...), the public procurement regulations state that "*The contract may provide for one or more extensions provided that its characteristics remain unchanged during the duration of these, without prejudice to the modifications that may be introduced in accordance with the provisions of Articles 203 to 207 of this Law.*".

Despite the fact that the regulations governing in-house procurement do not specify anything in this regard, it should be remembered that Article 44 of the LCSP states that " *[...] will be subject to special appeal in terms of contracting [...] in-house procurement when, due to their characteristics, it is not possible to set their amount or, in another case, when this, taking into account its total duration plus extensions, is equal to or greater than what is established for service contracts"* (that is, five years[88]). The fact that only in-house transactions that

[88] In accordance with Art. 29.4 LCSP, Supply and successive provision service contracts will have a maximum **term of five years** including any possible extensions that the contracting body agrees to in application of the second section of this Article, respecting the conditions and limits established in the respective budgetary regulations that are applicable to the contracting entity. Exceptionally, in supply and service contracts, a term longer than that

exceed a duration of 5 years are appealable before the Administrative Tribunals of Contractual Appeals seems to offer little guarantee for the potential operators affected, so it might be advisable to lower the threshold required to be able to file an appeal.

The excessive duration (including possible extensions) of an in-house providing has important effects on competition, since results in a closed market that, unlike a contract, is not preceded by competition for it.

Based on all the aforementioned points, **the following recommendations are made:**

Recommendation 16. Limit the duration of the in-house transactions to the minimum necessary for a proper outcome.

- The duration of the in-house transaction must not exceed the reasonable term to cover the need initially foreseen and must be subject to periodic reassessment if the circumstances for the initial duration have changed.
- When establishing the duration of the in-house procurement (including extensions, if applicable), the fact must be considered that, unlike contracts, there is no competitive bidding process for in-house transactions, so that the possible negative impact on the competition of an in-house transaction with a prolonged duration is greater.

4.2.2.6. Justification for the in-house transactions

As has been pointed out, carrying out an in-house transaction means losing the benefits of competition. This may mean a loss of efficiency, although it may also bring advantages for the contracting entity compared to with public procurement. Section 2 of this document analyses such advantages and costs, and section 2.1 offers guidance on the elements to take into account in order to evaluate them.

Beyond the advantages and costs of opting for an in-house providing over a public contract, the use of in-house entities generates negative effects on its efficiency and on the market as a whole (sections 2.2 and 2.3), especially when

established in the previous paragraph may be established, when required by the recovery period of the investments directly related to the contract and these are not capable of being used in the rest of the productive activity of the contractor or its use would be uneconomic, provided that the amortisation of said investments is a relevant cost in the provision of the supply or service, circumstances that must be justified in the contracting file indicating the investments referred to and the recovery period. The concept of relevant cost in the provision of the supply or service will be subject to regulatory development.

the use of in-house entities is recurrent and extended to meet the needs of the public sector.

The regulations contain express references to the motivation of efficiency that have been interpreted by the Administrative Tribunals of Contractual Appeals as linked to when the in-house entity is created (Article of the 86.2 LRJSP) and not to the attribution of the specific in-house transactions[89]. This results in the practical difficulty, already mentioned, of having to weigh the need for the in-house transactions (efficiency, public safety, urgency) and their proportionality in advance when establishing an in-house entity (see section 4.1.2) and not hinders the convenience of weighing up such principles in each in-house transaction.

However, the absence of an express obligation does not exempt public authorities from compliance with the general principles of good regulation and administration[90]. As already indicated, the use of in-house procurement, as opposed to a public contract, is optional. Therefore, in accordance with the principles of better regulation and good administration (efficiency in the management of public funds, minimum competitive distortion, necessity and proportionality of actions that distort competition, among others), public authorities must assess the impact of their performance and choose the most beneficial form of procurement from the point of view of public interest.

However, as the supervisory bodies have pointed out, in general the awarding of in-house procurement is not usually adequately justified, since the reasons are usually generic and documents are not included to prove them, simply collecting the certificate of absence of resources or that of the suitability of the in-house undertaking[91] .

---

89 See, for example, TACRC Resolutions of 17.12.2018 (rec. 1084/2018), 18.02.2019 (rec. 1369/2018), 07.10.2019 (rec. 814/2019) and 16.06.2022 (rec. 590/ 2022).

90 Some Autonomous Communities have regulated the requirement of justification of the resource for each contract. For example, Report of the Accounts Council of Castilla y León of March 8, 2016; Instruction 11/2018, of June 7, 2018, of the General Intervention of the Junta de Andalucía, which approves the guide for prior inspection of expense files derived from ih-house contracts; or Law 5/2018, of November 22, on the legal regime of the government, the administration and the Institutional public sector of the Community of Cantabria (Art. 91.4 b).

91 This has been revealed in the IGAE report on Article 332.11 of the LCSP (2020) It adds that: *"In general, the use of controlled undertakings is not usually adequately justified, since the reasons are usually generic and no supporting documents are included, the most utilised being the certificate attesting a lack of means."* Likewise, the Constitutional Court (TC) (Motion No. 1198) concludes that, in general, documents that formally cover this requirement appear in the files. In this sense, it is alleged as justification for the recourse to the transfer of the task

In practice, the principle of good administration requires an examination conceptually similar to the one that should be used to justify the creation of a controlled undertaking. In the first place, the benefits, and costs of using an in-house transaction as a form of procurement must be assessed, including both economic considerations and other motivations of general interest. Secondly, the alternatives to the in-house providing must be assessed, and whether they are better from the point of view of general interest.

For the purposes of this assessment, **the following recommendations are made:**

Recommendation 17. Analyse whether, from the point of view of general interest, the in-house providing is preferable to public tendering through a rigorous comparison of the advantages and disadvantages of both alternatives.

- The advantages and disadvantages should be properly weighed up to use an in-house providing or public procurement and choose the most advantageous supply option, taking into account, at least, for each of them:
  - The quality of the works/services received and their adjustment to the needs of the public entity, as well as their estimated economic cost.
  - The need for each option from the point of view of the imperative reasons of general interest that are relevant in each specific case.
  - The availability of resources of the controlled undertaking and the need for it to carry out subcontracting to execute the in-house transactions entrusted.
  - Celerity and bureaucratic burden in the availability of the works/services required.
  - Flexibility in the way the services, products and works are required.
  - Ability to control the execution of works, the provision of services and supply of products.
  - The foreseeable need to modify the transaction and the limitations applicable for each of the alternatives.
- To carry out this comparison, it is advisable to address the following criteria:
  - Identify fully the works, products or services that would be the object of the in-house transaction to be supplied by the in-house entity and **catalogue them** within the list

(contract) to the lack of means for the development of the activities entrusted, in the speed in its formalisation and flexibility in its execution, in the inability of the market to provide the services required, or on the mere suitability of the work being carried out by the entrusted entity (a controlled undertaking) due to its experience or specialisation. However, it found that these circumstances or situations were not sufficiently accredited in the file with the necessary reports or studies.

of activities used in public procurement (CPV), so that the purpose of the in-house transaction cannot be imprecise and allows for greater comparability[92] .

- Make a good prediction of the results and costs (quality-price) of both procurement alternatives, for which historical data from in-house procurement and public contracts with a similar purpose can be used. In this case, the **samples** must be **sufficiently representative** and **selection bias** should be avoided.
- **To compare the quality** of previous in-house procurement and public contracts, the information must be transferable in specific, objective, and quantitative terms to allow for a comparison (for example, customer service in managing complaints within a specific period or the availability of certain complementary services).
- The analysis of **overriding reasons of general interest** that can justify one procurement route or another must not be based on the mere invocation of such reasons but must prove that the expected benefits derived from each option that is, from a causal relationship between one and the other (**adequacy of each option to the objectives**).
- If **environmental objectives or results are evaluated**, it is recommended to reduce the subjective element through objectification mechanisms, in particular, the use of a common taxonomy (there is one for the entire EU), so as to identify whether each of the affected activities can be classified as sustainable compliance with certain requirements (for example, level of recycling; level of emissions; use and management of water…)[93].
- The **reasons of urgency** for using in-house procurement cannot be based on the **mere convenience** of obtaining a reduction in deadlines, greater comfort in management or a structural deficiency of available resources[94]. The reasons of

[92] In this regard, refer to the reference rules with respect to the categories included in the CPV (Common Vocabulary for Public Procurement), which is largely derived from the EU.

[93] Regulation (EU) 2020/852 of June 18, 2020, OJ L 198, 22.6.2020. In this regard, it should be remembered that the EU taxonomy defines the criteria to determine whether an activity is "green" in the sense in which the European Commission understands it, that is, in such a way that it is aligned with the strategy and policies of the EU in terms of decarbonisation and sustainability. It is about preventing "Greenwashing", that is, that companies, investment funds, etc., call themselves "green" without being so. In addition, the taxonomy will be a tool to be used in sustainable finance, considering the objectives of the European Commission to promote the channelling of public and private funds towards investments and activities that contribute to sustainability objectives.

[94] These types of justifications have been noted by the IGAE in the aforementioned report: "Taking into account that in a significant percentage of the EMPs (Environmental Management Plans) the insufficiency of personal resources has been alleged in more than 79% of them, in addition to having revealed the chaining of EMPs, it does not seem that the use of the MP as a specialised entity has the necessary virtuality, for which reason a global analysis of the human resources of the State Administration would be convenient in order to adopt the decisions that proceed regarding their organisation or flexibility to avoid continuing with EMP

urgency **cannot be claimed in a systematic and recurring manner** and, when they are not due to unforeseen events, they must lead to **improving planning for** the public needs. When reasons of urgency are alleged, the public entity must specify to what extent it expects to be able to shorten the deadlines for the in-house procurement route and under public procurement regulations, taking into account the possibility of an early processing of the public procurement file[95], and must prove that **the anticipated reduction in deadlines is essential** from the point of view of overriding reasons of general interest. In addition, in these cases, the content of the in-house transaction should be limited to the **actions that require to be immediate**, submitting the rest of the activities related to the ordinary procurement process through competitive bidding procedures.

- To determine **the foreseeable cost** for each of the procurement alternatives. Historical data can be used. In the case of in-house transactions, the public budget that finances it is representative of its initial real cost. In the case of public contracts, the award value must be computed. Depending on the cases, it may be relevant to consider the supervening modifications.

- Finally, it is recommended that public contracting authorities have **guidelines or internal protocols** regarding the justification of the in-house procurement (see example of the CNMC in text box 12).

Text Box 10. Lack of justification of in-house transactions for reasons of urgency.

Resolution of the Administrative Tribunal of Contractual Appeals of Castilla y León, in its Resolution of May 22, 2019 (61/2019)

When analysing the urgency for the execution of some urbanisation works as a justification for the in-house transactions entrusted to TRAGSA, the Tribunal indicates that: "*The bylaws restrict the cases to two in which you can invoke urgency to conclude an in-house transaction to TRAGSA in relation to any type of work or service: unsuccessful tenders and contractual resolution due to breach of the contractor. Aside from these cases, the in-house transaction cannot be justified on such grounds. On the basis of the aforementioned, and in view of what was alleged by TRAGSA, it must be concluded that the second of the assumptions that could justify the in-house procurement for reasons of urgency does not apply. And this is because the resolution of the previous works contract was agreed at the request of the contractor* (…) *Notwithstanding the foregoing, the mere reduction of the processing period cannot justify, by itself, the urgency to go to an in-house procurement, since it could have gone, where appropriate, to the urgent processing provided for in article 119 of the LCSP, and also the*

that intend to replace the insufficiencies of non-specialised personnel of the public bodies, even exercising administrative powers in 3% of the cases analysed."

[95] The LCSP allows the file to be subject to the urgent procedure and, exceptionally, to the emergency procedure or, where appropriate, to the negotiated procedure without publicity for reasons of urgency.

reasons that justify the urgency in the restart and execution of the works do not appear in the file".

Resolution of the Central Administrative Tribunal of Contractual Appeals February 18, 2019 (120/2019).

The Tribunal upheld an appeal against the in-house transaction entrusted by the Department of the Valencian Community to TRAGSA for the "Drafting of the project and execution of the functional adaptation works of the Superior Court of Justice of the Valencian Community".

One of the reasons given was the lack of justification for the in-house transaction and its inadequacy with the corporate purpose of TRAGSA. The Administration and TRAGSA claim that there are reasons of public safety, urgency, and the circumstance that the previous public tender had been declared void due to the lack of tenderers.

The Tribunal recognises that the characteristics of the in-house transaction entrusted to the in-house undertaking is configured as an exception to public procurement, which must be subject to a restrictive interpretation, which entails the need to justify the lack of suitable technical resources and the greater suitability of an in-house transaction (whether for reasons of public safety or emergency or efficiency compared to public tendering and economic profitability criteria).

The Tribunal holds that the deficiencies in the building that houses the headquarters of the TSJ of Valencia does not reflect a real and objective urgent situation, that cannot be satisfied by going to a public tendering process (whether by the urgent or emergency procedure; or by the negotiated procedure without publicity for reasons of urgency, concluding that, in any case that: *"The recourse to the in-house procurement to the in-house entity should, where appropriate, be limited to the execution of essential actions to avoid damages derived from imminent risks, submitting the procurement of the rest of the actions, as far as possible, and in the interest of the principles of publicity and competition, to public tendering processes".*

Consequently, the Tribunal partially upheld the appeal, in part, due to the lack of sufficient justification of the specific assumptions on which the conclusion of the in-house transaction is based.

Source: owned elaboration.

Text Box 11. CNMC protocol for processing in-house transactions with controlled undertakings

The procedures to be carried out for the initiation, processing, formalisation, execution, payment, and reception of in-house transaction to in-house entities are internally regulated. Different phases are identified: **Planning, preparatory, processing of the file, execution and reception/conformity and liquidation of the in-house transaction**.

- In the planning phase, in-house transactions and public cooperation agreements are considered, in addition to contracts, subject to planning of Article 28.4 of the LCSP.
- In the preparatory phase, a series of procedures tending to duly motivate the use of an in-house procurement are contemplated. It highlights the realisation of a market study in order to determine that the in-house option generates efficiencies with respect to public tenders. Thus, the proposing unit must verify: (i) That the in-house transaction is a more effective

and efficient option than the formalisation of a service contract; (ii) if there are different in-house undertakings available to carry out the provision (if the activities to be commissioned are part of its corporate purpose and they have the material and human resources to carry them out), comparative analysis of the most economical (comparison of rates); (iii) that with its formalisation it can be reasonably presumed that it will not produce potential negative effects on the structure of the market/s whose scope corresponds to the benefits that constitute its object.
o Likewise, documentary evidence of the result of the activities that constitute its object must be left. The act of reception will have the purpose of verifying the effective realisation of the object of the in-house transaction and its adequacy to the requirements and characteristics indicated in the resolution by which it was formalised, as well as to accept the in-house transaction as received. The minutes must include the appropriate observations. If deficiencies are noticed in the performance, they will be recorded in the minutes, indicating that the in-house procurement is not considered as received. A term will be granted for the in-house to correct the deficiencies identified.

Source: owned elaboration.

4.3. Review of the conditions for in-house entities

If it is relevant that in-house undertakings meet the formal and substantial requirements at the time of their creation, it seems equally reasonable that these requirements are met throughout their life and that, if there have been changes to them, the pertinent measures are adopted to review the permanence of the qualification of the entity as a controlled undertaking.

In this sense, the Supreme Court, in the Judgement of September 20, 2018 (RJ 2018\4409), declared that the control of the existence of in-house entities must be exercised not only at the time of declaration of an in-house entity as such, but during the subsequent exercise of permanent control, that is, control of effectiveness and continuous supervision, provided for in Article 86 of the LRJSP.

It should be remembered that, in accordance with Article 81.2 of the LRJSP: "*All Public Administrations must establish a system of continuous supervision of their dependent entities, in order to verify the subsistence of the reasons that justified its creation and its financial sustainability, and which must include the express formulation of proposals for maintenance, transformation and extinction.*".

Furthermore, Article 85 of the LRSJP specifies that the entities that are part of the state institutional public sector will be subject to checks on their performance and **continuous monitoring**[96] .

Checks on their performance (exercised by the Department to which the entities themselves are attached, through service inspections) will aim to assess compliance with the objectives of the specific activity of the entity and the proper use of resources, in accordance with the provisions of its action plan and its annual updates, without prejudice to the checks that, in accordance with Law 47/2003, of November 26, is exercised by the General Intervention of the State Administration.

Continuous supervision (exercised by the IGAE) will monitor that the requirements set forth in the LRJSP are met. In particular, it will verify, at least, the following: a) the subsistence of the circumstances that justified its creation; b) its financial sustainability; and c) the concurrence of the cause of dissolution provided for in this law referred to the non-compliance of the purposes that justified its creation or that its subsistence is not the most suitable means to achieve them.

A recent regulatory reform has worsened the system of verification and control of controlled undertakings in at least two aspects. On the one hand, it has repealed the consequence, provided for in the old section 5 of article 32 of the LCSP, of loss *supervening* of the condition of controlled undertaking due to non-compliance with the established requirements. On the other hand, the modification formulated in Article 86.3 of the LRSJP limits the report of the IGAE to newly created controlled undertakings (according to the previous regulation, the IGAE had to also report on the existing controlled undertakings).

Recommendation 18. Continuous control of the conditions of in-house undertakings

- In accordance with the principles of good administration, both the controlled undertakings and the public authorities that control them must continuously evaluate whether the reasons of general interest that led to the creation of the in-house undertaking are

[96] For this, all entities that are members of the state institutional public sector will have, at the time of its creation, an action plan, which will contain the strategic lines around which the activity of the entity will develop, which will be reviewed every three years, and that will be completed with annual plans that will develop the creation plan for the following year.

maintained or if, on the contrary, it is necessary to adapt the corporate purpose or the resources available to the controlled undertaking or, in the end, cease[97].

[97] In fact, Article 85 of the LRJSP expressly includes: "*The concurrence of the cause of dissolution provided for in this law referred to the breach of the purposes that justified its creation or that its subsistence is not the most suitable means to achieve them.*".

5. RECOMMENDATIONS FOR PUBLIC COOPERATION AGREEMENTS

The cooperation agreement is a formal act in which the concurrence of wills between two or more parties is reflected, which, from a position of equality, decide to collaborate in the **achievement of goals of common interest**. In a more technical-legal sense, according to Article 47 of the LRJSP, the cooperation agreements are "*Agreements with legal effects adopted by Public Administrations, public bodies and public law entities linked or dependent or public Universities among themselves or with private law subjects for a common purpose".*

It should be remembered that relationships between public entities are subject to a series of principles, among others, those of collaboration (act with the rest of the Public Administrations to achieve common goals), cooperation (assuming specific commitments for the sake of a common action) and efficiency in the management of public resources (sharing the use of common resources, unless it is not possible or justified in terms of their best use)[98].

From a subjective point of view, two types of cooperation agreements can be distinguished: those existing between entities belonging to the public sector and agreements between public sector entities and natural or legal persons subject to private law[99].

Unlike the in-house providing for controlled undertakings, which share a similar object to that of public procurement, the cooperation agreements present a different object: the achievement of common goals. Cooperation agreements are excluded from the public procurement regulations and are not subject to its principles.

The risk of affecting competition occurs when the requirement for cooperation between two entities is perverted. That is, when a strictly contractual relationship is masked behind a cooperation agreement to circumvent the inspiring principles of public procurement regulations.

Additionally, if the financial compensation contemplated were not well established and economically benefited one of the parties, there could be a State aid concern,

---

[98] Article 140 of the LRJSP.

[99] The reference to persons subject to private law can introduce an element of insecurity since public commercial companies also fit into this category.

taking into account the regulations established by the EU in this regard. Similarly, it should be noted that, in the event of incorrect use of cooperation agreements, especially when carried out with private operators, it could result in the attribution of advantages or the strengthening of the market position of the operators participating in the agreement or the weakening of competition between operators.

Text Box 12. Incorrect use of public sector cooperation agreements

Annual report on state aid 2010 (CNC)

In 2010, the Spanish competition authority analysed the actions carried out between public entities, on the one hand, and airlines, on the other, aimed at increasing the influx of travellers to certain Spanish airports. These actions were generally formalised through collaboration agreements between the parties, or through public service contracts. In both cases, the purpose of the proceedings was the provision of advertising promotion services.

The report indicated that, if the projected actions consisted of the provision of costly services, such legal relationships must be formalised through the corresponding public contract. If the collaboration agreement path is followed, both parties must make an equitable economic contribution, limiting the possibility that the entire economic contribution by the airlines is made through controlled undertakings (website, in-flight magazine, sale of airline tickets for promotional events…).

Lastly, without prejudice to other equally interesting issues (ex post evaluation of the measures implemented from the point of view of their effectiveness and efficiency), the report remarked that these measures may be susceptible to being considered State aid.

Source: owned elaboration.

It is therefore essential to analyse the content of the cooperation agreements and verify that it is not included in the objective scope of the public procurement regulations or in that of other special administrative regulations[100]. It will be the precise and concrete content of the activity or provision included in the cooperation agreement, taking into account all its defining elements, that determines its legal regime, regardless of its formal classification[101]. In the

[100] Article 12.4 of Directive 2014/24 and Articles 6.1 and 2 of the LCSP.

[101] For example, in the Resolution of the Central Administrative Tribunal of Contractual Appeals of November 14, 2014, appeal no. 807/2014) a collaboration agreement signed between Ibiza Town Hall and the Association of Autonomous Taxi Drivers on September 24, 2014, for the provision of management service through satellite positioning technology of the transport service fleet in Ibiza is analysed. It concludes that once the cause of the business, the elements and its obligations, its form and substance have been analysed, that it is a true collaboration agreement between a local Administration and a private legal person "*there is no conflict of interests, but on the contrary, the search for a space for collaboration that benefits*

absence of true cooperation (when, for example, there is a unilateral assignment of tasks from one public entity to another), a collaboration agreement will have a contractual nature and, consequently, must be subject to public procurement regulations.

To minimise this risk, the regulations currently in force require, especially for cooperation agreements between public entities, compliance with a series of requirements:

In the first place, in accordance with the regulations governing the legal regime of the public sector, "*the signing of cooperation agreements should improve the efficiency of public management, facilitate the joint use of public resources and services, contribute to carrying out activities that are useful for the public and comply with the legislation on budgetary stability and financial sustainability. […] The cooperation agreements that include financial commitments must be financially sustainable, and those who sign them must have the capacity to finance those commitments for the term of the agreement"*[102]*.*

In this regard, reference should be made to what has already been stated regarding financial sustainability. Likewise, it must be confirmed that there is no economic benefit, a key element of contracts[103]. Therefore, if there is some type of economic compensation regime between the parties, it must be based on the real cost of providing the former, excluding the commercial profit margin of market operations[104]. In addition, there is an obligation of motivation through a justification report, where the need and opportunity, the economic impact, and

---

the public interest, the interests of the parties are public and the benefits are commutative, that is, equivalent". Furthermore, the name given by the parties to the cooperation agreement is irrelevant when deciding whether it really is a collaboration agreement or a public contract and must be in keeping with the real and objective nature of the agreement (STS of February 18, 2004).

[102] Article 48.3 of the LRJSP.

[103] The case law of the CJEU has outlined the differences between agreements and contracts, for example, amongst others, in the Rulings of January 18, 2007, cases C-220/2005, *Jean Auroux et al. v. Commune de Roanne*; of December 19, 2012, C-159/201, Azienda Sanitaria Locale di Lecce; of May 28, 2020, Case C-796/18, *ISE-Cologne*. Also of interest is the Ruling of the CJEU of December 18, 2007, which condemns the Kingdom of Spain (Case C-220/06, *Professional Association of Delivery and Handling Companies Correspondence*) by considering the cooperation agreements signed by the State with the state-owned company CORREOS contrary to law, on the understanding that there is an authentic contract and that there has been no public bidding.

[104] The aforementioned Judgement of the CJEU of December 11, 2014, case C-113/13, *Azienda sanitary locale.*

the non-contractual nature of the activity in question are analysed, among other aspects, as well as publicity and control measures[105].

Secondly, according to public procurement regulations, *"excluded from the scope of this Law are the cooperation agreements, whose content is not included in that of the contracts regulated in this Law or in special administrative rules concluded between themselves by the General Administration of the State, the Management Entities and the Common Security Services Social, the Public Universities, the Autonomous Communities and the Autonomous Cities of Ceuta and Melilla, the Local Entities, the entities with public legal personality dependent on them and the entities with private legal personality, provided that, in the latter case, they have the condition of contracting authority"*[106].

For this exclusion to occur, these three conditions must be met:

a) That the entities involved are not market-led, which will be presumed when they carry out in the open market a percentage equal to or greater than 20 percent of the activities object of collaboration[107] .

b) That the agreement establishes or develops a cooperation between the participating entities to guarantee that the public services incumbent on

[105] The LRJSP makes it obligatory to register the agreements signed by the General State Administration in the state Electronic Registry of Bodies and Instruments of Cooperation of the state public sector, and to publish them in the official state gazette (BOE).In addition, within the three months following the signing of any agreement whose financial commitments exceed 600,000 euros, these must be sent electronically to the Court of Accounts or external control body of the Autonomous Community, as appropriate. In addition, Law 19/2013 requires the publication of the list of signed agreements, mentioning the signatory parties, their object, term of duration, modifications made, obligated to carry out the services and, where appropriate, the agreed economic obligations.

[106] Articles 6 and 31.1 of the LCSP.

[107] Article 6 of the LCSP adds that: *"For the calculation of said percentage, the average of the total business volume or another appropriate alternative indicator of activity will be taken into account, such as the expenses incurred in relation to the benefit that constitutes the object of the agreement in the three years prior to the award of the contract. When, due to the date of creation or start of activity or the reorganisation of activities, the volume of business or another appropriate alternative indicator of activity, such as expenses, were not available with respect to the three previous years or were no longer valid, it will be enough to demonstrate that the calculation of the level of activity corresponds to reality, especially through business projections."*.

them are provided in such a way that their common objectives are achieved[108].

c) That the development of cooperation be guided solely by considerations related to the public interest[109].

Likewise, the referred regulations indicate that *"Cooperation agreements entered into by public sector entities with natural or legal persons subject to private law will also be excluded from the scope of this Law, provided that their content is not included in that of the contracts regulated in this Law or in special administrative regulations".*

In this case, the delimitation between the characteristics of the contract and that of the cooperation agreement may be more unclear. Consequently, greater precautions must be taken, so that it can be confirmed that there is a true combination of efforts to achieve general interest goals that interest both the private party and the corresponding public entity.

Text Box 13. Incorrect use of cooperation agreements

CNMC REPORT **PRO/CNMC/002/19 ON PUBLIC BIDS FOR PASSENGER TRANSPORTATION IN PASSENGER VEHICLES IN THE SCHOOL, WORK AND HEALTH FIELDS** (January 9, 2020).

A collaboration agreement signed on April 9, 2008, between the Department of Health of the Autonomous Community of Madrid and the Madrid Professional Taxi Federation (FPTM) was

[108] For example, it could be the concurrence of a division of responsibilities or that the action of one of the parties constitutes a "specific complement" to the public interest functions of the other party (conclusions of the General Advocate, dated January 23, 2014, in case C-15/13, *Datenlotsen Informations systeme GMBH / Technische Universität Hamburg-Harburg)* or even "additional services" (Recital 33 of EU Directive 2014/24).

[109] On the delimitation between real cooperation through agreements and public contracts, see, amongst others, the Ruling of the CJEU of June 9, 2009, C-480/06*, Commission v Germany (Hamburg)*; of June 13, 2013, C-386/11, *Piepenbrock;* and of June 4, 2020, C-429/16, Remondis II. Also, the European Commission Working Document on the application of EU public procurement rules (SEC (2011) 1169, October 4, 2011): *"A general reading of the case law also indicates that the agreement must have the character of a real cooperation, as opposed to a normal public contract in which one of the parties performs a certain task in exchange for remuneration. If a contracting authority unilaterally assigns a task to another, this cannot be considered cooperation. Example: The supply of electricity to the administrative buildings of a city by a public service company of another city without there being a prior contracting procedure. Cooperation is governed by considerations relating to the pursuit of objectives of public interest. Consequently, it may entail reciprocal rights and obligations, but not financial transfers between the cooperating public parties, except for the reimbursement of the actual costs of the works, services, or supplies. The provision of services for remuneration is a feature of public contracts subject to EU public procurement rules.".*

analysed about provision of transport to complement other means of medical transportation, a cooperation agreement that was extended from year to year, and in which only one type of vehicle (taxi) could provide the service.

The CNMC recalled that agreements entered into by public sector entities with natural or legal persons subject to private law must be of an exceptional nature. The CNMC considered it debatable that the objective scope of the cooperation agreement in question was not included in the matters of public procurement, as in fact was the case in other Autonomous Communities.

Additionally, they were warned that the very existence of this cooperation agreement, without the possibility of concurrence, is already in itself, essentially restrictive. It reinforces the competitive advantage of a certain profile of operators without proving the reasons of general interest that supposedly would justify it. For this reason, it was recommended that it be converted into one of the public procurement modalities subject to effective competition.

Source: owned elaboration.

Ultimately, it is of paramount importance that verification is carried out of strict compliance with the requirements set forth to avoid fraudulent use of the agreement mechanism through the non-application of public procurement regulations. In any case, since it is also a decision that would limit operators' access to the market, the decision adopted must respect the double assessment test that has already been described for in-house undertakings.

In other words, it is to be expected that not only the outlined requirements are met (some of which already include references to these principles) but also that the decision adopted adequately respects the principles of good regulation (necessity, proportionality, efficiency, non-discrimination, amongst others…).

Text Box 14. Incorrect use of cooperation agreements

Report on certain legal transactions signed between Bilbao City Council and Fundación Metrópoli . Basque Competition Authority (2017).

The Basque Competition Authority (AVC) received a request to analyse the agreements signed by different public entities, from the perspective of their impact on competition: Bilbao City Council and PROMOBISA (A Bilbao promotion and development limited liability company of municipal equity) with the Fundación Metrópoli in relation to various remodelling projects in the city.

It was verified that PROMOBISA awarded the Fundación with the task of carrying out a strategic diagnosis of the Bilbao city project for 300,000 euros, and it was classified as an cooperation agreement. However, the content of the legal transaction was contractual. Furthermore, it was also concluded that the choice of mechanism for the cooperation agreement was not justified for another legal transaction between both parties - the purpose of which was to promote the international positioning of the city, which included a donation of 162,000 euros - given that the onerous characteristics of a contractual transaction concurred.

Ultimately, it was concluded that the cases analysed in which it had been decided to go through different alternatives to public procurement to obtain compensations typical of a contract have signified a limit to competition and represented an advantage for the Fundación for which there is no justification.

Source: owned elaboration.

Finally, reference should be made to the cases in which public sector entities resort to *"mixed formulas",* that is, a combination of horizontal and vertical cooperation. These formulas are very common in the direct management of local public services: through a cooperation agreement between, for example, two territorial administrations, by which the controlled undertaking of one becomes the in-house undertaking of the other with the aim that the latter provides a public service (for example, the supply of drinking water).

It is expressly admitted that "in house" awards occur within the framework of a collaboration agreement or horizontal cooperation. In fact, it is indicated that the "similar control" requirement can be manifested by different means, so that, despite the fact that the municipality does not have any participation in the capital of the "in-house" entity, it must have the possibility of exercising a decisive influence, both on the strategic objectives, as well as on the important decisions of the successful awarded entity and, therefore, an effective, structural and functional control over it[110].

These types of combinations should be viewed with even greater caution. It must be verified both that the cooperation agreement in question is not objectively contractual in nature and complies with the rest of the aforementioned conditions, and that the requirements in question, for carrying out in-house procurement, are met[111].

In accordance with all the considerations, the following **recommendations** are made:

---

[110] It can be seen in this regard in the Ruling of the CJEU of June 18, 2020, *Porin Kaupunki*, C-328/19.

[111] For example, see: Report on the case of Vidreres, of March 22, 2017 and the Report on the Santa Maria d'Oló case, dated March 26, 2015. They are prepared by the Catalan Competition Authority (ACCO) with respect to the public drinking water supply service on the basis of Article 97.2 RDL 781/1986, of April 18, which approves the consolidated text of the legal provisions in force regarding local government. For an approximation of the impact on local entities, see Colomé, A. and Grau, S.: "Remunicipalisation of local services and competition". Cuadernos de Derecho Local (Local Law Notebooks) QDL43, Democracy and Local Government Foundation. ISSN: 1696-0955 (2017).

Recommendation 19. Avoid using cooperation agreements when they are not necessary or there are more appropriate ways to intervene from the point of view of general interest.

- Submit the cooperation agreements to the planning requirements (together with the rest of the procurement formulas), in line with the recommendations of the CNMC (Guide to planning public procurement).
- Resolve the existing regulatory misalignment between the two types of cooperation agreements contemplated, so that the requirements that are applicable to both are expressly and clearly identified.
- Introduce greater precision in some of the concepts used, such as considerations related to the public interest. One possibility would be to use the reference to the overriding reasons of general interest included in Article 3.11 of Law 17/2009, of November 23, on the free access to the services activities and their exercise.
- Publicise the justification exercise that would support the use of the cooperation agreement, in such a way that the effectiveness would be conditioned by the publication of the supporting report.
- Reinforce the justification report that must accompany each cooperation agreement, so that in addition to the elements that must be assessed, it shows proof that the general interest objective pursued could not be achieved more effectively by means of a competitive process, typical of a public tender.
- Introduce a preference for the use of competitive bidding procedures in at least two situations: (i) in those border cases in which the contractual route could be used, altering the subject of the same, but not the objective of general interest pursued; (ii) in those cases in which, despite using the cooperation agreement route, the object of the agreement can be carried out with a plurality of operators, especially if they are private law persons.

6. CONCLUSIONS

As long as the aforementioned requirements are met, cooperation relationships between public entities (agreements and in-house procurement) constitute an alternative to contracting to satisfy the needs of the public sector.

Cooperation agreements and in-house procurement can offer certain advantages over public contracts, for example, in terms of agility, predictability, flexibility and control over the execution of services. Much of these advantages are because of the longer time and procedural costs involved in the public procurement procedure. Although this document does not address these difficulties, the CNMC plans to analyse public competitive tendering in the following phases of the process of updating the Guide on public procurement and competition.

At the same time, the use of these horizontal and vertical cooperation alternatives to public procurement can lead to less efficiency in the services provided to the public sector and a reduction in competition in the markets.

Therefore, the freedom to use these alternatives is subject to certain requirements and demands. On the one hand, material, and formal requirements to exclude certain legal transactions from the rules of public procurement. On the other, a necessary adjustment to the principles of good regulation and administration.

This guide aims to offer guidelines to public authorities so that the use of these tools entails fewer risks to efficiency and competition.

This Guide will be sent to the Ministry of Finance and Public Function, the Ministry of Economic Affairs and Digital Transformation, the Court of Accounts, the General Intervention of the State Administration, the State Public Procurement Advisory Board and the Independent Office for Regulation and Supervision Public Procurement. Additionally, it will be published on the website of the CNMC[112].

[112] The CNMC has a section dedicated to public procurement where you can find all the resources on this matter (guides, studies, reports on regulatory projects, reports on bidding documents, and challenges) at this link.