

# Performing ICT Services through Cooperation among Public Administrations

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# ICT SERVICES AND PUBLIC ENTITIES

According to EU law, is it cooperation between public entities possible in the ICT sector?

Or is it mandatory to apply EU rules on competition?

# CONTRACTS BETWEEN PUBLIC ENTITIES AND AWARDING RULES

«*The sole fact that both parties to an agreement are themselves public authorities does not as such rule out the application of procurement rules*» (Dir. 2014/18/EC, cons. 31)

The EU public procurement rules apply to all contract for pecuniary interest concluded in writing btw economic operators and contracting authorities and having as their object the execution of works, the supply of products or the provision of services

«*'economic operator' means any natural or legal person or **public entity** or group of such persons and/or entities (...), which offers the execution of works and/or a work, **the supply of products or the provision of services on the market*** » (Dir. 2014/18/EC, art. 1, § 1, n. 10)

**A public entity could be an “economic operator”**

# THE PRINCIPLE OF SELF- ORGANIZATIO N

According to EU Law, a contracting authority could choose between using its own resources or awarding a contract to economic operators.

- in house providing
- cooperation

Right to self-organization directly recognized to national, regional and local entities

# THE NOTION OF COOPERATION IN EU LAW

All of the following conditions should be fulfilled:

- a) the contract 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;**
- b) the implementation of that cooperation is **governed solely by considerations relating to the public interest;**
- c) the participating contracting authorities perform **on the open market less than 20 % of the activities** concerned by the cooperation

(Dir. 2014/18/EC, art. 12, § 4)

**Also available among authorities of different member States**

SEE ECJ, 9 JUNE 2009, C-480/06, *COMMISSION V. FEDERAL REPUBLIC OF GERMANY*

# COOPERATION AND ICT SERVICES

Cooperation can cover all types of activities related to the performance of services assumed by the participating authorities

Also «ancillary activities» such as the adaptation of a SW

**no private service provider should be «placed in a position of advantage vis-à-vis its competitors»:**

- All the authorities participating must have the source code of the SW
- If they organize a public procurement procedure for the maintenance, adaptation or development of the SW, they must communicate the source code to potential candidates and tenderers
- The access to the source code must be in itself a sufficient guarantee of the public procurement principles

ECJ, 28 MAY 2020, C-796/18, *ISE mbH*