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PERMISSIBLE PUBLIC COOPERATION IN THE FIELD OF PUBLIC ADMINISTRATION – OPPORTUNITY FOR ENTERPRISES

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Abstract

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Public cooperation is aimed at ensuring the functioning of public administration. Some forms of cooperation are subject to a regulatory regime for European procurement directives, some forms of cooperation within the public and private sector is not subject to this regime. In this article we analyze the types of cooperation with regard to their character. The aim will be to identify the types of cooperation, their frequency, the need to use the legal regime of public investment, and other distinctive features affecting the modes of cooperation within the public administration and the implementation of public policies.

Keywords: public cooperation, application of public procurement law, public contracts, public administration

INTRODUCTION AND METHODOLOGY

Some of Public agreement should be treated in accordance to public procurement laws, some of them are without scope of public procurement rules. This aspect is important for practice and for public administration and for procedure how to treat this public procurement agreement. This pubic cooperation was solved in some decisions. Based on analysis follows from decision making practice we conclude which types of the public cooperation are under public procurement law (see in Grebeníček, P., Hájek, O., Smékalová, L., Danko, L., 2013).

This question and the main aim of this article it to find out criteria and model when cooperation is under regulation and without scope of regulation (model of cooperation).

Other objectives included the following.

What are the consequences for the public body, if not proceed under the rules of public investments?

As required by the rules of public investment cooperation deal with state-owned companies, some of which operate in the public interest, some of which are required to operate in competition and "must be self financing" (ie state-owned enterprises in the Ministry of Defence)?

Resolving these issues is important for public investment and public finances following the adoption of new procurement directives – 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 (see more in Treumer, S., 2012).

Analyses and Solving Character of Public Cooperation

There is considerable legal uncertainty as to how far contracts concluded between entities in the public sector should be covered by public procurement rules (Jurčík, R., 2013). The relevant case-law of the Court of Justice of the European Union is interpreted differently between Member States and even between contracting authorities and it is discussed (Jurčík, R., 2012). It is therefore necessary to clarify in which cases contracts concluded within the public sector are not subject to the application of public procurement rules (see Arrosmith, S., 2005).

Such clarification should be guided by the principles set out in the relevant case-law of the Court of Justice of the European Union. The sole fact that both parties to an agreement are themselves public authorities do not as such rule out the application of procurement rules. This should be clear (see more in Ochrana, F., Maytová, A., 2012). However, the application of public procurement rules should not interfere with the freedom of public authorities to perform the public service tasks conferred on them by using their own resources, which includes the possibility of cooperation with other public authorities.

How far contracts concluded between entities in the public sector should be covered by public procurement rules is solved in the cases Case C-159/11 Ordine degli Ingegneri della Provincia di Lecce and Case C-386/11 Piepenbrock Dienstleistungen GmbH & Co. KG v Kreis Düren (see Court of Justice, 2014).

In the Consiglio di Stato case it has been raises the question whether the conclusion of an agreement between public authorities is not contrary to the principle of free competition where one of the authorities concerned can be regarded as an economic operator, a classification which encompasses any public body proposing services on the market, regardless of whether it has a primarily profit-making objective, whether it is structured as an undertaking or whether it has a continuous presence on the market. The referring court refers, in that regard, to Case C-305/08. From that perspective, provided that the University has the capacity to take part in a procurement procedure, the contracts concluded with it by contracting authorities fall within the scope of European Union public procurement rules where they relate, as in the case in the main proceedings, to research services which do not appear to be incompatible with the services mentioned in categories 8 and 12 of Annex II A to Directive 2004/18 (it was solved by Feurstein, A., 2008).

The basic and fundamental question necessary for establishing of model of cooperation is, whether Directive 2004/18 must be interpreted as precluding national legislation which permits the conclusion, without an invitation to tender, of a contract by which two public entities set up between them a form of cooperation such as that at issue in the main proceedings. In that regard, first, it is immaterial whether that operator is itself a contracting authority (see, to that effect, Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 51, Court of Justice of the EU, 2014). It is also immaterial whether the body concerned is primarily profit-making, whether it is structured as an undertaking or whether it has a continuous presence on the market (see, to that effect, paragraphs 30 and 45, Court of Justice, 2014). Thus, with regard to entities such as public universities, the Court has held that such entities are, in principle, entitled to take part in a tendering procedure for the award of a public service contract. However, the Member States may regulate the activities of those entities and inter alia authorise or not authorise them to operate on the market, taking into account their objectives as an institution and those laid down in their statutes. None the less, if and to the extent that such entities are entitled to offer certain services on the market, they may not be prevented from participating in a tendering procedure for the services concerned (see, to that effect, paragraphs 45, 48, 49 and 51, Court of Justice, 2014). In the present case, the referring court stated that Article 66, first paragraph, of the Decree of the President of the Republic No 382 of 11 July 1980 on the reorganisation of University education, concerning training and organisational and teaching methodology reforms, expressly authorises public universities to supply research and consultancy services to public or private entities provided that that activity does not impair their educational role.

It follows however from the case-law of the Court that two types of contracts entered into by a public entity do not fall within the scope of European Union public procurement law. The first type of contracts are those concluded by a public entity with a person who is legally distinct from that entity where, at the same time, that entity exercises over the person concerned a control which is similar to that which it exercises over its own departments and where that person carries out the essential part of its activities with the entity or entities which control it (see, to that effect, *Teckal*, paragraph 50, Court of Justice of the EU, 2014).

The European Court stated that the answer to the question referred is therefore that European Union public procurement law precludes national legislation which authorises the conclusion, without an invitation to tender, of a contract by which public entities establish cooperation among each other where – this being for the referring court to establish – the purpose of such a contract is not to ensure that a public task that those entities all have to perform is carried out, where that contract is not governed solely by considerations and requirements relating to the pursuit of objectives in the public interest or where it is such as to place a private provider of services in a position of advantage vis-à-vis his competitors.

In the Piepenbrock case was stated that a contract such as that at issue in the main proceedings – whereby, without establishing cooperation between the contracting public entities with a view to carrying out a public service task that both of them have to perform, one public entity assigns to another the task of cleaning certain office, administrative and school buildings, while reserving the power to supervise the proper execution of that task, in return for financial compensation intended to correspond to the costs incurred in the performance of the task, the second entity being, moreover, authorised to avail of the services of third parties which might be capable of competing

on the market for the accomplishment of that task – constitutes a public service contract within the meaning of Article 1(2)(d) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (see definition in Švarcová, J.,Gabrhel, V., 2014).

The procurement directives, with their strict procedural requirements, do not apply to every small contract. Rather, the monetary consideration of the contract in question must reach a certain threshold in order to come under the procurement rules. Considering only proportionality grounds, the sometimes very expensive procurement procedures do not have to be used for every small-scale contract. In addition, a low contract value does not suggest a serious cross-border commercial interest.

As has already been intimated above, in its case-law the Court has developed two further exceptions, which relate to 'in-house operations' and various forms of inter-municipal cooperation. A description should be given, with a view to an examination of whether they are applicable in the main proceedings, of their main characteristics.

Unlike the case-law on in-house operations, where, in *Teckal*, the Court summarised the two relevant criteria in a succinct mnemonic, there is no comparable succinct formula in that leading decision as to the conditions under which, going beyond the case to be decided, inter-municipal cooperation to which the procurement rules are not applied may be regarded as lawful. Nevertheless, as has already been mentioned, it is possible to identify, from the line of argument pursued by the Court, a number of relevant criteria which must be satisfied cumulatively. Accordingly, the Court exempts inter-municipal cooperation from the scope of procurement law on the basis of the following criteria performance of a common public interest task or tasks relating to the pursuit of objectives in the public interest, solely by public authorities, without the participation of any private party, on a contractual basis or in an institutionalised legal form, such as an association, no private undertaking is placed in a position of advantage vis-à-vis competitors in relation to the conclusion of the contract, the contract does not seek to circumvent procurement law.

It could, in principle, be argued, against the direct applicability of this case-law to the main proceedings, that the present case – unlike the situation in *Commission* v *Germany* – does not concern cooperation between local authorities. In fact, the present case relates to a contractual agreement between a local authority and a public-law institution. Against this background, it is necessary to consider the extent to which it is possible, on the basis of this case-law, to assume the existence of an exception which covers forms of cooperation like the one at issue here. Legal form of the "public-public partnership". Extension of the exception to various forms of cooperation between public authorities A careful reading of the judgment in *Commission* v *Germany* nevertheless makes it clear that the exception developed by the Court does not, in principle, preclude such forms of cooperation.

An argument in support of this view is, first, that that case concerned a contract between Stadtreinigung Hamburg and four neighbouring Landkreisen, where Stadtreinigung Hamburg was a public-law institution and not a local authority. Second, it should be borne in mind that in the judgment the Court often uses the neutral term 'public authority' (Court of Justice, 2014) by which it intimates that cooperation, as a condition for the application of the unwritten exception, is open not only to municipalities. To restrict the exceptions solely to cooperation by local authorities would also be excessively formalistic and difficult to comprehend in view of the different forms of administrative organisation in each of the Member States. Accordingly, it is more logical to give a broad understanding to the scope of that unwritten exception and talk about 'cooperation between public authorities'.

These decisions put some important criteria for public-public cooperation at stake (Article 11 of the Public Procurement Directive and Article 15 of the Concessions Directive). The agreed text will considerably ease the conditions originally set by CJEU case-law on 'in-house' and 'public-public cooperation' (and recently reaffirmed in Case C-159/11 Ordine degli Ingegneri della Provincia di Lecce and Case C-386/11 Piepenbrock Dienstleistungen GmbH & Co. KG v Kreis Düren) for public authorities to tender out public tasks among each other without transparency and without competition rules applying.

Types of Ppublic Cooperation and Model of Cooperation

There are exists many types of public cooperation. We can divide them on two basic types:

- Public cooperation with public interests – there are not under public procurement.
- Public cooperation with free market character – there are under procurement regulation.

It would allow municipalities to procure all kind of services of general economic interest that they cannot or do not want to provide by themselves, by other municipalities and their municipal companies, without having to put these services out to tender. Easing the conditions of tender-free public-public cooperation would pull a vast quantity of services off the market. As a result, the objectives of the public procurement law reform would be defeated, i.e. to ensure the optimal use of public expenditure, to help to achieve the objectives of the Europe 2020 Strategy and to complete the single market.

In addition, the reform would miss its aim to provide legal certain certainty: the provisions

I: *Types of public cooperation and their characteristic*

Type of cooperation	Features	Influence of participation of public subject	Scope of public procurement directives
Classical public contracts (e.g. cleaning)	Realization in free market	Public subject will compete with private suppliers	YES
Concessions	Realization in free market	Public subject will compete with private suppliers	YES
Classical public contract and concession	In-house conditions should be met	The contract based on decision is given in-house supplier who can be public subject	NO
Public Cooperation in public interest	Based on law or by administrative code or ensuring of public services	Public subject is necessary to be join	NO

Source: own preparation

on the exemption of public-public arrangements from the obligation for a tendering procedure would not be conclusive. I believe that this might lead to litigation. CJEU has made it clear that the criteria it has laid down apply for both interpretation of secondary procurement legislation and interpretation of the relevant fundamental rules and general principles of the Treaty (Case Ordine degli Ingegneri della Provincia di Lecce, point 24, Court of Justice, 2014).

Public cooperation means that one municipality realized some activities for other municipalities, or one state body for other state body. Public subject means municipality, state, state enterprise, public university. When we analyses these types of cooperation when there are on both sides of public contract public subjects we can conclude that under procurement law we are in first two column because the relations are based in free market conditions.

CONCLUSION

European Union public procurement law precludes national legislation which authorises the conclusion, without an invitation to tender, of a contract by which public entities establish cooperation among each other where – this being for the referring court to establish – the purpose of such a contract is not to ensure that a public task that those entities all have to perform is carried out, where that contract is not governed solely by considerations and requirements relating to the pursuit of objectives in the public interest or where it is such as to place a private provider of services in a position of advantage vis-à-vis his competitors. Some risks and uncertainty is exists (see more concrete details in Ochrana, F., 2010).

From Tabs. I and II we can conclude that cooperation between two public subjects should be procuring under Directive if subject of cooperation is not in public interest. When we see types of cooperation in practise, there are many of them. Some have of public features and some not. The distinction in our model is necessary answer is if analysing type of cooperation is in public interest or in ensuring of public interest. The examples were mentioned above.

We can state that any possible broader context of cooperation was not discussed as the court simply looked to the activities which were the subject of the draft contract and concluded that is was fundamentally concerned with cleaning buildings and nothing more. And advantage of this approach is its simplicity. Taken in conjunction with both cases, it is now apparent that arrangements whereby one contracting authority engages another to provide services which could be regarded as ancillary to the performance of the public task in return for compensation, will generally be regarded as a public contract subject to the Directive unless falling within the mentioned Tescal exception. Exemptions from the scope of these Directives must be very narrow, in order to reach the aim and to fulfil the purpose of public procurement law. This purpose is to grant fair and equal access to public contracts for every operator and to ensure an efficient spending of public money, i.e. to enable contracting authorities or entities – and the citizen – to get the best value for money.

It should be ensured that any exempted public-public cooperation does not result in a distortion of competition in relation to private economic operators in so far as it places a private provider of services in a position of advantage vis-à-vis its competitors.

It should also be clarified that contracting authorities such as bodies governed by public law, that may have private capital participation, should be in a position to avail themselves of the exemption for horizontal cooperation. Consequently, where all other conditions in relation to horizontal cooperation are met, the horizontal cooperation exemption should extend to such contracting authorities where the contract is concluded exclusively between contracting authorities.

The case of Piepenbrock reinforces a clear direction of travel seen recently in Azienda Sanitaria Locale di Lecce. The court has again adopted a dryly factual approach to a characterising the contract. Any possible broader context of cooperation was not discussed as the court simply looked to the activities which were the subject of the draft contract and concluded that it was fundamentally concerned with cleaning buildings and nothing more. An advantage of this approach is its simplicity (see Tab. II).

A more difficult question remains as t when the third aim of the three-part test set out in Azienda Sanitaria Locale di Lecce will be satisfied, that is when will an arrangement be concerned with cooperation governed solely by consideration and requirements relating to the pursuit of public interest objectives. The most potentially interesting aspect of the case, which might have provided at least a partial answer in this regard, concerns the national referring court's various comments an queries on the nature of the proposed contract including the fact that it was concerned with delegation of the tasks and that such arrangements were authorised by national law of European member states. However, the various point raised by the referring court pertaining to the legislative background to the proposed contract were not addressed substantively in the judgement. These provisions of German law solved in the case of Piepenbrock permitting delegation arrangements have been the subject of criticism from the European Commission (see Press Release IP/08/1516 Public procurement: infringement proceedings against Germany concerning road maintenance services and flight measure services, Court of Justice, 2014) and it would have been helpful if the judgement had addressed this more fully. Rather, the court merely made mention of the referring court's view that the aim of the draft contract did not appear to be established cooperation between the two contracting authorities rather than positively addressing the question of what types of arrangements are properly to be regarded as involving such cooperation.

The last comments, if a government undertaking carries out activities in the public interest, and if the contracting authority intends to simultaneously succeed in other activities in the middle market, it is most appropriate to establish a subsidiary company, ensure that these activities and this will be the contracting authority. In practice, this intends to carry out state-owned enterprises in the Ministry of Defense. These must be resolved in order to maintain employment in state enterprises. The impact of unemployment and criterion of its impact was solved (see more Palát, 2013). The law on state enterprises mentioned explicitly prohibits, nor allows, which would be suitable to solve more detail and in practically application. The use of authorized government agreements would address the situation of public enterprises (eg LOM Praha) operating within the Ministry of Defence. These state-owned enterprises were established Ministries of Defense for the purpose of providing public services in the field of security (repair military equipment), which makes the implementation of defense for other states and private entities.

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