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Insights from the CJEU regarding cooperation agreements between contracting authorities

by Sylvia Lindén

On May 28 2020, the European Court of Justice (CJEU) provided preliminary rulings in Case C-796/18 Informatikgesellschaft für Software-Entwicklung (ISE) mbH ./. Stadt Köln, and on June 4, in Case C-429/19 Remondis GmbH ./. Abfallzweckverband Rhein-Mosel-Eifel.
Both cases concerned the frequently debated issue of public contracts between contracting authorities; and in particular, the interpretation of the exemption in Article 12(4) in Directive 2014/24/EU on public procurement (the "Directive"), referred to as the "Hamburg exemption." The exemption means that contracting authorities can enter into cooperation agreements with each other without carrying out a public procurement procedure.
Thus, under certain conditions, the Directive allows contracting authorities to cooperate with each other, using each other's capacity to perform public service tasks they are required to perform, instead of procuring a contract with a supplier.
The main question in the preliminary rulings was to determine when a co-operation agreement falls outside the scope of the Directive.
The cases are thus of particular importance as guidance for contracting authorities that wish to enter into cooperation agreements without having to apply the procedures in accordance with the Directive.

The main proceedings in the national court
Case C-796/18 concerned a cooperation between the federal state of Berlin and the city of Cologne. The state had purchased software used for managing operations within the fire brigade which it, through an agreement, allowed the city to use free of charge. The contracting authorities also entered into a cooperation agreement which allowed the other party to take part in any future development of the software.
Case C-429/19 concerned the management of residual waste in a waste facility. Two German districts and one city jointly controlled a union, which was tasked with carrying out the duties of the districts and the city to recycle and dispose of waste. The union itself did not have the capacity to handle the waste and therefore subcontracted 80 percent of the waste to private companies and the remaining 20 percent to a third district with its own responsibility for waste management within its territory.
The preliminary rulings of the CJEU
In Case C-796/18, the CJEU began by clarifying that the contract in question needs to be a public one in order for the exemption from the rules on public procurement to be applicable. The CJEU found that a public contract exists when an agreement is mutually binding, which was considered to be the case in the main proceedings because the parties had undertaken to share software development with each other. The Directive furthermore requires that the cooperation concerns public services. The CJEU found

that cooperation regarding activities that are subordinate to public services can also be covered if the activities contribute to the performance of the public services. Lastly, the CJEU clarified that, to benefit from the exemption, the cooperation between contracting authorities may not lead to a private company making a profit.

In Case C-429/19, the CJEU found that the contract in question was intended solely for one authority to provide the other with a paid service. In order for it to be a cooperation within the meaning of the Directive, it is necessary for all parties to participate in the provision of the public services that are the subject of the cooperation.

It can therefore not be considered a cooperation when one of the contracting parties' only contribution is to reimburse costs. In such cases, the public contract is not exempt from the procurement rules.

Analysis

As elaborated by the CJEU and the Directive, the exemption is available solely to organizations that fall within the definition of "contracting authority" in the Directive. Suppliers may thus not be parties to such agreements. The agreement must relate to a cooperation designed to achieve the contracting authorities' common goals, and must also relate to public services. Further, the cooperation must only be governed by considerations related to the public interest. The cooperation can hence not relate to commercial activities. The participating authorities' cooperation activity may not exceed 20 percent of the activity in the relevant market

In the current rulings, the CJEU clarifies that both of the contracting authorities need to contribute, not just by paying costs, in order for the contract to come under the exemption in the Directive. Of particular interest is that the CJEU highlights that activities that are support services to public services also can be the subject of a cooperation as long as they contribute to the actual performance of the public services.

These two cases serve to further clarify and define what a public contract is. The CJEU emphasizes that a public contract can exist even in cases where there are no obligations to pay for the service or product, as long as the contract is mutually binding for both parties. The CJEU also points out that cooperation between contracting authorities must not lead to a private company making a profit. This highlights that contracting authorities not only have to comply with the rules of the Directive, but also must take into consideration the rules of competition law. Before entering into a cooperation, the authorities should therefore consider the effects that their proposed cooperation may have on competition.

Thus, the preliminary rulings bring important insights to what is required for a cooperation agreement to fall within the scope of Article 12(4) in the Directive; and brings more clarity regarding the scope and conditions for the application of the Hamburg exemption.