Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 29 January 2020[1]

Case C-796/18

Informatikgesellschaft für Software-Entwicklung (ISE) mbH
v
Stadt Köln,
intervener:
Land Berlin

(Request for a preliminary ruling
from the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany))

(Reference for a preliminary ruling — Public procurement — Directive 2014/24/EU — Concept of contract for pecuniary interest — Horizontal cooperation between contracting authorities — Making available of software for the coordination of fire-fighting operations — Cooperation agreement on updating and developing the software — Activity ancillary to the public service — Prohibition on placing third parties in a position of advantage)

1. The first European rules on public procurement date back to the 1970s. A number of successive provisions enacted since then culminated in the adoption in 2014 of three texts intended to regulate all aspects of this field: Directive 2014/24/EU[2] (the interpretation of which forms the subject of this reference for a preliminary ruling), Directive 2014/23/EU[3] and Directive 2014/25/EU.[4]

2. Prior to the entry into force of the 2014 Directives, the Court of Justice had already accepted that the rules of EU law governing public procurement did not apply, in principle, in the case where, subject to certain conditions:

– a contracting authority entrusted the performance of certain tasks to a legal person under its control without recourse to other external entities (*vertical* cooperation or *in-house* award); or

– two contracting authorities worked together to ensure the performance of a public-service task common to both (*horizontal* cooperation).

1 Original language: Spanish.

2 Directive of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

3 Directive of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1).

4 Directive of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243).

3. In the case of the second form of cooperation between public authorities mentioned above, the case-law of the Court of Justice had generated a degree of legal uncertainty [5] which Directive 2014/24 attempted to dispel. I am not convinced that that attempt has been as successful as might have been expected.

4. In the dispute giving rise to this reference for a preliminary ruling, a company (Informatikgesellschaft für Software-Entwicklung; 'ISE') is challenging before the referring court a contract between Stadt Köln (City of Cologne) and Land Berlin under which the latter transfers to the former software for managing interventions by its fire service, and which is accompanied by an agreement on cooperation between the two authorities.

5. The referring court needs to know, first and foremost, whether or not the relationship between the contracting authorities which prompted this dispute falls outside the public procurement rules contained in Directive 2014/24. The Court thus has an opportunity to supplement its previous case-law, albeit in the light of a new provision (Article 12(4) of Directive 2014/24) on the subject of which, unless I am mistaken, no judgment has yet been given.

I. Legal framework

A. EU law: Directive 2014/24

6. Recital 5 states:

'… nothing in this Directive obliges Member States to contract out or externalise the provision of services that they wish to provide themselves or to organise by means other than public contracts within the meaning of this Directive. […]'.

7. Recital 31 reads:

'There is considerable legal uncertainty as to how far contracts concluded between entities in the public sector should be covered by public procurement rules. The relevant case-law of the Court of Justice of the European Union is interpreted differently between Member States and even between contracting authorities. 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.

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 does not as such rule out the application of procurement rules. 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.

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'.

5 Described as 'considerable' in recital 31 of Directive 2014/24. That recital states that the relevant case-law 'is interpreted differently between Member States and even between contracting authorities'.

8. According to recital 33:

'Contracting authorities should be able to choose to provide jointly their public services by way of cooperation without being obliged to use any particular legal form. Such cooperation might cover all types of activities related to the performance of services and responsibilities assigned to or assumed by the participating authorities, such as mandatory or voluntary tasks of local or regional authorities or services conferred upon specific bodies by public law. The services provided by the various participating authorities need not necessarily be identical; they might also be complementary.

Contracts for the joint provision of public services should not be subject to the application of the rules set out in this Directive provided that they are concluded exclusively between contracting authorities, that the implementation of that cooperation is governed solely by considerations relating to the public interest and that no private service provider is placed in a position of advantage vis-à-vis its competitors.

In order to fulfil those conditions, the cooperation should be based on a cooperative concept. Such cooperation does not require all participating authorities to assume the performance of main contractual obligations, as long as there are commitments to contribute towards the cooperative performance of the public service in question. In addition, the implementation of the cooperation, including any financial transfers between the participating contracting authorities, should be governed solely by considerations relating to the public interest'.

9. Article 1(4) provides:

'This Directive does not affect the freedom of Member States to define, in conformity with Union law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to. Equally, this Directive does not affect the decision of public authorities whether, how and to what extent they wish to perform public functions themselves pursuant to Article 14 TFEU and Protocol No 26'.

10. Article 2(1)(5), defines public contracts as follows:

'… contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services'.

11. Article 12 ('Public contracts between entities within the public sector') states, in paragraph 4:

'A contract concluded exclusively between two or more contracting authorities shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

a) the contract establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common;

b) the implementation of that cooperation is governed solely by considerations relating to the public interest; and

c) the participating contracting authorities perform on the open market less than 20% of the activities concerned by the cooperation'.

12. Article 18(1) states:

'Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators'.

B. National law

13. Under Article 91c(1) of the German Basic Law, 'the Federation and the *Länder* may cooperate in planning, constructing and operating information technology systems needed to enable them to discharge their responsibilities'.

14. Paragraph 108 of the Gesetz gegen Wettbewerbsbeschränkungen (Law against restrictions on competition; 'the GWB') reproduces Article 12 of Directive 2014/24.

15. According to the so-called 'Kiel decisions', adopted in 1979, a public authority may transfer software developed or acquired (by itself or on its behalf) to other public authorities in Germany, provided that there is reciprocity. Reciprocity is granted where the budgetary provisions or the budgetary laws or by-laws of the entities in question — the owner and the recipient of the software — have taken into account the budgetary rules recommended in 1980 by the Conference of Finance Ministers. Generally speaking, reciprocity is measured in political rather than commercial terms. It is seen not as a mutual exchange *per se* but as the possibility of one.[6]

II. The dispute in the main proceedings and the questions referred for a preliminary ruling

16. In September 2017, Stadt Köln and Land Berlin concluded a software transfer contract whereby the latter transferred to the former, free of charge and for an indefinite period, software for managing interventions by its fire service.

17. The transfer was to comply with the conditions set out in a cooperation agreement of the same date that contained, inter alia, the following articles:

'Article 1. Purpose of the willingness to cooperate

[…] The partners have decided to put in place an equal partnership and, if necessary, to exhibit a readiness to compromise in order to adapt the software to each other's prevailing needs and to make it available to each other on a cooperative basis […].

Article 2. Definition of the objective of the cooperation

[…] The software system can be extended by further specialised functionalities in the form of modules and transferred to the other partners in cooperation for them to use on a cost-neutral basis […].

6 A study conducted in 2014 found that, in Germany, the Kiel decisions are commonly understood to operate in practice as follows: where the principle of general reciprocity provided for in those decisions is applied to a unique form of cooperation, an essential component of a public contract as defined in the GWB is lacking. The absence of any consideration for the transfer of software supports the idea that such a transfer is free from the point of view of the GWB. Pursuant to the principle of general reciprocity, the recipient of the service does not specifically undertake to furnish pecuniary consideration; it has merely determined in the abstract to provide software developments free of charge in a comparable situation, if necessary (Gutachten: Evaluierung der Kieler Besschlüsse II, 20.08.2014, p. 106).

[…]

Article 5. Form of cooperation

[…] Transfer of the basic software shall be cost-neutral. Specialised add-on modules shall be offered to the partners in cooperation on a cost-neutral basis.

[…]

The cooperation agreement shall be binding only with the [software transfer] contract as a joint document'.

18. ISE, which develops and sells software, applied to the Vergabekammer Rheinland (Rhineland Public Procurement Board, Germany) for a review of the contracts concluded between Land Berlin and Stadt Köln, claiming that they should be terminated. It argued that Stadt Köln had awarded a public supply contract the value of which exceeded the amount exempt from the obligation to apply the public procurement rules. Stadt Köln's involvement in developing the software represented, in its opinion, a sufficient economic advantage. Furthermore, the purchase of the base software entailed new orders from the manufacturer, inasmuch as, for a third party, developing and maintaining that software would represent an unbearable economic cost.

19. The Vergabekammer Rheinland (Rhineland Public Procurement Board) dismissed ISE's application for review, on the ground that the agreements between Stadt Köln and Land Berlin could not be classified as 'public contracts' for the purposes of the European legislation. In the Board's opinion, the two parties had simply established a scheme for fair cooperation under which the software was transferred free of charge.

20. ISE appealed that decision to the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany). Stadt Köln opposed the appeal on the ground that the decision under appeal was correct.

21. It was in those circumstances that the aforementioned court referred the following questions for a preliminary ruling:

(1) Does the provision of software by one public administrative authority to another public administrative authority, which is agreed in writing and linked to a cooperation agreement, constitute a 'public contract' within the meaning of Article 2(1)(5) of Directive 2014/24/EU or a contract within the meaning of Article 12(4) of that directive which — at least initially, subject to Article 12(4)(a) to (c) thereof — comes within the scope of the directive if, although the software recipient does not have to pay a price or reimbursement costs for the software, the cooperation agreement connected with the provision of the software provides that each cooperation partner — and therefore also the software recipient — is required to make available to the other partner, free of charge, any of its own further developments of the software that it may create — but is not obliged to create — in the future?

(2) Pursuant to Article 12(4)(a) of Directive 2014/24/EU, does the subject matter of the cooperation of the participating contracting authorities have to be the actual public services that are to be provided to citizens and which must be provided jointly, or is it sufficient if the cooperation relates to activities that in some way serve the public services that are to be provided in the same way but do not necessarily have to be provided jointly?

(3) Does a so-called — unwritten — prohibition on placing a party in an advantageous position ('Besserstellungsverbot') apply in the context of Article 12(4) of Directive 2014/24/EU and, if so, with what content does it apply?

22. The order for reference was received at the Court on 19 December 2018. Written observations have been lodged by Stadt Köln, the Austrian Government and the Commission.

23. A hearing attended by counsel for ISE, Stadt Köln, the Austrian Government and the Commission was held on 6 November 2019.

III. Analysis

A. Issues raised and preliminary observations

24. The provision of services through intra-administrative cooperation, also known as 'horizontal' or 'public-public' cooperation, was expressly incorporated into EU law in Section 3 ('Exclusions') of Chapter I of Title I of Directive 2014/24, in particular, Article 12(4).[7]

25. According to that provision, 'a contract concluded exclusively between two or more contracting authorities shall fall outside the scope of' Directive 2014/24 where all of the conditions which it lists are fulfilled.[8]

26. The text in force accommodates horizontal cooperation more *generously* than the Court's case-law prior to the 2014 Directives did. That case-law,[9] to which recital 31 of Directive 2014/24 refers,[10] had laid down certain conditions for verifying that public services could be provided without recourse to the market by way of cooperation between public administrative authorities.

27. As well as requiring that the entities entering into a such a scheme with each other should be contracting authorities, those conditions stipulated that the inter-administrative agreement must:

– be intended to ensure the performance of a public-service task common to the entities concerned;

– be concluded exclusively by public entities, without the participation of a private undertaking;

– not favour any private supplier over its competitors;

– establish cooperation governed only by considerations and requirements characteristic of the pursuit of public-interest objectives.

28. Directive 2014/24, however, does not simply codify the arrangements that were already in place, but reformulates, clarifies, removes and supplements one or more of the aforementioned requirements. It follows that, when it comes to interpreting that directive, it will not always be relevant or expedient simply to turn back to the previous case-law.

7 A similar scheme is provided for in Article 17 of Directive 2014/23 and in Article 28 of Directive 2014/25.

8 The Member States are free to decide whether or not to apply their own public procurement rules to such relationships.

9 Judgment of 9 June 2009, *Commission* v *Germany* (C-480/06, EU:C:2009:357; 'the judgment in *Commission* v *Germany*'); judgment of 19 December 2012, *Azienda Sanitaria Locale di Lecce and Università del Salento* v *Ordine degli Ingegneri della Provincia di Lecce and Others* (C-159/11, EU:C:2012:817; 'the judgment in *ASL*'); order of 16 May 2013, *Consulta Regionale Ordine Ingegneri della Lombardia and Others* (C-564/11, not published, EU:C:2013:307); judgment of 13 June 2013, *Piepenbrock* (C-386/11, EU:C:2013:385; 'the judgment in *Piepenbrock*'); order of 20 June 2013, *Consiglio Nazionale degli Ingegneri* (C-352/12, not published, EU:C:2013:416, '*Consiglio Nazionale* order'); and judgment of 8 May 2014, *Datenlotsen Informationssysteme* (C-15/13, EU:C:2014:303; 'judgment in *Datenlotsen*'). References to horizontal cooperation can be found in other judgments relating to vertical cooperation.

10 According to that recital, the clarification as to which contracts between public-sector entities fall outside the scope of Directive 2014/24 'should be guided by the principles set out in the relevant case-law of the Court of Justice of the European Union'.

29. The provisions relevant in this instance are Article 12(4) and recitals 31 and 33 of Directive 2014/14. Taken together, these create a legal regime that reconciles two competing objectives: on the one hand, the desire not to interfere with the way in which Member States organise their internal administration; on the other hand, the need to ensure that exclusion does not have the effect of infringing the principles governing public procurement under EU law.

30. Directive 2014/24 makes it clear that Member States are under no obligation to turn to the market in order to procure or obtain the services they need to carry on their activities. [11]

31. However, removing this type of inter-administrative contract from the public procurement procedures may operate to the detriment of the objective of establishing an internal market in this area too. The more contracts that are excluded, the less scope there is for creating and developing the internal market in public procurement.

32. Self-supply on the part of public entities, be this in the form of 'in-house' or 'horizontal' cooperation, is not without risk for the free movement of goods and services. [12] Equally legitimate are the misgivings about its effects on free competition beyond the situation expressly referred to in the second paragraph, *in fine*, of recital 33 of Directive 2014/24, which warns against cooperation that places an economic operator in a position of advantage vis-à-vis other competitors.

33. Inappropriate use of these collaborative mechanisms could indeed have the effect of 'shrinking' the demand side of the market and reducing the number of suppliers which that market could sustain. Neither is it inconceivable, in theory, that the public authorities would abuse the (collective) dominant position they might come to hold.

34. It is also true that, viewed from another perspective, the greater flexibility which Directive 2014/24 grants to horizontal cooperation between contracting authorities (as a result of a political decision on the part of the European legislature) may at the same time have positive effects on competition in the sense of incentivising private operators to offer better contract terms.

35. A Member State's decision about how to provide a public service (which may indeed be to do so not by recourse to the market but by way of administrative cooperation) must comply with the fundamental rules of the TFEU, in particular those relating to the free movement of goods, freedom of establishment and freedom to provide services, as well as the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency. [13] These rules and principles must also be taken into account when it comes to interpreting Article 12 of Directive 2014/24.

36. The sum of the foregoing considerations explains the existence of Article 12 of Directive 2014/24 and justifies the prerequisites for 'public-public' cooperation which are explicitly set out in paragraph 4 thereof.

37. It should be noted, finally, that *the exclusion* of those mechanisms for collaboration between contracting authorities from the scope of Directive 2014/24 is dictated not by the binary logic of rule versus exception, but by a different understanding of the field of play on which that directive operates.

11 The discretion to decide whether or not to go to the market had been reiterated in the Court's case-law concerning vertical cooperation: see the judgment of 11 January 2005, *Stadt Halle and RPL Lochau* (C-26/03, EU:C:2005:5), paragraph 48; the judgment of 13 November 2008, *Coditel Brabant* (C-324/07, EU:C:2008:621), paragraph 48; and, recently, the judgment of 3 October 2019, *Irgita* (C-285/18, EU:C:2019:829; 'the judgment in *Irgita*'), paragraph 50 and paragraph 2 of the operative part. So far as concerns horizontal cooperation, see the judgment in *Commission* v *Germany*, paragraph 45.

12 The risks are similar to those which Directive 2014/24 identifies in connection with the aggregation and centralisation of purchases, which, according to recital 59 of that directive, 'should be carefully monitored in order to avoid excessive concentration of purchasing power and collusion, and to preserve transparency and competition, as well as market access opportunities for SMEs'.

13 Judgment in *Irgita*, paragraphs 48 and 50 and paragraph 2 of the operative part, by way of interpretation of 12(1) of Directive 2014/24.

38. After all, what Article 12(4) of Directive 2014/24 seeks to do in stating that the collaborative relationships between contracting authorities for which it provides 'fall outside'[14] the scope of that directive is to set the limits of that directive, all the other rules of which are simply not enforceable against such relationships. It follows, in my opinion, that the findings contained in the aforementioned judgments with respect to the (restrictive) interpretative criterion applicable to exceptions, as opposed to the general rule, are not, strictly speaking, an automatic point of reference for the interpretation of that *exclusion*.[15]

B. First question referred for a preliminary ruling: the transfer of software and the scope of Directive 2014/24/UE

1. Preliminary point: factual premiss for the application of Article 12

39. The referring court asks, in the first place, whether a transfer of software such as that which took place between Land Berlin and Stadt Köln falls within the scope of Directive 2014/24: either as a 'public contract' (within the meaning of Article 2(1)(5), or as a mere 'contract' (within the meaning of Article 12(4)).

40. The question, as raised, is prompted by the (apparent) lack of pecuniary interest in the transfer. Its wording supports the inference that, in the view of the referring court, the scope of Directive 2014/24 is not defined by Article 2 alone. The fact that, in Article 12(4), the term 'contract' is not accompanied by the adjective 'public' could mean that certain contracts not consistent with the definition given in Article 2(1)(5), are also subject to the EU public procurement rules.

41. Rather than undertaking a detailed analysis of the different meanings that attach to the term 'contract' and its accompanying adjectives depending on the various provisions of Directive 2014/24 in which that term appears,[16] I shall focus on interpreting Article 12(4) thereof with a view to determining whether it is applicable to a relationship such as that agreed upon between Land Berlin and Stadt Köln. I shall therefore address the first question referred in the light of the special nature of that provision.

42. The word 'contract' in Article 12(4) is explained by reference to its schematic relationship not so much with Article 2 of Directive 2014/24 as with the other paragraphs of Article 12 itself. In that context, it reflects the difference between it and vertical cooperation (paragraphs 1 to 3 of that provision), whereby the relationship between the participants is structured around internal control. It would appear to serve, in effect, to express the idea that there must be an agreement or arrangement that establishes the basis of, and legal framework for, the relationship between the parties, the objective of the cooperation and the activities (contributions) which each party has to carry out (make).[17]

14 This is the expression used in the first paragraph of Article 12(4) of Directive 2014/24.

15 See, in connection with vertical cooperation, the Opinion of Advocate General Hogan in *Irgita* (C-285/18, EU:C:2019:369), point 45. The same idea is expressed in the judgments of 11 January 2005, *Stadt Halle and RPL Lochau* (C-26/03, EU:C:2005:5), paragraph 46; of 13 October 2005, *Parking Brixen* (C-458/03, EU:C:2005:605), paragraph 63; and of 11 May 2006, *Carbotermo and Consorzio Alisei* (C-340/04, EU:C:2006:308), paragraph 45; and in the judgment in *Datenlotsen*, paragraph 23.

16 There are arguments to support the proposition that the term 'contract' has only one meaning: the title of Article 12 itself ('Public contracts between entities within the public sector'); the fact that that term is used at various points in Directive 2014/24 and in other directives as an abbreviated form for 'public contract'; the addition or otherwise of the adjective 'public' to qualify the noun 'contract' varies depending on which language version of the text is consulted: thus, it appears in Article 12 (in particular, paragraph 1 thereof) in some versions, such as German, French, English and Italian, but not in others, such as Spanish.

17 Article 11(4) of the proposal for a Directive of 20 December 2011, COM(2011) 896 final, used this form of words: 'An agreement concluded between two or more contracting authorities *shall not be deemed to be a public contract within the meaning of Article 2(6) of this Directive*' […]' (emphasis added).

43. The same idea is conveyed by the second paragraph of recital 33 of Directive 2014/24, when it refers to 'contracts for the joint provision of public services', and, then, by the third paragraph, 'commitments to contribute towards the cooperative performance of the […] service', which do not necessarily have to take the form of the performance by all the parties of the main contractual obligations.

44. On that premiss, Article 12 of Directive 2014/24 envisages two types of situation in which the usual meaning of 'public contract' may not be very appropriate because those situations are, more accurately, alternatives to that category.

45. First, it provides for 'vertical cooperation' (paragraphs 1, 2 and 3), whereby, as I have stated elsewhere, 'under the in-house system, the contracting authority does not, from a functional point of view, contract with a separate body but, in effect, contracts with itself, given the nature of its connection with the formally separate body. Strictly speaking, there is no award of a contract, but simply an order or task, which the other "party" cannot refuse to undertake, whatever the name given to it'. [18]

46. Secondly, it also provides for 'horizontal cooperation', which is to say that which contracting authorities establish between themselves in the form of a contract aimed at ensuring that the public services for which they are responsible are provided with a view to achieving a common objective, within a framework guided only by the public interest and with due regard for free competition (Article 12(4) of Directive 2014/24).

47. There is, of course, another type of inter-administrative relationship that falls outside the scope of Directive 2014/24, even though its enacting provisions do not expressly say as much, such as those arising from a transfer or delegation of competence, [19] including the creation of a consortium of entities having legal personality under public law. Such situations are regarded, in principle, as 'fall[ing] outside the sphere of public procurement law'. [20]

48. Under a horizontal cooperation scheme, a contracting authority, which could meet its needs (in terms of goods, works or services) by resorting to private suppliers via a call for tender, chooses to dispense with that route and, instead, collaborates with another public body that is able to satisfy those needs.

49. From an objective point of view, this type of collaboration between public bodies is special in three ways: the form of cooperation that governs the *inter partes* relationship; the common purpose which that cooperation pursues; and the public interest objective by which the cooperation must be guided.

50. The collaboration usually entails contributions from all the parties, which are subsequently paid for from the public purse. The relationship between those parties, however, does not stop at the 'quid pro quo' which defines a synallagmatic contract and which, according to the Court's case-law, characterises a public contract subject to the procurement directives. [21]

51. A legal transaction involving mutually enforceable acts of performance by all those party to it will be present in so far as the respective contributions of those parties are intended to achieve a shared ulterior objective. It is precisely that common goal, which must serve the public interest, that forms the *reason* for the contributions made.

18 Opinion in *LitSpecMe* (C-567/15, EU:C:2017:319), point 70.

19 On the conditions under which a transfer of competence relating to the performance of public functions falls outside the scope of the public procurement rules (contained, at that time, in Directive 2004/18), see the judgment of 21 December 2016, *Remondis* (C-51/15, EU:C:2016:985; 'judgment in *Remondis*'), paragraph 41 et seq..

20 Judgment in *Remondis*, paragraph 53.

21 *Ibidem*, paragraph 43.

2. Whether the relationship between Land Berlin and Stadt Köln is for pecuniary interest or free of charge

52. In order to determine whether the relationship between Stadt Köln and Land Berlin was governed by the rules of Directive 2014/24, account must be taken not only of the transfer contract (by which the software is made available to the former) but also of the cooperation agreement accompanying it.[22]

53. The parties themselves devised the relationship between them as a single unit, making it explicit in Article 5 of the cooperation agreement that the latter is inseparable from the software transfer contract.[23]

54. As I have already said, the referring court's doubts stem from the apparent lack of pecuniary interest in the relationship between Land Berlin and Stadt Köln.

55. Being of pecuniary interest is part of the definition of a 'public contract' given in Article 2(1)(5), of Directive 2014/24. It may also, in my opinion, be regarded as a characteristic component of the relationship between contracting authorities that is provided for in Article 12(4), which, as I have already explained, is not necessarily identical to the usual meaning of a 'public contract'.

56. As regards the meaning of pecuniary interest, I would recall that this has been the subject of extensive interpretation in the Court's case-law.[24]

57. In the relationship between Land Berlin and Stadt Köln, provision of the software is free of charge and fundamental to a scheme of cooperation aimed at developing and adapting that software to meet the management needs of the respective fire services.

58. As the referring court states,[25] the subsequent development of the software has an economic value which is potentially very high.[26] In the description of the facts, Stadt Köln states that the software is made available to it so that it can participate in the cooperation scheme. It has previously recognised that the fire-fighting services — which, according to its submissions at the hearing, it has a statutory obligation to provide — cannot feasibly be delivered without an optimum incident management system that must be continuously adapted to the operational requirements of the fire service, and for this, effective software is essential.

59. It is therefore reasonable to take the view, as the Commission maintains, that, even though the agreement does not lay down an obligation *stricto sensu* to develop the software, it would be unrealistic to assume that the software will not be developed and, if it is, that it will not be the subject of successive adaptations. As became apparent at the hearing, it is all but inevitable that the software will have to be updated, in the short term and subsequently.[27]

22 See, by analogy, the judgment in *Remondis*, paragraph 37: 'For possible categorisation of a multi-stage operation as a public contract […], the operation must be examined as a whole, taking account of its purpose'.

23 That relationship could have been devised differently, as counsel for Stadt Köln stated at the hearing in reference to a software transfer contract between Land Berlin and the city of Hamburg which does not have a cooperation agreement attached to it.

24 *Consiglio Nazionale* order, paragraph 38; judgment in *Remondis*, paragraph 43; judgment of 18 October 2018, *IBA Molecular Italy* (C-606/17, EU:C:2018:843), paragraph 31. In her Opinion in *Ordine degli Ingegneri della Provincia di Lecce and Others* (C-159/11, EU:C:2012:303), point 32, Advocate General Trstenjak stated that 'the view can be taken that only a broad understanding of the notion of "pecuniary interest" is consistent with the purpose of the procurement directives, which is to open up the markets to genuine competition', and made specific reference to other forms of remuneration such as swaps or the waiver of reciprocal claims existing between the contracting parties.

25 Paragraph 29 of the order for reference.

26 It may exceed that of the software itself. ISE mentioned this at the hearing, in the context of the third question referred for a preliminary ruling.

27 Counsel for Stadt Köln distinguished between major updates and other, more minor ones. The former must be carried out three or four times a year and take place following consultation of the other party (or parties) to the cooperation scheme in order, as far as possible, to take account of their requirements. The latter, involving the correction of minor errors, do not require consultation.

60. There is therefore a reasonable expectation that Stadt Köln will contribute developments and modular extensions of the software. This serves as consideration for the provision of the software by Land Berlin, otherwise, the transfer contract would not have been accompanied by a cooperation agreement.

61. In short, from the point of view of Stadt Köln, the consideration which makes it possible to speak of pecuniary interest in its relationship with Land Berlin is its participation in a cooperation scheme suitable for generating benefits for the latter in the form of adaptations of the software (Article 1 of the cooperation agreement) and additional specialised modules (Article 5 of that agreement). Those adaptations are bound to take place, at a given economic cost, because fire incident control centres cannot function without them.

62. The consideration is not therefore dependent on an optional condition; it is just a matter of time as to when it will materialise. We are therefore dealing not with the mere expression of an intention to cooperate but with an enforceable undertaking the discharge of which is a matter of *when* (when the update will take place) rather than *if* (if the update takes place).

63. It is true that the cooperation agreement provides for the possibility of software developments by both parties, and that, in theory, either of them could remain inactive and simply await contributions from the other. As I have already said, however, such a scenario is highly unlikely, inasmuch as it would have the effect of putting at risk the provision of the public service each party is responsible for delivering. That approach would render meaningless the very cooperation agreement the parties voluntarily entered into with each other.

64. In short, the contractual relationship between the contracting authorities which concluded an agreement on the transfer of the software in question and the conditions of their cooperation in developing that software is caught by Article 12(4) of Directive 2014/24.

C. Second question referred for a preliminary ruling: subject matter of the cooperation

1. Issue

65. The public fire service which the cooperating entities in this case are responsible for providing is not delivered jointly: it cannot be, not least because of the geographical distance between the territories on which those entities are respectively active.

66. For that reason, the referring court is uncertain whether the cooperation in question is covered by Article 12(4)(a) of Directive 2014/24 and asks whether, in order for that to be the case, '[it is] sufficient if the cooperation relates to activities that in some way serve the public services that are to be provided in the same way but do not necessarily have to be provided jointly'.

67. The answer calls for separate analyses of two matters: (a) the joint performance of the public service to which the cooperation relates; and (b) the 'public service' nature of the activity in which the cooperation occurs.

(a) Joint provision of the public service: from a 'common public service task' to 'common public interest objectives'

68. In accordance with the Court's case-law prior to Directive 2014/24, the viability of horizontal cooperation was conditional upon, inter alia, the requirement that the parties should perform a *common* public service task. The Court was not for that matter required to address the question whether that *commonality* extended to the actual provision of the service.

69. The model for horizontal cooperation which was excluded from the European public procurement rules was Case C-480/06, *Commission* v *Germany*, in which that cooperation, which took the form of actions and undertakings of a different nature and scale, effectively guaranteed the performance of a public service task which all of the contracting authorities were responsible for performing. That case concerned the disposal of waste, an activity in which all of those involved participated, inasmuch as they operated the facility for disposing of that waste.

70. The present issue was not the subject of special consideration in that judgment or in other, later judgments, in which the *commonality* of the public service task as a condition of its joint provision was lacking. [28]

71. Article 12(4)(a) of Directive 2014/24 provides that, in order for intra-administrative cooperation to fall outside the scope of that directive, the contract must cover objectives which the participating contracting authorities have in common. Each of those authorities must provide the 'public services they have to perform' [29] 'with a view to achieving objectives they have *in common*'. The contract or agreement must specify the form of provision in order to ensure that this is the case. The wording of that directive shows that that *commonality* now extends to the objectives, not to a particular public service task.

72. The preparatory texts for the directive show that the legislature's intention was to take a more flexible approach to the subject matter of the cooperation. [30]

73. The proposal for a Commission directive still spoke of the 'joint performance of their [the contracting authorities'] public service tasks'. On its passage through the Council and the Parliament, the text received different forms of words until the current version was arrived at. The current recital 33 also went through a process of modification in tandem with the transition of the wording of the article and of the opening line itself.

74. The final negotiations saw the disappearance from Article 12(4) of Directive 2014/24 of the reference to the joint performance of tasks, although this still appears in the current recital 33. The reference to common objectives was introduced at the Parliament's suggestion, at the same time as the description of the concept of cooperation as including 'common management and decision making and sharing of risks responsibilities and synergy effects' was removed from the corresponding recital (then, recital 14). [31]

75. The statement in the first paragraph *in fine* of recital 33 to the effect that the public services provided by the cooperating entities do not have to be identical but can be complementary, confirms that the requirement of a common public service task has been dispensed with.

76. In that context, the reference to the *joint* provision of services, which appears a number of times in the same recital, probably means that the public services, whether identical or complementary, which are the responsibility of each of the contracting authorities must be performed 'cooperatively', which is to say by each entity with support from the other or in a coordinated fashion.

28 Judgment in *ASL*, paragraph 37. The Court's later rulings adhered to the case-law established in the judgment in *ASL* in cases which were almost identical as regards the nature of the parties concerned and the substantive issue raised: see order of 16 May 2013, *Consulta Regionale Ordine Ingegneri della Lombardia* (C-564/11, not published, EU:C:2013:307), and *Consiglio Nazionale* order. That case-law was also applied to other fields in the judgments in *Piepenbrock*, paragraph 39, and *Datenlotsen*, paragraph 35.

29 In my opinion, the requirement that the contracting authorities *have to perform* the service in question means that they were responsible for providing it before they concluded the cooperation agreement. That expression could also include a public service to be provided as part of a specific cooperation scheme.

30 That flexibility is also in evidence in relation to the persons providing the cooperation: see recital 32, on horizontal cooperation between contracting authorities in which there is private capital participation. Article 11(4)(e) of the Commission's proposal, on the other hand, ruled out that possibility.

31 See the note from the Council of the European Union of 26 June 2013, number 11644/13.

77. The foregoing may appear to be semantic niceties, but it is a feature of the law that the legal consequences attendant upon the choice of one set of terms or another may differ significantly. The important point, as I have said, is that the (new) rule refers to objectives that are common to the contracting authorities cooperating with each other.

(b) 'Public service' and 'activities in support of a public service'

78. The second question referred for a preliminary ruling also calls for an analysis of the nature of the activity in which the contracting authorities cooperate: must that activity itself be a 'public service' [32] or can it be an ancillary activity, that is to say one in support of a public service? [33]

79. In the case-law prior to Directive 2014/24, the judgment in *Commission* v *Germany* threw some light on the type of activities suitable for the 'public-public' cooperation which is excluded from the public procurement rules. [34]

80. A reading of that judgment supported the inference that activities which were not in and of themselves public services, but which were directly related to the public service covered by the cooperation agreement between the contracting authorities, could be the subject matter of the cooperation.

81. The foregoing, however, does not answer the question whether the cooperation may relate *exclusively* to an activity which is not in and of itself a public service in a context such as that at issue in this dispute. I note that, in this case, the participating contracting authorities each provide the same public service (the fire service) on their own account and on a separate basis, while the cooperation is confined to an ancillary activity (the computerised management of the incident control centre).

82. So far as Directive 2014/24 is concerned, recital 33 points towards an affirmative answer to that question, inasmuch as it states that cooperation may cover '*all types of activities related to the performance of services and responsibilities* assigned to or assumed by the participating authorities […]'. [35] The legislative works again show that there was a desire to highlight this feature of cooperation, which had not appeared in the Commission's original proposal. [36]

83. The flexibility which I have mentioned as being a characteristic of horizontal cooperation under Directive 2014/24, and which is significant by comparison with the previous legislative position, the Court's previous case-law and the Commission's proposal, bears out the correctness of that affirmative answer.

32 I note that Article 12(4)(a) of Directive 2014/24 expressly refers to the 'public services they [the contracting authorities] have to perform'. This category of service is mentioned only in Article 93 TFEU. To a large extent, its equivalent is the 'service of general interest' (SGI), which may or may not have economic content. The freedom of the Member States to define, organise and finance services of general economic interest (SGEI) is dealt with in Article 1(4) of Directive 2014/24, which in turn refers to Article 14 TFEU and Protocol No 26 annexed to the TFEU and the TEU. See, in that regard, the Opinion of Advocate General Hogan in *Engie Cartagena* (C-523/18, EU:C:2019:769).

33 Directive 2014/24 does not specify the priority, status or nature (principal or auxiliary; compulsory or optional; economic or otherwise) of the *public services* to which horizontal cooperation may relate. Recital 33 suggests that there is much flexibility in this regard. It is therefore safe to say that cooperation is not confined to activities which serve a core (principal) function of the contracting authority, as appeared to follow from the judgment in *ASL*, first sentence of paragraph 37.

34 In that case, one of the contributions was the provision of facilities for the recovery of waste collected by the participants in the geographical area for which they were each responsible. Another field of cooperation was the provision of surplus capacity: waste disposal capacity unused by one party could offset another party's lack of disposal capacity. A further contribution consisted in an undertaking by the street cleaning service of one of the contracting authorities to defend the rights of the other services against the facility operator in the event that the latter caused loss or damage to the former.

35 Emphasis added.

36 See, by way of comparison, interinstitutional document number 12167/13.

84. This does not mean, however, that horizontal cooperation on this basis is unlimited. It goes without saying that the requirement that such cooperation should be directed at the provision of public services which the parties are responsible for providing still stands.[37] Where the subject matter of the cooperation is not the public service itself but an activity 'related' to it, that relationship must be such that the activity is functionally steered towards the performance of the service.

85. The balance between the competing objectives present in this field, as discussed earlier,[38] also indicates that, for the purposes of analysing that relationship, a distinction should be drawn according to the extent to which the various activities in question are linked to the service the provision of which they contribute to. To my mind, Article 12(4) of Directive 2014/24 permits the acceptance of, inter alia, supporting activities which are immediately and inseparably linked to the public service, which is to say those that are of such fundamental importance that the service itself could not be performed as a public service without them.

86. The cooperation must also meet the other requirements laid down in Article 12(4) (with respect to the authorities providing the cooperation, the purpose of that cooperation and the principles by which it must be guided) which I highlighted earlier.

2. The cooperation between Land Berlin and Stadt Köln

87. As I have already said, the two contracting authorities in this case do not jointly perform the principal public service activity, that is to say the fire service. The objective of their cooperation, on the other hand, is to create and keep updated a software package that is essential to enabling each of them to ensure optimum management of the operations carried out by their respective fire services in their own geographical areas.

88. According to the description of the software and its updates contained in the documents before the Court, combined with the consistent submissions made in this regard at the hearing, the software was and is essential to the provision of that public service.

89. It follows that the cooperation between *Land* Berlin and Stadt Köln, inasmuch as it relates to an activity essential to the effective performance of a public service which both contracting authorities have to provide, satisfies the requirement laid down in Article 12(4)(a) of Directive 2014/24.

D. Third question referred for a preliminary ruling: placing third parties in a position of advantage

90. The agreement between Land Berlin and Stadt Köln faces other objections, based on the tension between horizontal cooperation and competition law. The referring court addresses these in its third question, when it asks whether Article 12(4) of Directive 2014/24 contains an implicit unwritten prohibition on placing a party in a position of advantage and, if it does, to what substantive effect.

37 In its previous case-law, the Court had held as follows in the judgment in *Datenlotsen*, paragraph 16 (by reference from paragraph 34): '… neither the University nor HIS are public authorities, and HIS is not entrusted directly with the performance of a public service task'.

38 Point 29 et seq. above: the desire not to interfere in the Member States' organisation of their internal administration must be reconciled with the requirement that exclusion from the scope of EU law does not give rise to an infringement of the principles of public procurement and free competition.

1. Horizontal cooperation and competition law

91. The condition that no private operator be placed in a position of advantage vis-à-vis its competitors as a result of horizontal cooperation is not expressly and separately laid down in Article 12 of Directive 2014/24. It was laid down, however, in the previous case-law.[39]

92. In order to look at whether, despite the lack of verbatim reference to it, that requirement subsists, I note that the Member States enjoy a broad margin of discretion in deciding whether to provide services themselves or to outsource them.

93. In the first of those two scenarios (self-supply, in a broad sense), provided that certain conditions should be met, the Member States are not required to follow the rules and procedures of EU public procurement law. They do, however, remain subject to other rules,[40] including those relating to free competition that are laid down in Article 106(2) TFEU.

94. For that reason, the second subparagraph of Article 18(1) of Directive 2014/24 states, in a related context, that 'the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition'.

95. Thus, the limitation imposed by the rules on free competition also affects horizontal cooperation between contracting authorities. It does this in at least two ways:

– First, it governs their relationship with private operators as a whole, in their capacity as competitors on the market.

– Secondly, it determines how public entities must act in order to ensure that their cooperation, if it also involves private operators in some way, does not distort competition between them.

96. Article 12(4) of Directive 2014/24 is intended to avoid any distortion of competition in the context referred to in the first indent above, when it requires that the collaboration should take place exclusively between contracting authorities.[41] At the same time, it also lays down a number of restrictions with the same aim in mind:

– The cooperation must be confined to the provision of public services which the participating contracting authorities have to perform, which is to say that it must not extend to its ordinary economic activities (point (a)).

– It must be guided exclusively by reasons in the public interest, not market-related reasons (point (b)).

– If the entities cooperating with each other are also active on the open market, they may not perform there more than 20% of the activities concerned by that cooperation.

97. It is not possible to take the view, as Stadt Köln attempts to do, that the obligation to have regard for free competition is confined to the situation where the contracting authorities compete on the market with private operators as a whole.

39 Judgments in *Commission* v *Germany*, paragraph 47; *ASL*, paragraphs 35, 38 and the operative part; *Consegli Nazionale* order paragraph 44 and the operative part.

40 Points 30 to 35 above.

41 Although, in line with the in-house cooperation scheme, Directive 2014/24 does allow some private capital participation in public entities; see footnote 30 above.

98. On the contrary, as I have already explained, the general duty not to distort competition is found in primary law (Article 106(2) TFEU) and, within the specific context of public procurement, in the second subparagraph of Article 18(1) of Directive 2014/24.

2. Contracting third parties

(a) General considerations

99. Recitals 31 and 33 of Directive 2014/24 confirm that cooperation between contracting authorities must not 'result in a distortion of competition' by placing a private provider of services in a position of advantage vis-à-vis its competitors.[42] It is important to make the point that those recitals do not actually add any new normative material to the enacting terms of the directive; they simply serve as a guide to the interpretation of Article 12(4).

100. It follows that any conduct by the contracting authorities which distorted competition and placed a private provider of services at a disadvantage vis-à-vis its competitors would not comply with Directive 2014/24. 'Placing a party in a position of advantage', as referred to by the national court, inasmuch as it favours one private operator over others, is therefore prohibited.

101. Two not exactly equivalent situations may be presented in this regard:

– Horizontal cooperation in which one contracting authority makes available to another certain goods or services which the former itself acquired from a private operator without complying with the public procurement rules. In so far as those rules were applicable at that time (on account of the subject matter or value of the contract, and so on), the third party operator would suffer *new* and, as it were, *twofold* disadvantageous treatment on account of the failure to take those rules into account both the first time and subsequently.

– Horizontal cooperation requiring for its future development the participation of economic operators other than the contracting authorities. If any of those private operators were, in a discriminatory or arbitrary way, robbed of the opportunity to join the mechanism for the future supply of goods and services, those affected would be in a position of disadvantage.

102. In the second of those scenarios, in which a tendering process is initiated with a view to supplementing or continuing an inter-administrative cooperation scheme, there are no grounds on which it may be claimed that an individual is, in law or in fact, inevitably in a better position than his competitors to contribute to the tasks comprising that scheme.

42 There are of course other conceivable forms of distortion, as, for example, if the acquisition of the software and the successive maintenance or add-on operations were made the subject of individual contracts as a way of avoiding a single contract the value of which would exceed the threshold beyond which public procurement is compulsory. See the judgment of 18 January 2007, *Auroux and Others* (C-220/05, EU:C:2007:31), paragraph 67; and the judgment in *Commission* v *Germany*, in which the Court says that the authorities in question were 'contriving to circumvent the rules on public procurement' (paragraph 48).

(b) Contracting third parties for the purposes of the cooperation between the Land Berlin and Stadt Köln

103. The documents before the Court do not contain sufficient information to be able to say on what basis Land Berlin originally purchased the software package that it would later transfer to Stadt Köln. Neither is it entirely certain whether Land Berlin acquires new software modules, outside the context of its cooperation with Stadt Köln, on or off the market. [43] It will be for the referring court to verify these points of fact.

104. The future development of the cooperation scheme, on the other hand, appears to require the participation of third parties, and Stadt Köln has therefore published a notice of a (restricted) invitation to tender for a contract for the adaptation, deployment and maintenance of the software transferred by Land Berlin. [44]

105. The extensions and updates of the software transferred by Land Berlin to Stadt Köln for the purposes of cooperation are characterised by their high economic value. It is therefore logical that the interest of market operators [45] should be centred on the subsequent contracts for its adaptation, maintenance and development.

106. ISE argues that the technical complexity of those operations is such that nobody other than the manufacturer would be able to carry them out. If that were the case, the decision relating to the original purchase of the software might have a significant bearing on the award of the later public contracts, inasmuch as it might effectively block the participation of operators other than the software creator.

107. In those circumstances (which it is for the referring court to verify), the requirement not to place market operators in a position of advantage vis-à-vis their competitors [46] would call for special care to be taken when it comes to drawing up calls for tenders for subsequent services. In particular, all potentially interested parties would have to be provided with the information necessary to enable them to take part in such a process. [47]

108. This may nonetheless prove to be insufficient, which would indicate that the problem lies at an earlier point in time, that is to say when the software was first purchased. It is for the referring court to determine whether, for technical reasons, the original purchase gives rise to a situation of exclusivity that predetermines later procurement procedures, and, if that is the case, to establish the relevant measures for correcting the effects of that exclusivity. [48]

43 At the hearing, counsel for ISE stated that, in July 2018, Land Berlin had published a notice of an invitation to tender for a contract for the development of that software worth EUR 3 500 000.

44 At the hearing, it was stated that the notice (reference number: 2019-0040-37-3) was published in OJ 2019/S 160-394603 and that the economic value of the call for tenders is EUR 2 000 000.

45 At the hearing, counsel for ISE stated that the economic interest lay not in the acquisition of the base software, or in its sale, but in the subsequent operations of adapting, maintaining and developing the program.

46 Together with the objective of awarding the contract to the supplier submitting the economically most advantageous tender.

47 At the hearing, it was debated whether it was sufficient to indicate in later calls for tender that the successful tenderer would have access to the software source code. Stadt Köln emphasised that this was what it had done, although ISE contended that this step would not be sufficient, given the practical difficulties associated with developing adaptations from the base program in a risk-free way.

48 The possibility that the purchase of the original software would give rise to a blocking effect should, ideally, have been assessed at the time when it was purchased. Otherwise, at the current juncture, such an assessment would not be possible, and any remedies could only be palliative. At the hearing, the Commission suggested that the software manufacturer be asked to give an undertaking to cooperate with the suppliers having successfully tendered to provide subsequent services.

IV. Conclusion

109. In the light of the foregoing, I propose that the answer to the questions referred for a preliminary ruling by the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany) should be as follows:

‘(1) Article 12(4) of Directive 2014/24 of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC must be interpreted as meaning that a transfer of software agreed in writing between two contracting authorities and linked to a cooperation agreement between those two authorities constitutes a “contract” within the meaning of the aforementioned provision.

That contractual relationship is for pecuniary interest even where the transferring entity does not have to pay a price or reimbursement costs for the software, if each of the parties (and, therefore, the transferee too) undertakes to make available to the other the future adaptations and developments of that software and these, being essential to the provision of a public service which both contracting authorities have to perform, will inevitably take place.

(2) Cooperation between the contracting authorities under Article 12(4)(a) of Directive 2014/24 does not necessarily have to relate to the actual public services that have to be provided to citizens. Cooperation which relates to activities in support of those services will still be covered by Article 12(4) of Directive 2014/24 in the case, inter alia, where the ancillary activity is of such fundamental importance to the public service that the latter could not be performed without it.

(3) Cooperation between public authorities which places a private operator in a position of advantage vis-à-vis its competitors on the market cannot be covered by Article 12(4) of Directive 2014/24’.