

## LEGAL UPDATE

### European Court rules on public-public cooperation between contracting authorities

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A European Court [judgment](#) on public-public cooperation between contracting authorities was issued on 4 June.

The case is set in Germany. There, three local public authorities have entrusted the performance of their task of recovering or disposing of the waste produced in their respective territories to a collective jointly controlled by them, which is also a contracting authority. This waste treatment requires a special separation plant, which the collective itself does not have. Therefore, the collective has outsourced about 80% of the waste task to private companies and 20% to an administrative district (outside the collective), on the basis of an agreement.

A private company has filed a complaint against the latter agreement. According to the company, the agreement constitutes an illegal private award.

Following this, the German court asks the European Court how the exception to the procurement obligation through public-public cooperation (Article 12(4) of Directive 2014/24/EU, implemented in the Netherlands in Section 2.24c of the Dutch Public Procurement Act) should be interpreted in this case.

The European Court stresses that the award of contracts within such a cooperation falls outside the scope of procurement law if that contract establishes or implements a cooperation between the participating contracting authorities that aims at ensuring that the public services they have to perform are provided with a view to achieving objectives they have in common. According to the Court, the concept of 'cooperation' is key.

The parties must be *joint* participants in the cooperation agreement. It is not sufficient if the sole contribution of certain parties to the agreement is limited to simply reimbursing costs. That interpretation of the concept of 'cooperation', is confirmed by recital 31 of the Directive, which states that the mere fact that both parties to an agreement are themselves public authorities does not in itself exclude the application of procurement rules.

The preparation of a cooperation agreement presupposes that contracting authorities jointly identify their needs and how these needs can be met. The cooperation must be based on a common strategy and requires contracting authorities to combine their efforts to provide public services.

In this case, according to the Court, there was no cooperation but only the acquisition of a service in return for a fee. This is not sufficient for the public-public cooperation exception.

Thus, this judgment provides a useful interpretation of how Article 12(4) of the Directive, and therefore also Article 2.24c of the Dutch Public Procurement Act, should be interpreted.

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