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**Horizontal cooperation as a limitation on  
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2018 no 2

**UrT**

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REPRINT FROM PROCUREMENT LAW JOURNAL

# Horizontal cooperation as a limitation on the scope of applicability of the rules of public procurement and the conclusion of concession contracts<sup>\*1</sup>

*Aleksij Mužina, Klemen Pohar, Žiga Rejc\*\**

## ABSTRACT

MUŽINA, Aleksij, POHAR, Klemen & REJC, Žiga: Horizontal Cooperation (the Hamburg Doctrine) as a Limitation on the Scope of Applicability of the Rules on Public Procurement and the Conclusion of Concession Contracts

EU legislation includes two limitations to the application of rules of public procurement. Beside the limitation of in-house/vertical cooperation (the Teckal doctrine), the CJEU has also developed in its case law the so-called Hamburg doctrine, which concerns horizontal cooperation between contracting authorities. In 2014, this doctrine was incorporated into Paragraph 4 of Article 12 of Directive 2014/24/EU on public procurement, Paragraph 4 of Article 17 of Directive 2014/23/EU on the award of concession contracts, and in Paragraph 4 of Article 28 of Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors. Since the text of the paragraphs is rather concise, it is necessary to interpret it in the light of relevant judgments of the CJEU, which is the aim of this paper.

Keywords: public procurement, concessions, cooperation, public tasks, Hamburg doctrine, in-house

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\* This article has undergone careful and rigorous scientific scrutiny through peer review.

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<sup>1</sup> A paper, covering the subject matter with emphasis on Slovenian legislation and legal theory, written by co-authors Dr. Aleksij Mužina and Žiga Rejc, was published in the legal magazine »Pravnik« (in Slovenian language): Mužina, A. & Rejc, Ž: Horizontalno sodelovanje (doktrina Hamburg) kot omejitve uporabe pravil o javnem naročanju ter podeljevanju koncesijskih pogodb z vidika prava EU in nacionalnega prava. Pravnik : revija za pravno teorijo in prakso, 2017, year 72, vol. 5/6, p. 383-407.

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## Introduction

Contracts for pecuniary interest between one or more economic operators and one or more contracting authorities, the object of which is the execution of works, the supply of products or the provision of services, have to be as a rule concluded in an appropriate public procurement procedure in accordance with 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 (hereinafter referred to as: Directive 2014/24/EU)<sup>2</sup> or Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (hereinafter referred to as: Directive 2014/25/EU).<sup>3</sup>

The Court of Justice of the European Union (hereinafter referred to as: the CJEU) has, however, in its case law, which was later enshrined through substantially identical provisions not only in the directives on public procurement, but also in Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (hereinafter referred to as: Directive 2014/23/EU),<sup>4</sup> established two exceptions in which the applicability of the rules on public procurement is limited, despite the fulfilment of all essential elements of a definition of a public contract. These exceptions are called *in-house* relations of (vertical) cooperation and relations of horizontal cooperation. In this paper we will analyse the latter relations, which were in the case-law of the CJEU established after the exception of *in-house* relations.

The significance of this paper lies especially in the fact that the case law of the CJEU was incorporated in the legislative text of the directives (which is on this matter virtually identical in all the three directives<sup>5</sup>) in a concise manner, which means that the provisions of the directives must be interpreted in the light of the relevant judgements of the CJEU. In this regard it is relevant that a significant part of the case law of the CJEU, presented in the paper, which contributes to the understanding of certain important aspects of horizontal cooperation, originates from the period after the draft (and the subsequent adoption) of the directives.

This paper consists of two substantive parts. The first part comprises the review of the relevant case law of the CJEU regarding the interpretation of some fundamental notions defining public procurement, with special emphasis on the cases in which the contract subject matter includes an international element. The second

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<sup>2</sup> Official Journal L 94, 28. March 2014, pp. 65–242.

<sup>3</sup> Official Journal L 94, 28. March 2014, pp. 243–374.

<sup>4</sup> Official Journal L 94, 28. March 2014, pp. 1–64.

<sup>5</sup> Due to the fact that the provisions on horizontal cooperation are virtually identical, the main text of the paper contains, in the interest of a more fluent reading, only references to Directive 2014/24/EU, while references to directives 2014/25/EU and Directive 2014/23/EU are in the footnotes.

part focuses on the conditions which the CJEU has established regarding particular provisions of the directives in relation to horizontal cooperation.

## 1 The obligation to apply the rules on public procurement when concluding a public contract (in relations with an international element)

Directive 2014/24/EU defines a public contract in item 5, paragraph 1, article 2 as a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as its object the execution of works, the supply of products or the provision of services.<sup>6</sup>

Directive 2014/23/EU includes more detailed definitions and specifically distinguishes in item 1, paragraph 1, article 5 between the notions of a works concession and a service concession. A works concession is a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the execution of works to one or more economic operators the consideration for which consists either solely in the right to exploit the works that are the subject of the contract or in that right together with payment; while a service concession means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the provision and the management of services other than the execution of works constituting a works concession to one or more economic operators, the consideration for which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment.<sup>7</sup>

Considering these initial definitions the question must first be answered, for which relevant contracts must a contracting authority apply the rules on public

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<sup>6</sup> Item 1, paragraph one, article 2 of Directive 2014/25/EU provides an identical definition of »supply, works and service contracts«.

<sup>7</sup> Here the key substantial difference between public procurement and concession contracts should be highlighted, as explained in recital 18 of Directive 2014/23/EU: »The main feature of a concession, the right to exploit the works or services, always implies the transfer to the concessionaire of an operating risk of economic nature involving the possibility that it will not recoup the investments made and the costs incurred in operating the works or services awarded under normal operating conditions even if a part of the risk remains with the contracting authority or contracting entity. The application of specific rules governing the award of concessions would not be justified if the contracting authority or contracting entity relieved the economic operator of any potential loss, by guaranteeing a minimal revenue, equal or higher to the investments made and the costs that the economic operator has to incur in relation with the performance of the contract. At the same time it should be made clear that certain arrangements which are exclusively remunerated by a contracting authority or a contracting entity should qualify as concessions where the recoupment of the investments and costs incurred by the operator for executing the work or providing the service depends on the actual demand for or the supply of the service or asset.«

procurement and for which must it apply the rules on the award of concession contracts.<sup>8</sup>

## 1.1 Contracts for pecuniary interest

The rules on public procurement apply only for contracts of pecuniary interest. In this regard it must be noted that a contract must be considered as being concluded for pecuniary interest in terms of the rules of public procurement even if the remuneration remains limited only to reimbursement of the expenditure incurred to provide the agreed service;<sup>9</sup> or in other words, a contract cannot fall outside the concept of a public contract merely because the remuneration is limited only to reimbursement of the costs to provide the service.<sup>10</sup> Whenever such contracts are concluded by contracting authorities, the procedures, laid down in the directives, must be followed. A contract, concluded contrary to the rules of public procurement, can in accordance with the national legislation of some member states even be null and void.<sup>11</sup>

A contract does, however, fall outside the concept of a public contract, where every economic operator, who fulfills certain conditions, is selected, and the contracting authority concludes a contract with every such economic operator. This can be seen in the latest case-law of the CJEU, namely in the case C-9/17,<sup>12</sup> where the court held that a farm advisory scheme, through which a public entity admits all the economic operators who meet the suitability requirements set out in the invitation to tender and who pass the examination referred to in that invitation to tender, even if no new operator can be admitted during the limited validity period of that scheme, does not constitute a public contract within the meaning of EU law.

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<sup>8</sup> At this point it should already be noted that legal relations which can be defined as horizontal cooperation, as explained in detail below, are excluded from the application of the rules on public procurement and on conclusion of concession contracts. For this reason the threshold value for the application of the directives, as defined in article 4 of Directive 2014/24/EU, article 15 of Directive 2014/15/EU and article 8 of Directive 2014/23/EU, is not relevant for contracts on horizontal cooperation.

<sup>9</sup> Judgement of the CJEU C-386/11, EU:C:2013:385, paragraph 31.

<sup>10</sup> Judgement of the CJEU C-159/11, EU:C:2012:817, paragraph 29.

<sup>11</sup> Such is the legislation in Slovenia, set in item 2, paragraph 1, article 44 of Legal Protection in Public Procurement Procedures Act (Official Journal RS, no. 43/11, 60/11 – ZTP-D, 63/13 and 90/14 – ZDU-11).

<sup>12</sup> EU:C:2018:142, paragraph 41.

## 1.2 The notion of a contracting authority

As follows from the definition of a public contract, such contracts are concluded by contracting authorities. These are generally defined in Directive 2014/24/EU in item 1, paragraph one, article 2, according to which contracting authorities are the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities and one or more such bodies governed by public law.<sup>13</sup>

It must be noted that the CJEU has in the case C-31/87<sup>14</sup> already taken the position that the notion of the State must be interpreted in functional terms. Furthermore, in case C-470/99<sup>15</sup> the CJEU has stated that even a body which was not established to satisfy needs in the general interest not having an industrial or commercial character, can be regarded as a body governed by public law on condition that it has subsequently taken responsibility for such needs, which it has since actually satisfied (which must be objectively established). The notion of a public entity must therefore also be interpreted in functional terms, not in formal terms.<sup>16</sup>

Interpreting the notion of a public entity in functional terms can most clearly be seen in the case C567/15,<sup>17</sup> where the CJEU took the position that a company which, on the one hand, is wholly owned by a contracting authority whose activity consists of meeting needs in the general interest and which, on the other, carries out both transactions for that contracting authority and transactions on the competitive market must be classified as a body governed by public law within the meaning of EU law, provided that the activities of that company are necessary for the contracting authority to exercise its own activity and, in order to meet needs in the general interest, that company is able to be guided by non-economic considerations. The court also noted that the fact that the value of the internal transactions may in future represent less than 90 per cent or an insignificant part of the overall turnover of the company is in that regard irrelevant.

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<sup>13</sup> An identical definition can also be found in paragraph one, article 6 of Directive 2014/23/EU and paragraph one, article 3 of Directive 2014/25/EU. At this point we must also note the provisions of article 7 of Directive 2014/23/EU and article 4 of Directive 2014/25/EU, which in addition to »contracting authorities« also define »contracting entities«. The latter include contracting authorities and also entities, which operate on the basis of special or exclusive rights granted by a competent authority of a member state.

<sup>14</sup> EU:C:1988:422, paragraph 11.

<sup>15</sup> EU:C:2002:746, paragraphs 53 and 63.

<sup>16</sup> A functional definition of the notion of bodies, governed by public law, as a subset of entities, defined by EU law as contracting authorities, also follows from item 4, article 2 of Directive 2014/24/EU (in relation to recital (4) of the same Directive).

<sup>17</sup> EU:C:2017:736, paragraph 48.

According to the position of CJEU in case C-373/00<sup>18</sup> the term »needs in the general interest« should not be viewed in the light of established concepts in the national legislations, as this is an autonomous concept of EU (then Community) law. The terms, adopted from EU law, should therefore not be interpreted in accordance with the particular national legal understandings, but instead autonomously, taking into account the objectives of the common market and the authentic language variants of the relevant legal act.

Here we have to highlight a dilemma regarding particular national regulations of member states on the matter of the definition of a contracting authority. Namely, the question arises, whether a foreign body, governed by public law, i.e. an entity which has under foreign law the status of a public entity (not necessarily only by the legal doctrine, but also under the valid legislation), should be given the same status by domestic law. In other words: would it be possible to consider in a particular case a foreign legal entity, which is regarded as a public entity by foreign law, as a private entity according to domestic law?<sup>19</sup>

Regarding the highlighted dilemma it has to be taken into account that the purpose of the uniform provisions of both public procurement directives and the concessions directive is primarily to ensure competition on the common European market and to prevent entities, governed by public law, to award contracts without appropriate procedures and to favour particular subjects,<sup>20</sup> which would result in distorting and hindering the forces of competition, hampering economic development.<sup>21</sup>

Considering the above, it should in our opinion not be relevant for determining the status of a body, governed by public law, in relation to its involvement in a relationship of horizontal cooperation, what formal status is attributed to this entity in its home member state. Consequentially it is not possible to simply conclude that the Hamburg doctrine allows cooperation between bodies,

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<sup>18</sup> EU:C:2003:110, paragraph 45.

<sup>19</sup> The fact that different national legislations define bodies, governed by public law, in a different manner, is also highlighted by the public procurement directives: »However, political parties in some Member States might fall within the notion of bodies governed by public law.« (recital (29) of Directive 2014/24/EU; recital (37) of Directive 2014/23/EU).

<sup>20</sup> »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.« (recital 31 of Directive 2014/24/EU).

<sup>21</sup> These rules are the result of a fundamental assumption that the free market or the environment which ensures the highest possible level of competition, as a rule provides for optimal economic development, which also follows from the recitals of the concessions and the public procurement directives: »The award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services...« (recital (1) of Directive 2014/24/EU; see also recital (4) of Directive 2014/23/EU and recital (2) of Directive 2014/25/EU).

governed by public law from different member states, which are given this status by their national laws, - or, *a contrario*, it is not possible to make the axiomatic opposite conclusion – but rather a substantive assessment has to be made in each individual case regarding whether the subjects concerned fall under the criteria, set in this matter by EU law.

This is also confirmed by individual national cases. In Slovenia one such case is the case of the company Nuklearna Elektrarna Krško d.o.o. (the Nuclear Power Plant Krško), 50 per cent of which is owned by the Republic of Croatia through the company Hrvatska Elektroprivreda, d.d. (Croatian Electric Power Company). The company is therefore not under the majority ownership or governance or control of a Slovenian public entity, as required in article 9 of the Slovenian Public Procurement Act<sup>22</sup> in order for a company to be regarded as a contracting authority. The Krško nuclear power plant company, which is otherwise wholly owned and governed by (Slovenian and Croatian) public entities, can nevertheless be found on the (informative) list of contracting authorities,<sup>23</sup> which further confirms the fact that the status of a contracting authority in terms of the procurement and concessions directives must be interpreted in a broader sense, i.e. outside the national legislative frameworks.

### 1.3 The notion of a tenderer

The second question that must be answered is who can be regarded as a tenderer in public procurement procedures. A particularly clear answer to this question was given by the CJEU in the case C-203/14,<sup>24</sup> where the court held that, bodies governed by public law can also participate as tenderers in procedures for the award of public contracts, while emphasizing, that the Court had already held that any person or entity which, in the light of the conditions laid down in a contract notice, believes that it is capable of carrying out the contract, either directly or by using subcontractors, is eligible to submit a tender or put itself forward as a candidate, regardless of whether it is governed by public law or private law, whether it is consistently active on the market or only on an occasional basis and whether or not it is subsidised by public funds.<sup>25</sup>

The same conclusion can also be reached from another viewpoint, i.e. from the position of the CJEU that the internal organization of the state (*iure imperii*) does not fall within the scope of harmonization of EU law and that the way in which

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<sup>22</sup> Official Journal RS, no. 91/15.

<sup>23</sup> See supplement 3 of Decree on the indicative list of contracting authorities and mandatory information in notices regarding small-value contract procedures (Official Journal RS, no. 37/16).

<sup>24</sup> EU:C:2015:664, paragraphs 33-34.

<sup>25</sup> The court also referred to judgements in cases C305/08, EU:C:2009:807, paragraph 42, and C568/13, EU:C:2014:2466, paragraph 35.

the member states internally organize the exercise of powers through national bodies is solely a matter for each state to decide. The CJEU has namely on many occasions acknowledged that every member state is free to delegate powers to its domestic authorities as it sees fit,<sup>26</sup> and that the question of how the exercise of powers may be entrusted by member states to specific national bodies is solely a matter for the constitutional system of each state.<sup>27</sup> Additionally it should be pointed out that according to recital 34 of Directive 2014/24/EU »a purely administrative relationship should not fall within the scope of public procurement procedures«.<sup>28</sup>

In so far as the purpose of a specific cooperation between contracting authorities would be the performance of a public service originating from the service (and not the authoritative) function of the state, the limitation of the use of the rules on public procurement, based on the above premises – as follows from the argument *a contrario* – would not be allowed<sup>29</sup> and the rules on public procurement would have to be fully respected.

#### 1.4 The limitations of application of the rules on public procurement

The EU law defines certain specific situations in which the contracting authority is under exhaustively listed conditions allowed to directly conclude a public contract, i.e. without the obligation to carry out a prior public procurement procedure.

Here, we have to specifically highlight the cooperation between subjects of public law which is not based on an administrative relationship, but on the realization of common goals in public interest. Based on the arguments above, such cooperation does not have to be limited to the national borders, as must *a contrario* be the internal organization of the state as *iure imperii*. Namely, it has to be noted that even in cases where the conditions for performing a public

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<sup>26</sup> See e.g. cases C301/12, EU:C:2014:214, paragraph 42; C391/11, EU:C:2012:611, paragraph 31; C428/07, EU:C:2009:458, paragraph 50.

<sup>27</sup> This follows e.g. from cases C428/07, paragraph 49, and C156/13, EU:C:2014:1756, paragraph 33.

<sup>28</sup> Recital 34 of Directive 2014/24/EU. See also recital 6 of Directive 2014/23/EU and recital 8 of Directive 2014/25/EU.

<sup>29</sup> This is all the more true for the due transfer of the »authoritative« tasks on the provider of the service, which would be a condition for the use of this exception, as emphasized in the opinion of the advocate general in the case C-51/15, EU:C:2016:504: »... it is clear, from the requirement highlighted by the Court that the transferring authority must relinquish its power, that if a transfer of powers is to be genuine, it must be comprehensive. The entity to which powers are transferred must thus hold all the powers and responsibilities necessary to perform fully and autonomously the public task for which the powers have been conferred on it. It must, inter alia, have the power to determine the regulatory framework and procedures for the performance of that task. Following the transfer, the transferring authority must, in contrast, completely relinquish the powers relating to the public service task in question.« (paragraph 53).

procurement procedure were *prima facie* met, the CJEU has in its case law defined certain situations in which – provided that specific special conditions are met – public entities are not obliged to apply the rules on public procurement.

These situations, in which it is (exceptionally) allowed to directly conclude a public or a concession contract, can be substantively divided into two groups.<sup>30</sup> The first group consists of **internal (in-house) relations** (the legal theory in this regard also uses the term *the Teckal doctrine*, after the name of the company in the procedure before the CJEU<sup>31</sup>), the key element of which is a direct or indirect relation in ownership between the subjects, concluding the relevant contract.<sup>32</sup>

The second group of situations consists of **horizontal cooperation relations**, also named »*genuine inter-municipal cooperation*«,<sup>33</sup> which can involve public entities, among which there is no relation in ownership. This exception was first formed by the CJEU in the case C480/06,<sup>34</sup> regarding waste disposal services in the city of Hamburg, *ergo the Hamburg doctrine*.

The literature emphasizes that the Teckal and Hamburg doctrines, i.e. the (vertical) in-house relations and horizontal cooperation, do not constitute exceptions from the rules on public procurement, but a limitation of the scope of these rules. In other words: the concept of public procurement, as defined in EU law, does not cover situations, which can be subsumed under the abovementioned doctrines of the CJEU, and are therefore not subject to the directives. This opens some possibilities to take into account the broader interests of the parties concerned in specific situations.<sup>35</sup>

## 2 Horizontal cooperation (the hamburg doctrine; genuine inter-municipal cooperation, horizontal in-house)

Horizontal cooperation does not constitute a genuine *in-house* relation<sup>36</sup> since there is no cooperation between a contracting authority and a dependent legal entity, but rather a cooperation between two (or more) contracting authorities to achieve

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<sup>30</sup> The situations are as such explicitly defined in paragraphs 31 to 35 of the CJEU judgment in the case C-159/11 and paragraphs 33 to 37 of the case C-386/11.

<sup>31</sup> C107/98, EU:C:1999:562.

<sup>32</sup> An analysis of (genuine) in-house relations is out of the scope of this paper. These are analysed by the co-author of this paper e.g. in the article Mužina, A.: Razjasnitev uporabe notranjih (in-house) razmerij pri izvajanju javnih naročil/koncesij. Pravna praksa, 13. December 2012, year 31, no. 48, pp. 21-22.

<sup>33</sup> This term follows e.g. from the opinion of the advocate general in the case C-159/11, EU:C:2012:303, paragraphs 62 and 81.

<sup>34</sup> EU:C:2009:357.

<sup>35</sup> Cf. Arrowsmith, S.: The Law of Public and Utilities Procurement: Regulation in the EU and UK. UK: Thomas Reuters Professional, 2014, p. 527 in relation with p. 477.

<sup>36</sup> Horizontal cooperation is also termed »horizontal in-house« in the case C-15/13, EU:C:2014:303, paragraph 33.

a common objective which, as demonstrated in detail below, must include a common performance of one or several public services by the contracting authorities and consequently a more economical and easier performance of these services.

The concept of horizontal cooperation was first developed in the case law of the CJEU, which was in 2014 enshrined in the body of the new public procurement directives and the concessions directive.<sup>37</sup> Horizontal cooperation is defined in paragraph four, article 12 of Directive 2014/24/EU,<sup>38</sup> which states that a contract concluded exclusively between two or more contracting authorities falls outside the scope of the directive where all of the following conditions are met:

- (a) the contract implements or establishes 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 the cooperation is governed solely by considerations relating to the public interest, and
- (c) the participating contracting authorities do not perform on the open market 20 per cent or more of the activities concerned by the cooperation.<sup>39</sup>

Here we have to note that in accordance with the case law of the CJEU in order for a certain relationship to be qualified as horizontal cooperation, all the above conditions have to be met.<sup>40</sup> Therefore it is clear that the application of the Hamburg doctrine, which establishes the notion of horizontal cooperation, is limited to a relatively narrow range of cases. In these cases, a specific set of conditions has to be met, which are from the viewpoint of the contractual parties both objective and subjective in nature.

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<sup>37</sup> As noted in recital 2 of Directive 2014/24/EU, the directive was inter alia adopted with the aim to clarify basic notions and concepts to ensure legal certainty and to incorporate certain aspects of related well-established case-law of the CJEU. See also recital 4 Directive 2014/25/EU.

<sup>38</sup> Also in paragraph four, article 17 of Directive 2014/23/EU and in paragraph four, article 28 of Directive 2014/25/EU.

<sup>39</sup> This does not necessarily mean, however, that the conditions for horizontal cooperation are the same in all member states. In Slovenia, although the relevant provisions of the public procurement directives have been implemented in paragraph six, article 28 of the Public Procurement Act, the use of the Hamburg doctrine is additionally limited, because a further condition (a relic of the previous legislation) was added, namely the requirement that the contract value of the contracted public services does not exceed their market value.

<sup>40</sup> See e.g. case C159/11, paragraph 36, and case C-386/11, paragraph 38.

## 2.1 The condition of loyal cooperation

Item a, paragraph four, article 12 of Directive 2014/24/EU<sup>41</sup> sets the first condition for horizontal cooperation, i.e. that the contract must establish or implement 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; which could be best termed as the condition of loyal cooperation. This is a complex essential condition for horizontal cooperation,<sup>42</sup> in relation to which the EU law sets the following requirements:

### 2.1.1 Cooperation between contracting authorities

In order for a relationship to be qualified as horizontal cooperation in accordance with the relevant provisions of EU law, it is not sufficient that a contract is (being) concluded by entities of public law, since such contracts have to be as a rule concluded in a public procurement procedure. On the other hand, the characteristic of a contracting authority must necessarily be present in all the cooperating subjects, which is clear from the text of the directives. In this regard it is not specified in which form or on what legal basis the cooperation has to take place; it could be a *joint venture* project or a contractual cooperation.<sup>43</sup>

### 2.1.2 Common performance of public services of the contracting parties

In the abovementioned case C-480/06, which represents the foundation of the doctrine of horizontal cooperation, the cooperation between four administrative districts (*Landkreise*) and the city of Hamburg fulfilled the necessary conditions for the establishment of an operational system of a new incineration facility at Rugenberger Damm. Namely, the cooperation between the subjects concerned, which were all obliged to provide the public service of waste treatment (which was the object of cooperation), enabled the city of Hamburg to build and operate a waste treatment facility under the most favourable economic conditions, as the

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<sup>41</sup> Also article 17 of Directive 2014/23/EU and article 28 of Directive 2014/25/EU.

<sup>42</sup> This follows from the operative part of the judgment in case C-386/11: »A contract such as that at issue in the main proceedings – whereby, without establishing cooperation between the contracting public entities with a view to carrying out a public service task that both of them have to perform, one public entity assigns to another the task ... constitutes a public service contract ...«.

<sup>43</sup> «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.» (recital 33 of Directive 2014/24/EU). See also CJEU judgment in the case C-480/06, paragraph 47.

waste contributions from the neighbouring administrative districts provided for a more efficient performance of the public service concerned.<sup>44</sup>

In relation to the above the CJEU emphasized that the contract at issue established cooperation between local authorities with the aim of ensuring that a public task that they all have to perform, namely waste disposal, was carried out.<sup>45</sup> The fulfillment of a task to provide a public service, common to all the subjects concerned, was emphasized as a key condition for horizontal cooperation in other cases as well.<sup>46</sup> On the other hand it has to be noted in this regard that merely the performance of certain supportive services cannot constitute horizontal cooperation.<sup>47</sup>

### 2.1.3 Genuine and mutual cooperation that has to pursue a common objective

Furthermore (also according to the public procurement directives and the concessions directive), horizontal cooperation can only exist in cases where there is a common objective among the public entities, while the contract establishing the cooperation represents an agreement regarding the common tasks to reach this objective. In this regard it can be understood from the case law of the CJEU that the subjects of horizontal cooperation must pursue such common objective from the very beginning of the cooperation; the intention of the parties concerned must therefore not be the subsequent (re)organization of the cooperation in the way that it would formally meet the conditions or demonstrate the characteristics of horizontal cooperation, while in fact pursuing other purposes and circumventing the rules of public procurement.<sup>48</sup>

It also has to be noted that in the case, in which the Hamburg doctrine was formed, the contract on waste disposal in a new incineration facility had been

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<sup>44</sup> Case C480/06, paragraphs 4 and 38.

<sup>45</sup> *Ibidem*, paragraph 37.

<sup>46</sup> »The second type of contracts are those which establish cooperation between public entities with the aim of ensuring that a public task that they all have to perform is carried out« (C-159/11, paragraph 34; identically also in case C386/11, paragraph 36); or, a contrario, as the CJEU clarifies why a certain relationship cannot be regarded as horizontal cooperation: »Thus, the cooperation between the University and HIS is not aimed at carrying out a public task which both of them have to perform, within the meaning of the case-law« (case C-15/13, paragraph 35).

<sup>47</sup> This is especially emphasized by CJEU in the case C159/11, as the Court states: »In that regard, it appears to follow from the information in the order for reference, first, that that contract contains a series of substantive aspects a significant or even major part of which corresponds to activities usually carried out by engineers and architects and which, even though they have an academic foundation, do not however constitute academic research« (paragraph 37).

<sup>48</sup> See case C480/06, paragraph 48: »It must, furthermore, be stated that there is nothing in the information in the file submitted to the Court to indicate that, in this case, the local authorities at issue were contriving to circumvent the rules on public procurement.»

concluded four years before the foreseen completion date of its construction,<sup>49</sup> in relation to which the CJEU emphasized that the construction of that facility was decided upon and undertaken only after the administrative districts concerned had agreed to use the facility and entered into commitments to that effect.<sup>50</sup> This must of course not be understood as a *conditio sine qua non* for the existence of a genuine and mutual cooperation, while it does, however, demonstrate that the cooperation must represent more than a mere procurement relationship.

As follows from the above, in order for there to exist a pursuit of a common objective, the cooperation must be genuine and mutual. The conditions of the directives are also understood in this way in the legal literature. In the journal *Public Procurement Law Review* we can thus find the definition of the relationship in the above case as *non-institutional horizontal cooperation*, whereby the genuineness of the cooperation is viewed as an opposing quality to an ordinary contract (»*The new provision thus seems to reflect the distinction between “ordinary contracts” and “genuine co-operation”...«*).<sup>51</sup>

Also noteworthy is the opinion of the advocate general in the case C-159/11, according to which the situation when a public authority is using the resources of another public authority to limit costs, does not from a legal point of view represent a genuine cooperation, but merely a contract for services which are provided for a consideration.<sup>52</sup>

Also important to emphasize is that in order for there to exist a horizontal cooperation it is required that the contracting parties form such a cooperation and mutual obligations that lead to synergetic effects for all the subjects concerned regarding the common public service, subject to the cooperation.<sup>53</sup> In practice this was achieved in the following ways:

- (1) As already mentioned, in the case C-480/06 the cooperation between the parties enabled the city of Hamburg the establishment and operation of a new incineration facility, as the waste contributions from the neighbouring administrative districts were required for an efficient performance of the public service concerned.<sup>54</sup>
- (2) In the case C480/06 the contract establishing the cooperation also included commitments of the local authorities, which were in direct relation to the

<sup>49</sup> Ibidem, paragraph 4.

<sup>50</sup> Ibidem, paragraph 38.

<sup>51</sup> Wigger, J.: Directive 2014/24/EU: The New Provision on Co-operation in the Public Sector. *Public Procurement Law Review*, no. 3, 2014, p. 90.

<sup>52</sup> Opinion of advocate general in the case C-159/11, paragraph 92.

<sup>53</sup> See also Arrowsmith, 2014, p. 522.

<sup>54</sup> Case C480/06, paragraph 38.

public service objective, namely the administrative districts made available to the department of waste disposal of the city of Hamburg the landfill capacity which they did not use themselves in order to alleviate the lack of landfill capacity of the city of Hamburg. They also agreed to take for disposal in their landfill the slag remaining after incineration that could not be utilised in proportion to the quantities of waste which they had delivered; and also to assist each other in relation to the performance of their legal obligation to dispose of waste.<sup>55</sup>

It follows from the above examples that horizontal cooperation can involve different ways of division of tasks among the subjects concerned. To achieve a common objective, a party can specialize or undertake certain specific tasks regarding the performance of the common public service.<sup>56</sup> However, all the parties have to undertake certain obligations, which go beyond a mere pecuniary compensation for the performance of tasks of the other parties, and are of mutual benefit regarding the common objective to all the subjects concerned, as was clearly emphasized by the advocate general in the case C-159/11:

*«...It is not therefore sufficient that the statutory duty to perform the public task in question concerns only one of the public authorities involved, whilst the other's role is limited to that of a vicarious agent, which takes on the performance of this external task under a contract. This seems understandable if we consider the etymological meaning of the word 'cooperation'; the essence of such cooperation consists precisely in a common strategy between partners which is based on the exchange and the coordination of their respective interests. The unilateral pursuit of one participant's own interests cannot really be described as 'cooperation' in the above sense.»<sup>57</sup>*

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<sup>55</sup> Case C480/06, paragraphs 41 and 42.

<sup>56</sup> This also follows from recital 33 of Directive 2014/24/EU: »The services provided by the various participating authorities need not necessarily be identical; they might also be complementary. ... 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 this regard Arrowsmith (2014, footnote no. 616 on p. 527) notes that the draft Directive included the condition of a common performance of the contractual obligations, which was later not adopted in the corpus of the Directive. This can be viewed as an additional argument that it is not necessary for all the subjects to perform the common service.

<sup>57</sup> Opinion of the advocate general in the case C-159/11, paragraph 75.

## 2.2 The condition of public interest

Directive 2014/24/EU furthermore limits in item b, paragraph 4, article 12<sup>58</sup> the use of horizontal cooperation for common performance of public tasks with the requirement that the implementation of such cooperation is governed solely by considerations related to the public interest. In addition to the abovementioned requirements regarding the common performance of public services, according to the case-law of the CJEU this condition also relates to limitations on financial transactions between the parties concerned, relating to the subject matter of the cooperation, as well as the requirement for equal treatment of private partners in the project.

### 2.2.1 Limitation of financial transactions between contractual parties

The CJEU has on multiple occasions emphasized the limitation that the financial compensations, paid in relation to the common performance of public tasks – the subject matter of horizontal cooperation – can only represent reimbursement of the costs generated thereby.<sup>59</sup> In this relation, we also need to stress the position of the AG in the case C-113/13<sup>60</sup> regarding the question which costs are to be included in the scope of »reimbursement of costs«, that was also confirmed by the CJEU in its judgement in the same case:<sup>61</sup> »it is immaterial whether the costs to be reimbursed to an association cover only costs directly relating to the performance of the services concerned or extend also to a part of the general costs«.

The basic principle of such cooperation between contractual parties, as already stated, lays in creating mutual legal obligations aiming at achieving synergies at providing public services for all the parties involved – and not (solely) in the higher prices of services in one local community as a consequence of either lower prices in the other or creation of profits (surpluses) for one of the public service providers involved. Therefore, a legal relation could only constitute horizontal cooperation if conducted in such a way that it only comprises those financial transactions that represent reimbursement of costs, generated by conducting the public services involved.

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<sup>58</sup> Directive 2014/23/EU, article 17; Directive 2014/25/EU, article 28.

<sup>59</sup> For example in the case C-480/06, paragraph 43: »...By contrast, the terms of the contract at issue show that the cooperation which the latter establishes between Stadtreinigung Hamburg and the four Landkreise concerned does not give rise to any financial transfers between those entities other than those corresponding to the reimbursement of the part of the charges borne by those Landkreise but paid by Stadtreinigung Hamburg to the operator.« See also e.g. C-159/11, paragraph 29; C-386/11, paragraph 31.

<sup>60</sup> ECLI:EU:C:2014:291.

<sup>61</sup> ECLI:EU:C:2014:2440, paragraph 37.

The rules, governing direct conclusion of contracts between legal entities that are contracting authorities according to the public procurement rules, seem to be, regarding the reimbursement of costs, interpreted in a very narrow manner. In this regard, we must point out that such contractual relations can only be qualified as horizontal cooperation under the condition that only the actual costs generated are reimbursement – any market interest of the subjects has to be excluded (or such overpayment is to be sanctioned as illegal by EU law/needs to be refunded). Such is for example the position of the Slovenian National Review Commission for Reviewing Public Procurement Award Procedures, which stressed in one of its decisions that one of the conditions for »*public-public cooperation*« is also the purpose of the cooperation, which can be identified in the common performance of a public service, that can only include financial transactions which encompass reimbursement of the actual costs generated, whereas the market interests have to be entirely excluded.<sup>62</sup>

Nevertheless, the legal literature points out the fact that such condition has never been directly included into the directives, as well as the fact that the Commission had foreseen such provision in the proposal for the directives, which has, however, not been adopted in the legislative procedure. Consequentially, these facts can also be interpreted in the way that this condition cannot be declared as absolute for all the cases of horizontal cooperation.<sup>63</sup>

### 2.2.2 Equal treatment (non-favouritism) of private partners

At first glance, one could interpret some of the conclusions of the CJEU from the time, when it was forming the doctrine of horizontal cooperation, as an absolute prohibition of taking part of entities, in which private capital is involved, in such projects.<sup>64</sup> In this relation the legal literature points out that such restriction is not to be necessarily understood as absolute since it has not been expressly included in Directive 2014/24/EU.<sup>65</sup>

We believe that the latter understanding of the legal framework is appropriate from the viewpoint of fostering competitive forces on the market, since it does not favour private capital in the sense of providing private entities with a market advantage. This is because every intervention on the market by the participant contracting authorities in the project of horizontal cooperation will be performed by the means of an appropriate public procurement procedure; and the remuneration will necessarily be limited to only cover the costs incurred by the participating parties, therefore preventing the generation of profits by the

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<sup>62</sup> Decision of the National Review Commission of January 11th 2002, Nr. 018-402/2011-6.

<sup>63</sup> Arrowsmith, 2014, p. 526, 530.

<sup>64</sup> See for example e.g. judgments C-480/06, paragraph 44 and 45; C-159/11, paragraph 35.

<sup>65</sup> Arrowsmith, 2014, p. 524.

private capital. Nevertheless, there is no doubt that we can identify a *conditio sine qua non* for horizontal cooperation, i.e. that under no circumstances, a certain private subject could be favoured in comparison to its competitors in the market as a consequence of taking part in such a project<sup>66</sup> - which also follows from the general purpose of the rules on public procurement.<sup>67</sup>

### 2.3 The condition of limited income from activities, subject of the cooperation

Lastly, item c, paragraph 4, Article 12 of Directive 2014/24/EU<sup>68</sup> imposes one more limitation for horizontal cooperation as it requires that the participating contracting authorities perform on the open market less than 20 per cent of the activities, which are subjects of the cooperation. The aim of such limitation of the market activities of subjects, taking part in the cooperation, can be found in the efforts that direct contracting between subjects which in general have to use special rules for awarding public contracts (contracting authorities) does not disturb the forces of competition on the (open) market.

## CONCLUSION

EU law regulates two groups of situations, formed by the practice of the CJEU, in which the application of the rules on public procurement is to be excluded. One of them represents the so called horizontal cooperation, which has been included in 2014 in 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, Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

In order to meet the conditions for horizontal cooperation, the contracting parties have to cumulatively fulfil several conditions. First, they have to fulfil the condition of loyal cooperation, that consists of the requirements that all the parties involved are contracting authorities according to the public procurement rules; that all of them cooperate in the common performance of their public services (whereas it is not required for all of them to execute all the tasks needed to achieve the common objective; a party can namely specialize or undertake

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<sup>66</sup> See judgments C-480/06, paragraph 47; C-159/11, paragraph 35; C-386/11, paragraph 37.

<sup>67</sup> A chronological presentation of the case-law of CJEU regarding the question of non-favouritism) of private partners, in relation to in-house public procurement, can be found e.g. in Pirnat, 2017, p. 19.

<sup>68</sup> Also article 17 of Directive 2014/23/EU; article 28 of Directive 2014/25/EU.

certain specific tasks regarding the performance of the common public service) as well as that the cooperation is formed on a broader, strategic level in the way that it can be identified as pursuing a common objective of all the contracting parties involved or, in other words, to exceed the boundaries of “regular public procurement contracting” between parties.

Secondly, the condition of public interest underlines not only the demand for limited financial transactions between the contracting parties, that cannot exceed the reimbursement of the costs generated thereby, but also (and especially) the prohibition of favouring private subjects involved.

And thirdly, there is also the condition limiting the amount of activities of the participating contracting authorities on the open market, which seeks to limit potentially harmful influences of such cooperation on the market forces, that could potentially distort the competition.

With the institute of horizontal cooperation, adopted within the last couple of years, that constitutes a limitation of the scope of applicability of the public procurement rules, the EU law stimulates cooperation between public entities (entities governed by public law) in order to achieve greater efficiency in performance of (common) public services of contracting parties. As a consequence, in the future, we can expect more cooperation between contracting authorities, aiming at achieving a higher level of efficiency in performing their public services, also on the international level.

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