

## TO THE EUROPEAN COMMISSION

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| <b>Matter</b>      | Complaint to the European Commission about the infringement of the European Union law                        |
| <b>Complainant</b> | Kustos ry<br>Isokatu 62 B 19<br>90120 Oulu   |
| <b>Attorney</b>    | Mr Jouni Alanen, Attorney-at-law<br>Roihu Attorneys Ltd<br>Siltasaarekatu 18-20 B<br>00530 Helsinki, Finland |

## 1. Complaint

The planned amendment to the Finnish Act on Public Procurement (1397/2016) concerning a categorical minimum ownership requirement of 10 % for determination whether the contracting authority can take advantage of the in-house exception infringes the European Union law. The complainants ask the European Commission to take action to prevent the planned infringement in question.

## 2. Executive summary

1. A categorical minimum ownership requirement of 10 % for determination whether the contracting authority can take advantage of the in-house exception in Article 12 of Directive 2014/24/EU infringes EU law based on the established CJEU case-law (Teckal, Asemfo etc.) and the general EU principles guiding the public procurement process.
2. As a result of adopting the ownership requirement, Finland's in-house rules would become by far the strictest in the entire European Union.
3. When analysing the categorical minimum ownership requirement, the emphasis should be on the practical consequences of the planned legislative amendment bearing in mind that there is not even national impact assessment available.
4. The additional ownership requirement would cause very harmful effects on the Finnish regional and local economy and on the valuable cooperation between public bodies, but no positive effects on competition.
5. The requirement would discriminate against small municipalities and other regional and local public bodies in sparsely populated areas in Finland.
6. Consequently, the proposal, if adopted, would infringe the core principles of primary EU law, particularly principles of equal treatment and proportionality.
7. The planned amendment is endangering the supremacy of EU law by extending the national margin of discretion to the core area of the notion of control. This endangers the efficient enforcement of EU procurement rules.
8. The Commission should take prompt action against the planned infringement of EU law.

## 3. Background

Petteri Orpo's Government Programme proposes an amendment to the Section 15 of the Finnish Act on Public Procurement (1397/2016). The proposed amendment introduces a categorical minimum ownership requirement of 10 % for determining whether the contracting authority can take advantage of the in-house exception in accordance with Art. 12 of Directive 2014/24/EU.

According to the Government Programme the possibilities of contracting entities to circumvent the Procurement Act with the help of affiliated entities would be limited. A minimum percentage (10 %) of ownership of an affiliated entity is set, taking into account the public interest.<sup>1</sup>

Based on the Government Programme working group led by the Ministry of Economic Affairs and Employment was set up for the preparation of amendments to the Act on

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<sup>1</sup> See Petteri Orpo's Government Programme 20.6.2023, Valtioneuvoston julkaisu 2023:58, p.105.

Public Procurement. Working group published its report on 8<sup>th</sup> of January 2025. Working group included in its report a proposal for 10 % minimum ownership requirement. (Link to the report is in the footnote 2 below.)<sup>2</sup> Government proposal shall be published during the coming autumn and the amendment is intended to come into force in the beginning of year 2026

The amendment would be purely national and not based on Directive 2014/24/EU. The ownership-based additional requirement for control deviates from the logic of requirements for control set in Art. 12(1) of the Directive. Other requirements regarding in-house transactions would remain unchanged.

It is to note that several participants in the working group presented differing opinions on the Working Group's report opposing the ownership requirement. These included, i.a., Ministry of Finance, Ministry of the Environment, Finnish Competition and Consumer Authority and The Association of Finnish Cities and Municipalities.

The fact that an in-house transaction, within the meaning of Art. 12(1) of Directive 2014/24, does not fall within the scope of that directive, cannot relieve the MSs of the obligation to guarantee that additional national conditions are compatible with EU law, i.e. the basic rules of the TFEU apply even when a Member State acts outside its obligations under the Directive.<sup>3</sup>

According to the Government Programme of Petteri Orpo's Government the planned amendment aims to improve the efficiency of the public sector and strengthens the regional vitality and the conditions for entrepreneurship. The government proposal suggests that the amendment takes into account general interests.

It seems however obvious that the chosen legislative measure is not suitable for achieving the anticipated goals nor the general interest goals in accordance with the basic rules of internal market law and in terms of principles of proportionality and discrimination. It is to underline that 607 statements on the proposed amendment were given, of which even as many as 452 were against or at least very critical towards the proposal. And what is even more important, eight Finnish Ministries of nine altogether were against the proposal (the responsible Ministry as only one supporting the proposal). And even the Finnish Competition Authority – whose primary task is to enhance competition – opposes the proposal.

It is to underline further, that the reasons for the vast number of opposing statements were, i.e., the total lack of effect assessment and, more importantly, that the amendment would have multiple serious harmful consequences, but almost no anticipated positive effects on competition and various markets in question.

Furthermore, the *travaux préparatoires* do not give out any reasoning for the selection of the proposed figure, 10 %. The selected figure is not based on any data, studies nor any other assessment. The only impact assessment on the legislative proposal has been conducted by the Finnish Competition and Consumer Authority. According to the Authority's findings, the proposed limitation would increase public sector costs,

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<sup>2</sup> Report of the Working Group on the Reform of the Public Procurement Act: [Hankintalain uudistamista käsittelevän työryhmän mietintö.pdf](#).

<sup>3</sup> See order of the Court in case C-59/00 Vestergaard (ECLI:EU:C:2001:654) p.19 with reference to previous case law; case C-285/18, Irgita (ECLI:EU:C:2019:829) 60 and 61.

as it fails to adequately consider the differences between various sectors, regions, contracting authorities, and affiliated entities. The conclusions and recommendations of the Authority, which were aimed at mitigating the adverse effects of the proposed amendment, have not been considered during the legislative drafting process. Among other things, the Authority suggested that exceptions to the minimum ownership requirement should be introduced. However, no such exceptions were addressed during the working group phase.

Despite of the opposing statements, the Government has announced that the proposal of 10 % requirement will be included in the upcoming Government's proposal.

#### **4. Concerns relating to the interpretation and application of EU procurement law**

This notice concerns a potential infringement of EU law relating to the planned amendment of Finnish Public Procurement Act. We consider that the Republic of Finland is wrong in adding a categorial ownership requirement to the national Act on Public Procurement. The transposition of Art. 12 of Directive 2014/24/EU<sup>4</sup> into national law in the planned manner, when the mentioned Art. 12 (1) is read in conjunction with paragraphs 31 and 32 of the preambles of Directive 2014/24/EU, does not ensure that the Directive could function effectively in accordance with the objectives which it seeks to attain.<sup>5</sup>

The planned amendment introduces a categorical minimum ownership requirement of 10 % for determining whether the contracting authority can take advantage of the in-house exception in accordance with Art. 12 of Directive 2014/24/EU.<sup>6</sup> The planned changes to the method of defining the scope of in-house exception can potentially have a significant impact on the development of concepts that are central to EU procurement law, and in this sense, the planned changes constitute a major adaptation in the method of analysing the existence of control under public procurement rules.<sup>7</sup>

According to the CJEU's case law the national legislature may impose specific conditions for the application of an in-house exception. Still, any conditions must clearly stem from the law and be predictable. The Court has also stressed that the choice of any mode of supply of services, e.g. a choice between internal procurement and competitive procurement, must respect the fundamental principles applicable to procurement. This can be considered an instruction for the contracting authority to be guided in such a decision by real needs to obtain a reasonable quality of service for the public interest. The proposed additional national requirement does not take into account the forementioned fundamental principles of EU public procurement in an adequate manner.

From the perspective of EU law's interpretation and application, the planned categorical requirement of ownership is not in accordance with the general interest

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<sup>4</sup> The aim of the unity of interpretation also enshrined in the CHFR Article 52(1).

<sup>5</sup> See case C-718/18 Commission v. Germany (ECLI:EU:C:2021:662) p. 138 and 139 with case law cited.

<sup>6</sup> Consolidated text: Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (Text with EEA relevance) Text with EEA relevance.

<sup>7</sup> In analogue about the acceptability of minor changes in conjunction to Article 72(2) of Directive 2014/24/EU.

and the general legal principles that are central to the matter. To ensure uniform conditions for the implementation of Art. 12 of Directive 2014/24/EU, implementing powers in this issue should be conferred to the Commission.

## **5. The margin of discretion in transposition of Directive 2014/24/EU**

The background of the objective pursued by Directive 2014/24/EU is that the free movement of services and the opening-up to competition that is undistorted and as comprehensive as possible.<sup>8</sup> According to CJEU the notion of control cannot be understood too narrowly, as this would encroach too widely on the rights of local self-government and, at the same time, on the competences of the MSs.<sup>9</sup> However, the proposed additional condition defining control in terms of a percentage does not facilitate well taking into account quality related factors and cooperative efficiencies, unlike the directive 2014/24/EU.

The CJEU has concluded that Art. 12(1) of Directive 2014/24/EU must be interpreted as not precluding a rule of national law whereby a MS imposes a requirement that the conclusion of an in-house transaction should be subject, inter alia, to the condition that public procurement does not ensure that the quality of the services performed, their availability or their continuity can be guaranteed, provided that the choice made in favour of one means of providing services in particular, made at a stage prior to that of public procurement, has due regard to the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency.<sup>10</sup>

Where it is for the MSs to decide whether to lay down such additional conditions which are not requirements of EU law, the national authorities have a wide margin of discretion as to how to lay them down. However, this discretion is not unlimited as public procurement law's purpose must be brought into harmony with the values of other policy areas<sup>11</sup>.

The principles of uniform application and equal treatment require that the wording of a provision of Union law must be interpreted independently and uniformly throughout the Union, taking into account the context in which it is used and the objectives of the legislation to which it belongs. Also, Directive 2014/24/EU aims to clarify basic notions and concepts to ensure legal certainty and to incorporate certain aspects of related well-established case-law of the CJEU.<sup>12</sup> From the perspective of legal certainty, it is important to note that the Directive does not introduce any foundations for such a method of as proposed amendment. Still, the Directive forms the legal basis for interpretation of the concept in control in EU procurement law.

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<sup>8</sup> Preamble of Directive 2014/24/EU, p. 41.

<sup>9</sup> See analogically opinion of AG Trstenjak in case C-324/07 Coditel Brabant STRL et al (ECLI:EU:C:2008:317) p. 84 with references to previous case law.

<sup>10</sup> See Article 4(1) of the Public Procurement Act and case C-285/18, Irgita (ECLI:EU:C:2019:829) p.48; joined cases 27/86–29/86, CEI and Bellini (ECLI:EU:C:1987:355)p. 15; case C-324/98, Telaustria ja Telefonadress (ECLI:EU:C:2000:669) p. 60; case C-573/07, Sea (ECLI:EU:C:2009:532) p. 39; case C-89/19–C-91/19, Rioco (ECLI:EU:C:2020:87) p. 37.

<sup>11</sup> See opinion of AG Trstenjak in case Case C-324/07 Coditel Brabant STRL et al (ECLI:EU:C:2008:317) p. 81; see inter alia opinion of AG Colomer in case C-196/08 Acotel (ECLI:EU:C:2009:332) p. 115.

<sup>12</sup> Preamble Of Directive 2014/24/EU, p. 2.

The notion of control relating to in-house exception is defined in Art. 12 of Directive 2014/24/EU and the scope of this exception is clarified in the case law of the CJEU. In fact, the chosen measure sets a national additional requirement that overrides the requirements set in Art. 12 and dismisses the case-law of the CJEU in which the Court has interpreted the criterion concerning the notion of control. There are less restrictive measures available which would bring less uncertainty and would make it possible to determine the methods for defining the notion of control in conformity with EU law.<sup>13</sup>

As Art. 12 codifies the CJEU's case-law, it should be clarified further accordingly. The clarification of the notion of control should be done so that the scope of Directive 2014/24/EU *ratione personae* remains unaltered: the aims envisaged by the Directive give rise to the judicial obligation to interpret national law, as far as possible, in the light of the wording and purpose of the Directive.<sup>14</sup> However, the proposed amendment does not follow the interpretational line presented in the CJEU's case law in a consistent manner, and the planned amendment might affect the scope of Article 12 in terms of *ratione personae*. A national legislative measure affecting the scope of EU legislation would cause uncertainty on the internal market, and the proposed method should be re-assessed in terms of the general principles of EU law noting that Directive 2014/24/EU extends the principles of equal treatment of tenderers, proportionality and non-distorted competition to internal situations.<sup>15</sup>

## **6. Equal treatment and proportionality of the chosen measure**

Under Article 12(1) of Directive 2014/24/EU, the aim of ensuring the widest possible opening-up to competition cannot override the essential principles of public procurement law. From the perspective of equal treatment, the planned ownership requirement would posit an unjustified criterion to in-house exception as it does not rely on the capacity of the undertakings to perform tasks conferred to them under the in-house exception, but to their ownership structures.

In accordance with the principle of proportionality, the amendment of criterion relating to existence of control under Article 12 of directive 2014/24/EU, should not go beyond what is necessary to achieve that intended objective.<sup>16</sup> The proposed ownership requirement fails to satisfy the requirements set by the principle of proportionality as it does not promote preserving a balance between the aims of enhancing competition and general interests protected under Directive 2014/24/EU in conformity with the general principles of EU law.

As clarified below, the proposed method of evaluating the existence of control by applying a fixed ownership requirement is not suitable for achieving the general interests at stake, and the same outcome could be achieved as efficiently by utilising measures that are less restrictive and at the same time would uphold the unity of interpretation of EU law.

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<sup>13</sup> See case C-48/23, *Alajärven sähkö ym.* (ECLI:EU:C:2025:144) p. 24.

<sup>14</sup> See opinion of Fennelly in case C-76/97, *Walter Tögel* (ECLI:EU:C:1998:161) p. 26 with references.

<sup>15</sup> See opinion of AG Tanchev in case C-598/19, *CONACEE*, (ECLI:EU:C:2021:349) p. 62.

<sup>16</sup> See opinion of AG Tanchev in case C-598/19, *CONACEE*, (ECLI:EU:C:2021:349) p. 69.

## 7. The notion of control under Art. 12(1) of directive 2014/24/EU

Notion of control must be assessed under Teckal criterion. In *Teckal*, the CJEU confirmed that a contracting authority does not have to go out to competitive tender (and can therefore directly award a contract) when:

1. the contracting authority exercises the same kind of control over the service provider as it does over its own departments.
2. the service provider carries out the essential part of its activities with the contracting authority.<sup>17</sup>

As Market Court's statement on the proposal reveals, the subject of the examination of the additional condition regarding the ownership share concerning affiliated entities is, conceptually, a matter that concern the first Teckal condition, i.e. the condition that the contracting authority has "control similar to that over its own units".<sup>18</sup>

The notion of control has been developed and clarified in the case-law of the CJEU. The case-law shows that the size of the shareholding of an individual public body in a cooperative of public bodies does not act as the relevant yardstick as regards the possibility of control.<sup>19</sup> Holding only 0.25 % of the capital in a public undertaking can be plainly decisive in determining control, i.e. the degree to which the concessionaire was market orientated and the degree of its autonomy.<sup>20</sup>

The planned additional condition for in-house procurement is far stricter than the conditions laid down in the procurement directive. Stricter conditions are not permitted without restriction. The case-law does not support an interpretation based decisively on shareholding: the notion of control can be determined by a very wide range of factors.<sup>21</sup> The assessment of control must 'take account of all the legislative provisions and relevant circumstances, and control can follow from that examination when the concessionaire in question is subject to a control enabling the contracting authority to use decisive influence over both strategic objectives and significant decisions of the contracting company'.<sup>22</sup>

Based on the before said, there is inconsistency between the planned national legislative measure and the aims of the Directive 2014/24/EU when read in conjunction with CJEU 's case law since the planned additional requirement sets the

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<sup>17</sup> See case C-107/98, *Teckal* (ECLI:EU:C:1999:562) p. 50.

<sup>18</sup> See statement of the Market Court.

<sup>19</sup> See case C-295/05, *Asemfo* (ECLI:EU:C:2007:227).

<sup>20</sup> See case C-295/05, *Asemfo* (ECLI:EU:C:2007:227). See also case C-231/03, *Coname* (ECLI:EU:C:2005:487); opinion and the opinion of Coromer in case C-196/08, *Acoset* (ECLI:EU:C:2009:332) p. 103 with references.

<sup>21</sup> See case C-458/03, *Parking Brixen* (ECLI:EU:C:2005:605) p. 65; case C-328/19 *Porin kaupunki* (ECLI:EU:C:2020:483) p. 12; case C-340/04, *Carbotermo ja Consorzio Alisei* (ECLI:EU:C:2006:308) p. 36; joined cases C-182/11 ja C-183/11, *Econord* (ECLI:EU:C:2012:758) p. 27; case C-15/13, *Datenlotsen Informationssysteme* (ECLI:EU:C:2014:303) p. 26; opinion of Sanchez-Bordona in joined cases C-155/19 ja C-156/19, *FIGC* (ECLI:EU:C:2020:775) p. 103.

<sup>22</sup> See opinion of AG Trstenjak in case Case C-324/07 *Coditel Brapant STRL et al* (ECLI:EU:C:2008:317) p. 56 with references to previous case law.

amount of ownership as a decisive factor when defining the existence of control. The appropriateness of the 10 % shareholding requirement is questionable, from the point view of unity of interpretation, proportionality, and equality.

## **8. The effect of ownership requirement to local and regional authorities**

In principle, measures concerning the internal reorganisation of State powers fall outside the scope of Union law. Nevertheless, according to EU law, the public authority must have possibility to perform the public interest tasks conferred on it by using its own resources, and without being obliged to call on outside entities not forming part of its own departments, and that it may do so in cooperation with other public authorities.<sup>23</sup>

The ownership requirement would impact on the principles of freedom and self-determination of public bodies. As can be seen from the statements on the proposal, the proposed regulatory change would particularly affect the self-government of small municipalities and welfare areas. The ownership shares of these actors in affiliated units are often less than 10 percent.<sup>24</sup> The economic impacts on municipalities or other actors have not been analysed in an adequate manner, and as result, the planned change does not detect sector specific market circumstances either. The proposed amendment would jeopardise the practical value of investments in infrastructure made by the municipal companies and increase the costs of the public sector significantly as the procurements would only fragment into smaller units instead of increasing competition.<sup>25</sup>

As The Association of Finnish Cities and Municipalities rightly states in its opinion, minimum ownership requirement would jeopardize and, in some cases, terminate regional cooperation in the organization of public services. If implemented, the legislative change would cause an extensive administrative burden across Finland. The associated transition costs are expected to be significant, and the availability of currently well-functioning services would be seriously compromised. The legislative proposal would force the dismantling of approximately 200 functioning and legally compliant companies across the country. The adoption of the ownership requirement would significantly reduce cost-efficiency and create challenges in delivering statutory services such as waste management. In addition, the change would inappropriately affect affiliated entities that operate entirely outside the scope of market competition, such as municipal waste management services granted as exclusive rights to municipalities.

In general, Directive 2014/24/EU does not facilitate full harmonisation, but it encourages a greater quality orientation of public procurement.<sup>26</sup> The proposed ownership requirement does not promote the quality of the services performed, their

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<sup>23</sup> See Case C-480/06 Commission v. Germany (ECLI:EU:C:2009:357) & Case C324/07 Coditel Brabant (ECLI:EU:C:2008:621).

<sup>24</sup> See. PeVL 67/2014 vp, PeVL 40/2014 vp, s. 3, PeVL 16/2014 vp, s. 3, ja PeVL 41/2002 vp, s. 3/II).

<sup>25</sup> See e.g. statements from Ministries of Environment and Finance, FFCA, Association of Finnish Cities and Municipalities, and wellbeing services county company Hyvil.

<sup>26</sup> *ibid* 90. See about quality as a point of reference in public contracts: See opinion of Stix-Hackl in case Case C-340/04, Carbotermo (ECLI:EU:C:2006:24) p.97 and 98 with references.



affordability or guaranteeing their continuity.<sup>27</sup> The qualifications of the undertakings under procurement rules should be evaluated in terms of their capacity to execute their tasks that are related to general interests, but the categorical ownership requirement does not facilitate in-depth analysis of the qualifications. Fixing the percentages and ratios in a way that restricts principles of freedom and self-determination for public bodies might be an arbitrary exercise as many affected market sectors have specific structural characteristics, which have not been considered in the Government Programme.

In sum, the proposed ownership requirement is not supported by reasoned justifications relating to general interests “society at large”, and it lacks proportional exceptions for situations in which the use of in-house procurement does not distort competition or where there is significant public interest at stake.

## 9. Concluding remarks

Adding a categorical condition regarding affiliated entity procurement based on shareholding to the Public Procurement Act is problematic as regards EU law. In principle, the MSs are allowed to apply stricter rules which restrict the right to in-house transactions more than the Directive allows as long as these measures do not endanger the purpose of Directive 2014/24/EU or the general principles of EU law.<sup>28</sup> However, the chosen method of clarification of national in-house procurement is very problematic as it is based on a fixed percent rate, while the methodology in the Directive is based on the concept of control”. The specification of notion of control should be done by utilising other measures than a categoric additional requirement on an ownership requirement that affects the interpretation of the whole Art. 12 of Directive 2014/24/EU.

The only impact assessment on the legislative proposal has been conducted by the Finnish Competition and Consumer Authority. According to the Authority, the proposed limitation would increase public sector costs, as it fails to adequately consider the differences between various sectors, regions, contracting authorities, and affiliated entities. The conclusions and recommendations of the Authority, which were aimed at mitigating the adverse effects of the proposed amendment, have not been considered during the legislative drafting process.

It is to underline that the concept of control in Art. 12 of Directive 2014/24/EU would be totally sufficient in ensuring efficient and correct implementation of the Directive in Finland also in the future. On the contrary, a categorical additional requirement on an ownership requirement would be in clear contradiction with the methodology in the Directive, and even without any positive effects on the competition in the Finnish market.

As Finland’s in-house provisions are already stricter than in most of the other Member States, the result of adopting the ownership requirement, Finland's in-house rules would become by far the strictest in the entire European Union.

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<sup>27</sup> See case C-89/19–C-91/19, *Rieco* (ECLI:EU:C:2020:87) p. 38.

<sup>28</sup> See opinion of Trstenjak in case Case C-324/07 *Coditel Brapant STRL et al* (ECLI:EU:C:2008:317).

From the perspective of unity of interpretation, the case-law of the CJEU clarifying the concept of control and its connection to the amount of ownership, does not support an interpretation based decisively on shareholding, but rather an interpretational approach that considers all the relevant circumstances relating to the notion of control. In sum, the introduction of an additional requirement fails to support the coherent interpretation and uniform application of Directive 2014/24/EU by supporting a quality-orientated process under procurement rules.

To that end, general interests relating to the purpose of EU's public procurement rules are central to the question whether the planned additional requirement relating to the determination is compatible with the concept of control when studied under the first Teckal-criterion parallel to the purpose of EU procurement rules and Art. 12 of Directive 2014/24/EU. The planned ownership requirement does not facilitate well taking into account general interests or the capacity of the undertakings to perform their tasks in a manner that promotes quality. In the light of the available information, the planned measure does not satisfy the requirements set by proportionality and discrimination principles and fails to uphold interpretational coherence in transposition of EU legislation.

The Commission should take immediate action against the planned infringement of EU law.

Helsinki 7<sup>th</sup> of July 2025

**Kustos ry**

The complaint was drafted by



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