LEGAL UPDATE

European Court rules on public-public cooperation between contracting authorities in the context of (further) software development

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On 28 May last, the European Court of Justice issued a judgment with relevant explanations on the exception from the obligation to invite tenders in public-public cooperation. More specifically, the judgment deals with an issue concerning the use and (further) development of software for control rooms of fire brigades.

The case before the Court concerns an agreement between the *Land* of Berlin and the city of Cologne. Berlin provides Cologne free of charge with software (for the management of fire brigade operations) purchased from Sopra. That this is permissible is based on German law from which it follows that public authorities can pass on software developments, in respect of which commercialisation by public authorities is not permitted, to each other free of charge. The agreement between Berlin and Sopra also allows Berlin to pass on this software free of charge to other public authorities with security tasks. On the basis of the agreement between Cologne and Berlin, Cologne is also allowed to further develop and modify the software. The *Land* of Berlin can then receive that further developed software back free of charge.

ISE, a party that develops and sells control room management software, disagrees with this construction. It believes - in short - that the agreement between Berlin and Cologne should be declared to be ineffective on grounds of failure to comply with public procurement rules. According to ISE, the agreement between Cologne and Berlin is a 'contract for pecuniary interest' because Berlin, in exchange for making the software available free of charge, received the right to the free provision of the software developed by Cologne. Cologne was obliged to make the software it had developed available to Berlin free of charge.

The Court first emphasises that the exception of 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 (Aanbestedingswet)) must involve a public contract within the meaning of the Directive. The Court concludes that the agreement between Berlin and Cologne qualifies as a public contract (inter alia because the obligations in the agreement are legally enforceable and because the adaptation of the software by Cologne generates a clear financial interest for Berlin and the agreement has therefore been concluded for pecuniary interest).

Next, the Court emphasises that a contract between two contracting authorities does not fall within the scope of the Directive - and therefore is not regarded as a procurement procedure for which an invitation to tender must be issued - when it has been concluded in order to ensure that the public services which the public authorities are required to perform are provided to pursue a common objective in the public interest (Article 12(4) of the Directive). The Court holds that it is not absolutely necessary that the task of public interest be performed jointly.

According to the Court, cooperation may cover all types of activities linked to the performance of services and to the exercise of responsibilities of the contracting authority. It may therefore also concern an ancillary activity of a public service, provided that this ancillary activity contributes to the effective fulfilment of the task of public interest.

Finally, the Court emphasises that, despite this not being included in Article 12 of the Directive, it is prohibited to place a private undertaking in a position of advantage vis-à-vis competitors. In doing so, the Court explicitly does not distance itself from previous case-law (Lecce and Piepenbrock judgments).

The Court then addresses the question of when there can be spoken of placing a private provider in a position of advantage via-à-vis competitors where it concerns the maintenance and further development of Sopra's software. ISE argues that the real value of software is not the initial acquisition of the base software but lies in the cost of software maintenance and further development. ISE then argues that, in practice, the contracts for the adaptation, maintenance and further development of the basic software are reserved exclusively for the software publisher, since its further development requires not only the source code of the software but also other knowledge relating to the further development of that source code.

This gets the attention of the Court and it considers that if a contracting authority is considering organising a public procurement procedure for the maintenance, adaptation or development of software acquired from an economic operator, it must ensure that adequate information is communicated to potential candidates and tenderers in order to allow effective competition to develop on the secondary market for the maintenance, adaptation or development of the software. Specifically, the Court directs the referring court to first ascertain whether Cologne and Berlin have access to the source code of Sopra's software, and second, that, in the event that they organise a public procurement procedure for the maintenance, adaptation or development of that software, those contracting authorities communicate that source code to potential candidates and tenderers and, third, that access to that source code is in itself a sufficient guarantee that economic operators interested in the award of the contract in question are treated in a transparent manner, equally and without discrimination.

For IT and procurement practice, this judgment is of great importance because in practice, publishers of base software usually do not make the source code available. If a contracting authority already has access to the source code, then the use (that the Court makes conditional for equal treatment of market parties) is not provided for in the agreement between the publisher of the software and the concerning contracting authority. After all, access to the source code is regulated by a source code escrow agreement under which access to the source code and its continued use are only possible under specific circumstances, such as bankruptcy of the publisher, or breach of maintenance obligations. Should the source code do become available to market participants as part of a tender, it would still need to be considered whether that would be sufficient for market participants to compete on equal terms. We do not expect this to be the case any time soon, as in addition to the source code, market parties will also lack knowledge of the product, its nature, operation and composition.

We believe that for IT and procurement practice, this judgment is important because the criteria laid down by the Court limit the possibilities of building on a software choice made in the past and of this past software choice becoming the starting point for a subsequent tender on software maintenance and adaptation.

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