"Who's Afraid to Cooperate?": CJEU Adopts Strict View on Non-Institutionalised Cooperation

Annotation of the Judgement of the Court (Fourth Chamber) of 28 May 2020 in Case C-796/18, *Informatikgesellschaft für Software-Entwicklung (ISE) mbH v Stadt Köln* & of the Judgement of the Court (Ninth Chamber) of 4 June 2020 in Case C-429/19, *Remondis GmbH v Abfallzweckverband Rhein-Mosel-Eifel.*

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I. Introduction

One of the innovations in Council and Parliament Directive 2014/24/EU of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014][1] (hereinafter: the Directive) was the codification of exemptions from European public procurement law developed by the Court of Justice of the European Union (hereinafter: CJEU or the Court) in several judgements. One of these exemptions is the in-house exemption, which was developed following the Court's *Teckal* judgement of 18 November 1999.[2] Another one relates to non-institutionalised or horizontal cooperation, which was consecrated in the *Commission v Germany* judgement of 9 June 2009.[3] The European Commission envisaged that, by clarifying the scope of European public procurement law, public-public cooperation in procurement could further develop.[4] Both exemptions were incorporated in Article 12 of the Public Procurement Directive as a result. These provisions, however, are not an exact codification of the pre-existing case law.[5]

In Spring 2020, six years after the Directive came into force, the CJEU had the opportunity to render two judgements on the subject of Article 12(4) of the Directive for the first time.[6] This provision consolidates the exemption for non-institutionalised cooperation and is formulated as follows:

> *"A contract concluded exclusively between two or more contracting authorities shall fall outside the scope of this Directive where all of the following conditions are fulfilled:*
> *(a) 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;*
> *(b) the implementation of that 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."*

The judgements discussed in this annotation (hereinafter referred to as the *ISE* judgement and the *Remondis* judgement) are a first step to gaining further insight into the consequences of the

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[1] OJ L94/65.

[2] Case C-107/98.

[3] Case C-480/06.

[4] Commission, 'Commission Staff Working Paper Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council on Public Procurement and the Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal sectors' SEC (2011) 1585 final, 45.

[5] Willem A Janssen, 'The Institutionalised and Non-Institutionalised Exemptions from EU Public Procurement Law: Towards a More Coherent Approach' (2014) 10 Utrecht Law Rev. 168, 179.

[6] Case C-796/18 *Informatikgesellschaft für Software-Entwicklung (ISE) mbH v Stadt Köln* [2020] (ECJ 28 May 2020); Case C-429/19 *Remondis GmbH v Abfallzweckverband Rhein-Mosel-Eifel* [2020] (ECJ 4 June 2020).

exemptions' codification.[7] In order to understand the judgements' exact contribution to the interpretation of Article 12(4), we will first compare the wording of the conditions therein with that of the case law on which it is based (II). In a next step, we will discuss the clarifications brought by the annotated judgements (III), followed by an evaluation of the legislature's and Court's take on the exemptions related to cooperation between public entities (IV).

II. Article 12(4) of Directive 2014/24/EU and its Underlying Case Law

Even though the foundations for the exemption of non-institutionalised cooperation were laid in the often-discussed case of *Commission v Germany*[8] (2009), it was in *Azienda*[9] that the CJEU more clearly defined the general conditions of this doctrine. In this judgement, the Court clearly distinguished between in-house procurement, referring to its *Teckal* judgement[10] and what it labelled as "contracts which establish cooperation between public entities with the aim of ensuring that a public task that they all have to perform is carried out".[11] This definition already contained a first condition for the exemption to apply: the contract would have to be aimed at carrying out *a public task that was common to the parties*.

In terms of the other conditions that have to be fulfilled, the CJEU pointed out that "*European Union rules on public procurement are not applicable in so far as, in addition,*

> *(1) such contracts are concluded exclusively by public entities, without the participation of a private party,*
> *(2) no private provider of services is placed in a position of advantage vis-à-vis competitors and*
> *(3) implementation of that cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest*".[12]

The Court explained that these criteria were cumulative.[13]

At the end of this case note, a table compares *Azienda* and Article 12(4) of the Directive.

A closer look at the text of Article 12(4) reveals that its introduction already entrenches a first condition: the exemption only applies to contracts concluded between two or more contracting authorities. This condition implies that private participation is excluded: only contacting authorities can be parties.[14] Hence, it is closely linked to the condition distinguished in *Azienda* under (1).[15] This judge-made condition however, was generally taken to mean that *direct* private participation in the cooperation itself was prohibited, as well as *private capital participation* in the contracting authority.[16] Recital 32 *in fine* now clarifies that the conditions in Article 12 (4) do not

[7] It should be noted that the *ISE* judgement was not yet available in English at the time this annotation was written. The wording used by the authors may differ from the wording ultimately used in the English version of the judgement.
[8] Case C-480/06 *Commission v Germany* [2009] ECR I-4747.
[9] Case C-159/11 *Azienda Sanitaria Locale di Lecce and Università del Salento v Ordine degli Ingegneri della Provincia di Lecce and Others* (ECJ 19 December 2012).
[10] Case C-107/98 *Teckal Srl v Comune di Viano en Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia* (ECJ 18 November 1999).
[11] Paras 31-34.
[12] Para 35, numbers added by the authors.
[13] Para 36.
[14] Sue Arrowsmith, The Law of Public and Utilities Procurement Volume 1 (Sweet & Maxwell 2014) 527.
[15] It would have been preferable for the Court to speak of 'contracting authorities' instead of 'public entities'.
[16] Commission, 'Commission Staff Working Paper Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council on Public Procurement and the Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal sectors' SEC(2011) 1169, 12; Ioan Baciu and Dacian C Dragos, 'Horizontal In-House vs. Vertical In-House Transactions and Public-Public Cooperation' (2015) 4 EPPPL 254, 262; Friederich L. Hausmann & Georg Queisner, 'In-House Contracts and Inter-Municipal Cooperation- Exceptions from the European Union Procurement Law Should be Applied

preclude contracting authorities with private capital participation from joining a cooperation agreement.

The Directive's condition under (a) is in turn inspired by the basic condition put forward in *Azienda* and 'hidden' in the Court's definition of the exemption, as explained above. The formulation, however, is somewhat different. Where the CJEU defined the contracts' purpose as 'ensuring that a public task that *they all have to perform* is carried out', the Directive refers to 'ensuring that *public services they have to perform* are provided with a view of achieving *objectives they have in common*'.[17] Whereas we can assume that 'public task' and 'public service' are synonyms in this respect, the Directive emphasises the need for common objectives, while the Court seems to point at a common public service / task.

Article 12(4) under (b) then corresponds to the *Azienda* condition under (3) (with a slight variance in formulation, which does not seem to imply a different purport). The cooperation as a whole must be influenced by considerations of public interest alone, including potential financial transactions between contracting authorities.[18] If the contracting authorities (or one of them) wish(es) to act with a commercial mindset, i.e. as a 'profit-oriented supplier'[19], the exemption will not apply, even though this mindset may be hard to prove and it remains unclear which indicators could lead to such a conclusion.[20]

Article 12(4)(c) does not appear in the Court's enumeration of conditions. The 20% threshold was the subject of unfavourable comments.[21] Even though the proposal, nor any other preparatory documents explicitly state the purpose of this condition, it is clear that the legislature wished to avoid a distortion of the competition.[22] This new condition must be viewed as the counterpart of another innovation in the procurement directive, namely the fact that direct private capital investments in contracting authorities are no longer a reason not to subsume a cooperation under the exemption (see *supra*). This change could grant private stakeholders a competitive advantage over private competitors, and the new threshold should prevent adverse effects.[23] The aim is to prevent that the 'joint ventures' resulting from cooperation would engage in business activities.[24]

This rule is easily mistaken for the counterpart of the 80% threshold in the institutionalised cooperation exemption. For the 'in-house' exemption to apply, one of the conditions is that the controlled entity carries out 80% or more of its activities for the controlling authority.[25] This threshold only takes into account the share of activities executed for the controlling entity, but has no regard for the situation on the relevant market as a whole and is as such inspired by considerations of operational or functional proximity to the contracting authority and its services,

with Caution', (2013) 8 EPPPL 231, 233; Janicke Wiggen, 'Directive 2014/24/EU: the new provision on cooperation in the public sector' (2014) 3 PPLR 83, 89.

[17] Emphasis added by the authors.

[18] Recital 33 *in fine*.

[19] Friederich L. Hausmann & Georg Queisner, 'In-House Contracts and Inter-Municipal Cooperation- Exceptions from the European Union Procurement Law Should be Applied with Caution', (2013) 8 EPPPL 231, 237.

[20] See also Ivo Pilving, 'Requirements for Horizontal Cooperation between Contracting Authorities' (2018) 2 *EPL* 255, 274-276. See also the conclusion at p. 279: "It is prohibited for participating public entities to use cooperation agreements for the purpose of making a profit, i.e. for bolstering their own budgets."

[21] Martin Burgi and Frauke Koch, 'In-House Procurement and Horizontal Cooperation between Public Authorities: An Evaluation of Article 11 of the Commission's Proposal for a Public Procurement Directive from a German Perspective' (2012) 7 EPPPL 86, 90.

[22] Christophe Dubois and Patrick Thiel, 'De quelques modifications pratiques dans la commande publique en 2017', (2017) 3 Revue de droit communal 4, 11.

[23] Janicke Wiggen, 'Directive 2014/24/EU: the new provision on cooperation in the public sector' (2014) 3 PPLR 83, 89.

[24] Ivo Pilving, 'Requirements for Horizontal Cooperation between Contracting Authorities' (2018) 2 *EPL* 255, 255.

[25] Art. 12(1)b) of Directive 2014/24/EU.

rather than by considerations of competition.[26] The non-institutionalised cooperation threshold of 20% relates only to the situation on the open market, in free competition, without regard to the situation of the cooperating authorities as such.

The Court's requirement in *Azienda* under (2), i.e. that no private provider of services is placed in a position of advantage vis-à-vis competitors, is in turn not reflected in the legislative provision. However, the condition still seems to apply, as it resurfaces in recital 31 of the Directive's preamble.

The above seems to suggest that the Directive is more liberal towards non-institutionalised cooperation than the Court's pre-existing case law.[27] In the annotated judgements, however, and especially in *Remondis*, the Court shows that it is not prepared to give too liberal an interpretation to the conditions set forward in article 12(4) of the Directive.

III. The Annotated Judgements' Contribution

1. The *ISE* Judgement

ISE concerned a preliminary ruling request by the German *Oberlandesgericht Düsseldorf*. The Land Berlin had bought software from a private company to manage interventions by its fire brigades.[28] The Land subsequently concluded two contracts with the City of Köln: one covering the transfer, free of charge, of the software to the City; the other organising the cooperation between the two public entities to further develop the software.[29] German law did not deem the free transfer of software between government entities that are not in competition with each other as such to fall under the scope of public procurement law.
ISE, a company that develops and sells software aimed at government entities with security-related tasks requested both contracts to be nullified. It argued that the commitment of the City of Köln to further develop and improve the software would grant the Land a considerable financial advantage, which would turn the contract into a contract for pecuniary interest.[30]

The referring court requests the CJEU to answer three preliminary questions.

The first question invited the CJEU to clarify the relationship between the notion of a 'contract' within the meaning of Article 12(4) of the Directive on the one hand and that of a 'public contract' within the meaning of in Article 2(1)5 on the other hand. The referring court wished to learn whether the contract in question could be qualified under the first or rather under the second notion. In a first step, the Court clarified that 'contract' and 'public contract' are synonyms in this context. In a second step, it examined whether the contract qualified as a 'public contract'. Without that qualification, there is naturally no need to have recourse to the exemption of Article 12(4).[31] Given the definition in Article 2(5) of the Directive, this requires a 'pecuniary interest', meaning that the contracting authority must enjoy a performance which yields direct economic benefit.[32] Even though the agreed transfer was in this case free of charge, the long duration of the contract meant that, at some point, the software would have to be updated and consecutively shared with the other party, meaning that the City of Köln's performance under the contract seemed certain. Hence, either party had a financial interest. Assuming that both the transfer and the cooperation

[26] The additional condition under art. 12(1)(c), excluding direct private capital participation in the controlled legal person, *is* on the other hand meant to avoid a distortion of competition.
[27] In that sense: Ivo Pilving, 'Requirements for Horizontal Cooperation between Contracting Authorities' (2018) 2 *EPL* 255, 255.
[28] Para 11.
[29] Paras 12-14.
[30] Para 16.
[31] The CJEU clarified that the contract should be reciprocal (ECJ 21 December 2016, C-51/15, Remondis, 43).
[32] Para 40 and the references therein.

agreement were indeed of a reciprocal nature, these agreements had to be considered contracts for pecuniary interest and subsequently public contracts.

The second question related to the scope of the word 'cooperation': is it necessary for the public services (as referred to in Article 12 (4) a)) to be carried out jointly, or does it suffice to jointly perform other tasks, only indirectly linked to the public service tasks? The Court ruled that a cooperation concerning ancillary activities, carried out by every party to the cooperation, even individually, can be considered a cooperation in the sense of Article 12 (4), as long as these activities accrue to the actual act of performing the public service task. In the case law prior to the Directive, the Court had already consecrated the possibility that activities which were not in and of themselves public tasks, but which were directly related to these tasks, could form the subject of such a cooperation.[33] This did not provide the legal world with an answer as to whether these ancillary tasks could be the *sole* subject of the cooperation. This has now been acknowledged, under the same condition of accruing to the performance of the public service task.

With its third question, the referring court wished to learn if Article 12 (4) implies an unwritten principle which prohibits a private operator's advantaged position vis-à-vis competitors. The Court held that no private operator may attain a privileged position vis-à-vis competitors because of the cooperation between public entities. As we explained earlier, this condition was already put forward in *Azienda*, but not codified in Article 12 (4). It flows logically from the rationales behind public procurement law, as referred to in recital 31 of the Directive, however. In the *ISE* case, the city of Köln and the land of Berlin needed to invest to modify, maintain and develop the acquired software, to guarantee its usefulness for the public service task. ISE argued that the initial developer, being the only one with access to the source code and supplementary knowledge, had a considerable advantage. The Court urged the referring court to ensure that the authorities grant competitors access to the necessary information to safeguard competition: in this case, to the source code and other indispensable information.

2. The *Remondis* Judgement

Remondis initiated from a request for a preliminary ruling by the *Oberlandesgericht Koblenz*. In this case, the districts of Mayen-Coblenz and Cochem-Zell and the town of Coblenz had entrusted the performance of their public service task of waste disposal to an association controlled by them. This association in turn tasked private undertakings to dispose of 80% of the waste. The remaining 20% was treated by the district of Neuwied under an agreement concluded between Neuwied and the association, which included a fee to be paid by the association to Neuwied for the waste's treatment.[34] A private company active in the waste treatment sector, viewed this as an unlawful award of a public contract and sought legal redress. The referring court's request for a preliminary ruling concerned the concept of 'cooperation' as referred to in Article 12 (4) of the Directive. The CJEU ruled that there is no 'cooperation' within the meaning of that Article when a contracting authority commissions another contracting authority to carry out a public interest task for a fee.

That the notion of 'cooperation' has a specific meaning in the context of the exemption referred to as 'non-institutionalised (horizontal) cooperation' was already announced by the Court's *Piepenbrock* judgement.[35] This concerned a case in which an association of local authorities and another public authority wished to enter into a contract, thus assigning the task of cleaning the first party's buildings to the second party. The Court ruled that the contract did not establish a

[33] Namely in *Commission v Germany* para 41, as explained in Opinion of Advocate General Campos Sánchez-Bordona of 29 January 2020 to case C-796/18, para 80.
[34] Paras 6-8.
[35] Case C-386/11 *Piepenbrock* (ECJ 13 June 2013); Charles M Clarke, 'The CJEU's Evolving Interpretation of In-House Arrangements under the EU Public Procurement Rules: A Functional or Formal Approach' (2015) 10 EPPPL 111, 117-118.

cooperation between the contracting public entities with a view to carrying out a public task that both of them had to perform. In its actual reply to the preliminary question, the Court referred to the fact that the contract consisted of one public entity assigning to another a task, while reserving the power to supervise the proper execution of that task, in return for financial compensation intended to correspond to the costs incurred in the performance of the task. The fact that one party only contributed via a financial compensation and nothing else, seemed to lead the Court to the conclusion that there was no cooperation. *Remondis* confirms as much. Since the agreement allowed for a third party's services to help perform the task at hand, this could have moreover put a private entity in an advantageous position vis-à-vis competitors.

As Arrowsmith notes, the exemption of non-institutionalised cooperation seems to imply that there is "some feature of the arrangement to distinguish it from a simple arrangement for one party to supply to another".[36] This seems not only to exclude arrangements in which one party simply[37] compensates the other for its services via a payment[38], but also those in which one party performs a service for another *in return* for another service. The idea seems to be that 'cooperation' requires something extra, being a common objective to which both performances contribute. In other words: the obligations taken on by both parties should each play a role in attaining a common good. If the outcome of their respective obligations is totally unrelated, there is no cooperation within the meaning of the exemption. This would be the case if, for instance, a contracting authority responsible for day-care (for children) would, as a result of a contract, organise day-care for another contracting authority's employees and, in return, the employees of the former would get free access to the (public) museums under the responsibility of the latter. In this scenario, the parties offer services to each other, not to combine forces and to realise a goal of public interest that they are supposed to pursue, but merely to benefit from the other party's service. In other words: their performance is a substitute for a mere payment and could just as well be replaced by such a payment; there is no added value in the choice for that public authority as a contracting partner as such.

IV. Evaluation of the Legislature's and Court's Take on Non-Institutionalised Cooperation

In the *ISE* case, the CJEU gives its first interpretation of the non-institutionalised cooperation's provision in the Directive. This judgement will probably not lead to intense legal debates or much controversy; its main importance lies in the clarification of the link between the agreement concluded between the parties and their respective public service tasks. In sum and taking into account the Advocate General's Opinion[39] – which is somewhat more systematic in its reasoning - *ISE* teaches us that:

- it is not required that the contracting authorities involved in the cooperation deliver a public service task jointly (e.g. share a fire brigade which serves their territories jointly);
- it is, on the contrary, enough that they have a common objective which is linked to a public service task that they have to perform (but thus not necessarily together, even though the Advocate-General admits that recital 33 refers still refers to 'the joint provision of public services'[40]);
- the activity that is the actual subject of the cooperation does not have to involve the actual provision of the public service for which both parties are responsible, but can also be an

[36] Sue Arrowsmith, The Law of Public and Utilities Procurement Volume 1 (Sweet & Maxwell 2014) 522.
[37] See *infra*, where we will argue that this is or should be different if both realise economies of scale via this arrangement.
[38] Or: the exemption in principle covers acquisition of works, supplies or services, but most examples in practice seem to concern services.
[39] Opinion of Advocate General Campos Sánchez-Bordona of 29 January 2020 to case C-796/18, ECLI:EU:C:2020:47.
[40] See para 76 of the opinion: according to the Advocate General, this "probably means 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".

ancillary activity in support of that public service (e.g. developing software to manage interventions by fire brigades).[41] The Advocate General emphasises, however, that this flexible approach has its limits:

> *"It goes without saying that the requirement that such cooperation should be directed at the provision of public services which the parties are responsible for providing still stands. 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."*[42]

One question that seems to remain open is whether the public service tasks that each party is responsible for and to which the cooperation contributes have to be identical. What if, for instance, a public body responsible for food safety and another for animal welfare develop an information campaign together not to consume bush meat (with one e.g. developing leaflets and the other a television spot)? They would have a common goal, but are as such responsible for different public tasks. There seems to be no reason why this type of cooperation should be excluded. Can this perhaps be derived from the sentence in recital 33 of the preamble to the Directive stating that "[t]he services provided by the various participating authorities need not necessarily be identical; they might also be complementary"? The Advocate General in *ISE* remarks that Article 12(4)a *"shows that that commonality now extends to the objectives, not to a particular public service task"*.[43] The CJEU agrees that the authorities must not carry out the same tasks in the framework of the cooperation, but does not clarify whether their proper public service tasks may differ. In *Azienda*, it referred to a public task that *all* the parties to the agreement have to perform, which seems to suggest a common task. The 'all' is not resumed in the Directive.

Remondis in turn offers more insight into the notion of 'cooperation' and is in that sense enlightening. It begs the question, however, of whether EU law's approach to exempting public-public cooperation from the scope of public procurement law is still coherent.

As confirmed by the European legislature in the Directive's preamble[44], public contracts between contracting authorities in principle fall *within* the scope of EU public procurement law. This principle implies that, if contracting authorities conclude a contract for pecuniary reasons that involves the acquisition of works, supplies or services by (at least) one of them, that contract is governed by the applicable national legislation transposing the Directive. There may, however, be reasons to mitigate that principle and allowing for cooperation between public authorities is definitely one of them. The question arises whether the strict approach to the exemption enshrined in Article 12(4) of the Directive is justified and logical in the light of the other form of cooperation that EU law exempts from the procurement rules, being what we shall call 'cooperative in-house'.

In its simplest form, an in-house construction consists of one controlling entity only. This entity alone exercises over a legal person governed by private or public law a control which is similar to which it exercises over its own departments (i.e. the situation governed by Article 12(1)). This is in-house in its 'pure' form: it is as if the task were performed by or within the procuring entity itself. In-house, however, can also take a cooperative form: contracting authorities may jointly exercise a similar control over a legal person. In that case, a public contract awarded to the controlled entity by either one of the controlling entities falls outside the scope of the Directive.[45] The basis for that possibility was found in the CJEU's judgement in *Coditel Brabant*, where the

[41] Para 78 of the opinion.
[42] Para 84 of the opinion.
[43] Para 71 of the opinion.
[44] Recital 31.
[45] Article 12(3) Directive 2014/24/EU.

Court ruled that the "*possibility for public authorities to use their own resources to perform the public interest tasks conferred on them may be exercised in cooperation with other public authorities*".[46] This trail of thought was later referred to in the first judgement concerning non-institutionalised cooperation in 2009.[47]

In its landmark judgement on non-institutionalised cooperation *Commission v Germany*, the CJEU stated that Community law did not require public bodies to use any particular legal form to carry out jointly their public service tasks. It did so in reply to a statement made by the Commission that, had the cooperation at issue taken place by means of a body for inter-municipal cooperation (i.e. a body to which the various local authorities would have entrusted performance of the task of waste disposal), it would have accepted that the rules of public procurement had not been applicable.[48] By discarding that line of reasoning, the Court seems to indicate that EU law is neutral towards the choice of instrument for cooperation: both cooperative in-house and cooperation without the joint creation and control of a public body are facilitated. This was also confirmed by the European legislature in the preamble to the Directive.[49]

Still, EU law in practice treats both forms of cooperation differently.

Firstly, it should be noted that, as we see it, the idea behind allowing for cooperative in-house as an exemption seems quite distinct from the original idea behind simple or 'pure' in-house. This is because there is no restriction as to the number of controlling entities. The Directive specifies that the decision-making bodies of the controlled entity should be composed of representatives of all participating contracting authorities and the contracting authorities should be able to jointly exert influence over the strategic objectives and significant decisions of the controlled legal person. Viewed from the perspective of a single controlling contracting authority, however, the degree of influence that it is able to exert may be very limited. Hence, the control relationship is very 'thin'. The original idea behind an in-house construction, i.e. construction 'as if the task were performed by or within the procuring entity itself' seems far off.

Hence, the reason to also include a construction in which multiple public bodies control a single entity, seems to be that EU law wishes to facilitate cooperation, i.e. the bundling of forces in order to organise public service provision in an optimal way. That cooperation allows public authorities to pool resources (money, personnel, infrastructure, equipment etc.), but typically via an initial financial contribution by all the participants or shareholders. After that, the newly established legal person will start functioning and the joint public service task (or the ancillary task common to all parties' public service obligations) will be performed by that legal person. Hence, cooperative in-house allows for economies of scale: building one waste incinerator and letting it function at full capacity for five municipalities is, for instance, much more efficient than building five that each only function once a week. The same economies of scale can, however, be reached via non-institutionalised cooperation, where one entity exploits the incinerator and the others use it to process their waste and pay a compensation *pro rata*. That, however, is precisely a form of non-institutionalised cooperation that EU law currently does not seem to allow for, given the Court's ruling in *Remondis*. This is the case even if the public authority receiving the payments does not make any profit whatsoever. In this form of cooperation, the contribution of the other public authorities (not being the ones managing the incinerator) takes the form of 'guaranteeing a market'[50] only. There seems to be no reasonable justification why this is allowed when contracting authorities create a separate legal person and not when *one of them* fulfils the need that they are all facing in kind.

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[46] Case C-324/07 *Coditel Brabant* [2008] ECR I-8457, para 49.
[47] Case C-480/06 *Commission v Germany* [2009] ECR I-4747, para 35.
[48] Paras 46-47.
[49] Recital 33: "Contracting authorities should be able to choose to provide jointly their public services by way of cooperation without being obliged to use any particular legal form."
[50] As phrased by Sue Arrowsmith, The Law of Public and Utilities Procurement Volume 1 (Sweet & Maxwell 2014) 523.

Not allowing for this type of cooperation is even more difficult to understand considering that the Directive also excludes so-called 'horizontal in-house' arrangements from its scope. Pursuant to Article 12(2), the in-house exemption also applies where a controlled legal person awards a contract to another legal person controlled by the same contracting authority.[51] Contracting authorities that are themselves not in a vertical relationship, i.e. a relationship characterised by a control chain, can thus award each other contracts, only because they share the same controlling authority, even if the awardee is in that particular case inspired by purely financial considerations (i.e. making a profit). If those same contracting authorities are not under such a 'joint command', however, one is not allowed merely to remunerate the other for a service that allows them both to realise economies of scale, even if that is their only intention and, hence, both of them have only the public interest in mind. It is hard to see the logic in these choices.

As explained above, cooperation requires *more* than a contract in which one contracting authority pays another for its services: that as such is not enough, since it does not ensure that both will strive for a common good. That does not mean, however, that cooperation can *never* involve a party paying another party for its services and having no other obligation under the contract. As long as that arrangement allows them both to realise economies of scale in the pursuit of a common goal, there seems to be no reason to treat these contracts differently than those in which all parties actually provide a service.[52] Hence, whether or not there is *cooperation* in the meaning of the Directive, should be evaluated in the light of the result achieved by the arrangement, not in the light of the nature of the performances delivered by the parties. The preamble's statement that not every party to the cooperation should perform main contractual obligations and its reference to financial transactions between cooperating authorities, seems to strengthen this view.[53] There seems to be no reason – contrary to what the European Commission has proclaimed[54] – why one party's contribution could not be limited to increasing demand. In that respect, the Court's ruling in *Remondis* can be criticised.[55]

Remarkably, the Court explains in *Remondis* that a *true* cooperation between public authorities is necessarily the result of a process of cooperation, thus seemingly envisaging a pre-contractual stage in which parties need to participate. Parties must at this point jointly establish their needs and a plan to fulfil these needs. The situation in which one contracting authority makes this analysis and then recruits a suitable cooperation partner is not regarded as *true* cooperation.[56] This condition could, in our opinion, however, be fulfilled when the parties convene from the start that one party's participation in the cooperation consists of enlarging the demand side. Moreover, the added value of this requirement of a "joint establishment of needs" is questionable: there seems to be no reason why a cooperation could not emerge in a situation in which one contracting authority e.g. has infrastructure in place and is confronted with an oversupply with which it can fulfil the needs of another contracting authority, as long as all the other conditions of article 12(4) of the Directive have been fulfilled.

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[51] Provided that there is no direct private capital participation in the legal person being awarded the public contract with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

[52] In the same sense: Ivo Pilving, 'Requirements for Horizontal Cooperation between Contracting Authorities' (2018) 2 *EPL* 255, 278.

[53] Recital 33.

[54] Commission, 'Commission Staff Working Paper Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council on Public Procurement and the Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal sectors' SEC(2011) 1169, 13.

[55] The Court could have considered the economies of scale realised by the arrangement between the parties. The fact that there was a private party involved that could have benefited, may have played an important role here, however, even though this is as such not related to the question whether are not there is 'cooperation', but to another condition, i.e. that a private operator cannot be put in an advantaged position vis-à-vis its competitors (see *ISE*).

[56] Para 33.

The Court clarifies the requirement of cooperation resulting from a culmination of a process of cooperation by envisioning a pre-contractual stage as explained above. This clarification does not convince. Imagine the situation where one authority exploits an incinerator, but only uses part of its capacity. After some time, another authority wishes to use this abundant capacity in exchange for remuneration. It would be inefficient and illogical to preclude them from cooperating in the pursuit of a common goal. One could also wonder whether a new party could join an existing cooperation, as this new party would not have been involved in the original cooperation agreement, nor in the cooperation leading up to this contract.

V. Concluding Remarks

The annotated judgements offer welcome clarifications to different pieces of the puzzle that is non-institutionalised cooperation. *ISE* is a great step forward, since it confirms that the public service task that the parties perform and to which the cooperation contributes, does not have to be performed *jointly* or *together*. Whether that also means that the nature of the parties' respective public service tasks can differ (and to what extent) remains unclear. What is clear, however, is that the activity that is the actual subject of the cooperation can be ancillary in nature, meaning that it does not have to involve the provision of a public service in itself, but can merely provide necessary support for that service.

Remondis, on the other hand, gives an interpretation to the notion of 'cooperation' which seems unnecessarily strict. The CJEU seems to rule that arrangements in which one contracting authority merely pays another can never qualify as a cooperation. We have criticised this view for being unnecessarily strict and incoherent with the in-house exemption.

A condition for non-institutionalised cooperation that will probably still need further clarification in the future is the one enshrined in Article 12(4)(b) Directive. In *Commission v Germany* (case C-480/06), the Court explained its ruling that the cooperation that was the subject of the preliminary ruling (emphasis added by the authors):

> *"does not undermine the principal objective of the Community rules on public procurement, that is, the free movement of services and the opening-up of undistorted competition in all the Member States, where implementation of that cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest and the principle of equal treatment of the persons concerned, referred to in Directive 92/50, is respected, so that no private undertaking is placed in a position of advantage vis-à-vis competitors"*.

If a contract between public authorities distorts competition, it should not have been concluded without following the rules on public procurement. To determine whether are not that is the case, the CJEU first and foremost looks at what the contract pursues: the exemption only covers contracts pursuing objectives in the public interest. This seems to mean that, as soon as one of the parties concludes the contract with something else in mind than furthering the public interest in mind, meaning that it is (also) driven by economic considerations, the contract should no longer be exempt. A contracting party pursuing an economic benefit, should not be treated any differently than others seeking the same type of benefit, and should hence be subject to public procurement rules. Only if all contracting parties are free of such economic considerations, there is a sufficient reason to consider their contract excluded from the rules of procurement law. As yet, however, it is still unclear what the Court would consider to be possible indicators in this respect. Across member states, the concept of considerations of public interest is interpreted differently.[57]

[57] Willem A Janssen, 'The Institutionalised and Non-Institutionalised Exemptions from EU Public Procurement Law: Towards a More Coherent Approach' (2014) 10 Utrecht Law Rev. 168, 180.

The CJEU's case law must now take the codification in the Directive into consideration, but the Court clearly still wishes to leave its own mark on the non-institutionalised cooperation. In times in which many local authorities struggle to make ends meet, at least EU law should offer them clarity on the conditions under which they can combine efforts and preclude that possibility only if it would undermine the objectives behind public procurement law.

Table comparing the Azienda-conditions and the current legislation

Pre-existing case law (*Commission v Germany* and *Azienda*)	**Article 12 (4) Directive 2014/24/EU**
(Contracts which establish cooperation between public entities with the aim of ensuring that a public task that they all have to perform is carried out (= definition)	(a) 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
(1) Such contracts are concluded exclusively by public entities, without the participation of a private party	Introduction: A contract concluded exclusively between two or more contracting authorities
	Recital 32 *in fine*: It should also be clarified that contracting authorities such as bodies governed by public law, that may have private capital participation, should be in a position to avail themselves of the exemption for horizontal cooperation. Consequently, where all other conditions in relation to horizontal cooperation are met, the horizontal cooperation exemption should extend to such contracting authorities where the contract is concluded exclusively between contracting authorities.
(2) No private provider of services is placed in a position of advantage vis-à-vis competitors	Recital 31 *in fine*: It should be ensured that any exempted public-public cooperation does not result in a distortion of competition in relation to private economic operators in so far as it places a private provider of services in a position of advantage vis-à-vis its competitors.
(3) Implementation of that cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest	(b) the implementation of that cooperation is governed solely by considerations relating to the public interest
	(c) the participating contracting authorities perform on the open market less than 20 % of the activities concerned by the cooperation