Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 9 June 2022 [1]

Joined Cases C-383/21 and C-384/21

Société de logement de service public (SLSP) 'Sambre & Biesme', SCRL (C-383/21)
Commune de Farciennes (C-384/21)
v
Société wallonne du logement

(Request for a preliminary ruling from the Conseil d'État (Council of State, acting as supreme administrative court, Belgium))

(Reference for a preliminary ruling – Directive 2014/24/EU – Public procurement – Services, works and project development – In-house award – In-house entity jointly controlled by several contracting authorities – Applicability of the directive)

1. In Belgium, a public housing developer and a municipality decided to conclude a framework procurement agreement. Under that agreement, a contract for technical assistance in connection with the building of housing and a contract for asbestos surveying services were to be granted not by competitive tendering but by direct award to a third party, which was also a public entity.

2. The authority commissioned by the Walloon Government to supervise the performance of public housing undertakings cancelled the aforementioned agreement on the ground that the conditions for a direct contract award were not met in that case.

3. The two signatories to that agreement each challenged its cancellation on the ground that, in their view, the direct award was compatible with Directive 2014/24.[2] The dispute has now reached the highest administrative court in Belgium, which has in each case made a reference to the Court for a preliminary ruling.

[1] Original language: Spanish.

[2] 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), as amended by Commission Delegated Regulation (EU) 2015/2170 of 24 November 2015 (OJ 2015 L 307, p. 5).

I. Legal framework. Directive 2014/24

4. According to recital 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 of the European Union 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 of the European Union. 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.

…'

5. Recital 33 states:

'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.'

6. Article 12 ('Public contracts between entities within the public sector') provides:

'1. A public contract awarded by a contracting authority to a legal person governed by private or public law shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

(a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;

(b) more than 80% of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority; and

(c) there is no direct private capital participation in the controlled legal person 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.

…

3. A contracting authority, which does not exercise over a legal person governed by private or public law control within the meaning of paragraph 1, may nevertheless award a public contract to that legal person without applying this Directive where all of the following conditions are fulfilled.

(a) the contracting authority exercises jointly with other contracting authorities a control over that legal person which is similar to that which they exercise over their own departments;

(b) more than 80% of the activities of that legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authorities or by other legal persons controlled by the same contracting authorities;

…

For the purposes of point (a) of the first subparagraph, contracting authorities exercise joint control over a legal person where all of the following conditions are fulfilled:

(i) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities. Individual representatives may represent several or all of the participating contracting authorities;

(ii) those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person; and

(iii) the controlled legal person does not pursue any interests which are contrary to those of the controlling contracting authorities.

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.

…'

II. Facts, proceedings and questions referred for a preliminary ruling

7. The company Société de logement de service public Sambre & Biesme [3] is a public entity in the legal form of a limited-liability cooperative society. Its main shareholders are the municipalities of Farciennes and Aiseau-Presles. It forms part of the network of public housing development companies in the Walloon Region (Belgium).

8. In 2015, SLSP Sambre & Biesme and the municipality of Farciennes decided to create an 'ecodistrict' comprising some 150 public and private housing units in Farciennes. Given the scale of the project, the parties sought the assistance of the Intercommunale pour la gestion et la réalisation d'études techniques et économiques, [4] an entity also in the legal form of a limited-liability cooperative society.

9. IGRETEC is comprised exclusively of legal persons governed by public law. In 2016, its members included more than 70 municipalities (including Farciennes) and more than 50 other 'public authorities'. The municipalities held 5 054 351 voting shares, with the remaining public authorities holding 17 126 such shares.

10. Under IGRETEC's articles of association, most of the votes and chairmanship of the various management bodies are reserved for the municipalities. The decisions of these bodies are adopted by majority of the votes cast by the municipal members.

11. At the material time, a councillor from the Municipality of Farciennes, who was also a director of SLSP Sambre & Biesme, was a member of IGRETEC's board of directors.

12. On 29 October 2015, SLSP Sambre & Biesme decided to buy a single share in IGRETEC, for EUR 6.20, in order to benefit from its services. It thus became a member of the inter-municipal company, although its shareholding was purely symbolic. [5]

13. In January 2017, the Municipality of Farciennes and SLSP Sambre & Biesme drew up a draft framework agreement in order to establish their respective rights and obligations in the design and construction of the ecodistrict in Farciennes. The agreement contained the following clauses:

— Under Article 1, the parties decided to undertake jointly the public procurement of services, works and project development and designated the Municipality of Farciennes as contracting authority with the task of acting on their joint behalf and taking on its own initiative any decision relating to the award of contracts.

— According to Article 5, [6] 'the parties agree that the Municipality of Farciennes will conclude with IGRETEC … an agreement on project management assistance, legal advice and

[3] Sambre and Biesme public-service housing company ('Sambre & Biesme SLSP').

[4] Inter-municipal Cooperative for the Management and Implementation of Technical and Financial Projects ('IGRETEC').

[5] It amounted to 0.0000000197% of the voting shares (p. 26 of the order for reference in Case C-383/21) and to 0.0000049% of the shares (p. 39 of the order for reference in Case C-384/21).

[6] Entitled 'Choice of project management assistance in connection with the implementation of contracts for services, works and project development and the urban regeneration project'.

environmental services, within the framework of the in-house relationship which each of the parties has with that inter-municipal cooperative'.

— With a view to coordinating decision-making in connection with the implementation of the framework agreement, the annex thereto provided for a steering committee.[7]

— IGRETEC, although not a signatory to the framework agreement, would not only be represented on the steering committee but would also act as its secretariat.

14. On 9 February 2017, the board of directors of SLSP Sambre & Biesme decided: (a) 'to approve the conclusion of a framework agreement on the conclusion of contracts in conjunction with the Municipality of Farciennes'; and (b) 'not to issue a public call for tenders for asbestos surveying services', the specifications for which it had previously approved, 'in view of the in-house relationship between [SLSP Sambre & Biesme] and IGRETEC'. Those specifications are described as the first stage in the implementation of the ecodistrict project in Farciennes.

15. On 10 February 2017, the SWL representative assigned to SLSP Sambre & Biesme challenged the aforementioned decisions ('the contested decisions') before SWL itself. SWL acts on behalf of the Walloon Government as the oversight authority responsible for supervising public housing development companies.

16. On 25 February 2017, SWL annulled the contested decisions on the ground that the contracts for technical assistance (Article 5 of the framework agreement) and the contract for asbestos surveying had been awarded to IGRETEC without a public procurement procedure.

17. In the view of SWL:

— It is reasonable to question whether SLSP Sambre & Biesme exerts a decisive influence over IGRETEC, in so far as it holds only one share in the equity capital of that cooperative, under whose articles of association the municipalities hold a predominant position.

— The designation of the Municipality of Farciennes as the lead contracting authority for the project (Article 1 of the framework agreement) is not sufficient to justify the direct award of the contracts to IGRETEC on behalf of the various parties to that agreement, even though the Municipality of Farciennes qualifies for the in-house exception in its own right in its dealings with IGRETEC. In the context of a joint contract, the various partners come together to configure the requirement, but they each have a duty to follow the customary contracting procedures.

18. As the SWL agreements are actionable before the administrative courts, SLSP Sambre & Biesme and the Municipality of Farciennes, proceeding separately, challenged the annulment of the contested decisions.

19. The Conseil d'État (Council of State, acting as supreme administrative court, Belgium), to which it falls to rule on those actions, has made two references to the Court of Justice for a preliminary ruling.

[7] The steering committee is made up of four representatives from the Municipality of Farciennes, two from SLSP Sambre & Biesme, two from IGRETEC and two from the Société wallonne du logement (Walloon Housing Company; 'SWL'). The committee's decisions are adopted by consensus.

20. By the first reference (Case C-383/21), it raises the following questions:

'(1) Must Article 12(3) of Directive 2014/24 … be interpreted as having direct effect?

(2) If the answer to the first question is in the affirmative, must Article 12(3) of Directive 2014/24 be interpreted as meaning that the requirement for a contracting authority, in this case a public service housing company, to be represented on the decision-making bodies of the controlled legal person, in this case an inter-municipal cooperative society, is satisfied solely on the basis that a person who sits on the board of directors of that inter-municipal cooperative society in his or her capacity as a municipal councillor of another participating contracting authority, in this case a municipality, is, due to purely factual circumstances and without any legal guarantee of representation, also a director of the public service housing company, while the municipality is a (non-exclusive) shareholder in both the controlled entity (inter-municipal cooperative society) and the public service housing company?

(3) If the answer to the first question is negative, must it be considered that a contracting authority, in this case a public service housing company, "participates" in the decision-making bodies of the controlled legal person, in this case an inter-municipal cooperative society, solely on the basis that a person who sits on the board of directors of that inter-municipal cooperative society in his or her capacity as a municipal councillor of another participating contracting authority, in this case a municipality, is, due to purely factual circumstances and without any legal guarantee of representation, also a director of the public service housing company, while the municipality is a (non-exclusive) shareholder in both the controlled entity (inter-municipal cooperative society) and the public service housing company?'

21. In the second reference for a preliminary ruling (Case C-384/21), the referring court raises the following questions in addition to those set out above:

'(4) Must Article 12(4) of Directive 2014/24 … be interpreted as having direct effect?

(5) If the answer to that question is in the affirmative, must Article 12(4) of Directive 2014/24 be interpreted as meaning that it allows tasks of project management assistance and legal and environmental services to be entrusted, without a prior call for competition, to a contracting authority, in this case an inter-municipal cooperative society, where those tasks form part of a cooperation between two other contracting authorities, in this case a municipality and a public service housing company, where it is not disputed that the municipality exercises "joint *in-house*" control over the inter-municipal cooperative society and where the municipality and the public service housing company are members of the inter-municipal cooperative society in the "consultancy and management and central purchasing" sector of its object, which is specifically concerned with the tasks they wish to entrust to it, which tasks correspond to activities carried out on the market by consultancy and management firms specialising in the design, execution and implementation of projects?'

III. Procedure before the Court of Justice

22. The requests for a preliminary ruling were registered at the Court on 24 June 2021. They were joined for the purposes of the written and oral stages of the procedure and the judgment.

23. Written observations have been lodged by SLSP Sambre & Biesme, the Municipality of Farciennes, the Belgian Government and the Commission. All of those parties attended the hearing held on 30 March 2022.

IV. Analysis

A. Preliminary point

24. In accordance with the Court's direction, this Opinion will deal with the first question in each case and with the fourth and fifth questions in the second case.

B. First question referred in Case C-383/21 and first and fourth questions referred in Case C-384/21

25. The referring court explains that the Belgian law incorporating Directive 2014/24 into domestic law was not yet in force at the time of the facts forming the subject of the dispute, even though the time limit for transposition had already expired. [8]

26. The applicants in the two cases each maintain that that Article 12(3) and (4) of Directive 2014/24 has direct effect, since it contains unconditional and sufficiently precise provisions which establish rights for individuals which the latter may enforce against the State and all of the bodies comprising its administration. [9]

27. The Belgian Government and the Commission [10] take the opposite view. They argue that Article 12(3) and (4) of Directive 2014/24 does not fulfil the conditions for producing direct effect, inasmuch as, in essence:

— The contracting authorities and public-law bodies covered by the public procurement directives are not 'individuals' benefiting from rights capable of being enforced against the State.

— Those provisions do not impose on the State an obligation to take or to refrain from taking action for the benefit of economic operators.

28. The outcome which I shall advocate below (that Article 12(3) and (4) of Directive 2014/24 is applicable to this dispute) would be arrived at in practice whether via the route of accepting that the benefit of any direct effect produced by those paragraphs extends to the public entities concerned, and is capable of being relied on by them against the State, or by simply arguing that, since that directive was not transposed within the time limit, those entities were bound by the aforementioned provisions. In my view, the latter proposition is correct.

[8] The deadline for bringing national law into line with Directive 2014/24 was 18 April 2016. The Belgian transposing law was adopted on 17 June 2016. It has been applicable since 30 June 2017, following the entry into force of an implementing decree of 18 April 2017.

[9] Observations of the Municipality of Farciennes, paragraph 33 et seq.; and of SLSP Sambre & Biesme, paragraph 34 et seq.

[10] Observations of the Belgian Government, paragraphs 17 et seq., and 80 et seq.; and of the Commission, paragraph 12 et seq. SWL had put the same argument to the referring court.

1. Direct effect, unconditional nature and possibility for the public authorities to rely on Article 12(3) and (4) of Directive 2014/24

29. To my mind, the premiss underlying the aforementioned questions referred is not entirely sound. If it were, the answer would have to be along the lines of that which SWL advocated in the dispute in the main proceedings and which the Belgian Government and the Commission are putting forward in these proceedings.

30. In support of that answer, I would recall that the primary purpose of the 'direct effect' doctrine developed by the Court in connection with directives is to protect individuals. It allows them to exercise the rights which directives confer on them and which they could not otherwise assert in the absence of the necessary implementing measures at national level.

31. The Court's settled case-law on the direct effect of directives, in particular those not transposed in time or not correctly transposed, establishes who can rely on such direct effect and under what conditions.

32. In the recent judgment of 8 March 2022, the Court held:

— 'Whenever the provisions of a directive appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly …' [11]

— '… a provision of EU law is, first, unconditional where it sets forth an obligation which is not qualified by any condition, or subject, in its implementation or effects, to the taking of any measure either by the institutions of the European Union or by the Member States and, second, sufficiently precise to be relied on by an individual and applied by a court where it sets out an obligation in unequivocal terms …' [12]

— '… even though a directive leaves the Member States a degree of latitude when they adopt rules in order to implement it, a provision of that directive may be regarded as unconditional and precise where it imposes on Member States in unequivocal terms a precise obligation as to the result to be achieved, which is not coupled with any condition regarding application of the rule laid down by it …' [13]

33. On that basis, I take the view that public entities such as the Municipality of Farciennes and SLSP Sambre & Biesme, which are simply an emanation of the State in a broad sense, cannot rely as against the latter on the (hypothetical) direct effect of Article 12 of Directive 2014/24.

34. For one thing, even if that article were regarded as containing a 'sufficiently precise' form of words in paragraphs 3 and 4 thereof, it could not readily be said to be of an 'unconditional nature' or to impose an unequivocal obligation on Member States. On the contrary, it authorises those States, should they deem it appropriate to do so, to exclude contracts concluded between public-sector entities from the scope of Directive 2014/24.

[11] Judgment of 8 March 2022 *Bezirkshauptmannschaft Hartberg-Fürstenfeld (Direct effect)* (C-205/20, EU:C:2022:168, paragraph 17).

[12] *Ibidem*, paragraph 18.

[13] *Ibidem*, paragraph 19.

35. The Court explains that Article 12(1) of Directive 2014/24, 'which … does no more than state the conditions which a contracting authority must observe when it wishes to conclude an in-house transaction, … *empower[s]* the Member States to exclude such a transaction from the scope of Directive 2014/24'. [14]

36. In the same vein, the Court states that Directive 2014/24 'does not require the Member States to have recourse to a public procurement procedure' and 'it cannot compel them to have recourse to an in-house transaction where the conditions laid down in Article 12(1) are satisfied'. [15] The same is true of paragraphs 3 and 4 of that article.

37. That statement is consistent with the freedom of the Member States 'as to the choice of means of providing services whereby the contracting authorities meet their own needs'. [16]

38. For another thing, as I have already said, municipal entities and bodies governed by public law (even if they take the form of commercial companies) cannot rely as against the State on the alleged 'direct effect' of Article 12(3) and (4) of Directive 2014/24. In their relations with the State bodies that control their decisions, municipal entities are not 'individuals' who are able to invoke that effect.

39. For those reasons, and notwithstanding that I consider an answer to the question of the direct effect of Article 12(3) and (4) of Directive 2014/24 to be unnecessary in this dispute, my view, should the Court decide to address this question, which was extensively debated at the hearing, is the same as that expressed at that hearing by the Belgian Government and the Commission.

40. Article 12 of Directive 2014/24 lays down the minimum conditions attached to a power the exercise of which, as I have said, the Member States may completely exclude. If they do not opt for exclusion, the only imaginable scenario in which Article 12 would have direct effect (on which only an economic operator considering itself to have been harmed would be eligible to rely) would be one in which a contracting authority sought to evade the public procurement rules and to have recourse to an in-house transaction or to horizontal cooperation in the absence of the minimum conditions laid down by the aforementioned article.

2. Application of Article 12(3) and (4) of Directive 2014/24 to public authorities

41. The foregoing does not mean, however, that Article 12(3) and (4) of Directive 2014/24 is not applicable in this case.

42. The requirement for public authorities to comply with Article 12(3) and (4) before the directive has been transposed derives not from any direct effect which those paragraphs might have, but from 'the obligation imposed on all State authorities to comply with the provisions of directives (third paragraph of Article 288 TFEU) as well as to adhere to the duty of sincere cooperation and to ensure complete fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions (Article 4(3) TEU)'. [17]

[14] Judgment of 3 October 2019, *Irgita* (C-285/18, EU:C:2019:829; 'the judgment in *Irgita*'; paragraph 43); emphasis added. Later, order of 6 February 2020, *Azienda ULSS n. 6 Euganea* (C-11/19, EU:C:2020:88, paragraphs 40 to 46).

[15] The judgment in *Irgita*, paragraph 46.

[16] *Ibidem*, paragraph 45, with reference to recital 5 of Directive 2014/24, which states that 'nothing in this Directive obliges Member States to contract out or externalise the provision of services that they wish to provide themselves or to organise by means other than public contracts within the meaning of this Directive'.

[17] In this regard, I concur with Advocate General Wahl in his Opinion in *Portgás* (C-425/12, EU:C:2013:623, point 52).

43. The correct answer to the first question referred in each of the two references for a preliminary ruling should therefore, preferably, focus on the link that exists between public authorities and Directive 2014/24 (what might be called its *binding* effect, as the Commission described it at the hearing) in the case where that directive has not yet been transposed notwithstanding that the time limit for its transposition has expired.

44. The Court has confirmed that requirement of compliance. [18]

45. So far as concerns the contracting authorities involved in these two disputes, the public nature of which is not in issue, this means that they were bound by Directive 2014/24 as from the date on which that directive should have been transposed. [19]

46. In the absence of transposition and irrespective of whether or not Article 12(3) and (4) of Directive 2014/24 had direct effect such as to enable individuals to rely on those provisions as against the public authorities or the entities answerable to them, the latter, in so far as they were acting as contracting authorities, were obliged to comply with the conditions laid down in that article.

47. If, with a view to obtaining the services necessary to implement their respective projects, the Municipality of Farciennes and SLSP Sambre & Biesme preferred not to have recourse to the market and wished to avoid the customary public procurement procedures, they were, at the material time, subject to the conditions laid down in Article 12 of Directive 2014/24.

48. Once the directive has been transposed, cooperation between public entities, whether vertical (in-house) or horizontal, will not be subject to the public procurement procedures if the Member State, exercising its freedom to do so, has decided to avail itself of the options for exclusion from the scope of Directive 2014/24 that are afforded to it by Article 12 as interpreted by the Court. [20]

49. Accordingly, where a Member State has chosen to permit the mechanisms for inter-administrative cooperation that are excluded from the formalised procedures laid down in Directive 2014/24, its contracting authorities must comply with the conditions laid down in Article 12(3) and (4) thereof, whether or not they intend to have recourse to the market in order to obtain particular services or supplies.

C. Fifth question referred in Case C-384/21

1. Subject matter

50. The fifth question in Case C-384/21 concerns the exclusion from the scope of Directive 2014/24 that is provided for in Article 12(4) thereof.

[18] Judgment of 12 December 2013, *Portgás* (C-425/12, EU:C:2013:829, paragraph 34).

[19] Following (correct) transposition, the public procurement rules and the exceptions to them are as laid down in national legislation. At the hearing, it was reported that the Belgian legislature largely reproduced the content of Article 12 of Directive 2014/24 in the Law of 17 June 2016. It could, however, not have done so. Transposition not entailing recourse to the power of exclusion provided for in Article 12 is therefore (in theory) conceivable.

[20] It is a cliché to require that that interpretation should be strict, on the ground that the situations referred to in Article 12 of Directive 2014/24 are 'exceptions' to, or 'derogations' from, that directive. Without wishing to embark here upon a discussion of how that interpretation is to be applied, I should reiterate that that article defines the scope of the Directive. It is not, strictly speaking, an exception to it (see my Opinion in *Informatikgesellschaft für Software-Entwicklung*, C-796/18, EU:C:2020:47, points 37 and 38).

51. Unlike the exclusion envisaged in Article 12(2) and (3) of Directive 2014/24, whereby a contracting authority (or a number of contracting authorities) must exercise control over a tenderer which has been awarded a public contract, the exclusion provided for in paragraph 4 is based on cooperation among contracting authorities between which no such relationship of control exists.

52. The question referred arises from the arguments which the Municipality of Farciennes put forward in the alternative, in the event that it is concluded that, in the light of the relationship between SLSP Sambre & Biesme and IGRETEC, the conditions laid down in Article 12(3) of the directive are not met. [21]

53. The Municipality of Farciennes submits that, in the absence of the joint control provided for in that paragraph, horizontal cooperation between contracting authorities is still possible under Article 12(4) of Directive 2014/24. The cooperation between itself, SLSP Sambre & Biesme and IGRETEC is of this nature.

54. I infer from reading its observations that the Municipality of Farciennes advocates two ways of understanding the relationship between the public entities in question:

— According to the first, which the municipality appears to prefer, that relationship is characterised by a horizontal cooperation which, according to the Municipality of Farciennes and SLSP Sambre & Biesme, is intended to support implementation of the ecodistrict creation plan and, according to IGRETEC, to assist the latter's work for the benefit of its members, which is to contribute towards their projects. The agreement between the parties is therefore geared towards the attainment of common objectives. [22]

— According to the second, the in-house relationship between the municipality and IGRETEC is defined by the fact that, where the municipality entrusts the performance of certain services to IGRETEC, the latter uses the former's own departments, a fact which must be taken into account in the context of its cooperation with SLSP Sambre & Biesme. [23]

55. In both configurations, the relationship is covered by Article 12(4) of Directive 2014/24. Consequently, a public call for tenders is unnecessary.

2. Cooperation under Article 12(4) of Directive 2014/24

56. According to Article 12(4), a public contract does not fall within the scope of Directive 2014/24 if the three conditions laid down in points (a), (b) and (c) of that paragraph are cumulatively met. [24]

[21] It is clear from the wording of the question that, in the view of the referring court, the Municipality of Farciennes exercises over IGRETEC a control similar to that which it exercises over its own departments, but the same is not true of the relationship between SLSP Sambre & Biesme and IGRETEC.

[22] Observations of the Municipality of Farciennes, paragraph 115 et seq., in particular paragraphs 143 and 145.

[23] *Ibidem*, paragraph 115 et seq., in particular paragraphs 139 and 140.

[24] In addition to those conditions, inter-administrative cooperation must in any event comply with the basic rules of the TFEU, in particular those relating to the free movement of goods, the freedom of establishment and the freedom to provide services, and the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency. On the prohibition of cooperation between contracting authorities which has the effect of favouring one private undertaking over its competitors, see the judgment of 28 May 2020, *Informatikgesellschaft für Software-Entwicklung* (C-796/18, EU:C:2020:395, paragraph 63 et seq. and paragraph 3 of the operative part).

57. The national court's doubts revolve around the concept of 'cooperation' within the meaning of that article, which must be interpreted independently. [25]

58. I explained on a different occasion [26] that the provision in question incorporates the Court's case-law prior to codification but expands upon that case-law by clarifying it and making it more flexible, bringing the conditions it lays down into line to some extent with those applicable to the other scenarios in which certain contracts concluded by public-sector entities may be excluded from Directive 2014/24. [27]

59. This explains the following characteristics of horizontal cooperation that is not subject to the formalised public procurement procedures under Directive 2014/24:

— There is no requirement, as was the case under the previous case-law, [28] for the cooperation to support the joint performance of a public-service task common to all of the participating contracting authorities. [29]

— Cooperation may relate to (or take the form of) activities to support public services, provided that they contribute towards the actual delivery of those services. [30]

— The services provided by the contracting authorities do not necessarily have to be identical. Subject to compliance with the condition that they are driven by objectives pursued in common, which must also be in the public interest, such services may be complementary. [31]

[25] Judgment of 4 June 2020, *Remondis* (C-429/19, EU:C:2020:436; 'the judgment in *Remondis II*'; paragraph 24).

[26] Opinion in *Informatikgesellschaft für Software-Entwicklung* (C-796/18, EU:C:2020:47, points 26 to 28).

[27] Prior to Directive 2014/24, the Court had refused to recognise horizontal cooperation in the direct award of contracts relating to the provision of support services to a public department, such as the production of architectural or engineering designs and office cleaning: see, in the case of the former, the judgment of 19 December 2012, *Ordine degli Ingegneri della Provincia di Lecce and Others* (C-159/11, EU:C:2012:817); and, in the case of the latter, the judgment of 13 June 2013, *Piepenbrock* (C-386/11, EU:C:2013:385). Nonetheless, it was possible to argue that the reason for that refusal lay not in the ancillary nature of the service but in the fact that the *inter partes* agreement was not directed towards the joint performance of shared public-service tasks: I refer to paragraph 34 of the judgment in *Ordine degli Ingegneri della Provincia di Lecce and Others* and to paragraph 39 of the judgment in *Piepenbrock*. Be that as it may, that restriction disappeared in the directive in force.

[28] In addition to those cited in the previous footnote, see the judgments of 9 June 2009, *Commission* v *Germany* (C-480/06, EU:C:2009:357, paragraph 37), and of 8 May 2014, *Datenlotsen Informationssysteme* (C-15/13, EU:C:2014:303, paragraph 35). A provision to the same effect was included by the Commission in its Proposal for a Directive of the European Parliament and of the Council on public procurement (COM/2011/0896 final), Article 11(4)(a).

[29] Judgment of 28 May 2020, *Informatikgesellschaft für Software-Entwicklung* (C-796/18, EU:C:2020:395, paragraphs 57 and 58 and operative part).

[30] *Ibidem*, paragraphs 59 and 60 and the operative part. In my Opinion in that case (C-796/18, EU:C:2020:47, points 84 and 85), I submitted that supporting activities must be 'immediately and inseparably linked to the public service', being 'of such fundamental importance that the service itself could not be performed as a public service without them'. Although the form of words used by the Court is different, it is in my view no looser for that.

[31] Examples of complementary services include waste collection and treatment activities, as referred to in the judgment of 9 June 2009, *Commission* v *Germany* (C-480/06, EU:C:2009:357); or teaching and research activities pursued by public universities, as mentioned by Advocate General in his Opinion in *Datenlotsen Informationssysteme* (C-15/13, EU:C:2014:23, point 59). In practice, the flexibility granted by Directive 2014/24 may prove to be redundant because the difference in the substance of the services provided by each contracting authority does not enable them to define objectives that are *common* to all those services. In such circumstances, an essential element of cooperation would be lacking. It is also conceivable that that difference might prevent the services from being performed *in a cooperative manner*, because one contracting authority has no interest in the services offered by the other, or because the complementarity is unilateral rather than reciprocal. Accordingly, if the relationship between the parties is confined to the fact that the contracting authority interested in the other contracting authority's services buys those services from the latter authority for a price, there is no cooperation within the meaning of Article 12(4) of Directive 2014/24. Neither, probably, could there be said to be an interaction governed *solely by considerations relating to the public interest*, as point (b) of that same paragraph requires: charging a fee for providing a service is not an objective in the public interest. The reference to complementary services (more specifically, public service 'tasks') appears in recital 14(aa) of the Proposal for a Directive of the European Parliament and of the Council on public procurement, annexed to the Note by the General Secretariat, Council Document 14971/12 of 19 October 2012. The exclusion of cooperation from the directive was expressly made subject to the condition that the complementary services could be delivered 'in a cooperative manner'. Given that it was redundant, the disappearance of that requirement from the final text is irrelevant.

— So long as there are commitments to contribute towards the cooperative performance of the public service, it is not necessary for each of the parties to participate equally in the cooperation, which may be based on a division of tasks or on a particular specialisation. [32]

60. It *is* essential, on the other hand, that the collaboration between the parties should be intended to achieve *objectives common to all of them*. This is a key element of horizontal cooperation that differentiates the latter from the direct award of contracts to entities controlled by the contracting authority.

61. This was the view taken by the Court in the judgment in *Remondis II* when referring to the 'inherently collaborative dimension' of the cooperation provided for in Article 12(4) of Directive 2014/24. That dimension can be seen in particular in the fact that, when drawing up the cooperation agreement, the parties define common needs and identify solutions to them. [33]

62. What is more, horizontal cooperation is based on a *cooperative concept*, meaning that it takes the form of reciprocal commitments on the part of those participating in it. Those commitments go beyond the performance of a particular service, on the one hand, and the remuneration for that service, on the other, as the judgment in *Remondis II* makes clear. [34]

63. The expression 'cooperative concept' explicitly contained in recital 33 of Directive 2014/24 is equivalent to the proposals for the requirement of a 'genuine cooperation' 'involving mutual rights and obligations of the parties'. [35] It is not possible for one of the contracting authorities to be 'a mere "buyer"' [36] of the work, service or supply in question.

64. The *genuine* nature of the cooperation is fundamental in any agreement that seeks to benefit from Article 12(4) of Directive 2014/24. That feature will make it possible to distinguish this form of horizontal cooperation from vertical (in-house) cooperation, as well as from contracts subject to public procurement procedures, whereby one party performs a task in accordance with specifications laid down by the other, which, in turn, simply pays for the performance of that task. [37]

3. In the case in the main proceedings

(a) First scenario

65. The Municipality of Farciennes presents an initial scenario in support of its argument as to the existence of a relationship of horizontal cooperation between itself, SLSP Sambre & Biesmes and IGRETEC.

[32] Third paragraph of recital 33 of Directive 2014/24. This idea had already appeared in the Commission staff working document on the application of the EU public procurement rules to relations between contracting authorities (cooperation within the public sector), SEC(2011) 1169 final of 4 October 2011, point 3.3.2

[33] The judgment in *Remondis II*, paragraphs 32 and 33.

[34] *Ibidem*, paragraph 27.

[35] Proposal for a Directive of the European Parliament and of the Council on public procurement of 20 December 2011 [COM(2011) 896 final], Article 11(4)(a).

[36] This expression appears in the Note by the Secretariat-General, Council Document 9315/12 of 27 April 2012, p. 38. In the judgment in *Remondis II*, the idea is referred to in paragraph 29.

[37] Horizontal cooperation does not preclude financial transfers between the participants but it does, as I have said, make it impossible for the contribution of one of the participants to be confined to a mere payment.

66. In summary, I would recall that:

— SLSP Sambre & Biesme and the Municipality of Farciennes took the initiative to undertake jointly their respective housing redevelopment and urban renewal projects in a given district.

— To that end, they concluded a framework procurement agreement to which IGRETEC was not a signatory.

— IGRETEC's involvement came about as a result of the commissioning of the services necessary to implement the ecodistrict project. That commission followed the decision of the contracting authorities to join forces in order to carry out that project.

67. In my opinion, the trilateral relationship as described above is not covered by Article 12(4) of Directive 2014/24. I concur in my assessment with the referring court, which takes the view that 'the mere fact that [IGRETEC] performs, in the context of the agreement concluded between the Municipality of Farciennes and SLSP Sambre & Biesme, tasks aimed at implementing a joint project for the creation of the ecodistrict in Farciennes does not mean that IGRETEC itself cooperates on that project, or that it pursues an objective in common with the signatories to that agreement'. [38]

68. There are several reasons why I endorse that assessment by the referring court, with which the Commission concurs, in the light of the description of the facts provided by that court. I should emphasise that it is for that court alone to establish the factual framework for the dispute, and, in doing so, to evaluate the actions of the parties to the dispute and the purpose pursued by each of them in taking those actions.

69. First, as the referring court notes in the terms I have just reproduced, there is no commonality of objectives that would warrant the existence between the three entities of cooperation within the meaning of Article 12(4) of Directive 2014/24. [39]

70. Following its analysis of IGRETEC's articles of association and its involvement in the projects at issue, the Conseil d'État (Council of State, Belgium) notes that the tasks performed by IGRETEC in this case fall under 'sector I' of its corporate purpose, that is to say activities carried out on the market by consultancy and management firms specialising in the implementation of projects, not 'sector II', which is concerned with the region's development from an economic, social and tourism point of view, and, in particular, the construction, financing and use of certain properties. [40]

[38] Order for reference in Case C-384/21, p. 56.

[39] Order for reference in Case C-384/21, p. 56. The observations of the parties do not reveal any purpose common to all of them, if one exists, and that purpose is not obvious to an outside observer. In my opinion, these cases illustrate the difficulties I mentioned in footnote 31. An example of cooperation in connection with (and through) the provision of complementary services having the same aim can be found in the contract analysed in the judgment of 9 June 2009, *Commission* v *Germany* (C-480/06, EU:C:2009:357): see paragraph 37 thereof. The common objective was the rationalisation of waste treatment at the nearest possible facility.

[40] Order for reference in Case C-384/21, pp. 56 and 57. It should nonetheless be noted that a precondition for exclusion from the scope of Directive 2014/24, pursuant to Article 12 thereof, is that the contracting authority should have a choice between procuring the service through (vertical or horizontal) inter-administrative cooperation or by going to the market. In general, services obtained through cooperation between public entities can (also) be obtained on the market.

71. Second, the collaborative dimension evidenced at the initial stage by the definition of needs and solutions common to the parties looking to cooperate is also lacking. At that stage, IGRETEC's professional intervention may serve to enable the Municipality of Farciennes and SLSP Sambre & Biesme to identify and understand the needs of the ecodistrict project which they both wish to create. IGRETEC's needs, on the other hand, are different.

72. Third, the strategy for how best to share and pool the parties' resources seems to me to be confined to the Municipality of Farciennes and SLSP Sambre & Biesme, even though they are working on the basis of options proposed by IGRETEC. [41] The latter does not actually provide any public service jointly with the municipality and SLSP Sambre et Biesme.

73. Finally, IGRETEC's incorporation into the relationship between the two contracting authorities [42] by way of the agreement on assistance with project management and legal and environmental services does not meet the requirements of genuine cooperation. By that agreement, the Municipality of Farciennes and SLSP Sambre & Biesme do not make, in relation to IGRETEC, any commitments that they would not make in a public call for tenders: they require services which IGRETEC offers and the sole obligation into which they enter in return is to pay for those services.

(b) Second scenario

74. The second scenario envisages a combination of horizontal and vertical cooperation whereby IGRETEC, controlled by one of the two participants in the horizontal cooperation (the Municipality of Farciennes), provides a service for the other participant (SLSP Sambre & Biesme) too and is paid by both.

75. The Municipality of Farciennes takes the view that, when it commissions IGRETEC to provide assistance with project management and legal and environmental services, the latter uses the municipality's own resources. That fact should also be taken into account in the context of the cooperation between itself and SLSP Sambre & Biesme.

76. I cannot accept that argument, which the Municipality of Farciennes itself puts forward in the alternative (in the course of a submission which is itself ancillary to the main proposition) and on which, perhaps for that reason, it does not elaborate further.

77. If I understand it correctly, the position of the Municipality of Farciennes is that the two entities party to the vertical cooperation relationship (IGRETEC and the municipality itself) are, by virtue of that relationship, a single entity for the purposes of horizontal cooperation with a third party. [43] There is therefore no need for both entities to sign the framework agreement with SLSP Sambre & Biesme.

[41] Its proposals focused on matters such as the number of housing units, the demolition or refurbishment of existing units, the use of private capital investment, the type of public contract and so on.

[42] In actual fact, as the Commission indicates (paragraph 33 of its written observations), IGRETEC does not have the appearance of a contracting authority. There is no indication of what service IGRETEC might 'acquire' and would have to put out to tender in the absence of the cooperation relationship.

[43] Paragraph 146 *in fine* of the observations of the Municipality of Farciennes: 'By definition, the in-house relationship means that [IGRETEC] can be regarded as being equivalent to the Municipality of Farciennes'. Although, at the hearing, the representative for the municipality referred to a 'functional and organic link' between the two entities, she maintained the line of argument based on the in-house relationship between them.

78. I do not concur with that argument. In the context of vertical (in-house) cooperation, the contracting authority and the delivery body over which it exercises a control similar to that which it holds over its own departments are formally distinct entities both before and after they conclude a public contract.

79. Thus, the existence of an in-house relationship between the Municipality of Farciennes and IGRETEC is not sufficient to support the view that the requirements attached to the presence of horizontal cooperation with SLSP Sambre & Biesme are met.

V. Conclusion

80. In the light of the foregoing, I propose that the Court's answer to the Conseil d'État (Council of State, acting as supreme administrative court, Belgium) should be as follows:

(1) A contracting authority which wishes to award a public contract falling within the scope 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 without being subject to the award procedures laid down in that directive must fulfil the conditions set out in Article 12 thereof as from the deadline for transposing that directive into national law, if it has not been so transposed by that date.

(2) Article 12(4) of Directive 2014/24 must be interpreted as meaning that:

– It precludes the existence of cooperation between contracting authorities where the relationship which exists between them, and in the context of which they undertake to provide their respective services, does not pursue objectives common to all of them.

– It does not cover a relationship between independent contracting authorities under which one obtains from the other a service in return exclusively for payment in money.