

# AG Opinion clarifies the boundaries of ‘horizontal’ co-operation between contracting authorities in public procurement (Informatikgesellschaft für Software-Entwicklung mbH v Stadt Köln)

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**Public Law analysis: Advocate General Campos Sánchez-Bordona’s opinion in this preliminary reference clarifies the boundaries of horizontal co-operation between contracting authorities that is not covered by the public procurement rules contained in Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement (Directive 2014/24/EU). Such horizontal arrangements need only comply with the conditions contained in Article 12(4) of Directive 2014/24/EU so as not to constitute ‘public contracts’ governed by the public procurement rules. Those conditions, and the Advocate General’s interpretation of them, are more generous than those to be found in the pre-Directive 2014/24/EU case law. Written by Jonathan Lewis, barrister, at Henderson Chambers.**

*Informatikgesellschaft für Software-Entwicklung (Public procurement-Opinion) [2020], [Case C-796/18](#)*

## What are the practical implications of this case?

[Directive 2014/24/EU](#) deals expressly with the provision of services through intra-administrative cooperation, also known as ‘horizontal’ or ‘public-public’ cooperation. It allows more scope for such arrangements than the pre-[Directive 2014/24/EU](#) case-law. [Directive 2014/24/EU](#) reformulates, clarifies, removes and supplements various conditions that had been imposed through prior case law. The Advocate General’s opinion in this case is the first time that the [Directive 2014/24/EU](#)’s conditions have been interpreted and the interpretation provided is a generous one.

While the UK has left the EU, it remains subject to EU law (including EU case law) during the transition period and this decision will remain informative for UK interpretation of [Directive 2014/24/EU](#), as implemented by the Public Contracts Regulations 2015, [SI 2015/102](#). Further, irrespective of how domestic public procurement law develops thereafter, this opinion gives one insight as to how the tension between public procurement law, competition law and the desire to give authorities freedom to organise their affairs can be resolved.

## What was the background?

In 2017, Stadt Köln (City of Cologne) and Land Berlin entered into a software transfer contract under which the latter transferred to the former, free of charge and for an indefinite period, software for managing interventions by its fire service. The transfer was to comply with conditions set out in an accompanying cooperation agreement. The authorities provided the same public service (the fire service) on their own account and on a separate basis, with cooperation being confined to an ancillary activity (the computerised management of the incident control centre). Informatikgesellschaft für Software-Entwicklung (ISE), which develops and sells software, sought to review the contracts on the basis that Stadt Köln had awarded a public supply contract and should have complied with the public procurement rules.

[Directive 2014/24/EU](#) created a legal regime that reconciles two competing objectives: the desire not to interfere with the way in which Member States organise their internal administration and the need to ensure that exclusion does not have the effect of infringing the principles governing public procurement under EU law (at para [29]). Horizontal co-operation can shrink the demand side of the market (at para [33]) but this is balanced by the fact that the greater flexibility afforded under [Directive 2014/24/EU](#) may have positive effects on competition in the sense of incentivising private operators to offer better contract terms (at para [34]).

Recital 5 of [Directive 2014/24/EU](#) provides that Member States are not obliged to contract out or externalise the provision of services that they wish to provide themselves. Recital 31 of [Directive](#)

[2014/24/EU](#) explains that public procurement rules should not interfere with the freedom of public authorities to perform public service tasks by using their own resources, which includes cooperation with other public authorities. Recital 33 of [Directive 2014/24/EU](#) provides that contracts for the joint provision of public services should not be subject to public procurement rules provided that they are concluded exclusively between contracting authorities, that the cooperation is governed solely by public interest considerations and that no private service provider is placed in a position of advantage vis-à-vis its competitors.

[Article 2\(1\)\(5\)](#) of Directive 2014/24/EU 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'

[Article 12\(4\)](#) of Directive 2014/24/EU provides that a contract concluded exclusively between two or more contracting authorities falls outside the scope of [Directive 2014/24/EU](#) where all of the following conditions are fulfilled:

- 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
- the implementation of that cooperation is governed solely by considerations relating to the public interest
- the participating contracting authorities perform on the open market less than 20% of the activities concerned by the cooperation

### What did the court decide?

The Advocate General decided that, despite appearing to lack a pecuniary interest, the transfer of software between the two authorities was a 'contract' within the meaning of [Article 12\(4\)](#) of Directive 2014/24/EU rather than a 'public contract' within [Article 2\(1\)\(5\)](#) of Directive 2014/24/EU. He noted that [Article 12](#) of Directive 2014/24/EU envisages two types of situation in which the usual meaning of 'public contract' may not be appropriate because those situations are, more accurately, alternatives to that category: 'vertical cooperation' (the in house scenario in which the authority contracts with itself) and 'horizontal cooperation' (at para [44]). He held that this type of collaboration between public bodies is special in three ways (at para [49]):

- 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

The pecuniary interest here was Land Berlin's participation in a cooperation scheme suitable for generating benefits for Stadt Köln in the form of adaptations of the software and additional specialised modules (at para [61]).

The Advocate General decided that it did not matter that the public fire service was not to be delivered jointly by the two authorities. He paid careful attention to the drafting of [Article 12\(4\)](#) of Directive 2014/24/EU and noted that it required the contract to cover objectives, not to carry out a public service task (at para [71]). What is required is 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' (at para [76]).

The Advocate General decided that the nature of activity upon which the authorities co-operate need not itself be a public service but could be an ancillary service, being one in support of a public service. However, the relationship between the activity and public service 'must be such that the activity is functionally steered towards the performance of the service' (at para [84]). [Article 12\(4\)](#) of Directive 2014/24/EU allows for 'supporting activities which are immediately and inseparably linked to the public service', being 'those that are of such fundamental importance that the service itself could not be performed as a public service without them' (at para [85]).

The Advocate General noted the apparent tension between horizontal cooperation and competition law and that [Article 12\(4\)](#) of Directive 2014/24/EU, unlike its preceding case law, does not expressly provide that no private operator be placed in a position of advantage *vis-à-vis* its competitors as a result of horizontal cooperation (at para [91]). He noted that of course such arrangements remain subject to other provisions of competition law (at para [93]) and relied upon [Article 18](#) of Directive 2014/24/EU which requires that public procurements shall not be made with the intention of artificially narrowing competition. Hence, the general duty not to distort competition is found in primary law.

#### Case details

- Court: Court of Justice
- Judge: AG Campos Sánchez-Bordona
- Date of judgment: 29 January 2020

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