

The new directives provide for the first time explicit legislative rules determining which contracts can be concluded between public sector entities without applying public procurement procedures. These rules are based on European Court of Justice case-law, but also take into account the need, often expressed by procurement practitioners, for improved legal certainty. These rules will help in particular local and regional authorities to take full advantage of the possibilities of cooperation to carry out their tasks for the benefit of citizens in the most efficient way.

### **In-House Relationships**

The rules for in-house relationships (“vertical cooperation”) follow the basic principles developed by the European Court of Justice.

- A contracting authority can award a public contract to an undertaking – for example a municipal utility company or a public waste management provider – without applying a procurement procedure, if **three conditions** are met:
  - The contracting authority must exercise **control** over the undertaking which is similar to that which it has over its own departments. This means in practice that the contracting authority must have a **decisive influence on the strategic objectives and significant decisions** of the controlled undertaking.
  - The controlled undertaking must do business **predominantly for the controlling contracting authority: more than 80% of its activities must** consist of the performance of tasks entrusted to it by the controlling contracting authority or authorities.
  - There must be **no direct private participation** in the capital of the controlled undertaking. The only **exception** is in cases where the participation of a private partner is **required by law**, provided that it does not give the private partner blocking or controlling rights or any other form of decisive influence on the undertaking.
  
- The **control** can be exercised by:
  - **one contracting authority** alone or
  - as **joint control** by several contracting authorities acting together, for instance in the case of public service associations controlled by all municipalities in a given area. If the control is exercised jointly, it must be ensured that:
    - all controlling contracting authorities are represented in the decision-making bodies of the controlled undertaking;
    - the controlled undertaking does not pursue interests that are contrary to those of the controlling contracting authorities.

### **Cooperation between contracting authorities**

The new directives also cover cases where contracting authorities are concluding **contracts among themselves** without creating a controlled undertaking (“**horizontal cooperation**”). This could, for

example, be the case where several municipalities decide to pool their resources in the field of waste management so that participating municipalities perform specific services for all members of the cooperation.

In the framework of such cooperation, contracts can be awarded between contracting authorities – without the participation of private parties – if the **following conditions** are met:

- The contract must **establish or implement a cooperation** between the participating contracting authorities that aims at ensuring that the **public services they have to perform** are provided with a view to **achieving objectives they have in common**.
- The implementation of the cooperation has to be **governed solely by considerations relating to the public interest**.
- Business on the **market outside the cooperation** has to be strictly limited: the participating contracting authorities must perform **less than 20% of the activities concerned by the cooperation** on the open market (i.e. outside the cooperation).

### **Transfer of a public task**

Finally, it is clarified that the **simple transfer of powers and responsibilities** for the performance of a public task from one public entity to another is **not in any way affected by the Directives** as long as it does not result in the exchange of a contractual performance for remuneration. This provides much desired clarity and legal certainty in particular for local and regional authorities which want to pool specific public tasks by transferring them to associations or other public structures.

A contracting authority (CA) intends to award a contract to another legal person, the provider

