

LEGAL UPDATE

When does cooperation between contracting authorities qualify as an exception to the obligation to invite tenders?

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If a contracting authority wishes to award a contract to another contracting authority, it is in principle subject to the procurement rules. However, there are exceptions whereby a contracting authority can award a contract directly (i.e. without organising a procurement procedure) to another contracting authority. This is then often referred to as a public-public cooperation. In a recent judgment, the Court of Justice of the European Union (CJEU) ruled on two such exceptions: non-institutionalised (also known as: horizontal) cooperation and institutionalised cooperation with joint control over a legal person ([joined cases C-383/21 and C-384/21, Sambre & Biesme](#)).

In the Dutch Public Procurement Act, these possibilities are elaborated in Sections 2.24c (horizontal cooperation, an implementation of Article 12(4) of Directive 2014/24/EU) and 2.24b (institutionalised cooperation with joint control over a legal person, an implementation of Article 12(3) of Directive 2014/24/EU). The conditions under which these options can be used follow from those provisions. If the conditions are met, there is an exception to the obligation to invite tenders that can be used.

The case

In the Belgian case before the CJEU, the question was whether the requirements of the above exceptions were met.

The case involved three parties:

- A public social housing company called SLSP Sambre et Biesme (SLSP). This is a public body, whose main shareholders are two Belgian municipalities (Farciennes and Aiseau-Prezles);
- Belgian municipality of Farciennes;
- Igretec. This is a public legal entity that focuses on project management, among other things. Its shareholders are municipalities and other public bodies. The municipality of Farciennes is also a shareholder and SLSP acquired one share in order to use Igretec's services.

The Farciennes municipality and SLSP concluded a framework agreement in 2017 to build a green district in partnership. This included that they would hire Igretec directly - i.e. without a tender procedure - to help with the project (with activities such as technical assistance with construction and asbestos inventory services). When this came to the attention of the Walloon supervisory authority on housing (SWL), the framework agreement was annulled. The supervisory authority considered that between SLSP and Igretec, the conditions for applying an exception to the obligation to invite tenders had not been met.

The municipality, SLSP and Igretec disagreed with this annulment. According to them, they met both conditions for non-institutionalised cooperation and the conditions for institutionalised cooperation with joint control.

The judgement of the CJEU

As for the exception of institutionalised cooperation with joint control, the CJEU rules that this exception does not apply. Things go wrong because of condition of joint control. To be able to use this exception to the obligation to invite tenders, the contracting authorities wishing to award a contract to the controlled legal person must exercise joint control over that legal person. This means that they must actually *participate in* the decision-making bodies of the controlled legal person. This means that *both*

cooperating contracting authorities must act as members of the decision-making bodies, representing the contracting authority *itself*. Thus, if only one of the participating contracting authorities is a member of a decision-making body of the controlled legal person, the requirement is not met.

This was the case in the present case, as SLSP did not have any representative on Igretec's board of directors. Igretec's board of directors did include a municipal councillor who was also a member of SLSP's board of directors, but on Igretec's board of directors, he only represented the Farciennes municipality. So for SLSP itself, representation was missing.

The CJEU further held that Igretec's participation in a public contract for the implementation of the green district project could not fall under the exception of non-institutionalised cooperation. It is true that Igretec performs its tasks in the context of cooperation between SLSP and the municipality of Farciennes to assist them in the implementation of their joint project, but the realisation of this project is not an objective pursued by Igretec itself. This means that the requirement that the cooperation be aimed at achieving objectives *common* to all contracting authorities is not met.

Conclusion

This interpretation of the CJEU confirms that the conditions of Section 2.24b of the Public Procurement Act concerning joint control by contracting authorities over the legal entity to which they wish to award a contract directly cannot be met indirectly. It also confirms that the concept of 'objectives common to all contracting authorities' has a decisive role in the exception of Section 2.24c Public Procurement Act. Achieving objectives common only to other contracting authorities is insufficient.

Would you like to know more about the CJEU's interpretation of cooperation between contracting authorities as an exception to the obligation to invite tenders ? Then also read the Legal Update ['European Court rules on public-public cooperation between contracting authorities'](#) (in Dutch only) and the Legal Update ['European Court rules on public-public cooperation between contracting authorities in the context of software \(further development\)'](#) (in Dutch only) or contact one of our specialists. Our specialists are fluent in English and will be happy to assist you.

This is a Legal Update by Anne Kusters.

For more information:

Anne Kusters
+31 30 25 95 572
annekusters@vbk.nl