Azienda—the Creation of an Exemption from Public Procurement Law

Kristian Pedersen

Erik Olsson*

EU law; Exemptions; Public contracts; Public interest; Public procurement procedures; Research and development; Universities

1. Introduction

On December 19, 2012 the Court of Justice of the European Union ("the court") handed down its grand chamber judgment in Case C-159/11 *Azienda Sanitaria Locale di Lecce, Università del Salento v Ordine degli Ingegneri della Provincia di Lecce and Others*. ("*Azienda*")[1] The judgment, the facts of which are described below (see s.4 below), is a development of the court's ruling in *Commission v Germany*, where the court first developed an exemption for purely contractual (non-institutionalised) cooperation between contracting authorities.[2] The exemption seems to run parallel to the case-law of the court regarding institutional cooperation, the so-called *Teckal*-exemption.[3] As is made clear by the court's judgement in *Azienda*, there is in fact an entirely new exemption developing for certain forms of cooperation between contracting authorities.

However, as it is still early days in the development of the new exemption the judgment in *Azienda*, as previously the judgment in *Commission v Germany*, has given rise to debate. In Sweden, some

* Partner and associate respectively, Advokatfirman Delphi, Stockholm, Sweden. Comments on the article may be sent to kristian.pedersen@delphi.se and erik.olsson@delphi.se.

[1] *Azienda Sanitaria Locale di Lecce, Università del Salento v Ordine degli Ingegneri della Provincia di Lecce and Others* (C-159/11),[2013], not yet reported in E.C.R, (2013) 22 P.P.L.R. NA61–64.

[2] *Commission v Germany* (C-480/06) [2009] E.C.R I-04747. For an analysis of this case see Kristian Pedersen and Erik Olsson, "Commission v Germany: A new approach on In-house Providing?" (2010) 19 P.P.L.R 33–55; Totis Kotsonis (2009) 18 P.P.L.R. NA212–216; Mustafa T. Karayigit "A new type of exemption from the EU rules on public procurement established: 'in thy neighbour's house' provision of public interest" (2010) 19 P.P.L.R 183–197; Janicke Wiggen "Public procurement rules and cooperation between public sector entities: the limits of the in-house doctrine under EU procurement law" (2011) 20 P.P.L.R. 157–172.

[3] The court has developed the *Teckaldoctrine* in a number of cases. *Teckal Srl v Comune di Viano (C-107/98)* [1999] E.C.R. I-8121; [2000] 2 P.P.L.R.,CS41-44; *ARGE Gewässerschutz v Bundesministerium für Land- und Forstwirtschaft* (C-94/99) [2000] E.C.R I-11037; [2001] 2 P.P.L.R. NA54–56; *Commission v Spain* (C-349/97) [2003] E.C.R I-3851; *Stadt Halle, RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna* (C-26/03) [2005] E.C.R I-0001; [2005] 3 P.P.L.R.,NA72–77; *Commission v Spain* (C-84/03) [2005] E.C.R I-0139; [2005] 3 P.P.L.R., NA78-79; *Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti* (C-231/03) [2005] E.C.R. I-7287; [2005] 6 P.P.L.R. NA153–159; *Parking Brixen GmbH v Gemeinde Brixen, Stadtwerke Brixen AG* (C-458/03) [2005] E.C.R. I-8585; [2006] 2 P.P.L.R. NA40-47; *Commission v Austria (Mödling)* (C-29/04) [2005] E.C.R. I-9705; [2006] 2 P.P.L.R. NA52–54; *Associazione Nazionale Autotransporto Viaggiatori (ANAV) v Comune di Bari, AMTAB Servizio SpA* (C-410/04) [2006] E.C.R. I-3303; [2006] 6 P.P.L.R. NA217–220; *Carbotermo v Comune di Busto Arsizio* (C-340/04) [2006] E.C.R. I-4137; [2006] 5 P.P.L.R. NA150–154; *Jean Auroux and Others v Commune de Roanne* (C-220/05) [2007] E.C.R I-0385; [2007] 3 P.P.L.R. NA65–70; *Commission v Italy (Augusta Bell Helicopters)* (C-337/05) [2008] E.C.R I-2173; [2008] 5 P.P.L.R. NA187-192; *Asociacion Profesional de Empresas de Reparto y Manipulado de Correspondencia v Administracion General del Estado* (220/06) [2007] E.C.R.I-12175; [2008] 5 P.P.L.R. NA204-208; *Asemfo v Tragsa* (C-295/05) [2007] E.C.R I-2999; [2007] 5 P.P.L.R. NA123-130; *Coditel Brabant SA v Commune d'Uccle and Région de Bruxelles-Capitale* (C-324/07) [2008] E.C.R I-8127; [2009] 3 P.P.L.R. NA73–78; *Commission v Italy (C-337/05)* [2008] E.C.R. I-2173; [2008] 5 P.P.L.R. NA187-192; *Sea Srl v Comune di Ponte Nossa (Sea)* (C-573/07) [2009] E.C.R. I-8127; [2010] 1 P.P.L.R. NA13–16; *Acoset SpA v Conferenza Sindaci e Presidenza Prov. Reg. ATO Idrico Ragusa and Others (Acoset)* (C-196/08) [2009] E.C.R I-9913; [2010] 2 P.P.L.R. NA45–49; *Mehilaninen Oy and Terveystalo Healthcare Oy v Uleaborgs stad* (C-215/09) [2010] I-13794; [2011] 3 P.P.L.R. NA70-73; *Econord v Comune di Cagno and Others* (joined cases C-182/11 and C-183/11) not yet reported in ECR, (2013) 22 P.P.L.R. NA32–34. Furthermore the *Teckal-doctrine* has been analysed extensively in a number of articles in P.P.L.R. See for instance: Toni Kaarresalo, "Procuring In-house: The Impact of the EC Procurement Regime" (2008) 17 P.P.L.R. 242–254; Fotini Avarkioti, "The Application of EU Public Procurement Rules to 'In House' Arrangements" (2007) 16 P.P.L.R.,2 2–35; Kurt Weltzien, "Avoiding The Procurement Rules by Awarding Contracts to an In-House Entity — Scope of the Procurement Directives in the Classic Sector" (2005) 14 P.P.L.R. 237–255.

commentators have even described the court's case law as opening up for cooperation between local authorities regarding tasks of public interest, without there being any need for application of the public procurement rules.[4]

In view of this debate, the purpose of this article is to analyse the new exemption and the prerequisites for its application. In the following, the judgment in *Azienda* will be analysed not only in comparison with the judgment in *Commission v Germany* and the Advocate General's opinion in *Azienda*, the latter differing on key points from the subsequent judgment in the case, but also in light of the on-going legislative process of simplifying the procurement directives.

As will be submitted below the court appears to take into account this legislative process, providing a judgement which is more suitable for transposition into legislative text than was the case with the judgement in *Commission v Germany*.

However, before going into the details of the case, it is helpful to recall the judgment given in *Commission v Germany* where the exemption for purely contractual cooperation between contracting authorities, was first created.

2. Commission v Germany

Four German administrative districts "*Landkreise*", had concluded a contract with the "*Stadtreinigung Hamburg*", an independent public body established by the City of Hamburg, relating to the disposal of waste in a new incineration facility without an open or restricted tendering procedure at the union level.

In its judgment, the court emphasised that there were no financial transfers between the *Stadtreinigung Hamburg* and the four *Landkreise* concerned, other than those corresponding to the reimbursement of the part of the charges borne by those *Landkreise* but paid by the *Stadtreinigung Hamburg* to the operator.

The contract was concluded solely by public authorities, without the participation of any private party, and did not, according to the court, provide for or prejudice the award of any contracts that might be necessary in respect of the construction and operation of the waste treatment facility.

The court also stated that cooperation between public authorities in order for them to carry out jointly their public service tasks does not undermine the free movement of services and the opening-up of undistorted competition, where implementation of that cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest and the principle of equal treatment of the persons concerned is respected, so that no private undertaking is placed in a position of advantage vis-à-vis competitors.

In light of these circumstances and since there was, according to the court, nothing to indicate that the local authorities at issue were contriving to circumvent the rules on public procurement, the court dismissed the Commission's action.

3. Exemption for purely contractual cooperation—the proposed directives

Since the judgement in *Commission v Germany* an effort has been made to implement the new exemption into the public procurement directives.

Already in 2010 the European Parliament adopted a resolution acknowledging the new exemption interpreting the judgement, so that the public procurement directives should not apply where the following conditions are fulfilled.[5]

- the purpose of the partnership is the provision of a public-service task conferred on all the local authorities concerned;

[4] See comment by the Swedish Association of Local Authorities and Regions in an article in the Swedish magazine, *Upphandling24*, June 16, 2009.
[5] European Parliament Resolution of May 18, 2010 on new developments in public procurement (2009/2175(INI)).

- the task is carried out solely by the public authorities concerned, i.e. without the involvement of private individuals or undertakings; and
- the activity involved is essentially performed on behalf of the public authorities concerned.

The European Parliament chose to see this exemption as an expression of the right to regional and local self-government as expressed in art.4(2) of the Treaty on European Union.

Shortly thereafter, in October 2011, the Commission issued a staff working paper giving its interpretation of the new exemption.[6] As the Commission understood the exemption, it contained at least the following criteria:

- the arrangement involves only contracting authorities, and there is no participation of private capital;
- the character of the agreement is that of real co-operation aimed at the joint performance of a common task, as opposed to a normal public contract; and
- the cooperation is governed only by considerations relating to the public interest.

Only two months later the Commission also published its proposal for new public procurement directives, in which an express exemption for purely contractual cooperation was included.[7] The proposed wording of the exemption was as follows:

> "An agreement concluded between two or more contracting authorities shall not be deemed to be a public contract within the meaning of art.2(6) of this Directive where the following cumulative conditions are fulfilled:
> (a) the agreement establishes a genuine cooperation between the participating contracting authorities aimed at carrying out jointly their public service tasks and involving mutual rights and obligations of the parties;
> (b) the agreement is governed only by considerations relating to the public interest;
> (c) the participating contracting authorities do not perform on the open market more than 10 per cent in terms of turnover of the activities which are relevant in the context of the agreement;
> (d) the agreement does not involve financial transfers between the participating contracting authorities, other than those corresponding to the reimbursement of actual costs of the works, services or supplies;
> (e) there is no private participation in any of the contracting authorities involved."

It is submitted, and will be further developed below, that it is important to read the court's judgment in *Azienda* in light of these legislative initiatives. In any case, the different interpretations of the *Commission v Germany*-judgment underlined the need for further guidance on the exemption for purely contractual (non-institutionalised) cooperation. The court's judgment in Azienda provides for such guidance.

Since the *Azienda* judgment, the negotiations on the new directives on public procurement have been concluded and there is now a version of the directive to be submitted by the Council to the Parliament for a vote.[8] As will be seen below the wording of this version has to a certain extent been influenced by the court's judgement in *Azienda*. However, it is also clear that the proposed text has been influenced by political compromise and by the trialogue-nature of the Union's legislative process. As a result, the proposal differs in some important aspects from the language of the court's case law.

[6] *Commission staff working paper concerning the application of EU public procurement law to relations between contracting authorities (public-public cooperation)* Brussels, October 4, 2011 SEC(2011) 1169 final.

[7] Proposal for a Directive of the European Parliament and of the Council on public procurement COM(2011) 896 final. For a comment on the proposal see Janicke Wiggen, (2012) 21 P.P.L.R. NA225–NA233 and Rhodri Williams, (2012) 21 P.P.L.R. NA101–NA105.

[8] Proposal for a Directive of the European Parliament and of the Council on public procurement (Classical Directive). First reading, Brussels July 12, 2013, Interinstitutional File: 2011/0438 (COD), 11745/13 LIMITE.

4. *Azienda*—facts of the case

4.1 Background to the Case

A contracting authority, *Azienda Sanitaria Locale di Lecce* (hereinafter "*Azienda*") had entered into an agreement with the *Università del Salento* ("the University") for the study and evaluation of the seismic vulnerability of hospital buildings in the Province of Lecce.

A number of associations of engineers and architects brought proceedings against *Azienda* claiming that *Azienda* had infringed public procurement rules by awarding the contract to the University without conducting a public tender procedure. *Azienda* objected that the agreement constituted cooperation and coordination between public authorities, since it was concluded in order to attain a public interest objective.

The case ultimately came before the *Consiglio di Stato*[9] which stayed the proceedings and made a reference to the court for a preliminary ruling on the following question:

> "Does directive 2004/18, and in particular, art.1(2)(a) and (d), art.2 and art.28 of that directive and Categories 8 and 12 in Annex II (A) thereto, preclude national legislation which permits written agreements to be entered into between two contracting authorities for the study of the seismic vulnerability for hospital structures and its evaluation in the light of national regulations on the safety of structures and of strategic buildings in particular, for a consideration not exceeding the cost incurred in the performance of the service, where the authority responsible for performance may act as an economic operator?"

4.2 Findings of the court

In its remarkably short judgement, the operative part being only 19 paragraphs long, the court agrees with the Advocate General in finding the contract to be covered by Directive 2004/18. The method for arriving to this conclusion, however, differs on some key points from the approach of the Advocate General.

Regarding the question of what constitutes a public contract, the court appears largely to agree with the Advocate General, stating both that the University appears to be an economic operator and that a contract cannot fall outside the concept a contract merely because the remuneration remains limited to reimbursement of the expenditure incurred to provide the agreed service.

As regards the question of whether the contract could be exempt, the court clarifies that there are two types of contracts entered into by a public entity, that do not fall within the scope of European Union public procurement law, the first being contracts covered by the Teckal-exemption and the second being contracts covered by the case-law of *Commission v Germany*.

Having found that the *Teckal*-exemption is not applicable, since *Azienda* does not exercise any control over the University, the court proceeds to examine the possible application of the exemption for purely contractual (non-institutionalised) cooperation.

First, and arguably for the first time, the court explicitly states the criteria for application of the newly developed exemption. The criteria can be summarised as follows:

- A contract establishing cooperation between public entities with the aim of ensuring that a public task that they all have to perform is carried out;
- Concluded exclusively by public entities, without the participation of any private party;
- Where no private provider of services is placed in a position of advantage vis-à-vis its competitors; and

[9] The "*Consiglio di Stato*" (Council of State) is a legal-administrative consultative body, entrusted with the task of ensuring the legality of public administration in Italy.

- Where the implementation of that cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest.

Having clarified that the criteria are cumulative, the court proceeds to find that the public task which is the subject-matter of the cooperation between *Azienda* and the University does not appear to ensure the implementation of a public task which *Azienda* and the University both have to perform. The court draws this conclusion from the fact that the activities covered by the contract do not constitute academic research, presumably implying that these activities therefore fall outside the public task which the University is obligated to perform.

Further, the court finds that the contract in question may bring about an advantage for private undertakings if the highly qualified external collaborators to whom it permits the University to have recourse for the carrying out of certain services include private service providers.

Given this, and pending the final assessment by the national court, the court finds that European Union public procurement law precludes national legislation which authorizes the conclusion, without an invitation to tender, of a contract by which public entities establish cooperation among each other where the purpose of such a contract is not to ensure that a public task that those entities all have to perform is carried out, where that contract is not governed solely by considerations and requirements relating to the pursuit of objectives in the public interest or where it is such as to place a private provider of services in a position of advantage vis-à-vis his competitors.

5. *Azienda*—possible interpretations

5.1 Introduction

Naturally, the exemption for purely contractual (non-institutionalised) cooperation is far from being fully developed and it seems highly likely that there will be more, if not many more, judgements developing the different criteria outlined in *Commission v Germany* and *Azienda*. One should keep in mind that it took some twenty cases for the *Teckal*-criteria to be developed to this point and that the latest case in that series, *Econord v Comune di Cagno and Others*, still entailed some clarification not apparent from previous case-law. Against this background the level of clarity reached after just two judgements on the application of the exemption for purely contractual (non-institutionalised) cooperation is quite remarkable.

In the following the different criteria of the exemption will be analysed not only in light of the *Azienda*-judgement but also in light of the opinion of the Advocate General, the judgement in *Commission v Germany* and, perhaps most importantly, the proposed exemption which might be implemented in the new directives on public procurement. In order to better understand the practical implications of the exemption each criterion will be dealt with separately.

5.2 A contract establishing cooperation between public entities with the aim of ensuring that a public task that they all have to perform is carried out

The first criterion is perhaps the most complicated one and there are a number of observations that can be made about this criterion.

First, it is now clear that the exemption is indeed applicable to all public entities and not only local authorities. Although this was already assumed after the judgment in *Commission v Germany* this clarification is welcome.

Secondly, it should be observed that there is an important difference in the approaches of the Advocate General and the court.

The Advocate General appears to focus not only on there being a public task, which is to be performed by the entities carrying out the cooperation, but on this task being *common* to the entities involved in the cooperation. The court on the other hand focuses more on whether the task performed by the University falls within the primary competence of the University.

At first glance the court's reasoning might indicate that the public task ensured by the performance of the cooperation does not need to be *common* to both entities involved in the cooperation. Instead it would, perhaps, be sufficient that the cooperation agreement falls within the primary, it appears preferably statutory—although this does not seem to be an absolute requirement—competence of each authority.

This difference may be illustrated by the following example. Assume that the performance of the cooperation agreement had indeed fallen within the scope of the primary competence of the University, that is to say that the services could have been classified as academic research. This would not necessarily mean that the cooperation contract regulated a public task *common* to *Azienda* and the University. Indeed, *Azienda* public task would be to study and evaluate seismic activity, while the task of the University would be to conduct academic research. Although both tasks would be performed within the scope of the cooperation, they would not necessarily be considered as common in the sense that they are one and the same. As the court has formulated the criterion, cooperation would be allowed as long as the cooperation falls within the primary competence of each entity, thereby allowing cooperation even if the tasks to be performed would not be common to the entities, so that one entity enters into the cooperation for the performance of one public task while the other enters into the cooperation for the performance of a different public task.

This, it is submitted, is logical, at least where the public tasks to be performed by each entity are in part overlapping, for instance where the performance of the study of seismic activity can be construed to involve the exercise of academic research.

However, the question remains of what happens where the two public tasks are not at all overlapping, but where the entities instead can make use of each other's abilities. Assume for instance that one public entity is involved in waste disposal and is in need of manpower to fulfil this public task, and that this entity enters into an agreement with another public entity engaged in correctional treatment and which in order to complete this task needs to find meaningful employment for prisoners for whom there is no risk of escape. If these two entities would enter into a contract whereby the second entity takes on the task of providing the first entity with manpower, such an agreement could be said to ensure that the public tasks are fulfilled. However, it is in our view not clear if such a contract should or would be covered by the exemption. If such a contract would be allowed that would, it is submitted, be a slippery slope to public entities swapping services with one another, thereby effectively circumventing public procurement law.

Perhaps one could interpret the court's judgement, as if even though the tasks performed do not have to be a common (the same) public task, the tasks performed must at least be overlapping, so that there is no exchange of services but rather a true cooperation in the performance of one service.[10]

This problem appears to have been dealt with, at least to some extent, in the version of the text as proposed by the Council to be submitted to the Parliament. The text suggests that the cooperation should have the aim of *ensuring that [the] public services the parties have to perform* are provided, *with a view to achieving objectives they have in common*. As we interpret this text, the *services*, i.e. the contribution, of each party, would not have to be the same although the *objective to be achieved* should be common to both entities. Presumably this text would allow entities to swap services as long as their objectives for performing these services are to some extent overlapping.

Regardless, cooperation would always require that each entity could help the other in the performance of their statutory or primary functions. Cooperation which distorts competition is often related to tasks

[10] See, in this regard, the court's judgment in *Piepenbrock Dienstleistungen GmbH & Co. KG v Kreis Düren* (C-386/11) [2013], not yet reported in E.C.R., which seems to support this view.

performed ancillary to such primary functions, where the authority as a complement to its statutory functions also provides or even sells a semi-commercial service on the market. Cooperation within the field of such tasks could be deemed to fall outside the scope of what can be called public tasks wherefore the exemption might not apply. The court's clear separation between the primary function and other services of the University indicates the relevance of differentiation between different types of tasks which can be performed by a public entity. Future case-law is likely to provide further guidance on how this separation should be made.

A question which remains unanswered is what would happen if part of a contract fell within the framework of a public task while some services fell outside such a framework. This is a situation which the court has not yet had the opportunity to address. However, it is submitted that one way of dealing with such a situation could be by employing the reasoning of the court in *Club Hotel Loutraki* and subsequent case-law, requiring the different services to be inseparably linked, thus forming an indivisible whole.[11] If so, the contract would be assessed in accordance with the rules applicable to the services constituting the main object or predominant feature of the contract.

5.3 Concluded exclusively by public entities, without the participation of a private party

It appears to have been common ground that no participation of any private party was involved in the cooperation between *Azienda* and the University. The criterion is therefore not discussed in any detail by either the court or the Advocate General. As has been submitted in these pages, any direct involvement of a private interest in a purely contractual cooperation between public entities would exclude the possibility of such a contract being exempt from public procurement rules.[12]

In the version of the proposal for the new directive, to be submitted to the Parliament after the *Azienda* judgment, this criterion has been omitted altogether. This is in our view somewhat problematic, since the court is very clear that this criterion is an absolute requirement for application of the exemption. Perhaps the reasoning of the Council has been that where there is participation of a private party it would be impossible to fulfil the criterion of the cooperation being governed solely by considerations relating to the public interest, and that it is therefore unnecessary to explicitly prohibit the participation of private parties. In our opinion, however, such a line of reasoning does not stand up. It is quite often argued by contracting authorities entering into cooperation agreements with private parties in the field of public services that the sole purpose of the cooperation is to advance public interest. However, upon a closer examination of the agreement or, more often, the circumstances surrounding the agreement, this is seldom the case. Indeed many private parties will consider entering into agreements *pro bono*; however there is almost always another commercial motive for this, such as advancing the private companies' relations with the contracting authority and thereby bettering its position on the public market, perhaps with the view to being awarded commercial contracts in the future. Of course, such behaviour can be dealt with at a later stage when the commercial transaction takes places, but at that point it might be hard to identify and separate from the original non-commercial agreement. The merit of the criterion suggested by the court is that it is very easy to apply; if there is a private party taking part in the cooperation the exemption is not applicable. The text to be submitted to the Parliament by the Council will require thorough examination of the circumstances surrounding the agreement and might be difficult to apply in practice.

[11] *Club Hotel Loutraki AE and Others v Ethnico Symvoulio Radiotileorasis and Ypourgos Epikrateias* (C-145/08) [2010] 3 C.M.L.R. 33. NA–44 and *Aktor Anonymi Techniki Etaireia (Aktor ATE) v Ethnico Symvoulio Radiotileorasis* (C-149/08) [2010] I-04165; (2010) 19 P.P.L.R. N174–179.

[12] *Commission v Germany* (C-480/06) [2009] E.C.R I-04747; [2010] 1 C.M.L.R. 32. For an analysis of this case see Kristian Pedersen and Erik Olsson, "Commission v Germany: A new approach on In-house Providing?" (2010) 1 9P.P.L.R. 33–55.

5.4 Where no private provider of services is placed in a position of advantage vis-à-vis its competitors

In addition to the absolute prohibition of direct participation of a private party in the cooperation, there is also a prohibition on the indirect favouring of any private party.

In this context, it is interesting to note that the Advocate General and the court have two entirely different views on what situations can be covered by this criterion.

While the Advocate General argues that the University in and of itself is to be considered a private party given an advantage, the court finds that it is the highly qualified *external* collaborators that may work with the University for the carrying out of certain services that might include private suppliers.

This distinction is important. On the view of the Advocate General, any contracting authority which provides any sort of service on a market, for which there is competition, would be precluded from using the exemption. On the view of the court such contracting authorities could use the exemption as long as they do not in turn employ a private party, giving this party an unfair advantage.

The test suggested by the Advocate General, whereby the exemption can only be used where no other party could provide the service, seems impractical. It would also arguably render the exemption pointless since the contracting authority awarding the contract to the public entity could instead arguably rely on some other exemption in the directive, such as the possibility to use the negotiated procedure without publication of a contract notice where, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator.

The rule devised by the court is, it is submitted, both more pragmatic and more efficient in achieving the purpose of the public procurement directives. As long as cooperation is entered into solely by public parties, there should be a possibility for exemption provided that no private party is given an advantage, being for instance a subcontractor to one of the public entities, employed in the performance of the cooperation.

It is important to note that the criterion of a private party not being given *an advantage* would indicate that a private party could indeed be involved in the execution of the cooperation as long as it cannot be considered having been given an advantage. This indicates that it would be possible to use the exemption even when one of the entities will employ private subcontractors for some aspects of the cooperation, so long as the award of this assignment to the subcontractor will be preceded by a tender procedure in accordance with the directive. It is submitted that such a subcontractor, which has been awarded a contract in competition through public procurement, has not been given an advantage in the way indicated in the third criterion. This view is supported by the emphasis by the court in *Commission v Germany* on the fact that the cooperation did not prejudice the award of any contracts that were to be necessary in respect of the construction and operation of the waste treatment facility.[13] A comparison can also be made with the court's case-law on state aid, where an undertaking being awarded a contract through a (public procurement) tender procedure is presumed not to have been given an advantage in the sense that that concept is used in the context of state aid law.[14]

In this context, it might be interesting to consider what would happen where one of the public entities has a framework agreement with a certain subcontractor, awarded in a tender procedure, and the services of this subcontractor are employed for execution of the cooperation agreement which the public entity enters into at a later stage but during the duration of the framework agreement. Arguably such a situation

[13] *Commission v Germany* (C-480/06) [2009] E.C.R I-04747; [2010] 1 C.M.L.R. 32; [2009] 6 P.P.L.R, NA212–216.

[14] *Altmark Trans GmbH and Regierungsprasidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH and Oberbundesanwalt beim Bundesverwaltungsgericht (C-280/00)* (C-280/00) [2003] I-07747.

could, at least in some cases, be deemed to be a material change of the framework agreement, making it necessary to conduct a new tender procedure.[15]

Lastly, it should be noted that there is no mention of this criterion in any version of the proposed directive, either in the Commission's proposal or in the version to be submitted by the Council to the Parliament. This is, it is submitted, worrying, since we consider the criterion to be instrumental to the proper and sound application of the exemption. This is especially the case now that the prohibition against participation of a private party has been omitted in the text to be submitted by the Council to the Parliament.

As stated above, it is not uncommon that private parties enter into agreements with public parties that on the surface seem non-commercial, but in reality mean that the private party is placed in a position of genuine advantage vis-à-vis its competitors.

5.5 Where the implementation of that cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest

The last criterion is not analysed specifically either by the Advocate General or by the court.

It is submitted that this criterion relates closely to the non-commercial character of the cooperation as such. As we have stated in our analysis of *Commission v Germany*, the court puts emphasis on the exchange of obligations and mutual dependence, which characterized the cooperation agreement between the *Stadtreinigung Hamburg* and the *Landkreise*, giving the overall impression that the contract was not typically one that would be of interest for private parties but rather a contract which had a number of characteristics which were specific to the unique relationship between two branches of government. Also relating to the non-commercial character of the contract was the court's emphasis on the fact that the contract did not give rise to any financial transfers between the *Landkreise* and the *Stadtreinigung Hamburg* other than those corresponding to the reimbursement of the part of the charges borne by those *Landkreise* but paid by the *Stadtreinigung Hamburg* to the operator. There was, in other words, no profit to be made, only costs to be covered, for the *Stadtreinigung Hamburg* in the contractual relationship.

The same can be said for the cooperation between *Azienda* and the University, where the remuneration for the services performed by the University was limited to the reimbursement of the expenditure incurred to provide the services. Although the non-commercial character of the cooperation, as stated by the court at [29] of the judgement, does not prevent the agreement from being a public contract, it might, in our view, be taken into consideration when assessing if *the implementation of the cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest*. Indeed, if the University was to make a profit from the cooperation it would, even if all other criteria where fulfilled, be difficult to argue that the University's participation in the cooperation was governed solely by the pursuit of objectives in the public interest. There would always be reason to suspect that the remuneration for the services had played a part in motivating the University to enter into the contract.

In the version of the proposed directive to be submitted by the Council to the Parliament, the text speaks only of the implementation of the cooperation being governed solely by considerations relating to the public interest, thereby failing to mention the *requirements* being related only to the pursuit of objectives in the public interest. This difference, however, is unlikely to have any material significance.

The criterion will, in our view, exclude all arrangements which are commercial in nature, that is to say where either entity receives remuneration that would go beyond the costs incurred by that party as a consequence of the arrangement. As we will see below it is possible for the contracting entities to perform some of their activities on an open market, supposedly making a profit, but it is not allowed for the entities

[15] *Pressetext Nachrichtenagentur GmbH v Republik Osterreich (Bund) APA-OTS Originaltext-Service GmbH v APA Austria Presse Agentur registrierte Genossenschaft mit beschrankter Haftung (C-454/06)* [2008] I-04401; (2008) 17 P.P.L.R. NA253-267.

to make a profit from the arrangement in and of itself. This point, which was not as apparent in *Azienda*, was front and centre in the court's reasoning in *Commission v Germany*.

5.6 A requirement added by the Council

In the version to be submitted by the Council to the Parliament an additional criterion, not mentioned by the court, has been added. According to the proposed Directive the cooperation is only allowed *"where participating contracting authorities perform on the open market less than 20 per cent of the activities concerned by the cooperation"*.

As seen above, a version of this criterion was first introduced by the Commission, stating in its proposal that the participating contracting authorities may not "*perform on the open market more than 10 per cent in terms of turnover of the activities which are relevant in the context of the agreement"*.

Judging by the wording of the proposed provision, a contracting authority would only be allowed to use the exemption if it only offers the services covered by the cooperation to a limited extent on the open market. We believe the percentage should be calculated taking into account the turnover of the total market activities, of the type covered by the cooperation, of all the cooperating authorities. However, since the wording is not entirely clear on this point some uncertainty on the interpretation and application of the provision remains.

Arguably, the criterion is a way to ensure the distinction between primary and ancillary functions of a public entity, making sure that an entity active on the open market does not use its cooperation with other public entities as a means of advancing its position on the market thereby distorting the cooperation occurring naturally there.

This addition is of course not contrary to the purposes of the exemption invented by the court. However, it brings with it some serious issues with regard to the different concepts introduced in the criterion. For instance the provision offers no guidance as to how an open market is defined. Is it for instance defined by the presence of competing (private) suppliers of the relevant services? If so, is it sufficient that there are potential competing suppliers or does there have to be such a presence already at the time of the agreement? Can a market be considered open even where entrance to the market is subject to some form of exclusive right being granted to the supplier? The criterion gives rise to many questions that have to be answered in upcoming judgments of the court or perhaps in a Commission guideline or other interpretative document.

6. Conclusions

The *Azienda*-judgement is a most welcomed development of the exemption for purely contractual (non-institutional) cooperation first outlined in *Commission v Germany*. Although given in Grand Chamber, we do not perceive the judgement to be a departure from previous case-law of the court. The fact that the judgement is given in Grand Chamber should only be viewed as an indication of the inherent importance of the case, not least when put in the context of the on-going negotiations on the new public procurement directives.

The court, in our view, strikes an appropriate balance between the legitimate interest of inter-authority cooperation and the underlying purpose of the public procurement rules.

It is, however, in our view regrettable that the legislator, when drafting the final version of the new directive, has not chosen a text that sits more closely to the language used by the court. Especially the omission of the prohibition against participation of private interests could have the effect of upsetting the balance struck by the court.

Both the *Azienda*-judgement and the proposed text of the new directive leave a number of questions unanswered. It is evident that it will take several more cases before there is full understanding of the scope of the new exemption.