Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

28 May 2020*

(Reference for a preliminary ruling – Public procurement – Directive 2014/24/EU – Article 2(1)(5) – Article 12(4) – Article 18(1) – Concept of 'contract for pecuniary interest' – Contract between two contracting authorities pursuing a common objective in the public interest – Transfer of software for the coordination of fire service operations – No financial consideration – Link with a cooperation agreement under which supplementary modules of that software are made mutually available free of charge – Principle of equal treatment – Prohibition on placing a private undertaking in a position of advantage vis-à-vis its competitors)

In Case C-796/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany), made by decision of 28 November 2018, received at the Court on 19 December 2018, in the proceedings

Informatikgesellschaft für Software-Entwicklung (ISE) mbH

v

Stadt Köln,

intervener:

Land Berlin,

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, K. Lenaerts, President of the Court, acting as Judge of the Fourth Chamber, S. Rodin, D. Šváby (Rapporteur) and N. Piçarra, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: D. Dittert, Head of Unit,

having regard to the written procedure and further to the hearing on 6 November 2019,

after considering the observations submitted on behalf of:

– Informatikgesellschaft für Software-Entwicklung (ISE) mbH, by Bernhard Stolz, Rechtsanwalt,

– Stadt Köln, by K. van de Sande and U. Jasper, Rechtsanwältinnen,

* Language of the case: German.

– the Austrian Government, by J. Schmoll and by G. Hesse and M. Fruhmann, acting as Agents,

– the European Commission, by L. Haasbeek, M. Noll-Ehlers and P. Ondrůšek, acting as agents,

after hearing the Opinion of the Advocate General at the sitting on 29 January 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(1)(5) and Article 12(4) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

2 The request has been made in proceedings between Informatikgesellschaft für Software-Entwicklung (ISE) mbH and Stadt Köln (City of Cologne, Germany) concerning two contracts concluded between the City of Cologne and Land Berlin (*Land* of Berlin, Germany) which provide, respectively, for the transfer of fire service operations management software to the City of Cologne free of charge and for cooperation with a view to the development of that software.

Legal context

EU law

3 Recitals 31 and 33 of Directive 2014/24 state:

‘(31) There is considerable legal uncertainty as to how far contracts concluded between entities in the public sector should be covered by public procurement rules. The relevant case-law of the Court of Justice … is interpreted differently between Member States and even between contracting authorities. It is therefore necessary to clarify in which cases contracts concluded within the public sector are not subject to the application of public procurement rules.

Such clarification should be guided by the principles set out in the relevant case-law of the Court of Justice … The sole fact that both parties to an agreement are themselves public authorities does not as such rule out the application of procurement rules. However, the application of public procurement rules should not interfere with the freedom of public authorities to perform the public service tasks conferred on them by using their own resources, which includes the possibility of cooperation with other public authorities.

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.

…

(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. Such cooperation might cover all types of activities related to the performance of services and responsibilities assigned to or assumed by the participating authorities, such as mandatory or voluntary tasks of local or regional authorities or services conferred upon specific bodies by public law. The services provided by the various participating authorities need not necessarily be identical; they might also be complementary.

Contracts for the joint provision of public services should not be subject to the application of the rules set out in this Directive provided that they are concluded exclusively between contracting authorities, that the implementation of that cooperation is governed solely by considerations 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 those 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. In addition, the implementation of the cooperation, including any financial transfers between the participating contracting authorities, should be governed solely by considerations relating to the public interest.'

4 Article 1 of that directive, entitled 'Subject matter and scope', provides in paragraph 1:

'This Directive establishes rules on the procedures for procurement by contracting authorities with respect to public contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 4.'

5 Article 2(1)(5) of the directive defines 'public contracts' as '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'.

6 Article 12 of Directive 2014/24, entitled 'Public contracts between entities within the public sector', provides in paragraph 4:

'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'.

7 Article 18 of the directive, which sets out the 'principles of procurement', provides in paragraph 1:

'Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.'

German law

8 Paragraph 103(1) of the Gesetz gegen Wettbewerbsbeschränkungen (Law against restrictions on competition) of 26 June 2013 (BGBl. 2013 I, p. 1750), in the version applicable to the dispute in the main proceedings ('the Law against restrictions on competition'), provides that public contracts are contracts for pecuniary interest concluded between contracting authorities and undertakings having as their object the supply of products, the execution of works or the provision of services.

9 Under the first sentence of Paragraph 106(1) of that Law, recourse may be had to the bodies responsible for reviewing the award of public contracts in the case of the award of public contracts whose value, exclusive of VAT, is estimated to be not less than the thresholds laid down.

10 Paragraph 108(6) of that Law provides that recourse may not be had to the bodies responsible for reviewing the award of public contracts in the case of contracts concluded exclusively between two or more contracting authorities where:

'1. 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,

2. the implementation of the cooperation referred to in paragraph 1 is governed solely by considerations relating to the public interest; and

3. the contracting authorities perform on the market less than 20% of the activities concerned by the cooperation referred to in paragraph 1.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

11 The *Land* of Berlin, which has the largest professional fire brigade in Germany, uses the 'IGNIS Plus' software which it acquired, under a contract, from Sopra Steria Consulting GmbH for the purpose of managing operations carried out by its fire services. The contract allows it, inter alia, to transfer that software to other safety authorities free of charge.

12 In Germany, under the 'Kiel' decisions of 1979, which established the principles for the exchange of software between public administrative authorities, the transfer of software by one public body to another free of charge is not regarded as a procurement procedure for which an invitation to tender must be issued. According to the principle of general reciprocity, software developments in respect of which commercialisation by public authorities is not permitted may be transferred between administrative authorities free of charge, since they are not in competition with one another.

13 On 10 September 2017, pursuant to those decisions, the City of Cologne and the *Land* of Berlin entered into a contract for the permanent transfer of the 'IGNIS Plus' software free of charge ('the software transfer contract'), which stipulates inter alia:

'1. Subject matter of the contract

The following provisions apply to the permanent transfer and use of the customised software "IGNIS Plus". The software provider holds the rights over this software.

The customised software "IGNIS Plus" is the software provider's operations management software for emergency calls, scheduling and operational tracking for activities of the fire service in firefighting, technical assistance, emergency rescue and disaster control. …

2. Nature and scope of performance

2.1. The software provider shall provide the software recipient with the customised software "IGNIS Plus" for the purpose of the agreements in the cooperation agreement.

…

4. Remuneration for transfer

The customised software "IGNIS Plus" is to be provided for use as operations management software free of charge. …'

14 On the same day, the City of Cologne and the *Land* of Berlin also entered into a cooperation agreement concerning that software ('the cooperation agreement'), with a view, inter alia, to adapting the software to the requirements of the partner and making it available to it by adding new technical functionalities in the form of 'supplementary add-on technical modules' to be provided to the cooperation partners free of charge.

15 The cooperation agreement provides in particular:

'Article 1 – Purpose of the willingness to cooperate

… The partners have decided to put in place an equal partnership entailing, if necessary, a readiness to compromise in order to adapt the software to each other's needs and to make it available to each other on a cooperative basis. …

Article 2 – Definition of the objective of the cooperation

The objective pursued by the cooperation partners is to implement the "IGNIS Plus" operations management software as a computer-aided dispatch system in the control centres of the fire service. The software system can be extended by further specialised functionalities in the form of modules and transferred to the other cooperation partners for them to use on a cost-neutral basis. …

…

Article 5 – Structure of the cooperation

… The base software shall be transferred on a cost-neutral basis. Supplementary add-on technical modules shall be provided to the cooperation partners on a cost-neutral basis.

The adaptation of the base software and the modules to individual processes must be independently commissioned and financed.

… The cooperation agreement is binding only together with the [software transfer contract] as a joint document.'

16 ISE, which develops and sells operations management software for safety authorities, submitted an application for review to the Vergabekammer Rheinland (Rhineland Public Procurement Board, Germany) with the aim of having the software transfer contract and the cooperation agreement declared to be ineffective on grounds of failure to comply with public procurement rules. According to ISE, the participation of the City of Cologne in the further development of the 'IGNIS Plus' software provided free of charge constitutes a sufficient economic advantage for the *Land* of Berlin, such that those contracts are for pecuniary interest.

17 By decision of 20 March 2018, the Vergabekammer Rheinland (Rhineland Public Procurement Board) dismissed the application for review as inadmissible on the ground that the contracts did not constitute public contracts because they are not for pecuniary interest. In particular, the cooperation at issue lacked the synallagmatic connection between performance and consideration.

18 ISE lodged an appeal against that decision before the referring court, the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany). It reaffirms that the cooperation agreement is a contract for pecuniary interest since the *Land* of Berlin sought to acquire an economic advantage by providing the software at issue in the main proceedings, the City of Cologne being obliged to make supplementary add-on software modules developed by it available to the *Land* of Berlin. ISE also complains that the Vergabekammer Rheinland (Rhineland Public Procurement Board) wrongly disregarded the fact that the procurement of the base software entailed the commissioning of the producer with follow-up contracts, as it alone would be able to adapt, support and maintain the software.

19 The City of Cologne contends that the decision of the Vergabekammer Rheinland (Rhineland Public Procurement Board) should be upheld and, furthermore, asserts that, were the cooperation agreement to be regarded as a contact for pecuniary interest, it would constitute cooperation between contracting authorities and therefore would not come within the scope of public procurement law under Paragraph 108(6) of the Law against restrictions on competition.

20 Since it has doubts as the validity of the decision of the Vergabekammer Rheinland (Rhineland Public Procurement Board), the referring court considers it necessary to refer questions to the Court concerning the interpretation of Directive 2014/24.

21 The first question referred thus seeks to ascertain whether a 'public contract' within the meaning of Article 2(1)(5) of Directive 2014/24 is different from a 'contract' under Article 12(4) of that directive. If so, a contract which is not for pecuniary interest could, without constituting a public contract, be categorised as a 'contract' within the meaning of Article 12(4) of the directive and therefore fall outside the scope of the public procurement rules, provided that the conditions set out in points (a) to (c) of that provision are met.

22 Furthermore, in its previous case-law the referring court has adopted a broad understanding of the concept of a contract for pecuniary interest which characterises public contracts within the meaning of Paragraph 103(1) of the Law against restrictions on competition, regarding any legal relationship of reciprocal performance as being sufficient. Consequently, although the provision of the 'IGNIS Plus' software leads to cooperation that gives rise to entitlements only if one of the cooperation partners wishes to extend the functionalities of that software, the offer of cooperation at issue is for pecuniary interest, despite the uncertainty surrounding further developments of the software in the future.

23 The referring court is, however, uncertain whether, having regard to the judgment of 21 December 2016, *Remondis* (C-51/15, EU:C:2016:985), it is necessary to adopt an understanding of the terms 'public contract' and 'contract for pecuniary interest' in Article 2(1)(5) of Directive 2014/24 which is narrower than that which it has previously adopted and which does not cover situations such as the one at issue in the main proceedings.

24 Lastly, the contracts awarded by the City of Cologne for the adaptations and maintenance of the 'IGNIS Plus' software should be regarded as being for pecuniary interest. They are independent contractual agreements with third parties that are severable from the provision of the software.

25 The second question concerns the subject matter of the cooperation between the contracting authorities under Article 12(4) of Directive 2014/24. After comparing the German, English and French versions of the directive and having regard to the beginning of recital 33 of that directive, the referring court considers that ancillary activities can be the subject matter of that cooperation without it being necessary for the cooperation to have taken place in the provision of the public services themselves.

26 The third question is justified by the fact that, according to the Court's case-law on Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts(OJ 2004 L 134, p. 114), the prohibition on placing an economic operator in a position of advantage was interpreted as meaning that horizontal cooperation could be exempt from public procurement law only if no private undertaking was placed in a position of advantage vis-à-vis its competitors. Article 12(4) of Directive 2014/24 does not provide for any such prohibition, even though it is mentioned in recital 33 of the directive.

27 Against this background, the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does the provision of software by one public administrative authority to another public administrative authority, which is agreed in writing and linked to a cooperation agreement, constitute a "public contract" within the meaning of Article 2(1)(5) of Directive [2014/24] or a contract within the meaning of Article 12(4) of that directive which – at least initially, subject to Article 12(4)(a) to (c) thereof – comes within the scope of the directive if, although the software recipient does not have to pay a price or reimbursement costs for the software, the cooperation agreement connected with the provision of the software provides that each cooperation partner – and therefore also the software recipient – is required to make available to the other partner, free of charge, any of its own further developments of the software that it may create – but is not obliged to create – in the future?

(2) [If Question 1 is answered in the affirmative], [p]ursuant to Article 12(4)(a) of Directive 2014/24, does the subject matter of the cooperation of the participating contracting authorities have to be the actual public services that are to be provided to citizens and must be provided jointly, or is it sufficient if the cooperation relates to activities that in some way serve the public services that are to be provided in the same way but do not necessarily have to be provided jointly?

(3) Does a so-called – unwritten – prohibition on placing a party in a position of advantage apply in the context of Article 12(4) of Directive 2014/24 and, if so, what is its scope?'

The questions referred for a preliminary ruling

The first question

28 By its first question, the referring court asks, in essence, whether Directive 2014/24 must be interpreted as meaning that an agreement which (i) provides that one contracting authority is to transfer software to another contracting authority free of charge and (ii) is linked to a cooperation agreement under which each party to that agreement is required to make available to the other party, free of charge, any further developments of the software that it may create constitutes a 'public contract' within the meaning of Article 2(1)(5) of the directive or a 'contract' within the meaning of Article 12(4) of the directive.

29 It should be noted as a preliminary point that, by referring only to 'contract' and not to 'public contract', the wording of Article 12(4) of Directive 2014/24 might suggest that these are two distinct concepts. However, in actual fact no distinction should be drawn.

30 First, Article 1 of that directive, which defines its 'subject matter and scope', provides in paragraph 1 that 'this Directive establishes rules on the procedures for procurement by contracting authorities with respect to public contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 4 [of that directive]'. It follows that the directive regulates only public contracts and design contests, to the exclusion of contracts which do not constitute a public contract.

31 Second, Article 2(1) of Directive 2014/24, which defines the main concepts governing the application of the directive, does not make any mention of 'contract', but only of 'public contracts', which suggests that the term 'contract' is merely an abbreviated version of the expression 'public contract'.

32 Third, that interpretation is supported by the title of Article 12 of Directive 2014/24, which refers to 'public contracts between entities within the public sector'. Consequently, the term 'contract' in Article 12(4) of that directive must be understood as referring to the concept of 'public contract' within the meaning of Article 2(1)(5) of that directive.

33 Fourth, that interpretation is also supported by the *travaux préparatoires* relating to Article 12(4) of Directive 2014/24. As the European Commission pointed out in its written observations, whilst its Proposal for a Directive of the European Parliament and of the Council on public procurement of 20 December 2011 (COM(2011) 896 final) included an Article 11 entitled 'Relations between public authorities', paragraph 4 of which provided that 'an agreement concluded between two or more contracting authorities shall not be deemed to be a public contract within the meaning of Article 2(6) of this Directive where the following cumulative conditions are fulfilled', the EU legislature did not wish to adopt that proposal. It follows that the effect of Article 12(4) of Directive 2014/24 cannot be to preclude the characterisation of cooperation between contracting authorities as a public contract. Its effect is confined to excluding such a contract from the procurement rules normally applicable.

34 Fifth, this interpretation is confirmed by an analysis of the context of Article 12 of Directive 2014/24. That article is included in Section 3, entitled 'Exclusions', of Chapter I of the directive. It would be inconsistent for the EU legislature to have sought to exclude contracts which do not constitute public contracts from the rules on public procurement. By definition, the exclusion Articles do not apply to such contracts.

35 It follows, first, that exclusion from the public procurement rules presupposes that the contract in question is a public contract within the meaning of Article 2(1)(5) of Directive 2014/24 and, second, that a public contract satisfying the conditions laid down in Article 12(4)(a) to (c) of the directive retains its legal nature as a 'public contract' even if those rules are not applicable to it.

36 Consequently, the concept of 'contract' in Article 12(4) of Directive 2014/24 is congruent with the concept of 'public contract' defined in Article 2(1)(5) of the directive.

37 In these circumstances, it must be determined whether an agreement which (i) provides that one contracting authority is to transfer software to another contracting authority free of charge and (ii) is linked to a cooperation agreement under which each party to that agreement is required to make available to the other party, free of charge, any further developments of the software that it may create constitutes a 'public contract' within the meaning of Article 2(1)(5) of Directive 2014/24.

38 It should be noted as a preliminary point that in order to determine whether a multi-stage operation should be categorised as a 'public contract' within the meaning of that provision, the operation must be examined as a whole, taking account of its purpose (see, by analogy, judgments of 10 November 2005, *Commission* v *Austria*, C-29/04, EU:C:2005:670, paragraph 41, and of 21 December 2016, *Remondis*, C-51/15, EU:C:2016:985, paragraph 37).

39 Under that provision, 'public contracts' are defined as 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.

40 Consequently, to be categorised as a 'public contract' within the meaning of that provision, a contract must have been concluded for pecuniary interest, meaning that the contracting authority which has concluded a public contract receives under that contract, in return for consideration, a service which must be of direct economic benefit to that contracting authority. In addition, the contract must have a synallagmatic nature, which is an essential element of a public contract, (see, by analogy, judgment of 21 December 2016, *Remondis*, C-51/15, EU:C:2016:985, paragraph 43).

41 In this case, the pecuniary nature of the software transfer contract and of the cooperation agreement appears to be conditional on the synallagmatic nature of the cooperation thereby established.

42 Since the third paragraph of Article 5 of the cooperation agreement provides that the contract is binding 'only together with the [software transfer contract] as a single document', account should be taken, in assessing the synallagmatic nature of the contractual framework formed by those two contracts, not only of their terms but also of the regulatory environment in which they were concluded.

43 On this latter point, it appears that, as the City of Cologne stated both in its written observations and at the hearing, the German rules on fire protection, technical assistance and disaster control and the rules on the emergency services, emergency response and ambulance transport by undertakings require the German local authorities responsible for those tasks to use the operations management system as optimally as possible and to adapt it to requirements on an ongoing basis.

44 It is on that basis that the Court will examine the terms of the contractual framework at issue.

45 In this regard, both the terms of the software transfer contract and the terms of the cooperation agreement make the existence of consideration likely. Although Article 4 of the software transfer contract states that the provision of the software is 'free of charge', it is nevertheless clear from Article 1 of the contract that it is 'permanent'. A software transfer contract like that at issue in the main proceedings, which is intended to be for the long term, will inevitably be subject to changes in order to take account of adaptations required by new rules, developments in the organisation of the emergency services or technological progress, as was asserted by ISE in particular at the hearing. Furthermore, according to statements made by the City of Cologne at the hearing, significant modifications are made to the software and supplementary modules are added three or four times each year.

46 In addition, as is stipulated in Article 2.1 of the software transfer contract, the 'IGNIS Plus' software is provided 'for the purpose of the agreements in the cooperation agreement', which suggests that the *Land* of Berlin introduced a form of conditionality. Consequently, although free of charge, the provision of the software does not appear to be disinterested.

47 Furthermore, according to Article 1 of the cooperation agreement, its purpose is to create 'an equal partnership entailing, if necessary, a readiness to compromise in order to adapt the software to each other's needs and to make it available to each other'. The wording also suggests that the parties

undertake to develop the initial version of the software at issue in the main proceedings where the optimal use of the operations management system and the ongoing adaptation of that system to requirements call for such developments.

48 Moreover, Article 5 of that agreement stipulates that 'the adaptation of the base software and the modules to individual processes must be independently commissioned and financed', which reflects the *Land* of Berlin's financial interest in the provision of the software free of charge. In addition, in response to a question asked by the Court at the hearing, the City of Cologne acknowledged that such a contract should allow each partner to make savings.

49 Lastly, in the event that one of the contracting parties to the contractual framework at issue in the main proceedings made adaptations to the software at issue in the main proceedings and did not pass them on to the other party, it would seem that the other party could terminate the cooperation agreement and, if necessary, the software transfer contract, or even bring legal proceedings to claim the benefit of the adaptation which had been made. It thus appears that the obligations arising from the public contract at issue in the main proceedings are legally binding and that their execution is legally enforceable (judgment of 25 March 2010, *Helmut Müller*, C-451/08, EU:C:2010:168, paragraph 62).

50 Thus, subject to verification by the referring court, it is clear from the above considerations that the software transfer contract and the cooperation agreement have a synallagmatic nature in so far as the provision of the 'IGNIS Plus' software free of charge gives rise to a reciprocal obligation to develop that software where the optimal use of the operations management system and the ongoing adaptation of that system to requirements call for such developments, which results in the financing of supplementary modules which must subsequently be provided to the other partner free of charge.

51 In those circumstances, it seems, as the Advocate General noted in essence in points 59 and 62 of his Opinion, that it is inevitable in practice that the 'IGNIS Plus' software will eventually have to be updated, with the result that the consideration is not dependent on a purely potestative condition.

52 Since the adaptation of the software at issue in the main proceedings by one of the partners presents a clear financial interest for the other partner, if the referring court were to conclude that the contractual framework formed by the software transfer contract and the cooperation agreement were synallagmatic in nature, those contracts would have to be regarded as having been concluded for pecuniary interest, with the result that the conditions for categorisation as a public contract, as recalled in paragraph 40 of this judgment, would be satisfied.

53 The answer to the first question is therefore that Directive 2014/24 must be interpreted as meaning that an agreement which (i) provides that one contracting authority is to transfer software to another contracting authority free of charge and (ii) is linked to a cooperation agreement under which each party to that agreement is required to make available to the other party, free of charge, any further developments of the software that it may create constitutes a 'public contract' within the meaning of Article 2(1)(5) of that directive where it is clear from the terms of those agreements and from the applicable national rules that the software will, in principle, be subject to adaptations.

The second question

54 By its second question, the referring court asks, in essence, whether Article 12(4) of Directive 2014/24 must be interpreted as meaning that cooperation between contracting authorities may fall outside the scope of the public procurement rules laid down in the directive where that cooperation relates to activities ancillary to the public services that are to be provided, even individually, by each cooperation partner, provided that the ancillary activities contribute to the effective performance of those public services.

55 It should be determined, first, whether Article 12(4)(a) of Directive 2014/24 authorises contracting authorities to establish cooperation relating to public service tasks which they do not provide jointly.

56 Under that provision, a public contract concluded exclusively between two or more contracting authorities falls outside the scope of the directive where it 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.

57 As the Advocate General noted in essence in point 71 of his Opinion, that provision simply mentions common objectives, without requiring the joint provision of a single public service. As is stated in the first paragraph of recital 33 of Directive 2014/24, 'the services provided by the various participating authorities [in such cooperation] need not necessarily be identical; they might also be complementary'. It does not therefore seem essential for the public service activity to be provided in common by public entities participating in the cooperation.

58 It follows that Article 12(4)(a) of Directive 2014/24 must be interpreted as indiscriminately authorising the participating contracting authorities to carry out a public service task, either jointly or each individually, provided their cooperation makes it possible to achieve objectives they have in common.

59 Second, according to Article 12(4) of Directive 2014/24, read in conjunction with the first paragraph of recital 33 of the directive, cooperation between public entities can cover all types of activities related to the performance of services and responsibilities assigned to or assumed by the participating authorities.

60 The expression 'all types of activities' can potentially cover an activity ancillary to a public service as long as that ancillary activity contributes to the effective performance of the public service task to which the cooperation between the participating contracting authorities relates. The third paragraph of recital 33 of Directive 2014/24 provides that cooperation between public authorities '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'.

61 In addition, it is not certain that software for tracking fire service operations in firefighting, technical assistance, emergency rescue and disaster control, like that at issue in the main proceedings, which would seem to be essential to the performance of those tasks, can be reduced to the status of a purely ancillary activity. This must, however, be ascertained by the referring court.

62 The answer to the second question is therefore that Article 12(4) of Directive 2014/24 must be interpreted as meaning that cooperation between contracting authorities may fall outside the scope of the public procurement rules laid down in that directive where that cooperation relates to activities ancillary to the public services that are to be provided, even individually, by each cooperation partner, provided that those ancillary activities contribute to the effective performance of those public services.

The third question

63 By its third question, the referring court asks, in essence, first, whether Article 12(4) of Directive 2014/24, read in conjunction with recital 33 and Article 18(1) of that directive, must be interpreted as meaning that cooperation between contracting authorities must not have the effect, in accordance with the principle of equal treatment, of placing a private undertaking in a position of advantage vis-à-vis its competitors and, second, what the scope of that principle is.

64 As is rightly noted by the referring court, it is clear from the Court's case-law concerning Directive 2004/18 that European Union rules on public procurement are not applicable to 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 in so far as such contracts are concluded exclusively by public entities, without the participation of a private party, no private provider of services is placed in a position of advantage vis-à-vis competitors and implementation of that cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest. Such contracts can fall outside the scope of European Union public procurement rules only if they fulfil all those criteria cumulatively (see, to that effect, judgments of 19 December 2012, *Ordine degli Ingegneri della Provincia di Lecce and Others*, C-159/11, EU:C:2012:817, paragraphs 34 to 36, and of 13 June 2013, *Piepenbrock*, C-386/11, EU:C:2013:385, paragraphs 36 to 38).

65 Although Article 12(4) of Directive 2014/24 does not mention that contracting authorities participating in cooperation must not place a private undertaking in a position of advantage vis-à-vis its competitors, the EU legislature did not in any way intend to depart from the Court's case-law cited in the preceding paragraph.

66 First, whilst noting that there is 'considerable legal uncertainty as to how far contracts concluded between entities in the public sector should be covered by public procurement rules' and that it is therefore necessary to provide clarification in this regard, Directive 2014/24 states, in recital 31, that such clarification should be guided by the principles set out in the relevant case-law of the Court of Justice. It follows that the EU legislature did not intend to call into question the Court's case-law on this point.

67 Second, according to the second paragraph of recital 33 of the directive, contracts for the joint provision of public services should not be subject to the application of the rules set out in the directive provided that they are concluded exclusively between contracting authorities, that the implementation of that cooperation is governed solely by considerations relating to the public interest and that no private service provider is placed in a position of advantage vis-à-vis its competitors, which corresponds, in essence, to the Court's existing case-law concerning Article 1(2)(a) of Directive 2004/18, as mentioned in paragraph 64 of this judgment.

68 Third, in any event, since cooperation between contracting authorities satisfying the conditions laid down in Article 12(4) of Directive 2014/24 remains a 'public contract' within the meaning of Article 2(1)(5) of that directive, as follows from the answer given to the first question, Article 18 of the directive, which sets out the principles of public procurement, is applicable to such cooperation.

69 Under Article 18(1) of Directive 2014/24, contracting authorities must treat economic operators equally and without discrimination and act in a transparent and proportionate manner and, furthermore, the design of the procurement may not be made with the intention of excluding it from the scope of the directive or of artificially narrowing competition, which is considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.

70 Thus, however regrettable it may be, in particular in the light of the principle of legal certainty, which is a fundamental principle of EU law and requires, in particular, that rules should be clear and precise, so that individuals may be able to ascertain unequivocally what their rights and obligations are and may take steps accordingly (judgments of 9 July 1981, *Gondrand and Garancini*, 169/80, EU:C:1981:171, paragraph 17; of 13 February 1996, *Van Es Douane Agenten*, C-143/93, EU:C:1996:45, paragraph 27, and of 14 April 2005, *Belgium* v *Commission*, C-110/03, EU:C:2005:223, paragraph 30), the failure in Article 12(4) of Directive 2014/24 to mention that, in the context of cooperation between contracting authorities, a private provider may not be placed in a position of advantage vis-à-vis its competitors cannot be decisive.

71 In this case, the *Land* of Berlin acquired the 'IGNIS Plus' software from Sopra Steria Consulting before transferring it, free of charge, to the City of Cologne.

72 As ISE has asserted, without being contradicted by the City of Cologne at the hearing before the Court, the adaptation of the software is a very complex process the economic value of which is much higher than that corresponding to the initial acquisition of the base software. Thus, according to ISE, the City of Cologne has already estimated the costs of adapting the software at EUR 2 million, whilst the *Land* of Berlin published a pre-information notice in the *Official Journal of the European Union* relating to the development of the 'IGNIS Plus' software for an amount of EUR 3.5 million. Consequently, according to ISE, the economic interest lay not in the acquisition or sale of the base software but at the later stage of the adaptation, maintenance (which costs EUR 100 000 per year) and development of the software.

73 ISE considers that, in practice, the contracts for the adaptation, maintenance and development of the base software are reserved exclusively for the software publisher since its development requires not only the source code for the software but also other knowledge relating to the development of the source code.

74 It should be stated in this regard that, if a contracting authority is considering organising a public procurement procedure for the maintenance, adaptation or development of software acquired from an economic operator, it must ensure that adequate information is communicated to potential candidates and tenderers in order to allow effective competition to develop on the secondary market for the maintenance, adaptation or development of the software.

75 In this case, in order to ensure compliance with the principles of public procurement set out in Article 18 of Directive 2014/24, the referring court must establish, first, that both the *Land* of Berlin and the City of Cologne have the source code for the 'IGNIS Plus' software, second, that, in the event that they organise a public procurement procedure for the maintenance, adaptation or development of that software, those contracting authorities communicate that source code to potential candidates and tenderers and, third, that access to that source code is in itself a sufficient guarantee that economic operators interested in the award of the contract in question are treated in a transparent manner, equally and without discrimination.

76 In the light of the above considerations, the answer to the third question is be Article 12(4) of Directive 2014/24, read in conjunction with the second paragraph of recital 33 and Article 18(1) of that directive, must be interpreted as meaning that cooperation between contracting authorities must not, in accordance with the principle of equal treatment, have the effect of placing a private undertaking in a position of advantage vis-à-vis its competitors.

Costs

77 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC must be interpreted as meaning that an agreement which (i) provides that one contracting authority is to transfer software to another contracting authority free of charge and (ii) is linked to a cooperation agreement under which each party to that agreement is required to make available to the other party, free of charge, any further developments of the software that it may create constitutes a 'public contract' within the meaning of Article 2(1)(5) of that directive where it is clear from the terms of those agreements and from the applicable national rules that the software will, in principle, be subject to adaptations.**

2. **Article 12(4) of Directive 2014/24 must be interpreted as meaning that cooperation between contracting authorities may fall outside the scope of the public procurement rules laid down in the directive where that cooperation relates to activities ancillary to the public services that are to be provided, even individually, by each cooperation partner, provided that the ancillary activities contribute to the effective performance of those public services.**

3. **Article 12(4) of Directive 2014/24, read in conjunction with the second paragraph of recital 33 and Article 18(1) of that directive, must be interpreted as meaning that cooperation between contracting authorities must not have the effect, in accordance with the principle of equal treatment, of placing a private undertaking in a position of advantage vis-à-vis its competitors.**

[Signatures]