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SUBJECTIVE SCOPE OF THE CONCEPT OF A "BODY GOVERNED BY PUBLIC LAW" IN THE CONTEXT OF PUBLIC OVERSIGHT OVER THE PUBLIC PROCUREMENT MARKET

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Abstract

In the practice of awarding public contracts, particular interpretative problems arise concerning the subjective scope of application of the public procurement regime. In this context, of key significance is the issue of properly capturing and understanding the legal institution of the "body governed by public law" ï as contained in the Directive of the European Parliament and of the Council 2014/24/EU of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, as well as Directive of the European Parliament and of the Council 2014/25/EU of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC. Depending on the interpretation admitted, different categories of entities can then be either bound by or relieved of the duty to apply the cited provisions. What is more: the content of the aforementioned Directives impacts the content of national legal regulations concerning public procurement. Not only is the aforementioned term composed of several elements that must (generally) appear together with one another, but those elements themselves contain a range of imprecise and vaguely-defined terms. Their interpretation must therefore refer not only to the scholarly literature, but also case-law, particularly that of the CJEU. This publication is an attempt at exploring the particular elements comprising the concept of a ñbody governed by public lawò in the context of public oversight of the public procurement market.

Keywords: Public Procurement, Body Governed By Public Law, Contracting Authorities, Objective Of A Bodyôs Activity, Influence Of Public Authorities

JEL Codes: K23, H57

1. Introduction

The issue of the duty to observe the public procurement regime[1] is associated with the command to apply all relevant legal regulations in a given situation. Their proper application should always be preceded by a precise interpretation of those rules. Observance of aforementioned regime is connected with a problem of public oversight over the public

[1] See more about public procurements ï for example: Arrowsmith (2005), Bonetto de Cima (1986), Bovis (1997), Drijber and Stergiou (2009), European Commission (1996), Fern§ndez Mart²n (1996), Hatzopoulos (2010), Trepte (2007), Weiss (1987), Weiss (1988), Weiss (1992) and Weiss (1993).

procurement market ï objective of this supervision is to provide that all binding regulations will be applied.

In the practice of awarding public contracts, particular interpretative problems can concern the subjective scope of application of the aforementioned legal regime. In this context, of key significance is the issue of properly capturing and understanding the legal institution of the "body governed by public law" ï as contained in the Directive of the European Parliament and of the Council 2014/24/EU of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ.EU.L.2017.337.19)[2] and Directive of the European Parliament and of the Council 2014/25/EU of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ.EU.L.2017.337.17)[3]. Cerutti (2012, p.167) suggests: ñmotion which Directives include [...] relating to public procurements to define its subjective scope of applicationò

Depending on the interpretation admitted, different categories of entities can then be either bound by (in this situation these ones are subject to public oversight over the public procurement market) or relieved of the duty to apply the cited provisions. What is more: the content of the aforementioned Directives impacts the content of national legal regulations concerning public procurement.

Not only is the aforementioned term composed of several elements that must (generally ï see below) appear together with one another, but those elements themselves contain a range of imprecise and vaguely-defined terms. Their interpretation (òconcepts referred to in that provision (...) must be given an autonomous and uniform interpretation throughout the European Unionò C-174/14, Sauda- or - Sociedade Gestora de Recursos e Equipamentos da Sa¼de dos A- ores SA v. Fazenda P½blica ï Judgement of the Court of 29 October 2015; C-279/12, Fish Legal and Emily Shirley v. Information Commissioner and others ï Judgement of the Court of 19 December 2013; Ãautonomous community-based concept (...) should be interpreted in the functional and wide wayò C-300/07, Interpretation of definitions contained in Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts: contracting authority (financed to a significant degree by the state, supply of products, framework agreement), Hans & Christophorus Oymanns GbR, Orthopª die Schuhtechnik v. AOK Rheinland/Hamburg ï Judgement of the Court of 11 June 2009; C-373/00, Adolf Truley GmbH v. Bestattung Wien GmbH - Judgement of the Court of 27 February 2003; C-283/00, Elements of the definition of a body governed by public law under EU provisions concerning coordination of procedures for the award of public works. Meeting needs in the general interest, not having an industrial or commercial character, Commission of the European Communities v. Kingdom of Spain - Judgement of the Court of 16 October 2003; C-536/07, Interpretation of the definition of a public works contract for construction works. Commission of the European Communities v. Federal Republic of Germany - Judgement of the Court of 29 October 2009; C-393/06, Ing. Aigner, Wasser-Wª rme-Umwelt, GmbH v. Fernwª rme Wien GmbH - Judgement of the Court of 10 April 2008) must be associated with the necessity of accounting for not only the output of legal scholars, but also the role of case-law, particularly the CJEU. This publication is an attempt at exploring the particular elements comprising the concept of a ñbody governed by public lawò in the context of public oversight of the public procurement market.

2. Legal structure of the definition

The definition of the concept of a "body governed by public law" has been written into Art. 2(1)(4) of Directive 2014/24/EU. This provision defines the term as "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

[2] Hereinafter: Directive 2014/24/EU.
[3] Hereinafter: Directive 2014/25/EU.

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 lawò

The same definition has been included in Art. 3(4) of Directive 2014/25/EU.

In commenting on the contents of the aforementioned definition, it should be observed that it contains a range of legal elements, some of which must be present, while the presence of others is not mandatory. It should also be pointed out that in the initial content of the definition, the European legislator indicates the necessity of all of them being present (see e.g. C-129/15, H.M. v. Agentsia za darzhavna finansova inspektsia (ADFI) ï Ruling of the Court of 7 July 2016; C-393/06, Ing. Aigner, Wasser-Wª rme-Umwelt, GmbH v. Fernwª rme Wien GmbH ï Judgement of the Court of 10 April 2008; C-300/07, Interpretation of definitions contained in Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts: contracting authority (financed to a significant degree by the state, supply of products, framework agreement), Hans & Christophorus Oymanns GbR, Orthopª die Schuhtechnik v. AOK Rheinland/Hamburg ï Judgement of the Court of 11 June 2009) of the elements contained in it ï ò*bodies that have all of the following characteristics...*". Literature suggests that ñthese characteristics are expressed as conditions that need to be met so that the body in question may be considered as a body governed by public lawò (Sigma, 2016, p.2), ña body must satisfy all three of these conditions in order to fall within the definitionò (Sigma, 2016, p.2) or ñthis category [...] is subject to three cumulative criteriaò (Hatzopoulos and Stergiou, 2010, p.12; see also: Manunza and Berends, 2003; Franch and Torrelles, 2009).

Nevertheless, the cited fragments of both provisions address only the issue of the joint occurrence of elements in the context of three subparagraphs (a, b, c) (in respect of Art. 3(4) Directive 2014/25/EU this refers to paragraphs; the remark concerns the entirety of the publication). Analysis of subparagraph c) allows us to observe that existence of the conditions contained therein does not require fulfilment of all of the elements listed. In this subparagraph, there are three distinct components (separated by the word "orò), and the conditions are met if at least one of them is present (ñthree alternative criteriaò C-526/11, IVD GmbH & Co. KG v. rztekammer Westfalen-Lippe ï Judgement of the Court of 12 September 2013; C-300/07, Interpretation of definitions contained in Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts: contracting authority (financed to a significant degree by the state, supply of products, framework agreement), Hans & Christophorus Oymanns GbR, Orthopª die Schuhtechnik v. AOK Rheinland/Hamburg ï Judgement of the Court of 11 June 2009; ñthe condition is satisfied where any of the three criteria is metò Hatzopoulos and Stergiou, 2010, p.13).

3. Purpose of the body's activity

The first element of the definitionôs content that needs to be discussed is focused on the purpose of the activity of a given body ï subparagraph a). This refers to an entity ñestablished for the specific purpose of meeting needs in the general interest, not having an industrial or commercial characterò.

In reviewing this element, it should first be observed that the legislator did not begin its definition of the meaning and scope of the content of the analyzed term with an indication of a given bodyôs assignment to a particular structure. In respect of a ñbody governed by public lawò, it could primarily refer to formal assignment to a structure of the state or e.g. local self-government entities. The definition of the purpose of a bodyôs actions itself does not have to prejudge the fact of its belonging to the public or the private sphere. For example, the indication of a duty to meet needs in the general interest may provide evidence of assignment to the structure of the state or of a local government (e.g. municipality); nevertheless, it may also concern a private body performing public tasks assigned to it by public entities (the issue of privatization of public tasks) Manunza and Berends (2013). It should thus be emphasized that

the condition of the purpose of a body's activity does not, in and of itself, determine the assignment of a specific entity to one of the two legal spheres under consideration.

The next element in the definition's content is the issue of the existence of a "specific purpose". It should thus be taken into consideration whether every body engaged in legal activity must have a defined (and then realized) purpose. In the case of public structures in the understanding of the state and/or units of local self-government, there can be no doubts arising from the fact that their distinction within the legal structure by the legislator is associated in particular with the necessity of performing the specified objectives (public interest, public purposes, etc.) which, by definition, do not need to be carried out by private entities.

In turn, as concerns bodies governed by private law, it should be held that private individuals are under no obligation to perform any (specified) purpose, as their existence – as bodies of a biological nature – is of an objective nature. The role of the legislator here does not consist in "creating" this category of bodies, but only defining their legal attributes such as legal capacity or capacity to perform legal acts.

In considering the remaining categories of bodies governed by private law (bodies imbued with legal personhood or only legal capacity), the existence of two versions should be noted. Within the context of the first of them, the legislator – with more or less precision – determines the purpose of the activity (e.g. conducting commercial activity, or objectives unrelated to profit). In consideration of the fact that the types of bodies under analysis are established by the legislator (and thus have no objective nature, apart from the unique body that is the state), and assuming that not every type of organizational entity necessarily enjoys legal personhood, in establishing a particular body governed by law the legislator should define its specificity, including the purpose of its activity.

Nevertheless, a second version is possible. In this case, the legislator does not define the purpose of the activity of a given body, allowing for total discretion in this respect. The only limitation is that of acting in the pursuit of objectives that are not contrary to the law in effect.

To recapitulate, it should be pointed out that in respect of natural persons, their specificity allows for the absence of an objective for functioning in legal relations, as well as in the further scope of its performance. As regards the remaining types of entities (public-private, with personhood, or only with legal capacity), there are various solutions in effect: from precise indication of purpose to allowing for freedom of choice in that regard.

It may thus seem that the presence in subparagraph a) of text regarding a "specific purpose" would exclude from the subjective scope of the term "body governed by public law" both natural persons and those organizational entities which do not possess a precisely-defined purpose for their activities. Nevertheless, if this fragment of the provisions under discussion is not definitive, as natural persons can strive to perform defined purposes, and sometimes have to do it (e.g. as entrepreneurs). In turn, as concerns the indicated organizational entities, we may defend the argument that, even in the case of freedom in selecting a purpose, each of them will, in practice, seek to achieve some objective.

Of key importance is the term "established". It points to a significant stage in the functioning of a given body typical of "artificial" legal entities created by various bodies (public and private) in various (but always defined by the legislator) ways. In respect of natural persons – natural creations – there can be no mention of "establishment", as they come about by way of legal events such as birth or conception. The aforementioned formula allows us to exclude natural persons from the conceptual scope of "bodies governed by public law".

Consideration should next be given to the number of purposes that bodies can pursue in light of the content of subparagraph a). A literal interpretation would lead us to the conclusion that there can be only one appointed purpose. Nevertheless, a multiplicity of purposes can be allowed – all the more so considering that the next regulations contained within that subparagraph are of key significance.

The EU legislator – in the context of the prerequisite under discussion here – has provided several rules for its interpretation. First and foremost, it has indicated that this is "a concept of community law [EU – J.O.] and must accordingly be given an autonomous and uniform interpretation throughout the Community [EU – J.O.], the search for which must take account of the background to the provision in which it appears and of the purpose of the rules in

questionò (C-283/00, elements of the definition of a body governed by public law under EU provisions concerning coordination of procedures for the award of public works. Meeting needs in the general interest, not having an industrial or commercial character. Commission of the European Communities v. Kingdom of Spain ï Judgement of the Court of 16 October 2003; C-373/00, Adolf Truley GmbH v. Bestattung Wien GmbH ï Judgement of the Court of 27 February 2003). Secondly, account must always be taken of òall the relevant legal and factual circumstances, such as those prevailing at the time of establishment of the body concerned and the conditions under which it exercises its activityò (C-373/00, Adolf Truley GmbH v. Bestattung Wien GmbH - Judgement of the Court of 27 February 2003; C-393/06, Ing. Aigner, Wasser-Wª rme-Umwelt, GmbH v. Fernwª rme Wien GmbH - Judgement of the Court of 10 April 2008; C-283/00, elements of the definition of a body governed by public law under EU provisions concerning coordination of procedures for the award of public works. Meeting needs in the general interest, not having an industrial or commercial character. Commission of the European Communities v. Kingdom of Spain ï Judgement of the Court of 16 October 2003; C-18/01, Concept of the contracting authority. Verification of the precondition of a need in the general interest, not having an industrial or commercial character. Division of competences between the Court of Justice and national courts within the framework of preliminary proceedings. Arkkitehtuuritoimisto Riitta Korhonen Oy and others v. Varkauden Taitotalo Oy - Judgement of the Court of 22 May 2003).

In the content of subparagraph a), the legislator has materialized the objective through indicating two elements in combination. The first of them is of a positive nature and defines the characteristic that must be exhibited by the purpose of the activity of bodies governed by public law: ñmeeting needs in the general interestò. In reference to the above remarks, it should be observed that there is a potential link between the objective of a body and its assignment to the public law sphere. The satisfaction of such needs is characteristic of the state and local self-government entities, and thus bodies which are classified as governed by public law. Nevertheless, it must be repeated that the legislator in subparagraph a) does not refer at all to the structural adhesion of particular bodies. Therefore, in light of the above considerations, this does not exclude the possibility that the status under consideration can also be attributed to a private entity. Indeed, the structural element is not present in the content of the subparagraph under discussion (assignment to organizations of public bodies is of no significance here), and the purpose of activity gains in importance, which is not *expressis verbis* excluded for bodies governed by private law.

In the case-law, we may observe that needs of this type are "needs which are ï for reasons related to the general interest ï the state itself decides to satisfy, or to maintain decisive influence over their satisfactionò (C-360/96, Gemeente Arnhem and Gemeente Rheden v. BFI Holding BV - Judgement of the Court of 10 November 1998; C-393/06, Ing. Aigner, Wasser-Wª rme-Umwelt, GmbH v. Fernwª rme Wien GmbH - Judgement of the Court of 10 April 2008; C-283/00, elements of the definition of a body governed by public law under EU provisions concerning coordination of procedures for the award of public works. Meeting needs in the general interest, not having an industrial or commercial character. Commission of the European Communities v. Kingdom of Spain - Judgement of the Court of 16 October 2003). In this respect ñit is immaterial that such needs are also met or can be met by private undertakingsò (C-393/06, Ing. Aigner, Wasser-Wª rme-Umwelt, GmbH v. Fernwª rme Wien GmbH - Judgement of the Court of 10 April 2008; C-360/96, Gemeente Arnhem and Gemeente Rheden v. BFI Holding BV - Judgement of the Court of 10 November 1998; Sołtysiñska, 2016).

It is necessary to add that ñneeds in the general interest are generally needs that are satisfied otherwise than by the availability of goods and services in the marketplace and that, for reasons associated with the general interest, the state chooses to provide itself or over which it wishes to exercise a decisive influenceò (Sigma, 2016, p.3), ñwith regard to the first part of this criterion, it has been considered that this definition excludes entities, which are subject to commercial pressure to purchase efficientlyò (case C-44/96 Mannesmann Anlagenbau Austria AG and Others v. Strohal Rotationsdruck GmbH [1998] ECR I-73; Hatzopoulos and Stergiou, 2010, p.12). ñThis applies to public entities providing goods and services in a competitive marketò (Arrowsmith, 2005, pp. 264-265; Hatzopoulos and Stergiou, 2010, pp.12-13), ñentities

providing services directly to the public often meet needs in the general interestò (Arrowsmith, 2005, p. 266; Hatzopoulos and Stergiou, 2010, p. 13) or ñthe definition of the term óneeds in the general interestôhas been interpreted very widelyò (Hatzopoulos and Stergiou, 2010, p. 13; see also Cerutti, 2012).

Analyzing in turn the negative element (it should be emphasized that ñthe legislature drew a distinction between needs in the general interest not having an industrial or commercial character and needs in the general interest having an industrial or commercial characterò C-360/96, Gemeente Arnhem and Gemeente Rheden v. BFI Holding BV - Judgement of the Court of 10 November 1998) ï concerning the issue of satisfying needs that are of neither an industrial nor commercial character (ñif an activity does meet needs in the general interest, it falls then to be considered whether these needs have an industrial or commercial natureò Hatzopoulos and Stergiou, 2010, p.13; this character is associated with such areas as ñgeneration, production, extraction and tradeò verdict of the Supreme Administrative Court in Warsaw od 28 October 2015, II GSK 2764/14; C-300/07, Interpretation of definitions contained in Directive 2004/18 of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (financing to a significant degree by the state, supply of products, framework agreement). Hans & Christophorus Oymanns GbR, Orthopª die Schuhtechnik v. AOK Rheinland/Hamburg - Judgement of the Court of 11 June 2009) ï the case-law indicated that the condition under discussion emerges when such elements are present as: the absence of competition on the market, the fact that the primary objective of a given bodyôs operation is not the generation of profit, or also the fact that it does not bear any risk in connection with its activity. In conjunction with the foregoing, if a body operates in normal market conditions, has as its objective the generation of profits, and bears losses in connection with its activity, it is unlikely that the needs which it intends to satisfy are neither of an industrial nor commercial character (C-283/00, Elements of the definition of a body governed by public law under EU provisions concerning coordination of procedures for the award of public works. Meeting needs in the general interest, not having an industrial or commercial character. Commission of the European Communities v. Kingdom of Spain ï Judgement of the Court of 16 October 2003; C-373/00, Adolf Truley GmbH v. Bestattung Wien GmbH - Judgement of the Court of 27 February 2003; C-393/06, Ing. Aigner, Wasser-Wª rme-Umwelt, GmbH v. Fernwª rme Wien GmbH - Judgement of the Court of 10 April 2008; C-536/07, Interpretation of the definition of a public works contract for construction works. Commission of the European Communities v. Federal Republic of Germany - Judgement of the Court of 29 October 2009; C-300/07, Interpretation of definitions contained in Directive 2004/18 of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (financing to a significant degree by the state, supply of products, framework agreement). Hans & Christophorus Oymanns GbR, Orthopª die Schuhtechnik v. AOK Rheinland/Hamburg - Judgement of the Court of 11 June 2009; C-126/03, Definition of a public procurement for services and the nature of the activity performed by the contracting authority associated with a given service. Commission of the European Communities v. Federal Republic of Germany - Judgement of the Court of 18 November 2004; C-18/01, The concept of the contracting authority. Verification of the condition of needs in the general interest not of an industrial or commercial character. Division of competences between the Court of Justice and national courts within the framework of preliminary proceedings. Arkkitehtuuritoimisto Riitta Korhonen Oy and others v. Varkauden Taitotalo Oy - Judgement of the Court of 22 May 2003; differently in the context of the profit motive: C-574/12, Centro Hospitalar de Set½bal EPE and Servi- o de Utiliza- ao Comum dos Hospitais (SUCH) v. Eurest (Portugal) - Sociedade Europeia de Restaurantes Lda - Judgement of the Court of 19 June 2014; see also: recital 10 Directive 2014/24/EU and recital 12 Directive 2014/25/EU).

It is worth adding that ñin that respect the Court examines both the characteristics of the marketplace in which the entity operates (in competition with other undertakings, which can influence its commercial behavior, commercial side-activities) and the nature of the entity itselfò (Hatzopoulos and Stergiou, 2010, p. 13). In this regard, bodies governed by public law meet needs in the general interest ñnot as operators, without the use of undertakings, as well as

without business activityò (Cerutti, 2012, p. 170) or it relates to ñlack of competition in the market, lack of profit-seeking, as well as lack of taking risk connected with business activityò (Franch and Torrelles, 2009, p. 385).

Furthermore, ñit is immaterial whether, in addition to its duty to meet needs in the general interest, an entity is free to carry out other profit-making activities, provided that it continues to attend to the needs which it is specifically required to meet. The proportion of profit-making activities actually pursued by that entity as part of its activities as a whole is also irrelevant for its classification as a body governed by public lawò (C-393/06, Ing. Aigner, Wasser-Wª rme-Umwelt, GmbH v. Fernwª rme Wien GmbH - Judgement of the Court of 10 April 2008; Sodysiska, 2016). Nevertheless, the condition defined in subparagraph a) will not be met by an entity which is a ònon-profit-making, but managed according to the criteria of performance, efficiency and cost-effectiveness, and which operates in a competitive environmentò (C-223/99, Conditions exclusing the acknowledgement of a body governed by public law as understood by EU regulations concerning the awarding of public works contracts to a juridical person performing activities in the general interest. Agora Srl v. Ente Autonomo Fiera Internazionale di Milano and Excelsior Snc di Pedrotti Bruna & C. v. Ente Autonomo Fiera Internazionale di Milano and Ciftat Soc. coop. arl - Judgement of the Court of 10 May 2001).

The case law gives as examples of bodies governed by public law or, correspondingly, tasks listed in subparagraph a) the following: a state-controlled commercial entity established for expressing the purpose of performing all activities necessary for the construction management, and sale of prisons of a member state (ñneeds in the general interest which the company is responsible for meeting being, therefore, a necessary condition of the exercise of the State's penal powersò C-283/00, Elements of the definition of a body governed by public law under EU provisions concerning coordination of procedures for the award of public works. Meeting needs in the general interest, not having an industrial or commercial character. Commission of the European Communities v. Kingdom of Spain - Judgement of the Court of 16 October 2003), activity of funeral parlors (òsuch activities are linked to public policy in so far as the State has a clear interest in exercising close control over the issue of certificates such as birth and death certificates, second, the State may be justified in retaining influence over those activities and in taking such measures on manifest grounds of hygiene and public healthò C-373/00, Adolf Truley GmbH v. Bestattung Wien GmbH - Judgement of the Court of 27 February 2003), entities engaged in construction of social housing (C-237/99, Cumulative conditions characterizing a body governed by public law as understood by Directive 93/37 concerning the coordination of procedures for the award of public works contracts for construction works and determining the status of the contracting authority. Commission of the European Communities v. French Republic - Judgement of the Court of 1 February 2001), universal health insurance (meeting particular needs associated with public health: C-300/07, Interpretation of definitions contained in Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts: contracting authority (financed in large portion by the state, supply of products, framework agreement). Hans & Christophorus Oymanns GbR, Orthopª die Schuhtechnik v. AOK Rheinland/Hamburg - Judgement of the Court of 11 June 2009), activity in respect of organizing trade shows, exhibitions, and other similar enterprises (Judgement of 10 May 2001 in combined cases C-223/99 and C-260/99 Agor¨ and Excelsior, Rec. p. I-3605, par. 33 et seq.; C-536/07, Interpretation of the definition of a public procurement for construction works. Conditions qualifying a contract as a procurement of construction works. Commission of the European Communities v. Federal Republic of Germany - Judgement of the Court of 29 October 2009), provision of services in the general economic interest in the field of the health service (the object of this task is ñproviding services of general economic interest in the field of health. The object of that task is the planning and management of the regional health system and associated information systems, infrastructure and facilities and the completion of construction, conservation, rehabilitation and reconstruction work on health establishments and services, in particular in areas covered by natural disasters and in areas regarded as risk areasò C-174/14, Body governed by public law and VAT. Sauda- or - Sociedade Gestora de Recursos e Equipamentos da Sa½de dos A- ores SA v. Fazenda P½blica - Judgement of the Court of 29 October 2015), universities (ñt is clear that education and the

performance of educational activity determines the general character of the activity conducted. This conclusion can be drawn from analysis of the Constitution of Poland itself, in which Art. 70(4) holds that public authorities shall provide universal and equal access to education. Thus, the performance of such activity, and by the same token the meeting of needs of those interested in this regard, should be treated as universal activityò Verdict of the Provincial Administrative Court in Warsaw of 18 November 2016, V SA/Wa 4704/15), ordering design and construction services (ña limited company established, owned and managed by a regional or local authority may be regarded as meeting a specific need in the general interest, not having an industrial or commercial character, where that company's activity consists in acquiring services with a view to the construction of premises intended for the exclusive use of private undertakings, and whether the assessment of whether that condition is satisfied would be different if the building project in question were intended to create favorable conditions on that local authority's territory for the exercise of business activitiesò C-18/01, Concept of the contracting authority. Verification of the precondition of a need in the general interest, not having an industrial or commercial character. Division of competences between the Court of Justice and national courts within the framework of preliminary proceedings. Arkkitehtuuritoimisto Riitta Korhonen Oy and others v. Varkauden Taitotalo Oy - Judgement of the Court of 22 May 2003), removal and management of household waste (C-360/96, Gemeente Arnhem and Gemeente Rheden v. BFI Holding BV - Judgement of the Court of 10 November 1998) or supply of heat energy within the borders of a local self-government entity via a municiple heat network (C-393/06, Ing. Aigner, Wasser-Wª rme-Umwelt, GmbH v. Fernwª rme Wien GmbH - Judgement of the Court of 10 April 2008).

It should be emphasized that even "an entity's private law status does not constitute a criterion for precluding it from being classified as a contracting authorityò(C-214/00, Private law status as a criterion excluding classification of that entity as a contracting authority. Commission of the European Communities v. Kingdom of Spain - Judgement of the Court of 15 May 2003; differently: opinion of of Advocate General Niil Jª ª skinen presented on 25 June 2015 in the context of verdict C-174/14, Body governed by public law and VAT. Sauda- or - Sociedade Gestora de Recursos e Equipamentos da Sa¼de dos A- ores SA v. Fazenda P¼blica - Judgement of the Court of 29 October 2015; Sodÿysi Eska, 2016).

4. Juridical personhood

Another element shaping the legal construction of the term under discussion is the matter of a given entityôs possession of juridical personhood. ñThis requirement has not provoked any great amount of legal debateò (Hatzopoulos and Stergiou, 2010, p. 13). This element is of an obligatory character. It generally attests to the presence of two aspects. The first of them is the legal distinctness of the entity. This primarily concerns the issue of distinctness from the state (or local self-government entity). We can therefore say that the fact of classification as a body governed by public law does not mean that a given entity has to be ï *stricte* ï formally (structurally, organizationally) a part of the state or local self-government entity. The distinctness under discussion also concerns independence from other entities: both bodies governed by private law and other public law entities.

Secondly, the characteristic of juridical personhood gives every entity two key attributes facilitating effective functioning in legal relations: legal capacity and capacity to perform acts in law. In particular, this allows the public law entity ï as the contracting authority ï to conclude an agreement with the selected contractor (See also Cerutti, 2012; Franch and Torrelles, 2009).

The issue of a given entityôs enjoying the attribute of juridical personhood fundamentally depends on the content of national legal regulation of particular EU Member States (for example: ñit can be seen from Paragraph 4(1) of SGB V that the statutory sickness insurance funds are corporations governed by public law and have legal personality as well as a right of self-management. They were created pursuant to Paragraphs 1 and 3 of SGB Vò C-300/07, Interpretation of definitions contained in Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts: contracting authority (financed to a significant degree by the state, supply of products,

framework agreement), Hans & Christophorus Oymanns GbR, Orthopª die Schuhtechnik v. AOK Rheinland/Hamburg ï Judgement of the Court of 11 June 2009). There is thus no doubt that the condition under consideration also determines that natural persons cannot be bodies governed by public law, as they are all characterized by that trait ï therefore, it was not necessary to include natural persons in the content of the definition.

It is thus correctly pointed out that the juridical personhood mentioned in art. (...) of Directive (...), should be understood as legal subjectivity (Pawlak, 2013). This means that under Polish law, organizational units not being juridical entities assigned legal capacity under statue can be bodies governed by public law can (art. 33^1 Civil Code, OJ.L.2018.650).

5. Impact of public authorities on a given entity

The last substantive element concerns the impact of public authorities on the functioning of a given entity ï "close dependence vis-¨-vis public authorities" (C-300/07, Interpretation of definitions contained in Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (mostly financed by the state, supply of products, framework contract). Hans & Christophorus Oymanns GbR, Orthopª die Schuhtechnik v. AOK Rheinland/Hamburg - Judgement of the Court of 11 June 2009), ñclose dependence vis-¨-vis public authoritiesò (C-526/11, IVD GmbH & Co. KG v. rztekammer Westfalen-Lippe - Judgement of the Court of 12 September 2013), ñclose dependenceò (C-283/00, Elements of the definition of a body governed by public law under EU provisions concerning coordination of procedures for the award of public works. Meeting needs in the general interest, not having an industrial or commercial character. Commission of the European Communities v. Kingdom of Spain - Judgement of the Court of 16 October 2003), ñsignificant dependenceò (C-373/00, Adolf Truley GmbH v. Bestattung Wien GmbH - Judgement of the Court of 27 February 2003), ñclose dependence on public authoritiesò (C-214/00, Private law status of an entity as a criteria excluding classification of that entity as a contracting authority. Commission of the European Communities v. Kingdom of Spain - Judgement of the Court of 15 May 2003), "control by public authoritiesò (C-214/00, Private law status of an entity as a criteria excluding classification of that entity as a contracting authority. Commission of the European Communities v. Kingdom of Spain - Judgement of the Court of 15 May 2003), ñthis condition is used primarily to determine the degree of dependency of the entity in question from the state and the degree of state controlò (Hatzopoulos and Stergiou, 2010, p.13), ñeffective and dominant public impactò (Cerutti, 2012, pp. 172-174) ï which creates the possibility of exerting influence on its decisions in respect of public procurement proceedings (C-526/11, IVD GmbH & Co. KG v. rztekammer Westfalen-Lippe - Judgement of the Court of 12 September 2013). It provides for three legal manners of indicating its existence. The presence of at least one of them constitutes fulfilment of that condition.

Primarily it should be observed that, in the opinion of the legislator, it is not possible to construct the term "body governed by public law" without the existence of a relation between a given entity and state structures (ñthe term ôthe Stateô (...) encompasses all the bodies which exercise legislative, executive and judicial powers. The same is true of the bodies which, in a federal State, exercise those powers at federal levelò C-323/96, Commission of the European Communities v Kingdom of Belgium - Judgement of the Court of 17 September 1998) or other public authorities listed in the definition. Second: the relation between the two mentioned structures (entities) can take on a diverse nature (which is expressed normatively as the elements indicated as optional in subparagraph c). Ultimately, it should be observed that the mere indication of the aforementioned impact will not be sufficient to declare that a given entity is encompassed by the term presently under consideration ï the conditions set out in subparagraphs a) and b) must also be met.

In the case-law ï as regards the meaning and influence of the analyzed premise on the public procurement market ï the following issue draws our attention: the necessity of decisions made by contracting authorities being determined exclusively by economic considerations (ñthat dependence is likely to enable the latter to influence the decisions of the body concerned with respect to public contracts, which might lead to considerations other than economic onesò C-

526/11, IVD GmbH & Co. KG v. rztekammer Westfalen-Lippe - Judgement of the Court of 12 Septemer 2013; C-536/07, Interpretation of the definition of a public procurement for construction works. Premises classifying a contract as an order for construction works. Commission of the European Communities v. Federal Republic of Germany - Judgement of the Court of 29 October 2009; C-300/07, Interpretation of definitions contained in Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts: contracting authority (financed to a significant degree by the state, supply of products, framework agreement). Hans & Christophorus Oymanns GbR, Orthopª die Schuhtechnik v. AOK Rheinland/Hamburg - Judgement of the Court of 11 June 2009; C-380/98, Body governed by public law as understood by EU law concerning the awarding of public procurement contracts. The premise of dependence on state or local government institutions. Understanding of the concept of ñfinancing activity". The Queen v. H.M. Treasury, ex parte The University of Cambridge - Judgement of the Court of 3 October 2000; C-470/99, Universale-Bau AG i Bietergemeinschaft: Hinteregger & Sº hne Bauges.m.b.H. Salzburg, ¥ ST¦ -STETTIN Hoch- und Tiefbau GmbH v. Entsorgungsbetriebe Simmering GmbH - Judgement of the Court of 12 December 2002), avoiding the risk of favorizing national tenderers or contractors when awarding a contract by contracting authorities (C-536/07, Premises classifying a contract as an order for construction works. Commission of the European Communities v. Federal Republic of Germany - Judgement of the Court of 29 October 2009; C-300/07, Interpretation of definitions contained in Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts: contracting authority (financed to a significant degree by the state, supply of products, framework agreement). Hans & Christophorus Oymanns GbR, Orthopª die Schuhtechnik v. AOK Rheinland/Hamburg - Judgement of the Court of 11 June 2009), and also protection of the free flow of services and goods (this impact "in particular constitutes a risk of preferential treatment of national tendered or contractors, leading to barriers in the free flow of services and goods, the avoidance of which is precisely the objective of Directives addressing public procurementò C-237/99, Cumulative conditions characterizing a body governed by public law as understood by Directive 93/37 concerning the coordination of procedures for the award of public works contracts for construction works and determining the status of the contracting authority. Commission of the European Communities v. French Republic - Judgement of the Court of 1 February 2001; C-526/11, IVD GmbH & Co. KG v. rztekammer Westfalen-Lippe - Judgement of the Court of 12 September 2013).

The first of the potential aspects attesting to the influence of public authorities on a given entity concerns its financing by those authorities (ñis financed in the most part by the state, regional or local authorities, or other public-law entitiesò). In the case law, it is stated precisely that ñthe concept of financing refers to a transfer of funds made without specific consideration with the aim of supporting the activities of the body concernedò (C-380/98, Body governed by public law under EU regulations concerning the awarding of public procurements. The premise of dependence on state or local self-government institutions. Understanding of the concept of ñfinancing activitiesò The Queen v. H.M. Treasury, ex parte The University of Cambridge - Judgement of the Court of 3 October 2000; C-526/11, IVD GmbH & Co. KG v. rztekammer Westfalen-Lippe - Judgement of the Court of 12 September 2013). It should thus be observed that the link under discussion between aforementioned structures (entities) encompasses both the economic factor, within whose framework the element of significant transfer to another entity (*id est* not in exchange for consideration), but also the premise of the objective: to support it.

It is also raised that the "most partò entails at least 50% of financing (C-129/15, H.M. v. Agentsia za darzhavna finansova inspektsia (ADFI) ï Order of the Court of Justice of 7 July 2016; C-380/98, Body governed by public law under EU rules on the awarding of public procurements. The premise of dependence on state or local self-government institutions. Understanding of the concept of ñfinancing activitiesò The Queen v. H.M. Treasury, ex parte The University of Cambridge - Judgement of the Court of 3 October 2000; see also: recital 10 to Directive 2014/24/EU; recital 12 to Directive 2014/25/EU; Cerutti, 2012, p. 173; Franch and Torrelles, 2009, p. 388). This implies a sort of transposition of a theoretical legal construction

into a specific mathematical value. Attention is also drawn by the fact that this can as well involve indirect financing ï unless the entity in question enjoys "significant autonomyò (ñdiscretionò ï C-300/07, Interpretation of definitions contained in Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts: contracting authority (financed to a significant degree by the state, supply of products, framework agreement). Hans & Christophorus Oymanns GbR, Orthopª die Schuhtechnik v. AOK Rheinland/Hamburg - Judgement of the Court of 11 June 2009, ñorganizational and budgetary autonomyò ï C-526/11, IVD GmbH & Co. KG v. rztekammer Westfalen-Lippe - Judgement of the Court of 12 September 2013); for example: ñSuch financing may be made by means of a fee provided for and imposed by statute as regards its principle and amount, and which does not constitute consideration for actual use of services provided by the body concerned by the persons liable to pay the fee and in respect of which the detailed rules for collection derive from the powers of a public authority (The fact that, formally, a body itself fixes the amount of contributions which provide for the greater part of its financing does not make it impossible that indirect financing could satisfy that criterion). The situation is entirely different when the considerable degree of autonomy left to it by that law to determine the nature and scope of, and the procedures for, the actions it undertakes in order to perform its tasks and to set the budget necessary to that end and, consequently, the amount of contributions that it will claim from its membersò (C-526/11, IVD GmbH & Co. KG v. rztekammer Westfalen-Lippe - Judgement of the Court of 12 September 2013); nevertheless, ña body such as a professional association governed by public law does not satisfy the criterion relating to financing for the most part by the public authorities when that body is financed for the most part by contributions paid by its members, in respect of which it is authorized by law to fix and collect the amount, if that law does not determine the scope of, and procedures for, the actions undertaken by that body in the performance of its statutory tasks, which those contributions are intended to financeò (C-526/11, IVD GmbH & Co. KG v. rztekammer Westfalen-Lippe - Judgement of the Court of 12 September 2013; C-337/06, Interpretation of the definition of ña body governed by public lawò in light of Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. Scope of exclusion from the application of the rules on public procurement encompassing the acquisition, preparation, production, coproduction of program materials by broadcasters (social mission of public broadcasters). Bayerischer Rundfunk and others v. GEWA - Gesellschaft f¿r Gebª udereinigung und Wartung mbH - Judgement of the Court of 13 December 2007; C-300/07, Interpretation of definitions contained in Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts: contracting authority (financed to a significant degree by the state, supply of products, framework agreement). Hans & Christophorus Oymanns GbR, Orthopª die Schuhtechnik v. AOK Rheinland/Hamburg - Judgement of the Court of 11 June 2009). It is properly pointed out that the directives ñcontain no details as to the procedures for delivering the financing to which that provision relates. Thus, in particular, there is no requirement that the activity of the bodies in question should be directly financed by the State or by another public body failing which the condition attaching to that point is not satisfied. A method of indirect financing is therefore sufficientò (C-300/07, Interpretation of definitions contained in Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts: contracting authority (financed to a significant degree by the state, supply of products, framework agreement). Hans & Christophorus Oymanns GbR, Orthopª die Schuhtechnik v. AOK Rheinland/Hamburg - Judgement of the Court of 11 June 2009; Hatzopoulos and Stergiou, 2010, pp. 13-14).

The second aspect is associated with the issue of review of an executive board by public authorities (ñit is subject to management supervision by those authorities or entitiesò). In this case as well, the case-law indicates an association between the aforementioned sphere of autonomy and the issue of management oversight (C-526/11, IVD GmbH & Co. KG v. rztekammer Westfalen-Lippe - Judgement of the Court of 12 September 2013). It is noted that the condition under discussion will also be satisfied when ñthe state can, at least indirectly, exert control over the awarding of public tendersò (C-306/97, Interpretation of the concept of a ñbody

governed by public lawò in the context of functional interpretation of the term ñcontracting authorityò, Connemara Machine Turf Co. Ltd v. Coillte Teoranta - Judgement of the Court of 17 December 1998). Nevertheless, ñin principle, a review *ex post facto* does not satisfy that criterion, for such a review does not enable the public authorities to influence the decisions of the body in question in relation to public contractsò (ñThat is the case, in principle, of a general review of legality conducted *ex post facto* by a supervisory authority and, *a fortiori*, of an action taken by that authority in the form of approval of the bodyôs decision fixing the amount of contributions which provide for the greater part of its financing, which is confined to ascertaining that the bodyôs budget is balancedò C-526/11, IVD GmbH & Co. KG v. rztekammer Westfalen-Lippe - Judgement of the Court of 12 September 2013; C-373/00, Adolf Truley GmbH v. Bestattung Wien GmbH - Judgement of the Court of 27 February 2003; C-300/07, Interpretation of definitions contained in Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts: contracting authority (financed to a significant degree by the state, supply of products, framework agreement). Hans & Christophorus Oymanns GbR, Orthopª die Schuhtechnik v. AOK Rheinland/Hamburg - Judgement of the Court of 11 June 2009) ï ñnormal reviewò (C-373/00, Adolf Truley GmbH v. Bestattung Wien GmbH - Judgement of the Court of 27 February 2003). It is necessary to add that ñthe managerial dependency condition concerns the direct participation of public authorities and officials in the management of the entityò (Hatzopoulos and Stergiou, 2010, p. 14).

The third ï and last possible ï aspect of dependency of an entity on public authorities concerns those authorities selecting members of the entityôs organs ("it is subject to management supervision by the latter or it has an administrative, managerial or supervisory board, more than half of whose members are appointed by the public authoritiesò). In the scope under consideration, our attention should turn to two issues. First, the EU legislator interprets the premise under consideration very broadly. On the one hand, the sphere of public authority is understood broadly; on the other, there are as many as three different types of organs of a given entity under consideration. In the case under discussion, it is sufficient that the appointment of members concerns only one of the listed organs.

The second issue is one of mathematical importance. Insofar as in respect of the condition of financing, the legislator uses only the general term ñin the most partò, in the context of the third aspect there is a precise indication of the impact of public authorities (ñover halfò). In the case law, the condition under discussion is given as an example in respect of commercial companies ("it should be added that W., in spite of being a commercial company, fulfils at least one of the remaining requirements set out in Art. 3(1) of the Public Procurement Act [of 29 January 2004, OJ.L.2017.2018 ï J.O.], qualifying it as a body governed by public law. Local self-government entities doubtlessly are in possession of over one-half of shares in W. (Art. 3(1)(3)(b), and also (at the general meeting) have the right to appoint over half of the members of the oversight body (supervisory board) (Art. 3(1)(3)(d)ò Verdict of the Supreme Administrative Court in Warsaw of 28 October 2015, II GSK 2764/14).

6. Summary

The provisions of the Directive under discussion, establishing the subjective scope of the term "body governed by public law", are composed of a range of elements. One set of them ï grouped in subparagraphs a) and b) ï must of necessity be present; the remainder of them ï in subparagraph c) ï are facultative (nevertheless, the content of subparagraph c) assumes that at least one of the elements listed within must occur).

This means ï firstly ï that materialization of the factual circumstances encompassed by the concept under consideration is the sum of various elements, which (generally) must occur in concert. It should be added that they are of a diverse legal nature: from indication of the objective of an entityôs activity (which, on the one hand, has a legal nature, resulting from the will of the legislator, who determines the legal status of a given entity, including the objective of its activity; on the other hand, it has the factual aspect of legal subject, connected with the evaluation of behavior of this body), through indication of existence of attribute that is legal

personhood (legal nature) and ï finally ï various methods of inclusion of legal and factual influence of public authorities on specified entity.

Secondly, legal qualification specified entity as body governed by public law is able to occur in various configurations ï where variable element is the premise of State influence (subparagraph c). That component is variable firstly therefore that influence can occur in a threefold way; it is possible also a situation when throughout the functioning of certain body there will be a change in the scope of way of influence of public authorities on this one (in contrast to premises included in subparagraphs a) and b), which should have permanent nature).

It is necessary to indicate two significant functions of regulations which are under consideration. The first one is informative function where EU legislator indicate what entities belong to defined sphere. Thus, contracting authority, contractors and institutions which exercise public oversight over the public procurement market have in each case opportunity to establish whether ï in the particular case ï there is a necessity to apply the public procurement regulations.

Second function is related to security function. In this situation, EU legislator ï by indication what bodies are obliged to apply appropriate the public procurement regulations ï safeguards the implementing rules which need of completing led to creation of these regulations. Jurisprudence indicate that ñby defining in broad terms the concept of ôbody governed by public lawô (é), Article (é) of Directive (...) seeks to define the scope of that directive in a sufficiently extensive manner so as to ensure that the rules on, in particular, transparency and non-discrimination which are required in connection with the award of public contracts apply to all State entities which do not form part of the public administration but which are nevertheless controlled by the State, in particular by means of their financing or their managementò (C-174/14, Sauda- or - Sociedade Gestora de Recursos e Equipamentos da Sa¼de dos A- ores SA v. Fazenda P¼blica ï Judgement of the Court of 29 October 2015).

It is worth adding that analyzed scope of entities includes ñboth public bodies which operate outside the market (ôformally and essentially publicô) and bodies, which take the private law forms, as well as are affected by dominant public impact and not operating under the market system (ôformally private but essentially publicô). On the other hand entities, which operate under the market one, are excluded ï both have private law forms (ôformally and essentially privateô) and are public entities (ôformally public but essentially privateô). In conclusion, it is intended by EU legislator to incorporate bodies not operating under market economy conditions (ôessentially publicô) and, at the same time, to except these ones which operate in the competition system (ôessentially privateô) ï regardless their public or private statusò (Cerutti, 2012, p. 168).

This issue can be also considered from the direction positive and negative. In the first situation UE legislator, indicating subjective scope of the concept of a ñbody governed by public lawò, points out what entities become obliged in the context of compliance with the public procurement regulations. Negative aspect indicates in turn what bodies are not obliged to apply mentioned regulations.

It is necessary to remember that discussed notion is a common concept for whole European Union and all its Member States. Cerutti (2012, p. 167) points out ñcommunity concept of the ôbody governed by public lawô is making an effort to provide application of requirements which are imposed by EU legislation in area of public procurementsò.

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