

Case C-429/19

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

5 June 2019

Referring court:

Oberlandesgericht Koblenz (Germany)

Date of the decision to refer:

14 May 2019

Applicant and appellant:

Remondis GmbH

Defendant and respondent:

Abfallzweckverband Rhein-Mosel-Eifel

Subject-matter of the main proceedings

Public contracts — Cooperation between contracting authorities in waste disposal — Question of which requirements must be satisfied by such cooperation in order to fall outside the scope of European procurement law

Subject-matter and legal basis of the reference

Interpretation of EU law, Article 267 TFEU

Questions referred

Is Article 12(4)(a) 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 to be interpreted as meaning that cooperation does indeed exist if a contracting authority responsible for waste disposal within its territory performs a disposal task — which is incumbent on it under national law and for the performance of which several operations are required — not entirely by itself, but

rather commissions another contracting authority that is independent of it and is likewise responsible for waste disposal within its territory to carry out one of the necessary operations in return for consideration?

Provisions of EU law cited

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), Article 12(4)(a) and (c), recital 33

Provisions of national law cited

Gesetz gegen Wettbewerbsbeschränkungen (Law prohibiting restraints of competition, 'the GWB'), Paragraph 108(6) and point 2 of Paragraph 135(1)

Rheinland-pfälzisches Landesgesetz über die kommunale Zusammenarbeit (Rhineland-Palatinate State Law on municipal cooperation, 'the KomZG')

Brief summary of the facts and procedure

- 1 Remondis GmbH is a private company that provides waste treatment services. Abfallzweckverband Rhein-Mosel-Eifel (Rhine-Mosel-Eifel special-purpose association for waste) is a contracting authority within the meaning of points 1 and 4 of Article 2(1) of Directive 2014/24. It was established by the administrative districts of Mayen-Koblenz and Cochem-Zell and the city of Koblenz — which are responsible under national law for the disposal of the waste accumulated within their territory — for the purpose of performing that task.
- 2 Approximately 50 000 Mg of mixed municipal waste, designated as residual waste and originating primarily from households, falls within the area of responsibility of the special-purpose association each year. It consists of waste that ideally contains no or only very little recyclable material. One means of disposal permitted under national law is the use of landfills, but this must always be preceded by a costly pretreatment process in a mechanical biological treatment (MBT) plant. The purpose of this pretreatment is to separate valuable substances and waste with a high calorific content from the rest of the waste, remove harmful substances to the greatest extent possible and significantly reduce the biological activity of organic waste.
- 3 The special-purpose association does not have its own MBT plant. Around 80% of the residual waste accumulated within the territory of the special-purpose association is disposed of by private companies under contract with the special-purpose association. For the remaining 20%, the special-purpose association entered into an agreement with the administrative district of Neuwied, which is also a contracting authority within the meaning of point 1 of Article 2(1) of

Directive 2014/14 and responsible for the disposal of the waste accumulated within its territory, which agreement allows the special-purpose association to dispose of that remaining 20% in the MBT plant of the administrative district of Neuwied. The agreement governs, inter alia, the estimated quantity of waste delivered (approximately 10 000 Mg per year), the agreed remuneration for the treatment of the waste (EUR 100 per Mg), the term of the agreement and the possibility of extending it, matters pertaining to liability, and the duty of loyal cooperation. In the event that treatment of the residual waste in its BMT plant is not possible owing to temporary operational disruptions, the administrative district of Neuwied also undertakes to enter into agreements with operators of other plants so that they can temporarily assume the task of treating the residual waste in such a case. The administrative district of Neuwied discharged this obligation, but has never had to make use of the capacity of other plants.

- 4 Furthermore, the agreement contains a provision, in Clause 2(3), pursuant to which the special-purpose association agrees to take possession of certain quantities of extractive waste, of up to 3 000 Mg per year, that is accumulated within the territory of the administrative district of Neuwied. The quantities to be taken into the possession of the special-purpose association are to be determined by its capacity and agreed between the parties, taking account of their mutual interests.
- 5 The partners to the special-purpose agreement are agreed that Clause 2(3) constitutes a declaration of intent, which, owing to the lack of current real needs on the part of the administrative district of Neuwied on the one hand and the lack of capacity problems on the part of the special-purpose association on the other, will probably never materialise and, moreover, probably never should materialise. The authorised representative of the special-purpose association also declared it to be 'expressly devoid of purpose'.
- 6 In addition to the waste from the territory of its own district and the waste delivered on the basis of the agreement with the special-purpose association, approximately 30 000 Mg per year of residual waste from two other administrative districts are also pretreated in the MBT plant of the administrative district of Neuwied. However, the pretreatment of this waste is based not on an agreement such as the one entered into with the special-purpose association, but rather on inter-municipal cooperation between the participating administrative districts pursuant to the KomZG. The rights and obligations arising from this cooperation are much more far-reaching than those arising from the abovementioned agreement between the special-purpose association and the administrative district of Neuwied. Furthermore, a small quantity of waste delivered by private individuals is also pretreated in the MBT plant of the administrative district of Neuwied.
- 7 Remondis was aware that the special-purpose association required further capacity in order to dispose of waste. In response to an enquiry of 26 October 2018, the special-purpose association informed the authorised representative of Remondis,

by letter of 31 October 2018, of the agreement entered into with the administrative district of Neuwied. Remondis regards this as an impermissible direct award and submitted an application for review to the Vergabekammer Rheinland-Pfalz (Rhineland-Palatinate Public Procurement Board, Germany) on 3 December 2018.

- 8 By decision of 6 March 2019, the Public Procurement Board refused the application for review as inadmissible, because cooperation between two contracting authorities which fell within the scope of Paragraph 108(6) GWB (which corresponds to Article 12(4) of Directive 2014/24) existed, meaning that there was no recourse to the review procedure under national law. Regarding the question of whether ‘cooperation’ between the parties exists, the Public Procurement Board stated that it did exist in the present case, since more than a ‘service for consideration’ was involved. The applicant lodged an immediate appeal against this decision with the referring court.

Principal arguments of the parties in the main proceedings

- 9 Remondis takes the view that there was no cooperation based on a cooperative concept. Rather, there was a ‘service for consideration’ situation and therefore a contract subject to the compulsory tender procedure, the award of which without prior publication of a contract notice in the Official Journal of the European Union was ineffective pursuant to point 2 of Paragraph 135(1) GWB.
- 10 The special-purpose association considers the decision to be correct.

Brief summary of the basis for the reference

- 11 The referring court takes the view that the agreement contains all the elements of a public contract: a contracting authority seeks to have a significant part of a public service task incumbent upon it, which at the same time includes a service that is customary on the market, performed not by itself, but by a different legal person that is independent of it, undertakes to provide the service and receives remuneration as consideration. The assumption of a contract within the meaning of procurement law is not precluded by the fact that the agreement is of a public law nature and the party performing the service is itself a contracting authority. It is also immaterial whether the consideration provided by the contracting entity covers costs or even generates a profit (see judgment of the Court of Justice of 19 December 2012, *Ordine degli Ingegneri della Provincia di Lecce and Others*, C-159/11, EU:C:2012:817).
- 12 However, this public contract would not be subject to European and national procurement law if the conditions under Article 12(4) of Directive 2014/24 and Paragraph 108(6) GWB, respectively, were fulfilled. The key question is whether it is sufficient for cooperation within the meaning of Article 12(4) of the directive if a contracting authority performs part of a mandatory task incumbent on it itself

and has part of it performed by another contracting authority that is independent of it.

- 13 In this connection, the referring court takes the view that it is immaterial that a large quantity of residual waste that originates from other territorial authorities is also pretreated in the MBT plant of the administrative district of Neuwied. This does not involve activities ‘on the open market’ within the meaning of Article 12(4)(c) of Directive 2014/24, because they are performed within the framework of inter-municipal cooperation, which falls outside the scope of European and national procurement law. As is the case with the small quantities totalling approximately 500 Mg per year that are delivered by various other parties, those activities therefore do not preclude the assumption that the conditions under Article 12(4)(c) of Directive 2014/24/EU are fulfilled, as regards the waste referred to in this paragraph.
- 14 The issue, however, is how the agreement between the special-purpose association and the administrative district of Neuwied is to be assessed. The referring court takes the view that the agreement in question falls outside the scope of European procurement law if it ‘establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common’ (Article 12(4)(a) of Directive 2014/24). Precisely what this means cannot be gathered from either the wording of the provision or the existing case-law of the Court of Justice and is a matter of debate in Germany.
- 15 The referring court takes the view that, from the outset, the (alleged) assumption of 3 000 Mg of extractive waste per year by the special-purpose association existed only on paper and was intended to conceal the lack of a cooperative concept. This aspect of the agreement cannot therefore be used as a basis for the assumption of a cooperation.
- 16 Thus, the core content of the special-purpose agreement is confined to the obligation of the administrative district of Neuwied (= contractor) to pretreat, for consideration, the residual waste delivered by the special-purpose association (= contracting entity) in accordance with the national statutory requirements in order thus to create the conditions for the landfilling sought by the special-purpose association. The parties involved are pursuing different interests in this respect, albeit under the umbrella of the general interest in disposing of waste in the proper manner. The special-purpose association has to perform a task assigned to it by law; it requires external assistance to do so, because it does not have its own MBT plant. The administrative district of Neuwied provides this assistance because it hopes to achieve an overall more cost-effective utilisation of its plant from taking on the pretreatment in return for reimbursement of the costs.
- 17 However, the referring court expresses its concern that this does not necessarily mean that the conditions of Article 12(4)(a) of Directive 2014/24 are not fulfilled, because recital 33 of that directive must also be considered in that connection,

pursuant to which contracting authorities are entitled to ‘provide jointly their public services by way of cooperation without being obliged to use any particular legal form’. This requires that ‘the cooperation [...] be based on a cooperative concept’, but this ‘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’.

- 18 However, it is not clear what form that cooperation must take and whether merely making a financial contribution restricted to the reimbursement of the costs is sufficient.
- 19 The referring court takes the view that an agreement that is confined to the outsourcing, for consideration, of part of a task incumbent on one of the parties involved is a ‘normal’ public contract that is not covered by the exclusion under Article 12(4) of Directive 2014/24, irrespective of whether — as is the case here — the parties involved have identical tasks within their respective territories. It would therefore interpret the term ‘cooperation’ used in that provision to mean that more is needed for a cooperative concept, in particular a contribution from each party involved which consists of more than the fulfilment of an obligation incumbent on it in any event and which also goes beyond a purely financial ‘contribution’. Put differently: cooperation requires that each party involved makes a contribution which, without the cooperation agreement, would have to be provided not by it, but rather by another party involved.
- 20 The referring court is therefore inclined to allow the immediate appeal of Remondis, but considers that an interpretation of the term ‘cooperation’ in Article 12(4)(a) of Directive 2014/24 by the Court of Justice is required in order to do so.