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Public to public cooperation revisited (again)

ECJ look again at the Hamburg Waste Principle by which public authorities may cooperate in delivery of services without setting up a separate body or running a tender exercise.

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The European Court of Justice (ECJ) has recently revisited the Public to Public Cooperation debate in the latest decision, in the Remondis line of case law. In the decision case C-429/19, Remondis GMBH v Abfallzweckverband Rhein-Mosel-Eifel, the court was asked to look once again on the nature of the Hamburg Waste Principle as captured in article 12, paragraph 4 of the underlying classic public procurement directive. As readers will no doubt be aware, this is the principle by which public authorities may cooperate in the delivery of public services, but without the need to set up a separate body to deliver that for them nor run a competitive tender exercise.

It is important to understand where the commission was coming from in this regard when drafting the directives and paragraph 33 of the recitals to the directive, help in this regard:

> *"Contracting authorities should be able to choose to provide jointly their public services by way of cooperation without being obliged to use any particular form. […] Contracts for the joint provision of public services should not be subject to the application of rules set out in this directive provided that they are concluded exclusively between contracted authorities, the implementation of that cooperation is governed solely by consideration 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 these 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."*

The specific provisions in relation to public to public cooperation using the Hamburg Waste Principle are captured in the Public Contract Regulations 2015 at Regulation 12(7). This provision is very much a direct lift (subject to UK drafting convention) of the underlying provisions in the directive and is a three-part test. The three-part test applies to contracts between two or more contracting authorities and such cooperation will fall outside of the directive where:

> (a) the cooperation is established with the aim of ensuring that public services that have to be performed are provided with a view to achieving objectives they have in common;
>
> (b) the 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.

Readers may recall from previous articles on this dispute, that the association had been established by a number of regions in Germany in order to deliver their various waste disposal obligations, including for the purposes of this decision, the disposal to landfill of waste that was otherwise not able to be recycled or re-used. It was established that, the association had let contracts to private sector providers for 80% of this type of waste. For the remaining 20% of its waste it had entered into what it considered to be a public cooperation arrangement with a district authority, which had a relevant facility, directly without competition. The court analysed the relationship as set out in the agreement for the cooperation, which dealt with provisions including delivery operations, the operation of the facility, the fees payable and obligations around mutual assistance. This included an obligation on the association to accept minimal waste fixed at a certain amount per annum.

The court analysed the arrangements and went through whether the arrangement in place was genuine cooperation or, in fact, was a procurable services agreement dressed up as cooperation between contracting authorities. Picking out some of the points, the referring court considered that the acceptance by the association of mineral waste was purely theoretical and was intended solely to conceal the lack of cooperation. Indeed, it felt that the content of that agreement was limited in essence to the obligation on the part of the district as service provider to provide the services in return for consideration. It also analysed the respective statutory obligations of the parties and found that the pre-treatment of waste in order to ensure that it was possible for it to be committed to landfill, which is the task of the association but not the district. Thus, even though the parties to the agreement at issue in the main proceedings, both had a general interest in disposing of waste, they nevertheless pursue different interests of their own within that context. The association had to accomplish a task which had been assigned to it by German law. Since it did not have a mechanical treatment plant, it sought assistance from the district, which would in return increase the profitability of its plant by have that opportunity. To this end there was not genuine cooperation, merely one party providing a service to another and being paid for that service.

The court in making its decision on the reference said the following:

> *"It is apparent from Article 12(4)(a) of the directive that a contract concluded exclusively between two or more contracting authorities falls outside the scope of that directive, where it established or implements 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 very wording of that provision thus places the concept of cooperation at the very heart of the exclusion laid down in that provision.****"* (emphasis added) They go on to say *"it follows that joint participation of all parties to the cooperation agreement is essential to ensure that the public services they have to perform are provided, and that condition cannot be deemed to be satisfied where the sole contribution of certain contracting parties goes no further than a simple reimbursement of costs."* Indeed, they made it clear that if reimbursement were in itself sufficient to constitute cooperation, there would be no distinction between such form of cooperation and a public contract, which of course is not covered by the exclusion laid down by that provision.

In its final paragraph of the decision, the court make it clear that the directive must be interpreted as meaning that cooperation between contracting authorities cannot be said to exist where a contracting authority which is responsible for a task:

- does not itself perform the entirety of that task,
- which is incumbent on it alone under national law; and
- for the performance of which a number of operations are required,

but rather commissions another contracting authority (that is independent of it and is likewise responsible for that public interest class within the same territory) to carry out one of the operations required, solely in return for consideration.

We have been saying this point to clients for a long time now, namely the exemptions afforded under the Hamburg Waste Principle, are founded on the principles of genuine cooperation. It has been clear from a number of cases over the years that you cannot dress up a services agreement between public bodies to pretend that it is a public to public cooperation under the Hamburg Waste principles. The exemption requires genuine cooperation of tasks in common, where both parties participate in that cooperative effort. Where you have a plain services agreement, it is going to be subject to procurement rules even where both bodies are contracting authorities. If it quacks like a duck, it is a duck!

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