

LGSS Law Briefing Note

The LGSS Model and Recent ECJ Case Law  
August 2013

**Lecce 2012 and Piepenbrock 2013**

The recent ECJ cases of Lecce 2012<sup>1</sup> and Piepenbrock 2013<sup>2</sup> have reiterated the existence of two exceptions from public procurement rules. Those are:-

- i) the Teckal exception and
- ii) the Commission & Germany exception, (Inter-municipal co-operation).

In Lecce, the Court made the following observation:

*31. It follows however from the case-law of the Court that two types of contracts entered into by a public entity do not fall within the scope of European Union public procurement.*

In Piepenbrock the judgement makes numerous references to the Lecce judgement and at paragraph 33 states:

*33. Moreover, such a contract does not appear to be one of the two types of contracts which, although entered into by public entities, do not come within the scope of European Union public procurement law.*

The above reaffirms the position that there are two established exceptions to the application of EU procurement law one of which relates to collaborative arrangements between public bodies governed solely by considerations and requirements relating to the pursuit of objectives in the public interest. (see Commission v Germany, paras 44 and 47<sup>3</sup>).

In the Lecce and Piepenbrock cases the Court is seeking to assess whether either of the exceptions might apply to the particular circumstances of those cases and in doing so identify, with more clarity, the key conditions which must be present for either of the exceptions to apply.

With regards to LGSS we are only concerned with the Commission and Germany (inter-municipal cooperation) exception and this note concerns itself only with that aspect of the judgements.

In Lecce the Advocate General, at para 65, identified the rationale underlying the exception for inter-municipal cooperation as follows:

*65. It is striking that, in the view of the Court, inter-municipal cooperation is characterised by the effort of all the participating local authorities to ensure jointly*

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<sup>1</sup> ECJ Case C-159/11 19/12/12

<sup>2</sup> ECJ Case C-386/11 13/06/13

<sup>3</sup> ECJ Case C-480/06 2009

*the effective performance of a public interest task. The legitimation for excluding that area from the scope of procurement law is the finding – as was held in Coditel Brabant – that a public authority may perform the public interest tasks conferred on it by using its own resources without being obliged to call on outside entities not forming part of its own departments. The Court considers, however, that this autonomy also requires a contracting authority to have the freedom to cooperate with other contracting authorities and thereby pool their respective resources.*

In Piepenbrock the Court listed the key conditions for the exception as follows:

*36. The second type of contracts are those which establish cooperation between public entities with the aim of ensuring that a public task that all of them have to perform is carried out.*

*37. In those circumstances, the European Rules on public procurement are not applicable in so far as such contracts are concluded exclusively by public entities, without the participation of a private party, no private provider is placed in a position of advantage vis-a-vis competitors and implementation of that cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest.*

When assessing the type of collaborative arrangements that are established between LGSS and other local authorities against these criteria it is clear that such arrangements fall within the inter-municipal cooperation exception.

- The contract is exclusively between public entities, without any private sector parties;
- No private party is placed in an advantageous position over any of its competitors and,
- The fundamental purpose of the arrangement is to enable the public bodies to fulfil their public obligations in the most efficient and effective way possible.

The fact that LGSS operates on a not for profit basis is not directly cited as one of the above criteria but it clearly underpins the fact that LGSS satisfies the last, i.e. the public interest criteria.

So why did the court find that the Piepenbrock arrangement fell outside of the exception? The Court noted that the contract contained a clause allowing the authority to use external private sector providers to provide the services thus breaching the requirement not to involve a private sector provider in a way which might give it an unfair advantage over its competitors.

In addition, the court was not persuaded that the arrangement showed sufficient cooperation between the authorities to be truly collaborative.

In contrast, the LGSS model is built around collaboration both initial and ongoing and this is characterised by the savings/costs sharing mechanisms and the level of involvement and input the stakeholders have to the management of the services.

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