Cooperative Agreements Between Public Authorities
Cooperative Agreements Between Public Authorities

The influence of CJEU case law on national legal systems
Kris Wauters

Cooperative Agreements Between Public Authorities. The influence of CJEU case law on national legal systems

Intersentia Publishing Ltd
Sheraton House | Castle Park
Cambridge | CB3 0AX | United Kingdom
Tel.: +44 1223 370 170 | Email: mail@intersentia.co.uk

ISBN 978-1-78068-312-6
D/2015/7849/57
NUR 823

Cover photograph © iStock-Thinkstock.com

© 2015 Intersentia
Cambridge – Antwerp – Portland
www.intersentia.com | www.intersentia.co.uk


No part of this book may be reproduced in any form, by print, photocopy, microfilm or any other means, without written permission from the publisher.
CONTENTS

Acknowledgements ................................................................. ix

Chapter 1.  
Introduction ............................................................................ 1
  1. Contextual background ......................................................... 1  
     1.1. Phenomenon of cooperation ............................................ 1  
     1.2. Ways and areas of cooperation ....................................... 2  
        1.2.1. Ways of cooperation .............................................. 3  
        1.2.2. Areas of cooperation ............................................ 4  
     1.3. Applicable law ............................................................ 6  
  2. EU law impact on national administrative law ....................... 9  
  3. Research questions .......................................................... 11  
  4. The importance of the research ............................................ 12  
  5. Methodology and structure ................................................. 15

Chapter 2.  
The Original Framework: the Public Procurement Directives ................. 19  
  1. Historical background of the public procurement Directives ........ 20  
  2. The public procurement Directives of 2004 ............................ 25  
  3. New developments ............................................................ 29  
  4. Objectives of the public procurement Directives ...................... 31  
  5. Conclusions ..................................................................... 33

Chapter 3.  
Concepts ................................................................................ 35  
  1. The meaning of ‘public authority’ or ‘contracting authority’ .......... 37  
     1.1. Contracting authority .................................................... 37  
        1.1.1. Preliminary remarks .............................................. 37  
        1.1.2. Traditional authorities ........................................... 38
1.1.3. Associations formed by one or several authorities .......................... 41
1.1.4. Body governed by public law ............................................. 41
1.2. Public authority ................................................................. 52
2. Cooperative agreements .......................................................... 55
  2.1. Public contract ................................................................. 55
  2.2. Service concession ............................................................ 59
    2.2.1. Foundations in EU law ................................................. 59
    2.2.2. Basic elements .......................................................... 61
    2.2.3. Transfer of risk .......................................................... 63
3. Public tasks ............................................................................. 64
  3.1. Historic development .......................................................... 65
  3.2. The concept ‘services of general interest’ .................................. 67
4. Public / private divide ............................................................. 71
  4.1. France .............................................................................. 72
  4.2. England ............................................................................ 73
  4.3. EU .................................................................................... 74
5. Concluding observations ........................................................... 75

Chapter 4.
Influence of EU Law on Public Authority Decisions .............................. 77
  1. Internal market law or competition law? ...................................... 78
    1.1. Relevant EU framework ...................................................... 78
    1.2. Internal market ................................................................. 80
    1.3. Freedom of services .......................................................... 82
  2. Applicability of EU law to State Measures ..................................... 84
  3. Interstate element ..................................................................... 90
  4. Restriction .............................................................................. 94
    4.1. Market access ................................................................... 95
    4.2. Principles of government contract law ................................... 98
      4.2.1. Equal treatment .......................................................... 98
      4.2.2. Transparency .............................................................. 100
    4.3. Cooperative agreements between public authorities ............... 101
  5. Justifications .......................................................................... 106
  6. General conclusions ............................................................... 108

Chapter 5.
Cooperative Agreements Between Public Authorities: Outside the Scope
of EU Law? ................................................................................. 111
  1. Applicability of EU law ........................................................... 114
    1.1. In-house provision ............................................................ 114
    1.2. Cooperative agreements ...................................................... 116
      1.2.1. Under the scope of EU law? ........................................... 117
Contents

1.2.2. Kind of cooperation .................................................... 121
1.2.3. Exclusion ................................................................. 123

2. Institutional or vertical cooperative agreements .................................................. 125
  2.1. Origins of the case law .................................................. 125
  2.2. The control criterion .................................................... 131
      2.2.1. Private input ...................................................... 132
      2.2.2. Public input ...................................................... 137
      2.2.3. Jointly exercised control ........................................ 140
      2.2.4. Conclusion ......................................................... 141
  2.3. The activities criterion ............................................... 143
      2.3.1. Need for a second criterion? ................................. 143
      2.3.2. Kind of activities ................................................ 144
      2.3.3. Several controlling public authorities ..................... 146
      2.3.4. Conclusion ......................................................... 146

3. Contractual or horizontal cooperative agreements ............................................. 147
  3.1. Analysis of the relevant case law .................................... 147
  3.2. Comments ................................................................. 150

4. New Directives ................................................................. 153
  4.2. Proposal for new Directives and new Directives .................. 155
      4.2.1. Vertical cooperative agreements ............................. 156
      4.2.2. Horizontal cooperative agreements ........................... 159
      4.2.3. Conclusion ......................................................... 161

5. State and market ............................................................... 162

6. General conclusions ............................................................. 163

Chapter 6.
Influence of EU Law on National Legal Systems ................................................. 169

1. French system ................................................................. 170
  1.1. Service public ............................................................ 170
      1.1.1. The place of 'service public' .................................. 170
      1.1.2. The concept of 'service public' ............................... 171
      1.1.3. Relation to a 'personne publique' ............................. 172
      1.1.4. General interest ................................................... 176
      1.1.5. Organisation and management of a 'service public' ....... 177
  1.2. Cooperative agreements between public authorities ..................... 180
      1.2.1. Historical evolution .............................................. 180
      1.2.2. Selection of a contract partner ............................... 182
      1.2.3. Freedom to choose a public authority as contract partner? 184
      1.2.4. Evolution case law ................................................ 187
      1.2.5. Sociétés publiques locales (local public companies) ...... 192
  1.3. Conclusion ................................................................. 194
## Contents

2. The English system .............................................................. 195  
   2.1. Public services ............................................................ 195  
       2.1.1. Administrative law ............................................. 195  
       2.1.2. Notion of public service ..................................... 196  
   2.2. The organisation or management of public services .......... 198  
       2.2.1. Direct provision ............................................... 200  
       2.2.2. Contracting ..................................................... 202  
   2.3. Cooperative agreements between public authorities ........ 205  
       2.3.1. The use of the capacity to contract by public authorities ... 205  
       2.3.2. Judicial review ............................................... 207  
       2.3.3. Cooperation .................................................... 209  
       2.3.4. Case law ....................................................... 211  
   2.4. Conclusion ................................................................. 215  
3. General conclusions ............................................................ 216

Chapter 7.  
General Conclusions ............................................................. 219

Bibliography ................................................................. 227
ACKNOWLEDGEMENTS

I would like to thank everyone who has contributed to the conduct of my research. My special thanks goes to my supervisors, Professors Rosa Greaves and Noreen Burrows. Throughout these six years, they each contributed to the realisation of this work. Several times we met in Glasgow to comment on the different chapters. Especially, Rosa Greaves has helped me significantly in different kinds of ways during the final few months, which were really hard. Her help was a substantial element in the realisation of the PhD. I thank also Yseult Marique, who read the whole text and made some fundamental comments, which improved the text. A special thanks goes to the examiners of my Viva Professors Tom Mullen and Martin Trybus, who added some precious remarks which improved the content of the PhD.

Some people also granted material help. I thank them also: Johan Herbots and the law office Monard-D’Hulst. Major material support I got from my parents, who were my first source of inspiration to work hard. They also gave me opportunities in my youth and encouraged me to start university studies. Jan Ghysels granted me the freedom to finish this PhD. Last but not least, I also thank my secretary at the Université de Louvain, Marie-Elise Bouchonville, and Ann-Sophie Vanwinsen, who structured the text, verified the footnotes and the bibliography.

Finally, I thank those who have demonstrated a lot of patience during the last years of this PhD. Mainly, weekends and holidays were spent on this text. Every time the family left on holiday, place was made for a pile of books and photocopies. A special thanks to my son, Chiron, and my wife, Goddy Haerden. My wife has motivated me to accomplish this work, although she suffered the most. I hope she can forgive me. I dedicate this book to her.