

Administration in International Organizations

LAW OF PUBLIC CONTRACTS

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Krzysztof Rokita

Contracting Authorities

1. The Public Sector Directive applies to bodies which are **contracting authorities** (a **concept of EU law**)

Directive 2014/24/EU – Article 2(1)(1): definition of a contracting authority

2. Guiding principle in its interpretation, according to the CJ:

The definition should cover all those entities that present a risk of giving preferential treatment to national industry in their purchasing

3. The definition of contracting authorities encompasses three groups of entities:

- the State, regional and local authorities;
- Bodies governed by public law;
- Associations formed by one or more of the above bodies

The State, and regional and local authorities

1. The State – central level of government
2. Regional authorities – regional level of government
3. Local authorities – local level of government

C-323/96 – in the context of the Flemish Parliament – „the concept of the State “necessarily encompasses all the bodies which exercise legislative, executive and judicial powers”

C-31/87 – „Consequently, a body such as that in question here, whose composition and functions are laid down by legislation and which depends on the authorities for the appointment of its members, the observance of the obligations arising out of its measures and the financing of the public works contracts which it is its task to award, must be regarded as falling within the notion of the State for the purpose of the abovementioned provision, even though it is not part of the State administration in formal terms.”

Bodies governed by public law

Directive 2014/24/EU – Article 2(1)(4):

„‘bodies governed by public law’ means bodies that have all of the following characteristics:

- (a) they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
- (b) they have legal personality; and
- (c) they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law; or are subject to management supervision by those authorities or bodies; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law” (*relationship of close dependency on a contracting authority*)

Bodies governed by public law

University of Cambridge (C-380/98 @ <http://curia.europa.eu/>):

1. Do all payments from contracting authorities should be treated as public financing in the meaning of the procurement directives? Why/Why not?
2. What does it mean that an entity should be financed by another contracting authority „for the most part” in order that it be considered a body governed by public law?
3. How does the principle of legal certainty influence the application of the provision?
4. Is it possible that an entity is considered a contracting authority during one year, but not during another?

Bodies governed by public law

Financed by another contracting authority

Principles laid down by the CJ:

- the provision seeks to identify a relationship of dependency;
- More than half of relevant funding (quantitative approach); but sometimes smaller proportion could suffice if it creates relationship of dependency;
- Financing by another contracting authority refers to payments which create relationship of dependency; payments within normal commercial relationships are not covered (private commercial company that depends solely on governments' contracts does not meet the criterion);
- The total sum of income is to be taken into account;
- The time period for calculation is the whole budgetary year;
- Financing does not have to come directly from the contracting authority;

Bodies governed by public law

Supervised by another contracting authority

- Management supervision must give rise to general dependency on a contracting authority (and not necessarily in the area of public procurement);
- A power actually to intervene in management decisions may constitute management supervision;
- Supervision over compliance with detailed rules of management may be sufficient

Bodies governed by public law

Supervised by another contracting authority

Relevant factors from cases where the criterion was met:

- The activities and objectives of the entities concerned were closely defined and partly determined by administrative decisions – detailed rules of management?
- Legal provisions creating ministerial supervision without limitations;
- The responsible minister had a power to wind up the entity, suspend management, appoint a liquidator in case of irregularities, management fault or failure to act;
- Minister could intervene when the entity's activity fell below minimum level of dynamism;
- Inter-ministerial committee had a power to inspect the entity and propose certain actions;
- Mere *ex post* review of legality would alone not suffice;
- Existence of sufficient powers enough to meet the criterion

Bodies governed by public law

Appointed by another contracting authority

A body has an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

Bodies governed by public law

Established or acting for the purpose of meeting needs in the general interest, not having an industrial or commercial character

The underlying rationale of the requirement is that an entity that is connected with the Government, but is subject to commercial pressure is unlikely to apply national preferences.

1. Needs in the general interest;
2. Not having an industrial or commercial character

Bodies governed by public law

Needs in the general interest

- No closed category of activities
- Entities providing services directly to the public: collection of household waste, funeral services, running a university, sickness insurance funds, operating a public telecommunications network, organising exhibitions and fairs to bring together providers of goods;
- The fact that private undertakings also carry on a particular activity does not prevent it from being in the general interest;
- Support activities to the activities in general interest may also be caught by the provision

Bodies governed by public law

Not having a commercial or industrial character

- it is relevant whether activity is carried out in competition with other undertakings; however, the competitive conditions must be able to induce commercial behaviour;
- Guiding principle: if entity operates in normal market conditions, aims to make a profit, and bears the risks of its activity it is unlikely that it aims to meet the needs not having a commercial and industrial character;
- Risk bearing – possibility of rescue by the State?

Bodies governed by public law

Entities engaged in both commercial and non-commercial activities

- if an entity has any non-commercial activities all its procurement is regulated, including procurement for its commercial activities

Established...

- Engaged in meeting those needs at present time, not necessarily from the beginning of its existence

Associations

An association formed by one or more of the contracting authorities

- No overlap between associations and bodies governed by public law
- Provision in relevant mainly for entities without legal personality