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Advocate General opinion broadens scope of the public - public procurement exemption

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A recent opinion from the Advocate General in the case of Informatikgesellschaft für Software-Entwicklung (ISE) mbH v Stadt Köln (ISE Case), has appeared to widen the scenarios in which contracting authorities can look to rely on the exemption contained with Regulation 12(7) of the Public Contract Regulations 2015 (PCR), potentially paving the way for increased collaboration between contracting authorities without needing to have regard to a procurement process under the PCR regime.

Regulation 12(7) of the PCRs allows for certain public contracts to fall outside the scope of Part 2 of the PCRs if the contract is concluded exclusively between contracting authorities and all of the following conditions are satisfied:

- the contract establishes or implements a co-operation 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 co-operation 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 co-operation.

The exemption was codified in the Article 12(4) of Directive 2014/24/EU (which was implemented in to the UK by the PCRs for England and Wales) and was based on a previous strand of case law starting with the Hamburg Waste case (Case C-480/06, Commission v Germany) under which the ability to rely on the exemption was conditional on the requirement that the parties should be performing a common public service task. When the exemption was codified many expressed the view that the case law derived from Hamburg Waste continued to apply to the interpretation of the new codified exemption. Following the Advocate General's opinion in ISE this appears to no longer be the case.

The facts of ISE

Land Berlin and Stadt Koln 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. There was underpinned by a co-operation agreement entered in to on the same date as the transfer and the transfer was to comply with the conditions set out in this agreement.

ISE, which develops and sells software, applied to the Rhineland Public Procurement Board (the **Board**) 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. The Board dismissed ISE's application, on the ground that the agreements between Stadt Köln and Land Berlin could not be classified as 'public contracts'. 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.

ISE appealed the decision to the Dusseldorf Higher Regional Court who in turn sent some questions for a preliminary ruling.

The Advocate General's opinion

Contract for pecuniary interest

The AG had some interesting observations about the nature of a public services contract and whether 'payment' was necessary. It was clear in line with existing precedents that the lack of payment in cash would not automatically mean that such contract would fall outside of the ambit of the procurement directives. Consideration can be found in many forms and in this instance the updating of the software itself and the form of collaboration meant that the contract would be subject to the rules (notwithstanding the availability of an exemption as detailed below).

On public-public co-operation

The Advocate General made it clear in his opinion that the 2014 directive which codified the public-public exemption (in the PCRs Regulation 12(7)) did not simply codify the exemption as it was contained in case law at the time but actually reformulated it.

The first major point the AG made in relation to the test was that there didn't have to be joint performance of the public service task that each of the contracting authorities in the co-operation were required to perform in order to satisfy the test. In this case, both contracting authorities were responsible for providing a fire service but they were both responsible for this function in different geographical areas and would not be assisting each other in the delivery of these services, but yet this would still be sufficient for the purposes of Regulation 12(7).

The second key point was with regards to the nature of the activity in which the contracting authorities cooperate and whether the activity in itself had to be a public service that the contracting authorities were required to perform. In this case, the participating contracting authorities each provided the same public service (the fire service) on their own account and on a separate basis, while the activity which was the subject of the cooperation was an ancillary activity (the computerised management of the incident control centre). Nevertheless the AG felt this was sufficient and could be subject of a co-operation which fell within the remit of Regulation 12(7). He indicated that any activity which was ancillary to the actual public service task could be the subject of a co-operation provided that:

- 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;
- the ancillary activity is 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.

The AG took the view that the provision of the incident control centre software satisfied these requirements as being 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.

Comment

The key consideration to take away from this opinion is the seeming expansion of Regulation 12(7) to include arrangements:

- where contracting authorities have a shared public/statutory function but which they do not deliver jointly; and
- where the activity which is the subject to the arrangement is not the public/statutory function itself, but is an ancillary activity to that function related to it and can be seen as fundamentally important to the delivery of that function.

This could path the way for contracting authorities to start collaborating to share key infrastructure systems which they need to perform a shared function (in the ISE case an IT system which allowed the delivery of fire services) without the need to run a procurement processes under Regulation 12(7). Some examples of things this could include are:

- case management systems in the provision of social care services;
- property asset management systems for maintenance of authority owned housing;
- systems which facilitate the management of waste disposal; and
- a service user helpdesk to deal with complaints in relation to a public/statutory function

However, we are of the view this apparent expansion is unlikely to give contracting authorities licence to enter in to collaboration agreement in relation to general back office services under Regulation 12(7) as it would be difficult to show that such services are so fundamental to the delivery of a public/statutory function. Additionally, it should be noted that this is merely an AG opinion and therefore is

not binding law and so we will have to wait and see if the Courts follow this, but it certainly provides strong guidance that the EU are willing to view the Regulation 12(7) exemption in a broader way than it has in previous case law.

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