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Public procurement – Definition of public contract – Requirement apply competitive tendering procedure – Horizontal cooperation – Principle of transparency and principle of equal treatment within the meaning of Article 49 and Article 56 TFEU – Competence of the Market Court – Emergency care service

The North Ostrobothnia Hospital District Joint Municipal Authority had concluded cooperation agreements with the regional rescue departments on the provision of an emergency care service without applying the tendering procedures laid down in the Act on Public Contracts. The Supreme Administrative Court was called upon to decide whether the cooperation agreements on the provision of emergency care services constituted a contract within the meaning of the Act on Public Contracts (hereinafter the 'Public Contracts Act') and the Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (hereinafter the 'Public Contracts Directive'). If that was the case, it would be necessary to assess whether the principle of transparency and the principle of equal treatment flowing from Article 49 or Article 56 TFEU constituted an obstacle to the concluding of cooperation agreements directly between a hospital district and the rescue departments without them being obliged to comply with the competitive tendering procedure.

The Supreme Administrative Court held, in accordance with the Market Court, that the cooperation agreements constituted a public service contract as stipulated in the Public Contracts Act. The Hospital District and the rescue departments were legally separate contracting authorities and had autonomous decision-making powers. The fact that the same municipalities largely made up the Hospital District Joint Municipal Authority and the rescue departments in question bore no pertinence for the assessment of whether they were distinct contracting authorities. Hence, the cooperation agreements were concluded between legally separate authorities and their purpose was to perform a service of pecuniary interest. The fact that the consideration was solely based on reimbursing the expenditure incurred in discharging the service or that the rescue departments could not have simultaneously operated on the market and sell their services to third parties had no legal significance for the assessment of the case (judgment of 19 December 2012, C-159/11, *Ordine degli Ingegneri della Provincia di Lecce and Others*, paragraphs 25 and 26). The cooperation agreements therefore in principle fell within the scope of application of the Public Contracts Act.

The Supreme Administrative Court stated that under the cooperation agreements the emergency care for which the rescue departments were responsible mainly covered emergency medical care and its support functions, while the responsibilities for transport were merely secondary within this totality. The emergency care service was considered to fall within the meaning of other services referred to in Annex II B to the Public Contracts Directive. These services fell outside the scope of the requirements to apply competitive tendering procedure under the Public Contracts Directive (judgment of 11 December 2014, C-113/13, *Azienda sanitaria locale n. 5 "Spezzino" and Others*, paragraph 41, and judgment of 28 January 2016, C-50/14, *CASTA and Others*, paragraph

38). Due to the scope of the appeal, the Supreme Administrative Court did not assess whether the criteria relating to technical specifications or contract notice as laid down in the Act on Public Contracts were satisfied.

However, contrary to the conclusion of the Market Court, the Supreme Administrative Court held that since the cooperation agreements were considered as being other services within the meaning of Annex II B to the Public Contracts Directive and therefore fell outside the scope of the requirement to apply competitive tendering procedure, it was not necessary to assess whether the criteria for horizontal cooperation as defined in the case-law of the Court of Justice of the European Union was fulfilled (judgment of 19 December 2012, C-159/11, *Ordine degli Ingegneri della Provincia di Lecce and Others*, paragraphs 34 and 35).

The Supreme Administrative Court stated, based on the financial value of the cooperation agreements and the fact that the undertakings offering emergency care services were operating in several Member States, that the cooperation agreements as such included a definite cross-border interest (judgment of 14 July 2016 in joint Cases C-458/14 and C-67/15, *Promoimpresa*, section 66 and the case-law cited).

The Supreme Administrative Court further stated that the fact that the Hospital District had concluded the cooperation agreements directly with the rescue departments lead to disadvantageous difference in the treatment of undertakings that were located in other Member States and were possibly interested in the cooperation agreements. The exclusion of other undertakings following from the cooperation agreements could be considered as indirect discrimination based on nationality, which is prohibited under Article 49 and Article 56 TFEU (the *Spezzino* judgment, paragraph 52 and the case-law cited and the *CASTA* judgment, paragraph 56 and the case-law cited).

In assessing whether the indirect discrimination based on nationality, following from the conclusion of the cooperation agreements, may be justified on the basis of objective considerations that are acceptable for the purposes of Union law, the Supreme Administrative Court held that the purpose of the cooperation agreements was, in fact, to contribute to the fulfilment of the objectives of the rules laid down in the Health Care Act on the provision of emergency medical care and therefore they were to promote the availability, quality and reliability of emergency care services and to ensure their cost-efficiency, along with effective use of equipment and human resources. According to the report received, in implementing the cooperation agreements on emergency medical care the rescue departments did not seek to achieve any objectives other than those following from legislation and the cooperation agreements (the *Spezzino and Others* judgment, paragraph 61 and the *CASTA and Others* judgment, paragraph 64).

Based on what has been stated earlier, the Supreme Administrative Court held that the principles of transparency and non-discrimination of Article 49 and Article 56 of the TFEU did not constitute an obstacle to the conclusion of cooperation agreements. With regard to national legislation, based on the specific rules for the provision of emergency medical care under the Health Care Act, the cooperation agreements fell outside the scope of the requirements to put out contracts to competition under the Public Contracts Act and therefore did not fall within the scope of application of the said Act. The Market Court was therefore obliged to rule the appeals inadmissible.

Act on Public Contracts (348/2007, including later amendments), section 1, subsection 1 and subsection 3, paragraph 1; section 5, subsections 1 and 4; and section 21, subsections 1 and 2

Health Care Act (1326/2010), section 1, subsection 1; section 3, subsection 3; section 39, subsection 1 (1326/2010) and subsection 2; section 40, subsection 1; section 73, subsection 2; and section 79, subsection 1

Rescue Act (379/2011), section 27, subsection 2 and subsection 3, paragraph 1

Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, Article 1(2)(a) and (d); and Articles 20 to 22

Treaty on the Functioning of the European Union (TFEU), Articles 49, 56 and 267

Judgments of the Court of Justice of the European Union, judgment of 8 May 2014, C-15/13, *Datenlotsen Informationssysteme*, ECLI:EU:C:2014:303, paragraph 24; judgment of 19 December 2012, C-159/11, *Ordine degli Ingegneri della Provincia di Lecce and Others*, ECLI:EU:C:2012:817, paragraphs 25, 26, 34 and 35; judgment of 11 December 2014, C-113/13, *Azienda sanitaria locale n. 5 "Spezzino" and Others*, ECLI:EU:C:2014:2440, paragraphs 41, 45, 46, 52, 53, paragraphs 55 to 57, paragraphs 59, 61 and 62; judgment of 28 January 2016, C-50/14, *CASTA and Others*, ECLI:EU:C:2016:56, paragraphs 38, 56, 57, paragraphs 59 to 62, paragraphs 64 and 65; judgment of 14 July 2016, joined Cases C-458/14 and C-67/15, *Promoimpresa*, ECLI:EU:C:2016:558, paragraph 66; and judgment of 17 December 2015, joined Cases C-25/14 and C-26/14, *UNIS*, ECLI:EU:C:2015:821, paragraph 39