A comparison between the concepts “undertaking” and “bodies governed by public law”

En jämförelse mellan begreppen ”företag” och ”offentligrättsliga organ”

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1 Introduction

Competition law and public procurement are closely related. Both are based on EU law and exist to create a functional market. Nonetheless, the rules have been developed separately, and we can differentiate two distinct fields. Both regulations have a significant impact on the internal market, although they regulate different components. The competition regulation concentrates on the supply side of the market, that is the industry.

In contrast, the procurement rules focus on the demand side of the market, which comprises the government and its organs in their role as buyers. The public market differs from the regular market as the demand side is usually stronger than in the regular market and in some cases, have a monopsony-like character. This means that it is one or very few buyers of a product; this could result in the purchasing decision taken by a governmental agency to change the whole structure of a market. It is therefore essential that the actions taken by a governmental agency come as close as possible to a rational buyer as in the regular market. Otherwise, it can lead to an uncompetitive procurement behaviour, which can lead to several problems. The one problem is corruption related, that contracts are given out to political allies of the government. Another is that by giving contracts to domestic companies can lead to a segmented European market, where national borders still will prevail. Another problem with is that it can hinder a rationalisation of an industry. It can also lead to less public goods for the taxpayers' money.

The concept of “undertaking” is crucial for competition law, as it is only an undertaking that is subjected to the competition and the state aid articles in the TFEU. The ECJ has developed the concept in extensive case law. The current definition covers, in some cases, governmental agencies. The procurement rules, on the other hand, do not have an undertaking definition, as the rules aim at the government. Instead, it has a few broad criteria for “bodies governed by public law”, and if an organisation fulfils the criteria, it needs to follow the procurement directives. There is, however, one exception in public procurement rules if the organisation has an industrial or commercial character. In that case, the governmental agency does not need to follow the procurement directives but only

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competition law. The exception is narrow, as there needs to be a qualified industrial and commercial interest, and in many cases it will be possible that the agency will need to follow both the competition law and the procurement regulation.

In other words, we have three scenarios: 1) Governmental bodies that are not undertakings and only need to follow the procurement regulation. 2) Governmental bodies that are undertakings and need to follow both the procurement regulation and competition law. 3) Governmental bodies that are undertakings and qualifies for the exception in the procurement rules and as such only need to follow the competition law.

To conclude, public companies which are under some commercial pressure, but not qualified enough to have commercial or industrial character must follow both the competition laws and the public procurement laws. At some point, the entity will be commercialised enough to follow the competition law. This paper will make a comparative analysis regarding the differences between the legal frameworks concerning the undertaking definition and when an entity fulfils the criteria to have a body governed by public law. Comparing the concepts gives a better understanding of both and how they relate to each other.

1.1 Purpose and leading questions for the paper
The purpose of this paper is to make a comparison between the concept “undertaking” in TFEU and the concept “body governed by public law” from the procurement directives. The paper will begin with researching when an entity is a body governed by public law. Secondly, the paper will research the requirements for an “undertaking” and compare when an entity is classified as an “undertaking” and when it qualifies for the “industrial and commercial character” exception in the public procurement legislation.²

The paper studies the four following questions:

1) What is a body governed by public law, and what does it mean to have an “industrial or commercial character”?

² Johan Hedelin argues that state aid, competition law and public procurement law could be used better together for achieving a better compliance with the purpose of the legislations. Johan Hedelin, “Statsstöd, Upphandling och Konkurrens,” Europarättslig tidskrift, (No 1, 2018),
2) How should the undertaking concept be understood in relation to governmental agencies?

3) What are the essential differences and similarities between the concepts?

4) Can the ECJ’s interpretation of the law be improved by a more economic approach?

1.2 Disposition

Chapter 1 will present the papers method. It will use both the Swedish classical legal method and the European legal method. The paper will also contain a few economic concepts which will be used in the analysis.

In chapter 2, the focus will be on analysing each criterion in the definition of “body governed by public law”. The chapter will end with a few Swedish cases to illustrate how the case law has been applied in national courts.

Chapter 3 focuses on the concept “undertaking”. The chapter will begin with the general rule and later on discuss different exceptions to the general rule. These are the solidarity exception, exercising public powers exception, and finally the regulatory body exception. The paper will then propose a few common criteria for assessing if an entity is an undertaking. The paper will then illustrate the application of the law by analysing a Swedish case related to the undertaking definition.

Chapter 4 will compare the “undertaking” concept and the “body governed by public law” concept. First a general comparison and thereafter, an in-depth analysis based on the criteria from the definition “body governed by public law”. The final part will discuss problems with the current case law and possible ways to mitigate it.

1.3 Method

The paper will proceed to use the classic legal method, using the legal sources to find a solution for a legal problem. In the Swedish context, as the paper will use Swedish cases in showing the application of the ECJ case law, it means that the preparatory works for the law will have more influence on the law than other legal orders. As EU law regulates public procurement and competition law, the paper will use the EU legal method primarily.

Both methods aim to reconstruct the legal system and systematise the laws. The systematisation enables the prediction of the outcome of the legal problem, which is
paramount for the rule of law. The purpose of the legal method purpose is to describe, systematise and interpret the law. In the Swedish context, it usually means that the purpose is to answer the questions a judge will pose regarding the legal order.³

It is, therefore, necessary to use the same method as a judge; give the legal sources appropriate weight, and balance these against each other to reach a legal solution that has the support of the current legal system. The purpose is to create a sound argumentation for a specific interpretation of the law. This method has been criticised for being technical and descriptive.⁴ The legal sources, which are essential for the classic Swedish method, are in descending order: law, other statutes, case law, preparatory works and doctrinal works. The latter can influence the legal system by systematising a legal field to give arguments for a legal solution for unregulated areas.⁵

Union law is divided into primary and secondary law. The primary law holds the treaties and the charter of fundamental rights. General principles are also part of the primary law. The principles can be written down in the treaties or be found in the case-law of the European Court of Justice (ECJ, but will also be referred as the “Court”). Competition law is regulated in the Treaty of the functioning of the European Union (TFEU) Art. 101-107. The secondary law is composed of regulations, directives, decisions, opinions and recommendations. These are based on articles contained in the treaties, and the primary law binds them.⁶

The EU legal order is relatively young, and as such, it is expanding at the same pace as the Union obtains additional competences. At the same time, as the legal order encompasses more than 25 legal systems, it is crucial to understand how the legal order works together with the national laws. The ECJ has an essential role, as they are the ones that exclusively interpret the Union's laws. The Court has developed principles that enable the Union to have an effective legal order. It is in the case law where the principles of direct effect and

⁴ Olsen “Rättsvetenskapliga perspektiv” 113.
superiority of the EU law have been developed, which are cornerstones for the legal order as we know today.\(^7\)

EU law is superior to national law, and it can have a direct effect, which means that it can directly affect the national legal system without any transformation into the national legal order. As mentioned previously, it is also an organisation driven by principles. One of the most fundamental principles is the principle of sincere cooperation between the EU and the member states. The principle of sincere cooperation signifies that the member states need to fulfil the duties that come from the treaties or the secondary law. The doctrine of indirect effect is developed from this principle which means that national law must be interpreted in the light of the community law as far as possible. Another effect is that a member state cannot take actions that goes against meaning of a directive, even if the implementation period has not expired. The doctrine of \textit{effet utile} (effectiveness) is a doctrine that aims to secure the effectiveness of EU rules. The doctrine focuses on how the EU law shall be interpreted effectively. The ECJ often emphasises in its case law that the EU rules shall have an effective, uniform interpretation in the whole Union. The doctrine is essential as a significant part of Union law and is to be implemented by the member states.\(^8\)

The best way of understanding what the EU law is, it is also to understand how the ECJ will interpret an EU provision. Consequently, this paper will provide a summary of the methods of interpretation that the ECJ apply.

The literal interpretation is used when the ECJ relies on the usual meaning of the words contained in the legal text. Providing that the legal text is clear and precise, it will generate a high amount of legal certainty and predictability of the ECJ judgements. Under settled case-law, the Court will not use contextual or teleological interpretation, if the wording of the provision is clear and precise. This stems from the principles of legal certainty. When it comes to EU law and textualism, it is essential to understand that all languages of the Union are authentic. Problems can arise when the legal text is translated in different ways, which may lead to different legal meanings. It follows from the principle of linguistic equality that if there is a divergence among the different linguistic versions of an EU act of general


application, then the ECJ cannot limit themselves to the interpretation of the legal text in the light of one language. Textualism does not suffice when such differences arise. Instead, other forms of interpretation may lead to a conclusion, and it can be strengthened by the textual reading of one of the languages.\(^9\)

Another form of interpretation is the contextual interpretation, which means that the court examines the inner workings of the legal text. The ECJ assesses the functional relationship between legal provision and the normative system it belongs to, in other words, the Court tries to assess which interpretation of the provision best fits in the general legal framework. The other way of contextual interpretation is when the court examines the legislative decision making that leads to the provision. In that case, the *travaux préparatoires* have a central role. *Traditionally*, the preparatory works have not been detailed enough to guide the court when it makes judgments. That is one explanation why it has not been used in the same extensive way compared to the Swedish legal order. The last contextual interpretation method is the systematic interpretation that is based on the idea that the legislator is a rational actor. That notion leads to the conclusion that the legal order is consistent and complete. Such consistency requires that each EU provision must be interpreted in a way to guarantee no conflict between the provision and general scheme of which it is part of. It also leads to that the EU legislator would avoid duplication or overlaps with different provisions. An example would be that two provisions would regulate the same thing, as such no provision is to be interpreted redundant. On the premise of the EU being a rational actor, it also favours an interpretation which seeks to preserve the validity of its acts over one, which would lead to their annulment. At the same time, if it exists several interpretations, preference must be given to the interpretation that makes the provision retain its effectiveness and compliance with primary EU law, but not as far as *contra legem*.\(^{10}\)

The last type of interpretation is teleological. It exists three sorts of teleological interpretation. The first one aims at securing the effectiveness of the provision by combining a systematic interpretation with the teleological and then chose the interpretation that assures the functionality of the provision. The second is if a provision is ambiguous, then it must be

\(^9\)Koen Lenaerts, José A. Gutiérrez-Fons, “To say what the law of the EU is : methods of interpretation and the European Court of Justice” EUI AEL *Distinguished Lectures of the Academy*, September 2013, 6-11.

\(^{10}\)Lenaerts, Gutiérrez-Fons, “To say what the law of the EU is,” 13-16.
interpreted in the light of the objectives it pursues. The third one focuses on the consequences that flow from an interpretation. The ECJ applies the principle of proportionality when EU law pursues more than one objective to assure that the teleological interpretation strikes a fair balance between the different objectives.\textsuperscript{11}

The paper will use these interpretation methods to understand the Courts reasoning in its case law. The courts argumentation will be analysed, and important factors will be deducted from the case law. The teleological interpretation will be used in particular, as the ECJ's argumentation is often based on the purpose of the legislation. The definition of “bodies governed by public law” has been the same in the earlier directives, it is therefore possible to use the previous case law.\textsuperscript{12}

1.4 Perspective and terminology
This section will explain how public procurement fits inside the context of the internal market and the economic considerations that will be used in this paper. In the following part, it will be clarified how the relevant economic considerations will be used in the paper.

Private markets are usually structured as a result of an interaction of buyers and sellers in a market. These markets can be everything from monopolies to have almost perfect competition. Public-markets, in contrast to the private market, tend to be structured differently as the market may have monopsony-like characteristics. That means that there are a few dominant buyers on the market for the product. The public usually works under budgetary considerations instead of the price mechanism. Public procurement regulation tries, in a neoclassical economic approach, to create a price competition which would create good conditions for welfare gains. By having transparency and price competition, it would result in an effective production and distribution, which leads to an optimal allocation of resources. Changing purchasing behaviour would also change the supply side of the market. This would aim to create a price converge in the whole union, which would lead to lower

\textsuperscript{11} Lenaerts, Gutiérrez-Fons, “To say what the law of the EU is” 25.
\textsuperscript{12} In the older directive the articles are: Art. 1(b) of council directive (93/37/ECC). Art. 2(1)(a) of directive (2004/17/EC) Art.1(9) of directive (2004/18/EC). For the current directives is Art. 2(1)(4) of directive (2014/24/EU) and Art. 3(4) (2014/25/EU)
prices for many public sectors. Moreover, a restructuring of the industry that would lead to the most efficient industries competes for contracts all over the Union.\(^{13}\)

In other words, the regulation forces the state to behave as a rational buyer\(^ {14}\) on the market. In contrast with a regulation that allows for more political decisions that leads, as previously stated in the introduction, to different problems. The procurement legislation will, therefore, affect the demand side\(^ {15}\) of the market in contrast with the anti-trust legislation that aims at the supply side\(^ {16}\), the industry.

There is a conceptional difference between the regulation of private markets and public market. In the private market, it is the normally consumers on the demand side that are susceptible to exploitation. While public markets have a dominant demand side due to having the state as the purchaser, the industry fights for the right to supply the goods to the buyer. Due to this difference, it is not enough to have competitive regulation aimed at the industry, the state also plays a considerable role in segmenting the market by restricting market access.\(^ {17}\)

There is a relation to state aid regulation, due to the fact that it is part of competition policy. State aid regulation has a corrective character with intentions of restoring the competitive market, whereas public procurement regulation aims at adjusting the buyer’s behaviour beforehand. As such, the procurement procedure is a safeguard of the internal market, as it makes it possible to transfer public funds for services that will not be deemed state aid.\(^ {18}\)


\(^{14}\) Which include among other things that: buyers are rational, they prefer more to less and they seek to maximize their utility. See Mankiw, N. Gregory and Mark P. Taylor, *Economics* (Andover: Cengage Learning EMEA, 2014), 102.

\(^{15}\) The market demand is the sum of all individuals demands for a good or service. The law of demand claim that all other things equal: the quantity demanded of a good falls when the price of the good rises. See Mankiw and Taylor, *Economics*, 43-44

\(^{16}\) The market supply is the sum of the supplies of all sellers. The law of supply claim that, all other things equal, that the quantity supplied of a good rises when the price of a good rises. See Mankiw and Taylor, *Economics*, 50-51

\(^{17}\) Bovis, *The Law of EU Public Procurement*, 6-7.

To conclude, public procurement affects the demand side of the internal market and thus it needs to be regulated. The conceptional difference between the market for public contracts and regular markets is that the supply side of the market, the industry, is the weaker party in the public market. In normal private markets it is the consumer, the demand side, who is the weaker party.

The procurement regulation can create two other kinds of market distortions. Firstly, price distortions which impose an efficiency loss on society. Secondly, it can set up a market structure that under certain conditions, increase the chance of collusion between competitive firms. This goes partly against the goal of public procurement, which is to use market mechanisms to maximise value for the contracting authority.\(^{19}\)

Price distortions can be analysed with a single dominant public buyer model. The single large buyer is accompanied by several smaller buyers who act on the fringe. The dominant buyer will, due to its size, act as a price setter.\(^{20}\) Fringe buyers act as price takers\(^{21}\) because their purchases are too small to influence the price in the market. The dominant buyer will try to adjust the amount of purchased goods to maximise profit by limiting the demand to assure low prices for its input, as it is a price setter. The behaviour of the dominant buyer leads to unrealised gains from further trade as it limits the number of purchased goods. In practice, it would be a higher cost for the buyer to buy products up to the real demand. This would lead to higher prices for all of its inputs, as it would not limit itself, but society would improve by an expansion in trade. However, it would hurt the public buyer as it would need to pay a higher price on all of its inputs as the total demand is higher. In summary, the buyer


\(^{20}\) Price setter is a firm which sets the price of a good or security. Only a firm with some degree of monopoly power can be a price-setter. A price-setter is contrasted with a price-taker, which is a competitive firm or an individual who has to treat the market price as given. Hashimzade, Nigar, Gareth Myles, and John Black. "price-setter." In *A Dictionary of Economics*, Oxford University Press, 2017 https://www-oxfordreference-com.ezproxy.its.uu.se/view/10.1093/acref/9780198759430.001.0001/acref-9780198759430-e-3838

\(^{21}\) Price taker is an individual or firm trading on a market where they do not believe that their own transactions will affect the market price. As a consequence a price-taker makes decisions on the basis that prices are given exogenously. Hashimzade, Nigar, Gareth Myles, and John Black. "price-taker." In *A Dictionary of Economics*, Oxford University Press, 2017. https://www-oxfordreference-com.ezproxy.its.uu.se/view/10.1093/acref/9780198759430.001.0001/acref-9780198759430-e-2432.
restricts the demand to the point where it is optimal for itself and maximise profits but at the same time imposes loss to the society as it is less trade.\textsuperscript{22}

This means in practice that the public buyer pays a lower price for any given product or than the regular equilibrium, where normal demand and supply would meet. Subsequently, it would lead to a decrease in trade, which results in potential foreclosure of suppliers and worse market conditions for fringe buyers, which is a net loss of social welfare. It is also clear that under most common market conditions, the increased transparency of the market facilitates collusion among bidders through repeated interaction. It is also possible to have collusion among public buyers, which will have the same effect as a buying cartel.\textsuperscript{23}

As shown, it is vital to have a successful regulation as there is a lot of potential problems with the public market. There needs to be a balance between private litigation and administrative action. Private litigation relies on private citizens, their lawyers, and creates incentives to force a firm to obey the regulation as it otherwise must pay damages for the harm it has created (ex-post regulation). On the other hand, direct regulation relies on public officials and tries to prevent harm from occurring in the first place rather than compensation (ex-ante). The ex-ante regulation approach promotes precise legal obligations and therefore, better compliance by lying down in advance of the regulated activity, which can be done by a specialised agency. This approach needs to be combined with an ex-post regulation, as full compliance is never achieved. The ex-post regulation can be damages or other penalties from the central agency. While creating clear rules includes high cost, because of designing and implementation, compliance will be achieved without frequent enforcement if violations are severely punished. It will, therefore be economical for the state to uphold such a rule. In contrast, if a regulation is vague it will need a lot if enforcement and litigation procedures to achieve a high compliance with regulation. Ex post-litigation and damages claim is always case-specific, and such enforcement is useful if it is a rare legal problem.\textsuperscript{24}

Goods can be analysed through the analytic framework of public goods. Public goods possess two characteristics that make it hard to make a profit and reach the optimal outcome. First, such goods are \textit{non-rivalrous in consumption}. The question is if the one person’s use

\textsuperscript{22} Sánchez, Public Procurement and the EU Competition Rules, 65-69.

\textsuperscript{23} Sánchez, Public Procurement and the EU Competition Rules, 68, 74-75.

\textsuperscript{24} Posner, Economic Analysis of Law, 491-494.
of the good diminishes another person’s ability to use it. National defence is an example, one more citizen does not increase the cost of protecting the country. The second characteristic is that the benefits are *non-excludable*. Which means that it is not possible to exclude people from, even though they have not paid. National defence is also an example of that, also. The failure to exclude people from the benefits of the good, removes the incentives for paying for the good. The problem is often solved by making payment compulsory. In contrast, a *private good* is something that is *excludable and rivalrous*. As an illustration, you can hinder people from consuming an apple, and once consumed no else can consume it. It is, therefore, possible to put a price on it and make a profit, while a *public good* does not have those characteristics. A *common resource* is rival but not excludable, an example of that is fish in the ocean. A *natural monopoly* is something that is excludable and non-rival. An example of that is power generation, it is possible to exclude a house from receiving power, but the additional cost of connecting one more house is small.²⁵

In summary, this part has explained how public procurement fits into the internal market and the economic considerations that will be used in this paper. Furthermore, it has been explained that a single dominant buyer, by restricting its demand, can impose a loss on society. Goods and services can be classified in accordance to different characteristics, excludable and rivalry. These characteristics leads to different market structures and thus different kind of regulatory solutions. Regulation can be divided into ex-ante and ex-post regulation. They are suitable for different kind of problems that needs regulation, but they can often complement each other to increase the enforceability of the regulation.

2 Bodies governed by public law

The coming chapter concentrates on the first question in the paper. It will analyse what a body governed by public law is, and which criteria that are relevant. These criteria will then be compared in chapter 4 to the criteria that is relevant for the undertaking concept.

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2.1 Introduction and legislation

The relevant legislation can be found in the general procurement directive (2014/24/EU). The directive states that contracting authorities need to follow the procurement directives. Article 2(1)(1) (2014/24/EU) defines contracting authorities as: ‘contracting authorities’ means the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law.

Article 2(1)(4) defines “Bodies governed by public law” as:

(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.

To be a “body governed by public law” and thus a contracting authority, three cumulative criteria needs to be fulfilled. The ECJ has developed the criteria in their case-law. The paper will, in the following chapter, discuss each criterion with references to the relevant case law.

2.2 General remarks

This part will give an introduction to the definition of bodies governed by public law. The following sub-chapter will provide in-depth analysis of each criterion. The body needs to be established for the specific purpose of meeting needs in the general interest, and not having an industrial or commercial character. That is the first of the three cumulative criteria. The purpose of the directive is to eliminate barriers and allow to provide services and goods. In other words, to protect the interest of all the traders in the member states and give them the possibility to offer goods or services to another contracting authority in another member state. The directive aims to minimise the risk of preference being given to national tenders,

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26 The definition also exists in directive (2014/25/EU) article 3(4).
or a national entity may choose to be guided by other consideration than economic ones. The concept contracting authority, including body governed by public law, should therefore be interpreted in *functional* terms.\(^{28}\)

*The functional approach* is the key to understand the ECJs case law when it comes to the concept of “body governed by public law”, as opposed to the formalistic approach. The ECJ uses a teleological approach where it looks at the purpose of the directive, which is to open domestic markets and curtail local governments power to affect the market with their procurement behaviour. The functional approach gives the ECJ wide possibilities not to let formalistic circumstances open up for a local government to circumvent the directive and favour a specific company or a domestic industry. All of the ECJ case law regarding the concept should be understood from the perspective that the court strives to make the concept so extensive that it will be hard, if not impossible to, for a local government, to circumvent the directive and favour a specific company. In other words, when the ECJ assess a body governed by public law it will ask *if the government can affect the body’s rewarding of contracts.*

In consequence, the functional approach means that a body governed by public law can be an entity which may be established by either private or public law.\(^{29}\) It does not matter if the entity was not established for the specific purpose of fulfilling a general interest; it *suffices that it takes responsibility for the interest.* For example, the statutes of a body do not need to be amended to reflect the actual changes in the activities of the entity. It is enough that it can be objectively established, by for example a contract with the authorities, that a body has taken up the responsibility to satisfy the needs in the general interest not having commercial or industrial character.\(^{30}\) As such, the important thing is that an entity is objectively responsible for the interest. Not the formalistic approach that it needs to be *established for fulling a purpose* which a textual reading of the directive gives at hand.

When the entity is established for a specific purpose of meeting needs in the general interest, it is irrelevant if it is free to carry out other activities in addition to the task that it is given. It does not matter that the needs in the general interest represent a relatively small


portion of the total activities of the entity. As long as it attends those needs, it will fulfil the first part of the criteria for the definition. In other words, the entity does not need to be entrusted with solely meeting such general needs.\textsuperscript{31}

If one part of an entity is a “body governed by public law,” that is in itself not sufficient to make all legal bodies within that entity classified as a body governed by public law. Each legal entity needs to fulfil the requirements for the classification. As such, it is possible that one part of a corporate group needs to follow the procurement legislation while another part does not need to. This comes from the functional approach to the case law where the question is if the authorities can affect the rewarding of contracts. If a body within an entity is not under the same control, then it is not necessary for that body to follow the procurement legislation. However, if one legal body is servicing both public and private needs then it will become “body governed by public law”. There is a possibility that the public nature of the body can subsidise the commercial part, even if the previous one is minor.\textsuperscript{32}

It is probably possible for a company to avoid applying the directive to an entity’s commercial activities when they are entrusted to a legally separate subsidiary. In the Mannesmann case, the ECJ indicated that a subsidiary is not a body governed by public law under these premises: solely being established by a contracting authority or their activities being financed by funds derived from activities performed by a contracting authority.\textsuperscript{33} The subsidiary of a company needs to fulfil the general interest criteria, which means that if the subsidiary is commercial, then it will not need to follow the directive.

If a “body governed by public law” wishes to avoid applying the directive to its commercial activities, it can set up a legally separate subsidiary. However, a subsidiary will usually be seen to be subject to management supervision of its parent based on its subsidiary status. According to this the directive will cover a subsidiary of a contracting authority that does not possess a commercial nature. According to the ECJ, it does not suffice to split the commercial and the general interest part by having separate accounts and an accounting system intended to avoid cross financing between the aforementioned sectors. This applies

as long as the entity is a single legal person who has a single system of assets and property and whose management decisions are taken in a unitary fashion.\textsuperscript{34}

The criteria that the ECJ alludes to means in practice that a company needs to have a separate entity that is independent of the parent as it otherwise implies unitary management. This separation criteria is logical from the point of view that it should be impossible to circumvent the directive. However, this challenges public bodies that serves both the public and the private sectors as they would be at a disadvantage of completely private firms which do not need to follow the procurement legislation. The cost of setting up a separate entity for bodies governed by public law may be higher than the expected revenue. It could lead to that the company will abstain or be at a disadvantage when participating in the private market which could lead to less competition on market as a whole. The high bar for separation between the commercial and public activities guarantees that a body has no possibility to claim that the purchase is for the commercial wing and therefore does not need to follow the procurement directive. One solution would be that the company needs to prove that there are no subsidies from the public part to the commercial one, as the latter would be under market pressure to make economically rational decisions.

The Court put transparency before commercial flexibility by arguing that the management and the assets cannot be shared, as in practice, it would mean that the company needs to have a separate company division. The ECJ has thus put a high bar for the separation of public and commercial activities. The current position can be summarised as it is easy to qualify in for the legislation, but it is hard to qualify out of it. If an entity fulfils all the criteria, it will be a “contracting authority”, and it will need to follow the procurement directive for all of its purchases. The body will also need to apply the directive on its commercial wing, if it has not made a proper separation between its activities.\textsuperscript{35}

To conclude, the ECJ uses a functional approach of the concept. Any entity that takes responsibility for a general interest can be a body governed by public law. It does not need to be established for that interest, neither does the size of the public interest matter. A body governed by public law can also serve the private market, but it will need to apply the


directive for all of the procurements if it has not made a proper separation between the different businesses.

2.3 Needs in the general interest

This part analyses how *needs in the general interest* should be understood in the ECJ’s case law. The following sub-chapter will analyse the industrial and commercial criteria. The ECJ has accepted in its case law several different general interests, such as printing official documents and waste collection. Needs in general interest are also given a functional approach where the teleological reasoning is apparent. The Court will, therefore, give it a broad meaning, as it would otherwise be possible to circumvent the directive.

The ECJ standard phrase for “needs in the general interest” is quite vague; “Needs in the general interest, not having an industrial or commercial character are generally needs which are satisfied otherwise than by the availability of goods and services in the marketplace and which, for reasons associated with the general interest, the state choose to provide itself or over which it wishes to retain a decisive influence.” There is no clearer case-law or definition of the term “general interest”. The interest should be understood as aiming to serve the interest of society as opposed to activities serving the particular interest of individuals or groups. Public goods, as explained earlier, would typically be something that would fall in that category because there is seldom an interest from private parties to supply that kind of goods. A general interest activity can, occasionally, correspond with activities of a private sector undertaking while still having the purpose of meeting needs in the general interest. The overall purpose that lies behind the activity will determine if the entity in question meets the needs in the general interest. Even if the activity benefits one individual or undertaking, it can be still a general interest if there is a social purpose.

The general interest can also be fulfilled when providing support for the activities of other entities which are themselves involved in delivering a public service or engaged in other

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governmental services which may be meeting the general interest. *Probably, the requirement to meet needs in the general interest will be fulfilled in all cases except those cases the market already meets the needs of both the general public and the private sector.* The criteria will not be fulfilled when the public sector is involved solely to raise revenue or when it is a step towards privatisation as governmental involvement is no longer necessary.\(^{41}\) The functional approach of the concept of the general interest is thus not what constitutes a general interest, but if the need is satisfied by the market. All interests will qualify for the criteria except the needs that are fulfilled in a purely commercial manner and thus have an incentive to act economically rational.

The ECJ takes into consideration the local conditions for the public entity and makes an assessment if the local authorities can affect the rewarding of contracts. Considering the premise that there exists hundreds of commercial companies nationally, that could fulfil the need, but if there is a local entity with ties to the local authorities, then it is likely that the ECJ will see it as not possessing a commercial character. In other words, there must be a local competition de facto, and not only at the national level. A comparison can be made with the *Adolf Truley* case. The case is about a burial-service company in Austria. At the time it was more than 500 entities that performed burial-services. However, in the City of Vienna, there was no significant competition, as it existed a licensing system that was linked to the examinations of needs which excluded the competition. It also seemed to exist an agreement between a subsidiary of the city and the city itself which gave the subsidiary the exclusive right for burials in the city. Competition did not, therefore, exist in practice.\(^{42}\)

To conclude, the general interest criteria will be fulfilled in all cases except where the market meets the needs from both the public and the private. The general interest criterion depends on the circumstances locally. A high commercial pressure locally, indicates that the need is not in the general interest.

2.4 Industrial or commercial character

This chapter analyses which circumstances that are relevant when analysing if a body has industrial or commercial character. The circumstances that will be analysed are: 1) If the


entity operates in a competitive environment. 2) If the entity is operating on normal market conditions. 3) If the entity intends to make a profit. 4) If the entity bears the financial risk associated with the activity. 5) If the entity is publicly financed.

A body governed by public law, that has an **industrial or commercial character**, fulfils the general exception in the public procurement directive. If the body has a commercial character, then it will not need to apply the directives as there is a commercial pressure to procure on an economic basis and thus avoid discrimination. When assessing if the entity has a commercial or industrial character, the ECJ will **usually not focus on the nature of the need, but whether the particular entity carries out the activity on a commercial basis**. The assessment is made by looking at the particular marketplace where the entity operates in and the particular circumstances of that entity. A consequence is that entities carrying out the same activity in the different member states may be treated differently under the directive.43

Heavy competition is an indication that there is not a general need outside the industrial or commercial sphere. However, it cannot be concluded that needs that are being served from a competitive market will be needs that fulfil the industrial or commercial exception. Conversely, a lack of competition is therefore not determinative of whether the public needs fall outside of the industrial or commercial sphere.44 The essential is that the entity behaves in an economically rational behaviour and is only guided by economic considerations.

One factor in assessing if the entity operates on a commercial basis is to see whether the entity operates in a competitive environment; the need to compete may force the entity to purchase in a commercial manner. The Court will look at the existence of the **de facto** competition rather than just assessing if there is free entry to the market in the legal sense. In the case of **Adolf Truley**45, the ECJ did note that it existed competition in the national burial service market, but there was no competition in the local market where the entity was operating. The Court noted in **Ing Ainger**46 that there were only two competitors of negligible size in the market for heating which meant that there was not any significant competition for

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45 Judgment of 27 February 2003, **Adolf Truley**, C-373/00, ECLI:EU:C:2003:110 para 58,66
46 Judgment of the 10 of April 2008, **Ing, Aigner**, C-393/06, ECLI:EU:C:2008:213 para 44
the relevant entity. Competition is not sufficient for an activity to be seen as commercial; the entity may be willing to bear losses to support a policy of the authorities to buy national. It is therefore essential to see if the entity operates under conditions that induce the commercial behaviour of the company.\textsuperscript{47}

A few other criteria in assessing if the entity has an industrial or commercial character is if the entity conducts its activities under normal market conditions, if the entity intends to make a profit and if the entity bears the financial risk associated with the activity. The Court also assesses whether the entity is publicly financed. If all the aforementioned criteria are met, which indicates that an entity is operating within the industrial or commercial sphere, other circumstances may result in the entity being still considered to operate outside this sphere. None of the criteria are determinative; it all depends on the relative strength in the specific case. The ECJ usually refers to several reasons for its decision. However, the public funding criteria may be sufficient in itself for giving a body a character of neither being industrial nor commercial. Receiving public funds can reduce the financial risk an entity is exposed to, which can lead uncommercial behaviour. If the financing is more than half of the body’s budget, it will automatically fulfil the third criterion of the body governed by public law definition, which will be analysed later on in the paper.\textsuperscript{48}

\textit{Operating on normal market conditions:} The body may receive public support and still be considered to have commercial or industrial character. Depending on the conditions for the support, the entity may still have incentives to operate on solely economic considerations. The support can also be part of a general scheme for companies in a specific sector which is widely different if the support comes from an earmarked fund for certain activities. The key is to establish if the entity makes acquisitions based solely on economic considerations. Normally if a company is operating on a highly competitive market, it will fulfil the criterion. However, the company may have exclusive rights or have a special position which leads to that it does not operate under normal market conditions.\textsuperscript{49} As such, it will presumably be classified as a body governed by public law. If the company operates on normal market

\textsuperscript{47} Arrowsmith, \textit{The Law of Public and Utilities Procurement}, 361-362.
\textsuperscript{48} Steinicke and Vesterdorf, \textit{EU Public Procurement Law: Brussels Commentary}, 143-145.
\textsuperscript{49} Steinicke and Vesterdorf, \textit{EU Public Procurement Law: Brussels Commentary}, 146
conditions and does not have a special status, such as a monopoly in the commercial sector, then the market powers will force it to make economically rational decisions.

*The entity intends to make a profit.* Making a profit is usually the goal of private undertakings. Public bodies do seldom have profit as the primary goal. Even if the body makes a profit, it may not be the primary purpose of the company. As such, the goal of making a profit from the entities activities is an indication of an industrial and commercial character. In the case of *Agorà and Excelsior*, The ECJ deemed that the organisation of fairs and exhibitions met the needs in the general interest. The question was whether it had commercial or industrial character. The organisation was *non-profit but aimed to cover the costs from revenue from its activities, and it was being operated according to criteria of performance, efficiency and cost-effectiveness*. There was no mechanism to offset any financial losses, so it took the entire economic risk of its activities. At the same time, the entity operated in a competitive environment and the commission had communicated how the single market rules benefit fair organisers. The ECJ deemed in the judgment that the fair organisers were not seen as a body governed by public law.

The case shows that an organisation which does not aim to make a profit can be still managed in a competitive environment in such a way that it fulfils needs that have industrial or commercial character. As it did not exist a way to offset losses, it needed only to follow economic considerations. There was little discretion to be guided by considerations other than economic ones.

A comparison can be made with the case of *Kohornen*; the ECJ needed to apply the criterion to a community-owned property company that had the purpose of setting up a property for other companies and create favourable conditions for them. The ECJ stated that it was in the general interest to have a company that set up the property and lease it out to companies as it is likely to give a stimulus to trade and the economic and social development for the region. According to the Finnish state, the type of company that was in question was seldom let to be declared bankrupt by the local authorities. The authorities recapitalise

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the companies so they could continue with the task which the authorities have been giving them. Meanwhile, the company can generate profit, but under Finnish law, it cannot constitute the principal aim as it was created to promote the general interest of the inhabitants of the local authority. The ECJ argued therefore it was probable that the company lacked industrial or commercial character.

In the case, profit was possible, but it could not be the principal aim under national legislation. This would allude to that it could be guided by other considerations, especially if the authorities seldom declared this type of companies bankrupt, which will be developed further under the next criteria.

If the entity bears the financial risk, it will need to act economical rational when it procures goods. Even if the purpose of the company is to turn a profit, it will have fewer incentives for acting economically rational if it is safeguarded against the economic consequences of its actions. However, it does not need to exist a scheme that makes it possible to offset losses from the local government. The very purpose of the entity’s activity may justify a presumption that the entity will not have to bear the economic risk associated with its activities and therefore, a risky economic situation. Conceding that it does not bear the risk of its own activity, it will be seen as having non-commercial nature.

Public companies may always be prevented from failing. It is therefore not clear what degree of risk of failure is necessary before a body is to be considered commercial. The past practice of rescue should be necessary to show that a rescue is sufficiently possible to influence the entities behaviour, which can be compared with the case of Korhonen as earlier stated. On the assumption that the property company knows that such a company is usually safeguarded by the authorities, then it will lack the incentives to act economically when rewarding contracts especially if there is no principle aim for profits.

In the case of SIEPSA, which was an experiential prison in Spain, it was argued by the Spanish State that the prison was meeting a general interest of commercial character and

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thus was not a body governed by public law.\textsuperscript{57} The ECJ did not accept the argument, even if one goal of the prison was to profit, that could not be the entity’s primary purpose according to the ECJ. The main objective was instead to implement the Spanish states prison policy.\textsuperscript{58} It did not exist any official way to offset losses, like in the Agora case, but the ECJ found it was unlikely that the company will bear any financial risk. The company is a fundamental part of the state’s prisons policy, it is likely that the state, who is the only shareholder, would take steps to prevent the liquidation of the company. That would, in turn, allow the company to be guided by other than purely economic considerations when awarding contracts.\textsuperscript{59}

A comparison can be made with a case from Vienna. The \textit{Ing. Ainger} case was is about a heating facility in Vienna that burned waste and turned it into heating for the district. The ECJ stated that providing heating in an environmentally friendly way for a city is a general interest. At the same time, it was common ground that the pursuit of profit was not the primary aim.\textsuperscript{60} It was also clear that the company virtually had a monopoly in the relevant market, which was district heating, and it was high market barriers for other potential competitors as it would require large scale conversion work. At the same time, the city adhered importance to the heating system for environmental purpose and thus, according to the court, would take into the pressure of the public opinion and it would not permit the system to shut down even if the system operates at a loss. As such, it may be guided by considerations other than economic ones.\textsuperscript{61}

The Spanish prison and the heating facility in Austria provided the communities with services and were, therefore, an essential tool for the politicians in the respective area. Because they are instrumental for the state, there was a low risk for them to be declared bankrupt, especially when the profit was not the principal aim for the companies. As such, there was risk for the local authorities to affect the bodies’ decision when rewarding contracts due to not having profit as a principal aim. At the same time, the companies may have fewer incentives to act economical rational when it does not need to worry about its survival as it is providing the community with a service. A comparison can be made with the Agora Srl

\textsuperscript{58} Judgment of 16 October 2003, \textit{SIEPSA}, C-283/00 ECLI:EU:C:2003:544, para 85-89.
and Excelsior case, as in the earlier mentioned cases, it did not exist a way to offset losses but the companies were “just” providing fairs for the community, and that was not deemed as necessary for the society by the court. The bodies were, therefore, operating under a more significant financial risk.

It is also important if the entity is publicly financed. If the entity receives public support, then its incentives for making acquisitions based on economic considerations are reduced. However, there is a difference in diverse subvention schemes and general schemes in which money is earmarked for different activities. The public can fund specific projects or activities in general. It is vital that an entity is competing on a levelled playing field against other undertakings; otherwise it may not fulfil the commercial exception.

These criteria help to establish whether the entity is under commercial pressure in the procurements. In these cases, none of the entities had the primary aim of making a profit but was organised as companies. The ECJ assesses the competition for the market in the specific case and how hard it is to enter the market. In the fair organising market, Agora, it was competition, and as it did not exist a way to offset losses, the entities needed to make economical rational decisions. In the case of Adolf Truley, it also existed competition on the national level, but due to a licensing system and contract with the local authorities, the local market was protected. As such, the entity was seen as a body governed by public law, even if there were indications that it could have been classified as having an industrial and commercial character outside the protected market. The SIEPSA and Ing. Ainger had both niche market with high entry to the market. It did not exist any official way to offset losses. The ECJ argued that they fulfilled such a fundamental task of the state that it would not allow them to stop operating, in comparison with the organisation of fairs which was a fringe activity.

To conclude, the important thing is to assess if the entity operates under normal commercial pressure. The earlier mentioned factors help in assessing if that is the case. The important thing is thus not the nature of the activity, but under which circumstances the body

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operates in, despite that the textual reading of the directive article 2(1)(4)(A) indicates that it is the activity that should be analysed.

2.5 Legal personality

The body governed by public law needs to have a legal personality according to the directive. If the body does not have its own legal personality, it can still be a “contracting authority” which bodies governed by public law are part of. In a case from the Netherlands, the ECJ stated that it must be a functional interpretation of the state (that is, a contracting authority), as it otherwise would be possible to circumvent the directive by having a body which awards contracts but does not have a legal personality of its own. In these circumstances, it sufficed that the composition and the functions of the body are laid down by legislation and it depends on authorities for the appointment of its members. Hence it can still be part of the state regardless of formal appearance.64

The “state” encompasses all the bodies which exercise legislative, executive and judicial powers in the regional and federal level. Moreover, according to settled case-law, a member state cannot rely on provisions, practices, or circumstances existing in its internal legal order to justify its failure to comply with the obligations laid down by the directives.65 Even if the government does not have any direct or indirect powers over the body, which are fulfilling the aforementioned criteria, it will still be seen as a part of the state.66

The ECJ has used the functional approach also when it comes to the legal personality. It is quite rare that a body lacks a legal personality, but in both mentioned cases, the ECJ has distinguished the body by looking at the legislation that gives the body powers or appoints members. A legal personality is still a requirement for being a body governed by public law but, this case law makes it possible to see the bodies as a part of the “state”. That would make it possible to apply the directive against the entity. A comparison can be made with a case from Italy, where a company was part of the state and did not have its legal personality. The ECJ argued that the application of the directive would depend on whether the body had a legal personality distinct from the state or not. The difference in the application of the law

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was not acceptable as the member states’ domestic law cannot undermine the unity and effectiveness of the directive. The body was therefore singled out even if it did not have a legal personality under the domestic law.  

The teleological interpretation method of the procurement directive allows the ECJ, therefore, to analyse the relationship between the entity and the state, even if it does not have a legal personality in the domestic legislation.

2.6 Publicly financed

The coming two parts will analyse the control criteria in the definition. First the paper will analyse the public financed criterion and in the next sub-chapter analyse the management appointment and supervision criteria. The body must be influenced by the public. *It can be financed, subject to supervision or the public have the possibility to appoint more than half of the members of the board.*

The difference between *public financing* in the form of support and contractual remuneration is blurred, considerations must be given to the reality of the relationship instead of formality. A key factor is whether the contracting authority has an *independent interest in the supply of the services for which the payment is paid for.* The interest needs to go beyond the authorities’ interest for generally supporting an entity to perform a service in the public interest. It is less important whether the contractual services correspond to activities that the entity normally performs based on public sector support. When there is no contractual benefit linked to payments, then it will be seen as public financing. Conversely, a private commercial company that depends mainly on governmental contracts, will not generally be seen as a contracting authority. However, the contract needs to be awarded on commercial terms.

The leading case when it comes to financing is the *University of Cambridge* case. In the case, the court established that only certain payment reinforces a specific relationship of subordination or dependency against the public. Payments that are for more contractual services provided by universities, such as the execution of particular research work or organisation of seminars and conferences. This service has a commercial nature, and the

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The contracting authority has an economic interest in providing the services. Consequently, this can create a dependency, but according to the court, this dependency is normal in contractual relationships freely formed in the market. These contractual payments are not to be seen as public financing. The public financing needs to be more than half to fulfil the criterion in the directive. The body will need to consider all financing and produce an exhaustive budget in order to confirm whether it may fulfil the criteria of being a body governed by public law.

The body can also be financed indirectly, as in the Oymanns case from Germany where a statutory sickness insurance fund was seen as fulfilling the criterion of being financed by the state. The mandatory fees were collected from the workers’ salary by the employers. The fees were then supervised by a public body which was regulated by public law. The ECJ argued that there was no distinction in the directive if the financing was direct or indirect, as the payments were compulsory for the members. The fees were paid without any specific consideration in return. This can be compared to the Cambridge case, where the ECJ stated that payments that is not for contractual work is public financing. The authorities did not fix the statutory sickness fund’s fee. Despite that, the fund had minimal discretion as it is regulated by social security legislation and therefore, it fulfilled the dependency criterion.

The ECJ’s use of a functional interpretation of “financed by the state” makes the concept encompass all forms of financing. The broadcasting fee for the German public broadcasting body, where a statute imposed a fee, was also considered to fulfil the criterion. It would also go against the functional approach of the directive to differ between financing that goes through the state budget and financing where the state grants a body right to collect money. In the case, the Court mentioned three principles for indirect financing; firstly, the finance is provided for and imposed by a statute. Secondly, it is not a consideration for the actual use of a service provided by an entity by those individuals providing the financing. Thirdly, the detailed rules for collecting of financing derive from the powers of public authority.

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74 Judgment of 13 December 2007, Bayerischer Rundfunk and Others, C-337/06 ECLI:EU:C:2007:786, para 40-41,47,50.
have been a bit diluted in the later case law but can still be used in assessing if the financing from the public can be seen as public support.\textsuperscript{75}

Another case regarding the dependency is the IVD case. The case is about a professional association of doctors. The entity had \textit{considerable autonomy}, and the \textit{public authority is only assuring that the budget is balanced}. The supervision was just an approval of the body’s decision to fix the amount of each contribution which was the greater part of the financing, to ensure that the budget is balanced. This was \textit{not enough to create a dependency} on the state.\textsuperscript{76} This leads to the conclusion that although the law determines the task and how a greater part of the financing would be organised, an organisation can still be seen to have the organisational and budgetary independence, which precludes it from being dependent on the public authorities. In other words, the collection of fees will then not constitute “financing for the most part” by the public authorities. It does not either allow the management supervision of that body by the authorities. The reasons are that the law does not determine the scope and the procedures for the actions undertaken by the body in the performance of its statute task, which the contributions are intended to finance. The supervision criteria will not be fulfilled when the authorities are confined to see that the budget is balanced for the body.\textsuperscript{77} Because of it lacking the dependence of the authorities, they could not affect the rewarding of contract, which is the main purpose of the procurement legislation.

In summary, the body needs to be financed by public means, either by the state budget or through a public law mandate where that payment must be made towards the organisation. The ECJ has used a broad functional approach to catch all forms of financing by the state.

2.7 Management appointment and supervision

This part analyses the two other control criteria. The directive state control of the body is possible if the body is \textit{“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.”}

\textsuperscript{75} Bovis, \textit{The Law of EU Public Procurement}, 320-321.
When it comes to *management appointment* the directive stipulates that half of the members should come from the authorities, as it will typically lead to control of the entity. That would lead to the entity being able to follow other interest than purely economic ones. It is also worth noting that with the new directive, it is insufficient that a contracting authority is *entitled* to appoint more than half of the members. Conceding that the right to appoint is unused, that may be a factor when assessing the control criterion. The criterion will also be upheld if several contracting authorities, independent from each other, nominate members that will make up more than half of the body. The control criterion include control that has a legal basis in public law or control that emanates from civil law, for example, ownership rights or agreements. This measure also covers the control exercised by a contracting authority over an entity without the legal basis to do so. For example, if the contracting authority has veto rights according to the internal rules of the entity.\(^78\)

The Court has stated that the *management supervision* criterion must give rise to a dependency of the public authorities that is equivalent to when one of the alternative dependency criteria is fulfilled. This is when the body is financed by the public authorities, or it appoints more than half of the member of its administrative managerial or supervisory organs which enable the public authorities to influence its decision in relation to public contracts.\(^79\) It is vital that there is a *general dependency* on a contracting authority, which means that the authorities does not need to exert supervision specifically over contracts.\(^80\) The managerial supervision criterion usually co-exist with the other two control criteria as managerial supervision *per se* does not necessarily lead to public authorities being able to directly influence the entity in its contractual dealings.\(^81\)

In *Adolf Truley* it was a shareholder agreement where the public authority was allowed to see the annual accounts, and to examine also the company’s conduct from the *point of proper accounting regularity, economy, efficiency, and expediency*. It also allowed the public to inspect the business premises and facilities and to report the result of those inspections to the competent bodies and the company shareholders. The ECJ deemed that such powers give

\(^{81}\) Bovis, *The Law of EU Public Procurement*, 319.
the authorities the possibility to control the management of the company. However, a “mere review” does not satisfy the criterion of management supervision.\footnote{Judgment of 27 February 2003, Adolf Truley, C-373/00, ECLI:EU:C:2003:110, para 73-74.} That is a reference to an ex-post review of the legality of the entities action and the annual accounts which would, according to the Court, be insufficient for influencing public contracts.\footnote{Arrowsmith, The Law of Public and Utilities Procurement, 355.}

The management supervision that is a review \textit{ex post facto} does not satisfy the criteria as it does not enable the public authorities to influence the decision of the body in question to public contracts.\footnote{Judgment of 12 September 2013, IVD, C-526/11, ECLI:EU:C:2013:543, para 29.} The relevant consideration is whether there is a general dependency on the contracting authority. It is not necessary to show management supervision that is concerned with the process for awarding contracts. Generally, if the public has the power to intervene in management decision in a potential body governed by public law, then that would constitute management supervision within the meaning of the directive.\footnote{Arrowsmith, The Law of Public and Utilities Procurement, 352.}

The management supervision criterion has been used in the \textit{OPAC} case from France, which involved commercial companies although their activities were very narrowly circumscribed by national law. The law controlled the company's statutes, and they were detailed regarding the objects of the entities. Since the rules of management are remarkable detailed, the mere supervision of compliance with them may lead to a significant influence being conferred to the public authorities. The law also gives government the right to supervise and empowers government to liquidate companies or suspend the managerial organs and appoint a provisional administrator. These powers could be used even in cases connected to management policy and not mere verification of legality.\footnote{Judgment of 1 February 2001, OPAC, C-237/99, ECLI:EU:C:2001:7 para 53-55.} Furthermore, an inspection for social housing could do on the spot inspections, and the company could be responsible for drawing up proposals for actions following inspections reports. The court, therefore, judged that the company was subject to supervision by the public authorities.\footnote{Judgment of 1 February 2001, OPAC, C-237/99, ECLI:EU:C:2001:7, 59-60.} The ECJ did not state if any of the factors mentioned earlier were more important than the other or if it was a cumulative effect. But the general rule is that the more detailed rules that govern a body, the
more power will the government have over the management. It is difficult to define what is sufficient, but rules that regulate standards and objectives for the entities are essential.

Another example of the criterion is The Irish Forestry board case, in which the state had set up a company to manage woodland industries and providing facilities for the public. The government had the right to give instructions to the company, requiring it to comply with the state policy on forestry or to provide specified services or facilities. The powers conferred to the government gave the state the possibility to control the company’s economy. No provision existed that gave the state control over the awarding of public contracts, but the ECJ stated that control could be exercised indirectly.88

The Advocate General noted that the government controlled how much timber and land could be saved for each year, and competent minister appointed the company directors, and investments over a certain amount must be approved. The board of directors were responsible for the contracts. On the other hand, the company was under the obligation to practice business economically, and the directors had a duty towards the company independently of its interest. Consequently, argued the Advocate General, the company did not fall under the directive.89 The case is based on the old supply directives, but the ECJ was looking for the same sort of general dependency criteria which is relevant for defining a body governed by public law.90

In summary, management supervision can be indirect by having so detailed rules that the management will be subjected to the authorities. A regular audit is not enough; there must be something more that makes it possible for the authorities to have the power to affect the awards of contracts. In the case of Adolf Truley, it was a shareholder agreement that was extensive. In the OPAC case, the legislation was so comprehensive and so precise that the ministry could, if needed, take over the company management. Nonetheless, in the Irish Forestry Board case, it is unclear what the ECJ meant by “indirectly” as it does not explain where that influence would come from. It may be an indication that if the state is the only shareowner, it had the power over the company’s policies.

The management supervision criterion assumes that the management of the body will be indirectly dependent on the authorities, which gives the authorities the possibility to affect the process of rewarding contracts. The management supervision criterion is challenging to analyse without looking into the specific case. An assessment of the formal competences or rights given by a contract is necessary to assess the contracting authorities’ presence in the entity.

2.8 Application of the case law in Sweden
The paper will here analyse and discuss the implementation of the ECJ case law in Sweden to give examples of how the implementation works in practice. There have been a few cases where entities have been tested in court on whether they are to be classified as “bodies governed by public law”.

The first was the state-owned gambling company “Svenska Spel” that during the legal process had a legal monopoly on a lot of forms of gambling. The question for the court was whether the entity needed to follow the procurement legislation, based on the 2004/18/EG directive.\(^91\) The second instance court (Kammarrätten) agreed with the lower court that the company fulfilled the requirement as it worked in the needs in the general interest by controlling gambling because gambling can be dangerous for the individuals. When it comes to the judgment of industrial and commercial character, the court made an assessment that it had a legal monopoly over certain areas of gambling and that the fact that it existed online alternatives should not change that assessment. The court also noted that the money which the company generated was shared with different civil societies and the state. As such profit is not the main goal for the company. When the court controlled if the entity was bearing the financial risk, it was satisfied not by the fact that it was an essential tool for the Swedish state combating excessive gambling, and therefore not be allowed to fail. Instead, the court found that it sufficed that the entity had a monopoly on a very lucrative market, and by having a dominant position it is enough to give the company a position where it does not need to bear its own financial risk. As such, the entity is to be seen as a body governed by public law.\(^92\)

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\(^91\) Kammarrätten i Stockholm dom 2009-11-19 i mål nr 6937-09, P 3.
\(^92\) Kammarrätten i Stockholm dom 2009-11-19 i mål nr 6937-09, P 4-6.
The argumentation from the court is interesting. If a company possesses a legal monopoly over something very lucrative, then it will not bear any real financial risk, and due to that qualify to be a body governed by public law.\textsuperscript{93} This is a form of the “normal market criterion”. If an entity has a special position in the market, then it is likely that it does not have commercial character. That argumentation is faulty because it concentrates on the possibility to make a profit and not if there is enough commercial pressure to induce rational procurement behaviour. Profit is virtually guaranteed if an entity has a monopoly, due to the fact that it can be guided by other considerations than economic ones. A revenue-raising monopoly, or for that matter any public company that has a lucrative exclusive right, like for example a right to mine a certain mineral in an area, would fall within the concept with the courts' argumentation. Even if it may be under a high commercial pressure to make rational procurements. A better argument that distinguishes between entities with exclusive rights is to look at the \textit{raison d'être}. If an entity is a tool for the state or serves the community, then it is not as likely that the company will face the same commercial pressure and therefore be more likely to be guided by other considerations than economical. One example is the case with Svenska Spel that fulfils a central role in the authorities’ strategy regarding gambling.

This year, however, the gambling market was re-regulated, and online casinos were allowed. Nevertheless, the land-based casinos are still part of the monopoly as it has been deemed to be an activity that the state should control.\textsuperscript{94} Svenska Spel should still be seen as a body governed by public law, whereas the part that is operating on the newly regulated market is now not following the procurement legislation.\textsuperscript{95} That follows from the statement from the ECJ mentioning that each entity within a group needs to fulfil all the criteria to be a body governed by public law. However, the part that is operating on the market is still under central management and uses the same resources, such as marketing. It is unclear if that is enough to avoid applying procurement legislation on the commercial entity.

Akademiska Hus, the state-owned agency that is responsible for facilities for higher education, was also deemed to be a body governed by public law. The question for the court

\textsuperscript{93} Kammarrätten i Stockholm dom 2009-11-19 i mål nr 6937-09, P 6.
\textsuperscript{94} Spellag (2018:1138) 5 chapter (in Swedish).
was whether the entity fulfilled needs that had industrial or commercial character. The court stated that it needs to be analysed which sector of a market a body is active on to see if there is an open competition. Having profit as the primary motive, also indicates that the needs are of an industrial or commercial character.\textsuperscript{96}

The court argued that the entity fulfilled needs in the general interest by developing higher education and universities facilities. When it comes to the question if the entity fulfils industrial or commercial character the court argued that the purpose of the directive, which is to open up domestic markets, leads to the conclusion that the reference market should be defined narrowly, in this case providing facilities for higher education. With that definition of the reference market, Akademiska Hus has a dominant position, and there is no real competition as their buildings are centrally placed on the university campuses. Therefore, it will not be seen as operating in normal market conditions. Conceding that the entity will be organised according to market principles, the central goal was still to provide facilities for the universities.\textsuperscript{97}

This is an interesting argument from the court, where the purpose of the directive determines the size of the reference market and in the following step deems that the entity holds a dominant position. It would be easier for the court not to use the “reference market concept” as it comes from antitrust law, and it is quite unusual for the ECJ to establish the relevant market in public procurement cases. The Swedish court should instead note that Akademiska Hus does not need to bear a real risk of its operations. The state would not let the company that handle valuable and central buildings for the university go bankrupt, leaving the buildings outside state control. This can be compared to the SIEPS case.\textsuperscript{98} A comparison can also be made with the Svenska Spel case. Akademiska Hus have control over buildings that the university needs and due to the unique nature of these buildings, the university cannot quickly move as in an open market. Therefore, it does not operate under normal market conditions.

On the other hand, it is appropriate to use the methods from the antitrust law, as it has a lot in common with public procurement legislation. However, in this case, a small reference

\textsuperscript{96} Högsta förvaltningsdomstolens dom 2016-06-29 i mål nr 884-15, P 7.
\textsuperscript{97} Högsta förvaltningsdomstolens dom 2016-06-29 i mål nr 884-15, P 9-10.
\textsuperscript{98} Judgment of 16 October 2003, SIEPSA, C-283/00, ECLI:EU:C:2003:544.
market is just one factor in assessing if there is sufficient competition that would force Akademiska Hus to act according to market principles. As previously argued, it would be easier for the court to look at the real economic risk and the fact that it has a virtual monopoly on buildings that public institutions need. This could be compared to the Adolf Truley case where there was a substantial competition outside the city of Vienna in the undertaking business. Nonetheless, in the local region, there was a virtual monopoly in the undertaking business due to a contract between the authority and the company. This can be compared to the contract that locks in the university with long rental contracts even if there is a lot of competition outside the general rental market.

The Swedish state monopoly “Systembolaget” is selling alcohol to consumers. It has been tested twice in the same court and both times have been classified as having an industrial or commercial character. In both cases, the court has accepted the premise that the Swedish alcohol monopoly is fulfilling the needs in the general interest, which is to control the alcohol market in Sweden.\textsuperscript{99} When it comes to the judgment of whether it has an industrial or commercial character, the court argued that alcohol is something that is not typical that the state choose to provide to its citizens, in contrast to the service of waste collection, as in the \textit{BFI holding} case, which indicates a commercial character. The court noted that “Systembolaget” had a legal monopoly on certain goods and due to that, it had a firm market position. However, according to a report that Systembolaget brought as evidence, 14\% of alcohol consumed in Sweden was taken in from outside Sweden. While another 11\% of alcohol consumed in Sweden was served on restaurants. It also existed some competition in selling to restaurants. The court found that Systembolaget was working on a competitive market. The court argued that the company needed to make a profit and that the state had as a goal that dividends should be paid out. The court also noted that there were no indications that the state would bear the financial burden if the company turned insolvent.\textsuperscript{100} In the second case, the Court stated that Systembolaget is non-discriminatory when it chooses the products due to EU legislation and restated the previous arguments.\textsuperscript{101}

\textsuperscript{100} Kammarrätten i Stockholm dom 2016-02-19 i mål nr 7265–14, P 6–8.
\textsuperscript{101} Kammarrätten i Stockholm dom 2017-02-20 mål nr 5101–16, P, 8–9.
There are several problems with the court’s analysis. Systembolaget does not work on a regular market as it has a legal monopoly to sell directly to consumers. The argument that alcohol can be brought in from other countries is problematic as real competition is just possible if you live close to a border. There is also a substantial investment in time to travel to another country to buy alcohol, which leads to the conclusion that it cannot be deemed as a regular competition.

However, the dissenting opinion in the second case is correct. It argues that even if there is a profit motive, it cannot be seen as the primary goal. The purpose of the company is to restrict the supply of alcohol, which can be seen in, for example, relatively limited opening hours. As the monopoly is an essential tool for the state when it comes to assuring the public health, it is unthinkable that, in the case that the company became insolvent, the state would not step in and assure its survival as it is a core instrument in public health policy.\textsuperscript{102} This can be compared to \textit{SIESPA}\textsuperscript{103} or \textit{Ing Ainger}\textsuperscript{104} where the prison service and the central heating facility is central for the governments' policy. It is too important to be allowed to fail. A comparison can also be established with “Svenska Spel” where Systembolaget has the legal monopoly on selling alcohol, that position is so favourable that it is difficult not to be able to make a profit and therefore it can be guided by other considerations than economic ones.

To conclude, the Swedish application of the procurement legislation presents mixed results. The Akademiska Hus case would be a correct application of the EU law, even if it was unnecessary to find out the relevant market. Svenska Spel is also correct; the company's decision not to procure for the division of the company that is participating in the regulated market is interesting as it still uses the same management. It is unclear whether it is possible, but as they use the same resources as the monopoly part, it is unlikely that it will be accepted by the ECJ. When it comes to Systembolaget, the Swedish courts does not follow the ECJ's current case law properly. As stated earlier due to its core role in Swedish public health regarding alcohol, it has no real risk of being insolvent. The judgment should therefore classify “Systembolaget” as a body governed by public law.

\textsuperscript{102} Kammarrätten i Stockholm dom 2017-02-20 mål nr 5101–16 P, 12–15.
\textsuperscript{103} Judgment of 16 October 2003, SIEPSA, C-283/00, ECLI:EU:C:2003:544
\textsuperscript{104} Judgment of 10 of April 2008, Ing, Aigner, C-393/06, ECLI:EU:C:2008:213
3 The concept “undertaking”

The current section will introduce the concept undertaking and essential element of economic activity. This chapter will be followed by three sub-chapters that make an in-depth analysis of the exception of the definition that is related to the government.

The concept undertaking is crucial for Article 101(1) TFEU. That article prohibits, among other things, agreements that restrict competition on the internal market. Article 101(1) applies only to undertakings. The concept of “undertaking” is not defined in the TFEU, instead, it has been developed by case law. The Court uses a functional approach to the definition of an undertaking. An entity may be an undertaking for some of its activities but not others, depending on the nature and aim of those activities, which is often the case for governmental bodies. The critical distinction is made between activities that are “economical” and will be classified as undertakings and “non-economical” activities which fall outside the scope of competition rules.\textsuperscript{105}

The ECJ has defined undertaking in Höfner and Elser v Macrotron which is a case about the German employment office. The Court stated in the case that “the concept of an undertaking encompasses every entity engaged in economic activity, regardless of the legal status of the entity and the way in which it is financed.”\textsuperscript{106}

The Court later added in Pavlov that “it has also consistently held that any activity in offering goods and services on a given market is an economic activity.”\textsuperscript{107}

In Wouters, the ECJ stated that the competition rules in the treaty “do not apply to an activity which, by its nature, its aim and the rules to which it is subject does not belong to the sphere of economic activity (...) which is connected with the exercise of the powers of a public authority.”\textsuperscript{108}

In practice, the same legal entity may be acting as an undertaking when it carries out one specific activity, but not considered as such, when it carries out another activity. Each

activity needs therefore to be classified, if the activity falls within or outside as an economic activity. The status of an entity or body in national law is not relevant when assessing if it can be considered an undertaking. The entity does not need to have a legal personality, under the law of the member state where it operates in, in order for the ECJ to classify it as an undertaking.

The functional approach to the definition undertaking asks if an entity is engaged in an economic activity. If that is the case, the entity will be classified as an undertaking. The relevant question is thus “what is an economic activity”?

3.1 Engaged in economic activity

Every entity engaged in economic activity is an undertaking. It is not decisive that a private operator could carry out the activity, but that the fact that the activity is carried out on market conditions. That is the essence of the functional approach. When the activity is carried out under market conditions, then it is an economic activity and the body performing it is an undertaking. However, the possibility to hold shares in an undertaking does not in itself make the owner of the shares an undertaking engaged in economic activity. Despite this, it would presumably be an undertaking in the case where the shareholder exercises control by involving itself in the management of the undertaking. It also means that dormant companies, which do not have any assets, turnover, employees or are offering services or goods on the market, are not performing an economic activity and are not acting as an undertaking.

A body can thus not be passively qualified to be an undertaking as it requires a certain form of activity. A comparison can be made with the fact that a body governed by public law is a concept that each part of an entity needs to qualify for. A body can neither be passively classified as a “body governed by public law” or “undertaking”. It is not sufficient that a parent or subsidiary body is fulfilling the criteria.

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The organisation does not need to have a commercial purpose or profit motive to be an undertaking. In Ambulanz Glöckner, the ECJ deemed that a recognised medical aid organisation that was non-profit, which was providing ambulance services for remuneration from users, to be an economic activity. The ECJ argued that such activities do not necessarily need to be carried out by public authorities. The fact that public service obligations may render the service provider less competitive than other comparable entities that are not bound by that obligation, is not in itself a hindrance for the activity from being seen as economical and the organisation seen as an undertaking.

This comparative criterion, where the ECJ compares the entity activity with other operators on the market and see if any operator performs the activity with a profit motive, has been reappearing in later cases. In the OTOC case, the ECJ noted that the entity did not seek to make a profit but that did not hinder it from being classified as an undertaking. OTOC offered services in a competitive environment where other operators sought to make a profit. The comparative test is essential for the functional approach to see if an activity possesses an economic nature. If an activity can be performed with a profit motive, then all providers will be seen as undertakings even if a specific body has a non-profit motive.

The activity of purchasing goods can be an economic activity. It all depends on the usage of the goods. If an entity buys goods in order to use them as input for offering goods or services on the market, it will be an economic activity and the entity is an undertaking. If the good is not used in an economic activity, the act of purchasing will not be an economic activity and the entity is thus not an undertaking. This will be analysed in-depth in chapter four of the paper. An individual acting as a final consumer will never constitute an undertaking. The logic does not apply to business as all purchases made by such entities would be inputs or closely related to the economic activity which they are engaged in.

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114 Judgment of 28 February 2013, OTOC, C-1/12 EU:C:2013:127 para 57.
Work as in employment is not an economic activity. A worker is during employment incorporated in the undertaking that employs them, and they form an economic unit. However, an employee who carries on an independent business would be an undertaking. Trade unions are not an undertaking when they act as an agent of its members, and it is solely an executive organ of an agreement between them. It will be an undertaking when they act in their own right.\textsuperscript{117} The Advocate General Colomer argued that it is the ability to take on financial risk, which makes an operator engage in trade, that is essential for classifying them as an undertaking. It requires the existence of an identifiable centre to which economically significant decisions can be attributed. Employees cannot for these reasons constitute undertakings.\textsuperscript{118}

Advocate General Jacobs argued that dependent labour is by its nature the opposite of the independent exercise of economic activity. Employees do not bear the direct commercial risk of a given transaction. They only offer services to one employer and are subject to orders from the employer.\textsuperscript{119} The ECJ made a distinction between self-employed, which is an undertaking, and an employee by looking if a person acts under the direction of his employer when it comes to the freedom to choose the time, place, and content of his work.\textsuperscript{120}

In conclusion, an economic activity is typically offering goods and services on the market. A profit motive for the individual undertaking is not necessary, as long as the activity can be performed under normal market conditions. The concept also needs some kind of activity, dormant companies are thus not performing an economic activity. The concept also includes the activity of purchasing goods under certain circumstances, while employees are incorporated into the undertaking in which they work for.

3.2 The solidarity exemption

The following chapters will analyse when an activity is considered not to be an economic activity. The exemptions can be divided up into three parts. Activities that are based on

solidarity, activities that are connected to exercising public powers, and regulatory activities. This sub-chapter will focus on the solidarity exemption.

The case law distinguishes between social security systems that are provided in market context, and systems based on solidarity which is defined as the inherently uncommercial act of involuntary subsidisation of one social group by another.\textsuperscript{121}

The complexity is most notable when the social security schemes are independently managed. The ECJ stated in \textit{Pouchet and Pistre} that such schemes are not undertakings, as they pursued only a social objective based on the "principle of solidarity". This meant that the benefits are not dependent on the amount of contributions, while the contributions were determined by reference to individual income. The fund was non-profit, and workers needed to contribute to the fund.\textsuperscript{122} The case can be compared with the \textit{Fédération Française des Sociétés d'Assurance} case. That fund was non-profit, optional and operating according to the principle of capitalization. The benefits depended solely on the amount of contributions paid by the recipient and the financial result of the investments made by the managing organisation. The ECJ deemed the latter to be an undertaking.\textsuperscript{123}

Pension funds are often classified as undertakings. The \textit{Albany} case is about a fund that was optional and itself determined the contributions and it operated under the principle of capitalisation. The benefits provided by the fund depended on the financial results of the investments made by the fund. Even if such a fund is non-profit and has elements of solidarity, that in itself is not enough to make it a non-economic activity. One indication that it was performing an economic activity was that the fund competed with insurance companies.\textsuperscript{124}

Insurance schemes against accidents at work have the same requirements. In the \textit{Cisal} case, the ECJ stated that the social aim of insurance is not sufficient to preclude an activity from being classified as an economic. Instead, the scheme must fulfil a few elements that demonstrate the principle of solidarity. In this case, the contributions were not linked to the

\textsuperscript{121} Whish, Bailey, \textit{Competition Law}, 88-89.
risk of the employment, but earnings. *The benefits were not propionate to the earnings, and a minimum and ceiling existed for the benefits.*\(^{125}\) The state supervised the fund, and the *contributions and benefits were fixed by it*, as such, the benefits were going to be paid regardless of the contributions paid and the financial result of the fund. Together with the *compulsory affiliation*, which is essential for the financial balance of the scheme, it demonstrated the principle of solidarity. The fund was, therefore, not economical in nature.\(^{126}\)

Statutory sickness funds can also perform a non-economic activity, as long they manage the social security system, fulfil a social goal and are entirely non-profit. An important *element for the ECJ was that the law compels the funds to offer identical benefits which do not depend on the amount of contributions*. It also existed an element of cost-sharing between different funds. It was therefore no competition between the funds, and thus, it was non-economic in nature. However, if they engage in an operation that does not have social characteristics, then they may be regarded as undertakings.\(^{127}\) In *Kattner*, the ECJ has emphasised that the funds within the system of self-management, which give them a degree of latitude, was *strictly delimited* by law. The ECJ formulated that the principle of solidarity had two essential elements. *First that the benefits are not strictly proportionate to the contributions. Secondly, the amount of benefits is subject to state control.*\(^{128}\)

Health care services has also been classified as a non-economic activity. The *FENIN* case is about governmental agencies in Spain that used their dominant position as a buyer to delay the payment of invoices. The General Court began the case by stating *that it is not possible to dissociate the activity of purchasing from the subsequent use of the good*. As such, the nature of purchasing activity must, therefore, be determined according to whether the subsequent use is an economic activity. This implies that, even if a body purchases large quantities that even give rise to monopsony, it can still be seen as not being an undertaking.\(^{129}\)

In this case, the General court reasoned that when providing healthcare to citizens, the public

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body did so based on *solidarity*, the behaviour was therefore not economical. Since the universal provision of healthcare was free of charge and not economical, then *the ancillary behaviour of procurement of that purpose was not economical either*. It may be different if the organisation also provides health care to tourists according to market principles.\(^{130}\) The ECJ agreed with the General Court.\(^ {131}\) In contrast, if the doctors are providing health services for remuneration at their own risk, they would be engaging in economic activities and thus, they would be considered undertakings.\(^ {132}\)

The AG2R case was about a decision made by an employer federation and a union (social partners) within a given sector to appoint a body (AG2R) to manage a scheme for additional reimbursement of healthcare cost. The social partners requested the public authorities to make affiliation to the scheme compulsory for all employees in that sector.\(^ {133}\) A key question was if the AG2R was an undertaking.\(^ {134}\) The ECJ deemed that the scheme was characterised by a high degree of solidarity. The ECJ did then make a deeper assessment of state control over the scheme in question. The ECJ noted firstly that the legislation gave the partners of the collective agreement, which regulated the AG2R, the right to *decide the collective guarantees* that the beneficiaries will get from the supplement. Secondly, the legislation also stated that the agreement needed to contain a clause setting out the circumstances in which and the frequency with which the detailed agreement for the pooling of the risk may be reviewed by the partners. Thirdly, the legislation demanded a ministerial decree to make the provision of such agreement compulsory for all employees and employers to whom they are applicable. It was within this framework, the monitoring of the functioning of the scheme had been devolved, to the representatives of the employers and employees.\(^ {135}\)

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\(^{134}\) It followed from the social security code that AG2R which was a society covered by that code is a non-profit making legal person, which has the object to cover physical injury by accident or sickness. By law it could not suspend cover or terminate an undertakings membership for failure to pay contributions. It pursued a social objective, even if it is not sufficient to preclude an activity to classified as economic. Judgment of 3 March 2011, *AG2R Prévoyance* C-437/09 EU:C:2011:112 para 40-46.

The representatives had a dominant position as they had a committee that would examine within a given timeframe, the pooling of risk and contributions to the scheme. Other factors relating to the appointment of AG2R as the manager of the scheme could lead to the conclusion that employers and unions enjoyed a degree of autonomy within the legislative framework. Firstly, the legislation provided that supplementary collective guarantees could be established in different ways than the chosen one. Secondly, the legislation provided that operations could be entrusted not only to provident societies and mutual insurance associations, but also insurance companies. There was no statutory obligation for the employers and unions to appoint AG2R to manage a scheme for additional reimbursement for healthcare or on AG2R to assume the management of such a scheme.\(^{136}\)

Other providers offered services substantially identical to those provided by AG2R. The ECJ pointed out that the national court needed to examine on which circumstances AG2R was designated to manage the scheme, and which margin AG2R had in deciding to take up the responsibility to manage the scheme. The national court also needs to see how those aforementioned circumstances affected the system as a whole. *The ECJ concluded that AG2R might be an undertaking, even if it is non-profit and acts based on the principle of solidarity.* AG2R was chosen by the social partners based on financial and economic considerations from among other undertakings in which AG2R competed with.\(^{137}\)

The Advocate Generals reasoning illuminates the importance of state supervision, both in terms of designating of the body and the essential elements of the scheme. The freedom that the body has to decide the size of the contribution to the fund and the value of the benefits

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\(^{136}\) Judgment of 3 March 2011, *AG2R Prévoyance* C-437/09 EU:C:2011:112 para 58-62. The Advocate General noted that unlike the Pouchet and Pistro, Cisal, AOK and Kattner the state played no part in designate the body (AG2R) with the management of the supplementary healthcare scheme and that the AG2R competed with insurance companies. The collective agreement parties had a free choice between various potential providers of a supplementary healthcare scheme. Therefore, it was not inconceivable that the selection of an entity was not only on management-related consideration, such as joint management in AG2R but also on financial and economic considerations. Even if the national authority must approve of AG2R type of body and it is subject to statutory and regulatory obligations in the same way as insurance companies Opinion of Advocate General Mengozzi of 11 November 2010, *AG2R Prévoyance*, C-437/09, EU:C:2010:676 para 77-80.

paid out is decisive when assessing if the principle of national solidarity is sufficiently used.\textsuperscript{138}

The last case is ongoing as it has been appealed from the General Court. \textit{Dôvera zdravotná poist’ovňa} is a case about state aid. The question for the General Court was if the activity of compulsory health insurance, as organised and carried out in the Slovak Republic was to be seen as an undertaking. The General Court started with emphasising that entities need to \textit{merely apply the law and not be able to influence the number of contributions, the use of assets or fixing of the level of benefits} to not be seen as an undertaking. The court emphasized that an activity can have economic nature even if it is performed without a profit motive.\textsuperscript{139}

A comparison can be made with the procurement law where certain bodies have \textit{been a tool for the public} in pursuing a policy. Bearing in mind the community interest, the body will not bear the financial risk as long as it needs to fulfil the policy, as such, it will be classified as a “body governed by public law”. For the undertaking concept it means that a body that merely applies the law and thus fulfils a state policy, when it is executing a strictly regulated policy, is not performing an economic activity.

The General Court then stated that social security schemes applying the principle of solidarity include “\textit{an obligation on health insurance bodies to be affiliated with the scheme, a lack of any direct link between contributions paid and benefits received, compulsory and...}”\textsuperscript{139}
identical benefits for all insured persons, contributions proportional to the income of insured persons and application of the pay-as-you-go principle.” Furthermore, social security schemes subjected to state supervision which include ”an obligation for health insurance bodies to offer compulsory benefits to insured persons and an impossibility for health insurance bodies to influence the nature and level of the benefits set by law or the amount of the contributions paid by insured persons.”

This is the first time a court has written out so clearly the criteria and explicitly refers to the “pay as you go principle.”

The court found that there was a high level of national solidarity within the system, with all the usual aspects with the addition of a risk equalisation scheme whereby health insurance bodies which insured high-risk individuals received funding from health insurance bodies with a portfolio composed of individuals with lower risks. The health insurance bodies were under strict supervision from the state. They were subject to special regulation, in addition to identical status, rights and obligations each health insurance body is established to execute public health insurance and cannot carry out activities other than those provided for by law. They are also subject to supervision by the regulatory office, which ensures compliance. As such, the compulsory health system had both regulatory and national solidarity features.

However, in contrast to other social security systems, the law allows health insurance companies to make, use, and distribute profits. The law also allows competition to a certain degree in terms of quality and services. That possibility calls into question the non-economic nature of the activity. The insurance companies are freely able to make a profit, regardless of the performance of their public health insurance task and of state supervision. They are pursuing financial gains, and therefore the activity falls within the economic sphere. Even if the bodies could not compete on the contributions or tariffs, they were free to supplement the compulsory statutory services with related free services, such as better coverage for certain complementary and preventive treatments. They could, therefore, differentiate themselves in the quality and scope of services in order to attract insured persons even if

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they were obliged to offer the same statutory benefits. In essence, they competed over quality and efficiency. 142

The General Court concluded that even if there is no competition regarding the benefits, that was compulsory, or the contributions, there was nevertheless competition in terms of quality of service, as the insured persons had a right to choose provider freely and switch once a year. As such, the profit pursued by health insurance companies and the existence of competition made the compulsory health insurance scheme an economic activity, and the participants were thus undertakings. 143

3.4 Criteria for fulfilling the solidarity exemption

The following section will analyse the case law to find common denominators. 144 The key factors that are going to be analysed are whether affiliation of the scheme is compulsory, whether the benefits must be statutory, whether the contributions are determined by the state and if there is a link between contributions and benefits.

An analysis of the case law reveals that there are a few criteria that must be met if a body is going to qualify for the solidarity exemption. The bodies need to have a social objective but that is not enough. All cases that had been qualified for the solidarity had a strong redistributive quality. When the system is inherently non-economic, then it will fall within the exemption. This was explicitly stated in the last case where the General Court wrote out that this is aimed at the “pay as you go principle” which is sort of redistribution from a stronger social group to a weaker that needs the support.

As stated earlier, if it is possible for a private entity to perform the activity with a profit motive, then it is an economic activity, and the entity is thus an undertaking. Redistribution, in the sense of compulsory taking funds from one individual to another, is not an economic

144 This analysis builds on the following article. Odudu, Okeoghene. "The Meaning of Undertaking within 81 EC." Cambridge Yearbook of European Legal Studies 7, (2005): 211-241. It has been updated with new case law and the analysis has been developed regarding on why state control is important.
activity. The criteria must thus be understood in the light of that it should be *impossible to make any profit on the endeavour.*

The first characteristic is that affiliation must be *compulsory.* The cases *Pouchet and Pistre, Cisal and Kattner* are examples of that. The compulsory affiliation has also been explicitly stated by the General court in the Slovak health care case. It is crucial to have a compulsory element as the financial balance of such a scheme would not be possible otherwise. As such it must be a part of a basic statutory scheme and not an optional supplement like in *Albany* or *AG2R.*

*The second characteristic is that the benefits must be statutory.* The essential is that the fund cannot affect which kind of benefits that will be paid out. In *Cisal* and *AOK* both had benefits that were being paid out regardless of the contribution paid in. The General court emphasized in the Slovak health care case that the benefits for the all insured persons should be *compulsory and identical.* In *Cisal* there was a floor and a ceiling for the benefits, that lead to redistribution from those who would get a higher benefit than the ceiling to those that would get a lower benefit than the minimum. In *AOK* the law compelled statutory sickness funds to offer identical benefits. In *Kattner,* both the contributions and the benefits were under the control of the state. When the scheme operators are unable to determine the level of benefits offered by the insurance, it severely restricts the possibility to make a profit.

*The third characteristics is if the contributions are determined by reference to the individual income* or in other ways *fixed by the state.* In *Albany,* the fund determined the contributions, and it was possible to be granted an exemption from participating in the


scheme. In *Cisal* and *Kattner* the ECJ emphasised that the state should decide the contribution. The General court stated explicitly in the Slovak health care case that the contributions should be proportionate to the income of the insured persons. If the operator cannot control the contributions and incomes to the fund, then it also together with the *second characteristic* restricts the possibility of making a profit. It is also possible as in the *AOK* scheme that there is an equalisation between the funds that insures a low-risk group against those who insure a high-risk group. This kind of scheme mitigates the effect of having several funds, the funds who insures low-risk groups and thus having a better possibility to make profit subsidise the higher risk funds. An effect of this is that it makes it harder to make a profit by only insure low-risk persons that have few claims.

The fourth characteristic: there can be no link between the contributions and the received amounts of benefits. The benefits can neither depend on the amount of contributions nor the financial results of the fund. If there existed a link between the contributions paid in and benefits paid out, it would be redistribution between individuals and it would create a possibility to make a profit. *Cisal, Kattner,* and *AOK* are illustrations of when there is not a direct link between the contributions paid in and the benefits paid out, or between contributions paid in and the risk of the workplace.

It is not sufficient that a scheme has a redistribution effect by applying the principle of solidarity. The state must have supervisory control in both contributions paid in and benefits paid but also the designation of the body. In *Pouchet and Pistre,* *Cisal,* *AOK* and *Kattner* the state was designating the bodies to be responsible for their respective tasks, but not in the but not in AG2R case, which the court deemed could be an undertaking. AG2R had a high

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degree of solidarity, but the State had no role in that redistribution system. It is possible that the ECJ deems it essential that bodies performing the social welfare system must be designated by the state. Although, it is more likely that in the AG2R case, there was a possibility for the employers and unions to choose not only an insurance society, but also an insurance company which would make it an economic activity. Conveying in such manner that AG2R was an undertaking.

The *Dôvera zdravotná poist’ovňa*\(^{157}\) case shows the logical conclusion of the case law. The court regarded the insurance bodies that they had a high degree of solidarity, and they were strictly supervised. The bodies could not compete on the contributions or tariffs, and there was an equalisation scheme between the funds. The insurance funds were free to supplement the compulsory statutory services with related free services, such as better coverage for complementary and preventive treatment. The self-management system resembles the one *AOK* possessed where there was an element of competition between the funds.\(^{158}\) In *AOK*, the management system was not seen as sufficient to qualify them as an undertaking.

*The big difference in the Dôvera zdravotná poist’ovňa* case is the possibility to distribute profit which made the insurance entities engaged in economic activity. Even if the system is characterised with high state control and strong solidarity. The possibility to make a profit does not make it a redistribution system but a competitive market. The system fulfilled the criteria to be economic activity because bodies could make a profit; thus were all the participants in the Slovak health care scheme qualified as undertakings. In order not to be classified as an undertaking, the independent body must act as it was a tool for the state when it comes to redistributive policy, it merely applies and executes the law, and it has limited discretion in making its own decisions. This requires legislation that makes the insurance compulsory, for ensuring the financial balance, and exclusion of the possibility to make a profit which makes something that only state-backed entities can do.

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The lack of profit is thus an indication of a sufficient state control, which is essential for an independent managed security scheme to not be seen as undertaking. AG2R applied the principle of solidarity but the fact that other companies also could provide the service, with a profit motive, indicates that the activity was economic in nature. The state regulation is thus fulfilling several purposes. It takes away the possibility for profit which is essential for the Glöckner test,\(^{159}\) which essentially tests if an activity can be performed under market conditions. If there is no possibility to operate the activity under normal economic conditions, then it will need state support, such as making affiliation with the scheme compulsory. The detailed state regulation indicates also that the entity is essentially a tool for a governmental policy. The conclusion that the bodies are tools finds some support in the General courts statement in the Dôvera zdravotná poist’ovňa case. The entities merely apply the law, taken together with other criteria leads to the conclusion that heavy state control is a decisive factor.

3.5 Exercise of public powers exemption

This section and the coming sub-chapters will analyse the second exemption to the economic activity: when an entity is exercising public powers. Moreover, this will be separated into two parts. The first part relates to public powers that has a distinct third-party element. The second will continue to analyse public powers and include a deeper assessment on how close an economic activity must be to a non-economic, such as exercising public powers, to be shielded from the competition legislation. After these two chapters an analysis of the collected case law will be made.

Public bodies are also undertakings as long as they carry out an economic activity, which includes the supply of public services.\(^{160}\) The functional approach of the undertaking means that a body may be treated in a hybrid way, sometimes seen as undertaking and in other cases the opposite when it exercises public powers.\(^{161}\) The exercise of public powers is sometimes referred to as “official authority”. Generally, unless the state has decided to introduce market

\(^{160}\) Bailey, Elizabeth John, Bellamy, Child, Bellamy & Child: European Union Law of Competition, 8 ed. 93. \\
\(^{161}\) Faull, Nikpay, Taylor. Faull & Nikpay: The EU Law of Competition, 194
mechanisms, activities that intrinsically form part of the prerogatives of official authority and are performed by the state are non-economic.\textsuperscript{162}

The ECJ has preferred not to define the concept of “exercise of public powers” in general terms but it can be summarised as “official authority is that which arise from the sovereignty and majesty of the state; for him who exercise it, it implies that power of enjoying the prerogative outside the general law, privileges of official powers and powers of coercion over citizens”. The activities and duties include the elemental powers of public authority such as general and fiscal administration, justice, security and national defence.\textsuperscript{163}

A few cases can be mentioned to exemplify the current case law. The question referred to the EJC in \textit{SAT Fluggesellschaft} was if the international organisation Eurocontrol was an undertaking.\textsuperscript{164} Eurocontrol provides navigational support in the airspace, for the benefit of any aircraft travelling through it, even when the owner of the aircraft has not been paying the charges owed to the Eurocontrol. Eurocontrol collects the charges on behalf of the contracting states and contribute to the maintenance and improvement of air navigational safety. The charges are for the obligatory and exclusive use of air navigation control facilities and services. The charges were decided by the contracting states. Thus, it only executed the decisions of the states that were part of the organisation. The ECJ deemed that Eurocontrol should not be regarded as exercising an economic activity when it was collecting the charges as it instead was exercising public powers. Eurocontrol was therefore not regarded as an undertaking.\textsuperscript{165} A comparison can be made with a case from Italy where an entity was responsible for collecting tax on behalf of the state. When it exercised that function it was not acting an economic operator because it did not have any margin of discretion.\textsuperscript{166}

Eurocontrol had been \textit{conferred powers to exercise public authority} by being able to give orders to an aircraft captain that gives rise to an obligation to comply. Moreover, Eurocontrol could also establish if air-regulations have been infringed. The Advocate General also stated that the \textit{exercise of public powers may prevent a range of activities from being subject to}

\textsuperscript{162} Bailey, Elizabeth John, Bellamy, Child, \textit{Bellamy & Child: European Union Law of Competition}, 8 ed. 94.
competition rules. Only when the economic activities form an inseparable part of the exercise of public powers should it also be covered. The Advocate General also argued that air control constitutes a natural monopoly in the airspace where it is carried out. Competition between bodies is neither desirable nor possible in practice. Air control is a public service where commercial exploitation alien which may not be inappropriate when it can be provided efficiently with the current economic management in question. Eurocontrol is a service provided for business but aimed to serve the community as a whole, which is given by that they provide service to any aircraft irrespective or not if they have paid charges.167

The Advocate General pointed out that the obligatory and exclusive use of the Eurocontrol facilities and services or the unilateral of laying down of procedures for collection in relation to users are not in themselves sufficient to prevent an activity from being seen as economic nature. If that was the case, both the public telecommunications services and public postal service would fall within that exemption. What is interesting to note is that the convention that governed the organisation at the time did not imply any transfer of powers to the international organisation by the states. Their intention was to entrust it with purely administrative tasks.168

A few years later another case regarding Eurocontrol appeared, the Selex Sistemi Integrati case. The applicants meant that when Eurocontrol was assisting national administrator with technical standardisation and research it would be seen as an undertaking.169 The ECJ restated that it in SAT Fluggesellschaft did not rule specifically on the activity on assisting national administrators, but the previous judgment should also cover that. Therefore, Eurocontrol is exercising public powers and thus not an undertaking when it assists the national administrators when so requested by them in connection with tendering procedures carried out by those administrators for the acquisition, in particular of equipment and system in the field of air traffic management.170 That means that ancillary activities or

supportive activities, that are connected to the primary powers will also fall under the exercise of public powers exemption, such as tendering procedures.

The Diego Cali case was about pollution control in the port of Genoa. The ECJ started with establishing that there is of no importance that the state is acting directly or through a body part of state administration or a body which is has conferred special or exclusive rights. The antipollution surveillance was deemed to be a task in the public interest as it is an essential function of the state to protect the environment in maritime areas. That surveillance is by its nature connected to the excessive of powers relating to the protection of the environment, which are typically those of a public authority. As such, it was not an economic activity and thus, not an undertaking. The levy that the entity put on the ships for the surveillance is an integral part of its surveillance activity in the maritime area and of the port, and that did not affect the non-economical nature of the activity. The ECJ also noted that the levy needed to be approved by the public authorities.

The Advocate General explained that certain bodies are instruments of policy in general public interest and enjoy prerogatives of the public authority. Bodies that exercise that activity have an exclusively social function and therefore, are not subject to competition rules. The surveillance and antipollution activities protected workers, inhabitants, the environment and ensured the protection of the public assets. The activity could not be carried out in a competitive system since that would jeopardize if not destroy the effectiveness of the system of safeguards. The service is provided for the benefit of the community, which is apparent from the fact that surveillance has to be exercised regardless of whether the fees owed by any particular vessel has not been paid. The body has no real power to influence the process of setting the tariff and is only able to decide the amount owed on each occasion and collect it.

The ECJ developed the case law further in the Compass-Dantebank case. The case is about storing and managing data collected from companies by statutory obligation. The

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Court started by stating that an entity may be regarded as an undertaking in relation to its economic activities. If it is possible to separate the exercise of public powers and the economic activity, then the entity will be an undertaking in relation to the economic activities. If separation is not possible between economic activities and public powers, then all activities exercised by that entity as whole remain activities connected with the exercise of those public powers.\footnote{Judgment of 12 July 2012, Compass-Dantebank, C-138/11, EU:C:2012:449, para 34-38}

Data collection of information on undertakings based on statutory obligation on those undertakings to disclose and provide the data, together with the powers of enforcement, which include administrative sanctions, falls according to the ECJ within the exercise of public powers. The ancillary use of maintaining and making the data public cannot be separated from collecting the data, as the collection would be useless in the absence of maintenance. The fact that remuneration is required to access the database did not change the activity as long as the fees for making the data available are not set directly or indirectly by the entity. The fees will be seen as inseparable as long as it is given by law even if it comes prohibitions of re-use of the data.\footnote{Judgment of 12 July 2012, Compass-Dantebank, C-138/11, EU:C:2012:449, para 39-43,49.} Thus, the collecting and the maintaining of the data by Compass-Dantebank would not be seen as an economic activity.

The Advocate General also concluded that Compass-Dantebank exercised public powers. The Advocate General emphasised that the vesting of rights and powers of coercion in the entity which derogates from ordinary law is an indication of public powers.\footnote{Opinion of Advocate General Jääskinen of 26 April 2012, Compass-Dantebank, C-138/11, EU:C:2012:251, para 47-50.} Even if private parties have the capacity to create and collect and commercialise data, they are not able to confer the same legal status as the data recorded in the official undertaking register. That status makes it possible to use the information contained within against third parties in other legal proceedings. This legal effect can only be created by specific rules. The purpose of a public register is to create a source of information that can be relied on in legal relations and thereby provide legal certainty in the market. The activity to allow inspection of the data is also a public function, it cannot create legal certainty if parties cannot access it. The fact that a fee is charged does not lead to that an activity is seen as economical, as there are non-
economic activities that have service fees, such as fees charged by courts. The fee should not exceed the administrative cost according to the law, which was not proven that it was.\textsuperscript{178}

The Advocate General also argued that according to the case-law economic and public activities will be separable if the economic activity is not closely linked to the public activity and the relationships are merely indirect. In this case, the activities were indivisible from the main activities.\textsuperscript{179} It is also worth noting that the creation of the Compass-Danktebank database was an execution of an EU directive, which stated that such a database should be created to facilitate easy access to information.\textsuperscript{180}

A comparison can be made with Advocate general Jacobs’ opinion in Höfner and Elser v Macrotron where he doubted that the German employment office exercises official authority as described above when it performs its statutory functions. No official authority would be exercised if a private undertaking was engaged in employment procurement. Even if an authorisation from the employment office was considered, in German law, delegation of public powers. That still means that an undertaking operating by virtue of such an authorization does not exercise any special prerogative powers against the public.\textsuperscript{181}

All things considered, when a body has special powers, to fulfil a policy of the state and is sufficiently regulated, its actions are seen as emanating from the state. Thus, it is not an economic activity. Conferred powers from the state is an indication of a special status, which can be seen in the Eurocontrol cases and the Compass-Danktebank case. The entities are usually a tool for a state policy and has a limited discretion. A comparison can be made with the solidarity exemption analysed earlier. Both Diego Cali, and Compass-Danktebank had regulations regarding the fees they could charge which affect the potential for profit. All mentioned entities in this chapter had a third-party element that motivated action and regulation from the state. All entities were providing services that can normally not be provided by the market.

3.6 Exercising of public powers and the ancillary powers

The following chapter will discuss the “connection criterion” between a non-economic activity and an economic one. An economic activity can be “shielded” from being classified as an economic activity if it has a “connection” to a non-economic activity. That “connection” criterion increases the amount of activities that can be exempted from competition law. The paper will use a case regarding public procurement as an example of the connection criteria and the possibility to separate the activities.

_TenderNed_ is an E-procurement platform set up by a ministry in the Netherlands which had several modules. A _publication module_ for tenders, a _submission module_ and an _E-guide_ to the site. The creation of the platform raised questions regarding state aid.\(^{182}\) The General court deemed that _TenderNed_ supported the contracting authorities in compliance with the procurement directives by safeguarding principles of equal treatment and transparency. _When authorities initiate procurement procedure and comply with procurement laws, they are acting as public authorities._ As TenderNed is free of charge and non-profit making, and its _publication module helps authorities follow procurement legislation, it is, therefore, closely related to the exercise of public powers._\(^{183}\) Because TenderNed assists the contracting authorities in complying with their statutory obligations under the procurement directives and the obligatory use ensures that tenders are published and the submission module ensures that public contracts are rewarded in accordance with transparency and equal treatment. It was not seen as performing an economic activity and it was thus not state aid.\(^{184}\)

It is important to note that a new strain of case law has been developed by this argument. The member states _exercise public powers_ when they are complying with statutory obligations. In this case, a union directive which among other things demanded implementation of electronic procurement procedures, and supporting activities pursuing that goal. In _TenderNed_ the commission argued, _“Contracting authorities and special sector entities are therefore acting in their capacity of public authorities when complying with those statutory obligations so that TenderNed should be considered, by extension, to act in a_

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similar capacity when providing them with the means to ensure those obligations are complied with.” Which should be compared with Compass-Dantebank case where it collected data from undertakings under statutory obligations. The same should be true when the activity consists of ensuring that contracting authorities comply with their statutory obligations to publish tenders and tender procurement contracts. The General Court agreed that when contracting authorities initiate a procurement procedure and comply with the procurement rules they are acting as public authorities.

It was appealed, and the ECJ needed to decide whether a “connection” is sufficient between the economic activities, which was the submission module and the E-guide and the exercise of public powers. This was, in this case, the publication module where the authorities must publish its decisions, which were a part of the exercising of public powers. If a connection is enough, between the public power and the economic activities, then the economic activities would be classified as ancillary powers, and the whole entity would not be classified as an undertaking and the state-aid rules would not be applicable. The ECJ stated that the “separation criterion” applied to the particular situation where certain activities of a public entity do not, as such, form part of the exercise of public powers. Therefore, it must be considered in isolation to be economic activities.

The ECJ found that the legal provisions in force require contracting entities to publish both tenders and awards. Moreover, the authority is required to communicate in accordance with their statutory obligations. Therefore, the publication module is closely connected to the exercise of public powers and is not an economic activity. To separate the submission module and the E-guide from the publication module would interfere with TenderNeds activities and undermine the objectives pursued by the procurement directives. Two activities should not be separated when one of them would be rendered largely useless in the absence of the other or when two activities are closely linked. If an activity cannot be separated from other activities connected with the exercise of public powers, the activities of that entity as a whole must be regarded as being connected with the exercise of public powers.

powers. Therefore, the submission module should not be separated from the publication module, and both must be regarded as being connected to the exercise of public powers.\textsuperscript{188}

What the ECJ in essence state is that if the separation of the economic activity and the exercise of public powers would interfere with the functioning of the entity and undermine the objective it pursues, at least as long as it is mandated by EU law, then it would be seen as having a connection to exercising of public powers. A comparison can be made with Compass-Dantebank, the case which the commission based their argument on, the database was fulfilling a union directive of having a central register for information regarding companies, the entity was thus also pursuing a union directive.

This line of case law could expand the exercise of public powers considerably, as it could shield any entity that is set up to pursue an objective stated by the union. If the conclusion should hold, then it adds weight to the argument that the Eurocontrol and Diego Cali cases were bodies that were essential tools that executed legislation for the member states’ government. It is paramount to note that these two bodies were not set up for pursuing a union directive but domestic ones. In that case, the nature of the activity should play less of a part when exercising public powers but under the circumstances which give the entity a clear goal and little discretion except executing the will of the government. Such a state privilege may only work when the member state is either implementing a union directive or act where there is no union law. It is unlikely that the ECJ would apply such a light touch regime as “interfering with the function and undermine the objective” when it comes to applying article 101 TFEU on the member states when it is not correctly applying union law under the guise of exercising public powers.

The interference and goal undermining test should, therefore, be seen as a light-touch approach for the ECJ to not apply the competition articles on the member states’ activities. The test has set a relatively low bar for the member states to pass, so the ECJ can claim that economic and exercising of public powers activities are inseparable and can, therefore, classify all the activities as the exercise of public powers.

Another interesting case regarding the connection between exercising public powers and economic activities is the EasyPay case. The case is about the Bulgarian pension system and

\textsuperscript{188} Judgment of 7 November 2019, TenderNed, C-687/17, EU:C:2019:932, para 40-45.
the old postal monopoly “Balgarski Poshti” that had the exclusive right to pay out the pensions. The market was deregulated, and other undertakings were established in the postal money order service. However, the monopoly had still the exclusive right to give out pensions. One of the questions was, therefore, if the treaty precluded the state from granting the exclusive right to pay retirement pension by money order.189

The ECJ pointed out that there was an exemption of undertaking for national solidarity. However, the local court must ascertain that the “Balgarski Poshti” is involved in the functioning of the public social service and must not be regarded as an economic activity falling within the scope of the competition rules. In that context, in order to avoid classification as an economic activity, that activity must by its nature, its aim and the rules to which it is subject be inseparably connected with the national pension system.190 The ECJ stated that postal money orders are just a payment method of the pensions. The post was an instrument for payments, not an inseparable part of the national pension system. The fact that there existed alternative payment methods of pensions such as bank transfers, indicated that separation from the national pension system was possible.191

When it comes to the separation between the exercise of public authority and other economic activities, the case law is developed into two different strains. One side is the Selex192 and TenderNed193 cases where the ECJ seems to have a more lenient view of how close an economic activity must be. The other strain is from the Easypay where the court emphasized that it should be an inseparable connection between the activities which is a relatively high bar, in that case, it took a functional view of the activity and concluded that the post was just the payment system and not a part of the social transfer system. The notion was further strengthened by that alternative payment options existed. In comparison with the TenderNed case where the bar was set relatively low when there is a direct connection between the exercise of public power activity and the potential economic one.

The ECJ has drawn a line between where it is an *indirect connection*, as in *Easypay*, the post was one of many payment methods and could easily be detached from the national pension system, and the *TenderNed* case where there is a *direct connection* and with that a low bar to prove a connection. When there is a direct connection, there is enough to prove an *interference in function and undermining of the objective* which is a low bar to make the ancillary activity shielded under the exercise of public powers exemption. By having a high bar for indirect connections to “non-economic” activities the ECJ hinders the exception to the competition articles to get too wide-ranging.

Taking everything into consideration, when a state initiate legislation, at least if it is stated by a union directive, it will be exercising public powers. If it creates a body for that purpose, then that body will exercise public powers if it helps to achieve the goal of the directive. Legislation or regulation is seen as state activity that is non-economic, which is the last exception that will be analysed later in the paper. The criterion for separation is fairly straightforward, if there is a direct connection between the non-economic activity and the economic activity it will be a low to not separate the activities. The economic activity will then be shielded from the competition legislation.

### 3.7 Criteria for exercising public powers

A general definition of the official powers’ exemption is impossible. There are a few common characteristics that are possible to identify. The exercising of public powers can be divided into primary powers and ancillary powers. The primary powers are when the state uses its coercive powers and makes binding decisions for individuals. These powers can be delegated from the state administration to independent bodies which get a special position or receive powers that exceed the normal powers that a private body possesses.\(^{194}\) They are *tools that are instrumental for the state. These bodies have been granted limited discretion within an area where the regulation and decisions taken by that body will still be seen as emanating from the state.* Examples of this are the *Diego Calì* and *SAT Fluggesellschaft* cases.

in which the bodies only executed policies of the state. In these cases, it was surveillance of the maritime environment and collecting charges, while Eurocontrol was controlling airspace and collecting charges. In both cases, the state had decided the remuneration for the bodies’ services, and they had been conferred certain powers.\textsuperscript{195}

When a member state in order to \textit{pursue a union directive creates an entity which has the function to support the implementation} of the legislation, the member state, and subsequently that body, will \textit{exercise public powers}. In \textit{TenderNed} case, both the General Court and the Court of Justice accepted that when contracting authorities initiate a procurement procedure and comply with the procurement rules, they are acting as public authorities. The union directive and the domestic law put a statutory obligation on the contracting authority to publish its decisions. TenderNed, which is obligatory for contracting authorities, provides a platform for publishing such decisions and it is, therefore, directly connected with the exercise of public powers and do not constitute an economic activity.\textsuperscript{196} The entity is a tool which will help those that will apply the law to do it correctly. A comparison can be made with \textit{Compass-Dantebank}. The database was fulfilling a union directive by creating a commercial register. The register could be used as an objective source of information in court proceedings for third parties, it was tightly regulated and did not make a profit.\textsuperscript{197}

An activity that is \textit{ancillary to a non-economic activity} can also fall under “exercising public powers” if there is a direct connection to the non-economic power. The primary role of TenderNed was implementing procurement legislation, while its ancillary competencies were the submission module and the E-guide, which had a \textit{direct connection} to the exercising of public powers and thus the “primary power”. This is the ancillary competencies that come from the \textit{FENIN} and \textit{Selex case law}. In \textit{FENIN}, the Court stated that the subsequent use of the goods should be decisive if the procurement of the goods is an economic activity. If the usage of the good is non-economic, then the procurement will not be deemed as an economic activity. In \textit{FENIN}, it was related to the procurement of medicine to a hospital system that


applied the principle of solidarity, there was thus a direct connection between the procurement of medicine and the non-economic activity of providing healthcare according to the principle of solidarity. In *SELEX* case it was a connection between the assistance to national administrators regarding procurement related to air-navigational systems and the providing of the non-economical service of providing air navigational support. Both cases related to the *exercise of public powers* and the supportive activities would also fall within the exemption. Another example is *Compass-Dantebank* where the collection of data was seen as exercising public powers. The supporting activity of maintaining and making the data public could not be separated from the collection of the data, according to the ECJ. That means in practice that economic activities can be protected from the application of competition law, as they will be classified as non-economic activities due to their connection to non-economic activities. It is important to remember that it must be a *direct connection* between the activities. The court will otherwise separate the activities in accordance with the “the separation criterion”, that was analysed earlier.

Activities that have been qualified as *exercising public powers* are services that are provided for businesses *but aimed to serve the community as a whole*. It often exists a third-party element that the state wants to protect. The activities are generally hard to profit on and still assure the desired outcomes. An analysis of the services can be made with the analytic framework of public goods which has been explained in chapter 1.4.

Both the *Eurocontrol* and *Diego Cali* cases are cases about non-excludable goods and non-rival goods, so called public goods.\(^{198}\) In *Diego Cali*, the entity charged every vessel according to formula, because surveillance and a clean port environment cannot be excluded from the parties that have not paid the fees. It is neither a rival good, as a clean environment cannot be consumed by a private party. Eurocontrol is also providing a non-excludable service as all planes need air navigational support to assure the safety of all the entities. It is not possible to exclude the planes that have not paid their fees from the air-navigational system without endangering the planes that have indeed paid the fees. Due to that safety

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\(^{198}\) Okeoghennes article *The Meaning of Undertaking within 81 EC* served as an inspiration to use the “public goods concept”. It has been applied on later cases and showed, in contrast to Okeoghennes article, that the essential criterion is not that it is the nature of a public good but the regulation that surrounds such a good.
consideration for the third parties, the air-navigational network cannot be classified as a natural monopoly, rather a public good.

*Compass-Dantebank*, was also a kind of public good. When the data is collected, it is non-rivalrous and non-excludable good. It provided a service to third parties to find reliable information that could be used in court as objective information, which requires state support. The prohibitions that *Compass-Dantebank* had for reusing the information was to provide a legal mechanism to enforce excludability. It creates an incentive for companies to pay the fees for accessing the information contained therein. It creates a possibility for profit, but it was not proven in the case that the remuneration did exceed the administrative cost. If that were the case, then it would presumably be a profit-making monopoly and it would be unclear how the ECJ would classify such an entity.

The *TenderNed* should first be seen as a tool that helps the state to fulfil a union directive, but it can also be seen within the framework of public goods. The government contract is a private good as it is excludable and rivalrous. On the other hand, the procurement legislation wants the typical procurement process to be both non-rivalrous and non-excludable. As many providers as possible should be able to participate, which is the outflow of the principles that guide public procurement. By making it free to use it for all tenders and contracts, with as low barriers as possible to make it fall within the public good. The Netherlands wanted to assure that all tenders were centralized to be sure that *equal treatment and transparency was fulfilled in every single procurement*. It could be more difficult to their goal, if it only had relied on private entities and contracting authorities to follow the legislation that pursued the outcome.

To conclude, all of the stated cases had *third-party elements* that the state wanted to protect, in the mentioned cases, air navigational, clean environment, and functional commercial register, and easy tendering procedures. The activities can be described by the use of the concepts of the public good, in which any of them do not possess the characteristics for being a private good and thus something that cannot easily be handled by the private market and still reach the optimal outcome. Therefore, it is more natural for the state to participate and regulate or provide the service. Another characteristic is that the bodies executed legislation or a policy for the government. They were *all regulated and had limited*
discretion, and the state decided the fees that the body could charge, and thus minimise the prospect of profit, with that obligation the entity also was conferred a special position or a power to be able to execute the policy well. In summary, the primary powers are where it is hard to make a profit, or where the competition will not fulfil the desired outcome. The exercising of public powers, of course, entails the exclusive state powers such as tax collection or legislation. The bodies are sufficiently regulated so its actions will be seen as emanating from the state.

This does not mean that if an activity has public good characteristics, it will be classified as exercising public powers. It is just more likely that the state will have sufficient control over the entity due to its public good character. Due to public good nature, it is more likely that a well-regulated entity exists, and which shall execute the policy of providing “the public service” and the state will not rely on the market for an optimal solution. Another indication of the state control is that the entities had special powers that derogated from the ordinary, with special powers comes special responsibilities. The bodies were also regulated regarding the fees which both control profits prospects and indicate control over the bodies. In all, the aforementioned bodies had limited discretion, and they were regulated several aspects due to the nature of the services they provided. In all, a decisive factor is once again a sufficient state control.

3.8 Regulatory bodies

This part will analyse the last exemption to economic activity, which is regulation. This sub-chapter will include case law and the following sub-chapter will contain the analysis.

Article 101 and 102 TFEU are concerned solely with the conduct of undertakings and not with laws or regulations emanating from member states. The essential theme is that it must exist state surveillance and control; otherwise, it will be classified as an economic activity. However, if there is a lack of that kind of control, a regulatory agency can be seen as an undertaking. In Wouters, the ECJ did establish that members registered in the Amsterdam bar were undertakings as they offer legal assistance for a fee. They also bore the financial risk attached to the performance.\footnote{Judgment of the Court of 19 February 2002, Wouters, C-309/99, EU:C:2002:98, para 48-49.} The bar had powers conferred by the state and in order
to perform a task in the public interest, adopt regulations for its members. The ECJ deemed that it was not exercising public powers as it was *exclusively composed of members of the bar when adopting regulation and was not required to refer to a specific public interest.*

The ECJ then distinguished between when the *state grants regulatory powers to an entity and defines the public interest and other principles in which the body must act, while the state retains the power to adopt a decision as a last resort.* In that case, it will remain state measures and not covered by article 101 TFEU. The second situation applies when rules are adopted by an entity alone, and that is subject to article 101. The ECJ uses the formalistic approach to see when the public can affect decision making. In practice, it means a reliance on institutional factors to assist in the determination in the case of a regulatory body. In particular, where on one hand it is composed of a *majority of representatives of the public authorities and on the other hand, is required by national legislation to observe various public interest criteria.*

A comparison can be made with sport where the ECJ established that the treaty would cover rules adopted in the field of sport that concerned the economic aspect of the sport. The ECJ, referring back to its case law, concluded that *rules that cover the sporting interest, such as the rules of the game,* by nature fall outside the Treaty. Conversely, rules that are adopted in the field of sport but concern the economic activity may fall within the Treaty. The regulation which relates to the particular nature of sporting events is inherent in the organisation and the proper conduct of the sporting competition. More generally, if the aim is to exercise public powers to regulate the market, but not with the goal of participating in it, it will not be covered by the competition articles.

In *OTOC,* which is a body for chartered accountants, the ECJ needed to judge if a regulation decided by the body would fall under article 101. The *decision was required by law* and related to compulsory training for the accountants. The ECJ started with concluding

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that chartered accountants were undertakings as they provided services and bore the financial risk related to the activities for remuneration.\textsuperscript{205} The ECJ judged that the contested rules were part of economic activity. The regulation had a direct impact on the economic activity on the market for compulsory training for chartered accountants, in which OTOC also provided the training and subjected all other providers to the standard in the contested regulation. There was an obligation to undertake the training following the standard. The accountants could otherwise be excluded from the association.\textsuperscript{206}

When adopting the contested regulation, the body did not exercise official authority, rather as a regulatory body for a profession which practices an economic activity. The OTOC was exclusively composed of a member of that association, and national authorities do play no part in the nomination of the members of that body. The regulatory powers invested in OTOC were not subject to any condition or criteria that the association was required to meet when adopting regulation. Instead, the statute regulating the body gives it broad goals which give the body a broad discretion to the principles, the conditions and methods of the training that the accountants must follow.\textsuperscript{207}

The ECJ noted that the statute that required the decision of OTOC did not give it exclusive right to provide training for the charted accountants. Neither did it lay down conditions for access by training bodies to the market of compulsory training for the accountants. The rules concerning those questions appear in the contested regulation. The OTOC adopted the regulation without any input from the state. According to the ECJ, it did not matter that OTOC was legally required to put into place a system of compulsory training for its members.\textsuperscript{208} Nor that OTOC did not seek to make a profit as it competed against other training bodies which did. The regulation taken by OTOC was a decision of an association of undertaking within the meaning of article 101.\textsuperscript{209} This is part of a formalistic approach, where if the body had public members or was tightly regulated, then the regulation in practice would emanate from the state and be subject to other articles.

\textsuperscript{205} Judgment of the Court 28 February 2013, OTOC, C-1/12, EU:C:2013:127, para 33, 37-38.
\textsuperscript{206} Judgment of the Court 28 February 2013, OTOC, C-1/12, EU:C:2013:127, para 40-43.
\textsuperscript{207} Judgment of the Court 28 February 2013, OTOC, C-1/12, EU:C:2013:127, para 46-50.
\textsuperscript{208} Judgment of the Court 28 February 2013, OTOC, C-1/12, EU:C:2013:127, para 50-54.
\textsuperscript{209} Judgment of the Court 28 February 2013, OTOC, C-1/12, EU:C:2013:127, para 57-58.
3.9 Criteria for a regulating body

This part will analyse the last exemption from economic activity. Regulation is a particular form of “exercising public powers” and should, therefore, be exempted from competition regulation. Regulation is per definition not offering goods or service on the market even if it affects how the market operates. The distinction that the ECJ makes in Wouters is essential. If an entity is affecting the market with regulation and they are participating in it, then there is a reason to believe that the entity will use its position and give itself an advantage on the market. In those circumstances an entity should be subject to the competition articles.

In contrast, if the state grants regulatory powers to an entity and defines the public interest that it must act according to, while the state retains the power to adopt a decision as a last resort, the entity will be a regulatory body. The entity is characterised by having limited discretion, and it can be seen as a tool for the government to regulate a specific part of the market. The legislation will be seen as a product emanating from the member state, and the legislation will not be subject to the competition articles.

The state control over the entity can be manifested in several ways. Control can be established by having a majority of members on the board from the public or nominated by the public. The state can also require that it must approve the regulation before it is being enacted. This is the formalistic approach towards the control criterion. The control can also be established by giving the body a narrow public interest that it must act within, which is a more functional approach and requires a more in-depth assessment if the control is sufficient. The ECJ mitigates the risk of giving an independent body the power to regulate a part of the market by putting up the criteria mentioned above.

A comparison can be made with the dependency criteria in “body governed by public law” providing that the body has members nominated by the public or that the public in other ways control a majority on the board. Then it will fulfil the dependency criteria. The other control criteria that the ECJ mentioned when it comes to regulatory bodies is that the body must follow a set of principles which can be compared with “management supervision” criterion. An entity can be dependent on the state if it needs to follow sufficiently detailed regulation. If the state has control over the entity, the regulation enacted by the entity will be seen as emanating from the state.
3.10 Criteria for undertaking

The previous sub-chapter has discussed the general rule for what an economic activity is and thus what constitutes an undertaking. The paper has also made an in-depth analysis of what is not to be deemed as an economic activity. This chapter will analyse the main rule and the exceptions to see which criteria can be generally used to assess whether an activity is of economic nature and thus an undertaking.

The general rule is that if an operator is performing an economic activity it will be an undertaking. It is also settled case law that “offering goods and services on the market” is an economic activity.

*Consumption* for individuals is per definition, not offering goods on the market. One individual’s consumption usually does not affect the market, and thus, there are a few reasons to apply competition legislation on their behaviour. When it comes to business procurement, it will be seen as economic activity as it is closely related to its activities of producing goods and services.

There are a few criteria that are common for the bodies that did qualify for not being an economic activity. All the entities that was not classified as an undertaking was controlled, in some way, by the state. They were mainly a tool for the state in achieving a goal. Therefore, each criterion should be understood in relation to how it affects the government’s control over the entity. Two activities that stem from the sovereignty of the state is *regulation* and *exercising public powers*, both of which are not economic activities. The ECJ put up formalistic requirements for regulatory bodies to assess if there was sufficient state control. While exercising public powers has a more functional approach, there is an assessment of how regulated the entities are. Especially if they have conferred powers and if there is a possibility to make a profit.

Another criterion that is common for all of the entities, but especially prevalent in the solidarity exception, is *that it must be a potential to make a profit*. As earlier stated, an undertaking can be non-profit, but there must be a possibility of making a profit. The fundamental question if an activity is an economic one is if it can, in principle, be carried
out by a private undertaking with profit.\textsuperscript{210} The Advocate General in the \textit{Glöckner} case argued that the comparison test leads to, in practice, that almost anything could make a profit.\textsuperscript{211} A comparison can be made with national defence, that have not always been in state control and has been provided with a profit motive. This should not be confused with the fact that national defence is a common public good and possesses the characters that make it hard, if not impossible, to profit if the entity does not have a contract directly with the state. Therefore, almost any activity can be classified as an undertaking as there are few activities that cannot in principle be carried out in profit. Two examples are \textit{OTOC}\textsuperscript{212} and \textit{Höfner v. Macotron}\textsuperscript{213}, where the ECJ used the comparative criteria. Both entities were non-profit, but there existed companies in the market that did seek to make a profit.

\textit{The lack of potential to make a profit} is thus an indication of sufficient state control. The possibility to make a profit is essential for the comparative test. Entities that were exercising public powers were providing services that would usually not be profitable due to the public goods nature. Since it is impossible to make a profit on public goods, the state needs to solve the market failure, by regulating the task and assign a body and give it little discretion in performing the task.

The criterion is paramount for solidarity bodies. If other entities than state-backed ones can perform the activity, it may be economical, as in the \textit{AG2R} case. The profit would also remove the redistributive character of the activity. Only the state has the power to organise a social security system based on solidarity, by for example being able to have a compulsory affiliation or taxing power, which does not have a profit element. As such, it is not the lack of profit in itself that is important, but the fact that only the state-backed entities could perform the activity under such circumstances.

\textit{Redistribution} is thus a key concept for the solidarity exception. As earlier mentioned, if there exists any regulation that opens up for the possibility to make a profit from the social

\textsuperscript{210} Opinion of Advocate General Jacobs of 22 May 2003, \textit{AOK}, C-264/01, EU:C:2003:304, para 28, the Advocate general stated that the basic test to see if it can be carried out by private undertaking in order to make a profit.


\textsuperscript{212} Judgment of 28 February 2013, \textit{OTOC}, C-1/12 EU:C:2013:127

security scheme, or if the entity had much discretion then it is seen as performing an economic activity. The Slovak case\textsuperscript{214} is a good example where it existed both high state control and solidarity, but since the insurance companies were allowed to distribute profit it was seen as an economic activity.

\textit{The last criterion for being an undertaking is the need to bear the financial risk.} The court has stressed in both \textit{Wouters}\textsuperscript{215}, \textit{Pavlov}\textsuperscript{216}, \textit{OTOC}\textsuperscript{217}, and several more cases that participants in the respective bodies are undertakings as they bear the financial risk for their behaviour.\textsuperscript{218} A comparison can be made with workers, as it was discussed previously. The difference between an independent provider of services and a worker is the risk component. The criterion involves the possibility to take decisions that can affect the market. There must be an identifiable centre that can take significant economic decisions. Employees are under control from the employer and can thus not take that kind of decisions. Dormant companies can by that logic not be undertakings.\textsuperscript{219} They are not engaged in economic activity and do not take economic decisions, which can affect the financial risk and in turn the market. Therefore, it is less reason to apply the competition articles on a dormant company.

A comparison can be made with a body governed by public law, certain bodies are a tool for a policy of the state, and they will in practice not bear their own financial risk. The entities in the following cases acted as a tool for a policy or provided a service to the community. \textit{Ing Ainger}, \textit{SIEPSA}, \textit{Eurocontrol}, \textit{Compass-Dantebank} and \textit{Diego Calì}. It would be improbable that the public would let a policy tool go bankrupt if the need still exists. This is especially true if the good has a public good characteristic. By being a tool for the state also implies that the \textit{state has control over the entity and is willing to shield it from the financial risk. That can in turn lead to an uncommercial behaviour from the entity which would lead to the applicability of the procurement legislation.}

\textsuperscript{217} Judgment of 28 February 2013, \textit{OTOC}, C-1/12 EU:C:2013:127.
\textsuperscript{218} Another interesting example is judgment of the Court of First Instance of 30 March 2000, \textit{Consiglio Nazionale}, T-513/93, EU:T:2000:91 para 37-39 where Italian customs agents also bore the financial risk of their work.
\textsuperscript{219} A comparison can be made with the judgment of the General Court 24 March 2011, \textit{Pegler}, C T-386/06, EU:T:2011:115, para, 46-51
In summary, to be classified as an undertaking, an entity needs to offer goods and services on the market, bear the financial risk and have the potential to make a profit. The exceptions are characterised by a form of state control, for example an entity that is composed of public members or has a sufficiently clear goal that it must be in accordance with. The body is dependent on the state or has a narrowly defined task. An entity can also pursue a community interest tasked by the state and be granted special powers to fulfil that policy. In those cases, the entities’ activities will not be seen as economic ones but actions that emanate from state’s sovereignty and will thus not be regulated by competition articles inmate and follow a union directive. The common denominator for all exceptions is that the state has sufficient control over the independent bodies which gives them limited discretion.

3.11 Application of the case law in Sweden

Competition law is regulated in Sweden by “Konkurrenslagen” (2008:579). 1 chapter 5 § contains the definition for the undertaking. In contrast to EU law, the undertaking is defined by the paragraph. According to the preparatory works to the older version of the competition law “företag” should be interpreted in the same way as undertaking in EU law and follow the case law development. A difference is that Swedish legislator wrote within the definition an exemption for “myndighetsutövning” which is comparable to “exercise public authority”. 220

The Swedish case “Svenska Bilsportförbundet” was about the “Swedish car sports association” and the question was if they were deemed to be an undertaking. When assessing if they were active with “economic activity,” the court noted that rules that was connected to the sport could still fall within the regulation. The court also noted that they were non-profit, but had incomes related to tickets and fees. the Court interestingly enough made an assessment of the average turnover for a car sports competition and deemed that it was big enough to be qualified as an “economic activity”. The fact that there are youth competitions that have a low turnover that it may not be classified as an economic activity does not change the assessment. 221

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221 MD 2012:16, para 116-121.
It is interesting that the court felt that it needed to assess the turnover, as that is not relevant in the classification of a body as an undertaking. The question is if it is possible to make profit on the activity as in Glöcker. There is no minimum turnover for a company, except it cannot be dormant. The functional approach does not assess if there is a high turnover, but if it is possible for a private entity to operate on the market.

4 Comparison between the undertaking and body governed by public law

This chapter will compare the analysis of two previously mentioned concepts and present an in-depth analysis of the different criteria. Thus, fulfilling the papers purpose by making a comparison. The first sub-chapter starts with a general comparison between the two concepts. The second sub-chapter contains an analysis between the concepts, based on the criteria that is used to assess if a body governed by public law fulfils the industrial or the commercial exception. The third part will discuss the concepts based on the idea of state dependency, and the last chapter will analyse the case-law from a more economical perspective. Comparing the criteria from each concept will give a better understanding of each concept and how they relate to each other. That would, in turn, lead to better compliance with the regulation as it gives a better understanding of which criteria that is relevant when assessing if an entity should apply the legislation.

4.1 General comparison between the concepts

The ECJ uses a functional approach to both concepts, “undertaking” and a “body governed by public law”. Both concepts have a small degree of formalism and the concepts and are purpose-driven. An example of this, is that neither concepts require the entity having a legal personality under domestic law. The functional approach for the concept “undertaking” is that the ECJ asks *if an entity is active in an economic activity and should thus be subject to the competition articles*. Some activities have been classified as non-economical and the ECJ has by its case-law extended the protection from the competition articles to economical activities by showing a direct link between the non-economic activity and the economic one. This is the case when the ECJ argues that the act of purchasing goods cannot be dissociated from the subsequent use of the goods. Therefore, ECJ will classify procurement as a non-
economic activity if the subsequent usage of the goods is non-economical. However, if an entity buys large quantities of goods it will affect the market even if the usage is for a non-economic activity.

When the ECJ assesses the concept “bodies governed by public law” it will ask *if the government can affect the rewarding of contracts*. The exception to the legislation is when a body is controlled by the state, but it is under enough commercial pressure to make it only follow economic considerations. That makes it impossible for the government to affect the rewarding of contracts.

The concept of undertaking tests if an activity is an economic activity and should, therefore, be regulated by the competition articles. The undertaking concept is more extensive and encompasses a range of activities that will fall within the competition legislation, while the industrial and commercial character criteria is an exception to the procurement legislation. The exception is as a result, a qualified economic activity. By comparing criteria from each concept, it creates a better understanding. If something is an undertaking and therefore subject to competition rules, then it is more likely that the body is also fulfilling the criteria of having commercial or industrial character. It also applies that if an entity is not an undertaking, then it is more likely that the entity will be considered a body governed by public law.

4.2 A comparison based on the industrial and commercial factors

This part will analyse both of the concepts based on the factors that were earlier discussed when assessing a body’s ability to possess a commercial or industrial character. This is relevant as the industrial and commercial exception in public procurement is essentially analysing if the body is commercial, which is a factor to take into consideration when assessing if an entity is an undertaking.

*The first criterion is if the entity is active in a competitive environment.* That indicates that the entity is both an undertaking, and it has an industrial or commercial character. For bodies governed by public law, the court will look at the specific case and determine if the entity is under commercial pressure. It is not enough that there is fierce competition nationally if there exist particular circumstances that remove the competition locally. This does not mean that a company cannot make less rational economic decisions, even if it faces
stiff competition locally. The entity may be still willing to bear some losses for a policy to buy national products. The important thing is that the government cannot affect the rewarding of the contracts. For undertakings, the ECJ will use the comparative test. It will look at the market and see if any participant is active in the market for making a profit. If that is the case, the activity will be classified as an economic one.

The difference between the concept is that hypothetical competition is not enough for “bodies governed by public law”. The ECJ will not look at hypothetical competition but de facto competition in the local market. The national market can be a fully functional market, but a local market can be locked in by a local governmental agency that has control over a trade, Adolf Truley is an example of that. The difference is thus a closer examination of the facts in the specific case to ascertain if the entity is run in accordance with industrial or commercial manner. On the other hand, in the undertaking concept, it is an abstract question if it is possible to pursue an activity with a profit motive in that market. It is enough to find one entity that is performing the same activity with a profit motive, but the entities do not need to compete.

The second criterion is if the entity is operating under normal market conditions. To be classified as an undertaking and fulfil the industrial or commercial exception in procurement law the body should operate under normal market conditions. If the entity has exclusive rights, powers or position, then that is an indication that it is not commercial and not performing economic activity. The entity can, for example, be active on the market but have a legal monopoly on a particular service or have other powers or position that a normal entity cannot get without state support.

A comparison can be made with the undertaking concept where independent entities have performed activities that have been seen as so important that it has been classified as the state exercising public powers. Due to the nature of the activities, the ECJ has shielded them from the competition articles. These entities had special powers conferred and a unique position on the market. Examples of these powers are the Swedish case of Systembolaget, legal monopoly on alcohol, Compass-Dantebank which had the power to force companies to disclose data and Eurocontrol that had the power to give orders to aircrafts. If an entity has a unique position or has powers, it is a strong indication that the entity will be classified
as a body governed by public law, and it will not fulfil the industrial and commercial exception. It also indicates that the entity is active in an activity that is non-economical, and that the entity can be seen as a tool for the state in fulfilling a policy. This should not be confused with the fact that an entity can have a special legal obligation from the public, the activity in itself may still be seen as an economic one, and thus entities performing the activity are undertakings.

*The third criterion is if the entity intends to make a profit.* Public entities do not usually have the intention to make a profit. However, it is not the aim that is important, but the effect of it. A non-profit organisation can be managed in accordance with other efficiency criteria which leads to the same kind of commercial pressure, which makes them qualify for the exception as in *Agora Srl and Excelsior.*\(^{222}\) The entity can also make a profit, but if it is not the primary goal, as in *Korhonen*, then the pressure will not be sufficient for a body governed by public law to qualify for the exception.

An undertaking does not need to make a profit, but the *activity* that it performs must grant the possibility to make one. *Redistribution* that is under state control, where profit is impossible, is not an economic activity. Voluntary schemes with high solidarity within the scheme may still be on a market where it is possible to make a profit such as in the *AG2R* case. Pure redistribution is not an economic activity as the act of redistribution of income needs to be backed by state enforcement which requires the exercising of public powers. Redistribution is often a policy of the state to assure equality among its citizens. As the ECJ is cautious of applying competition articles on the state this area is particularly hard for the ECJ to manage.

The potential to make a profit is essential for the concept of “undertaking”. The possibility to make a profit can lure in potential competitions in performing the economic activity and thus participating in the market. That will, in turn, lead to a higher risk that entities will try to distort the market by anti-competitive behaviour and maximise profits. Profit is thus a signal that there is a market, and if the profits are high, a possibility for competitors to enter the market and compete. This leads to a higher risk that entities will try maximising profit by anti-competitive deals, and by that distort the market which will motivate the application

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of competition articles. The difference between the concepts is that the profit potential is essential for undertakings as explained earlier while the intention of making a profit and the subsequent acting of a rational buyer is essential for bodies governed by public law.

*The fourth criterion is if the entity bears the financial risk.* This is crucial as it affects the long-term actions of a company. This is a better criterion than the profit criterion in assessing if a body will act economically rational. Even if a body intends to make a profit, it is not a threat to its existence, if it does not bear the financial risk of its failings. The liquidation of a company is the ultimate incentive for it to make economically rational decisions. In other words, it cannot afford to act in accordance with other considerations than economical, operating under normal market conditions. Regarding, for example, a monopoly, its profits are virtually guaranteed, and that may give it the discretion to act in other interest even if it bears the financial risk. On the other hand, if the entity is fulfilling a community interest, it is unlikely that the state would let the entity be liquidated, even if such a guarantee is not explicitly stated. Examples of this are *Ing Aigner*[^223] and *SIEPSA*[^224]. If the entity bears the financial risk, then it is more likely that the entity will fulfil the commercial exception. Conversely, if the body is responsible for a valuable service, then it will be less likely that the government will let the body fall and the entity can act according to other interest than purely commercial and it will thus not fulfil the commercial exception.

A comparison can be made with entities that perform a task that is classified as being non-economical. If the entity is a tool for state policy and has been conferred powers, then it is likely that it will not bear the financial risk as it will not be allowed to be liquidated. These bodies are usually crucial for third parties that need the services. The third parties are depending on the state being able to control the another party’s action. An example is *Diego Cali* case, where a state-controlled entity controlled all the vessels that past the port of Genoa, for assuring the clean maritime environment for the inhabitants that lived by the coast.

The financial risk is also crucial for the undertaking concept. The risk implies that there is a possibility to make economic decisions that can lead to profit or the possibility to bear

the loss. Dependent workers do not have the same risk on the market. They are, therefore, incorporated by the employer as the worker executes the will of the company. The workers do not have the possibility to act in accordance with the risk and change its behaviour, which is the significant difference between independent contractor and worker. The risk is, for that reason, something that an entity should act up to make economically rational decisions. The financial risk can also lead to profit which is crucial to establish that it exists a market and thus incentives to distort it, which motivates the application of the competition articles.

The difference between concepts regarding risk is that a body governed by public law needs to be under real financial risk to act without other considerations than economic ones. Concerning the undertaking concept, the risk indicates the possibility to make economic decisions, independence and the possibility to make a profit or bear the loss of the activity.

*The fifth criterion is being publicly financed.* Depending on the financing; it is possible that the government has a possibility to affect the rewarding of contracts. A key indication is that all entities have the same possibility to apply for the support; for example, general subsidies, then it is not as likely that the government can influence the body. For an undertaking, it is immaterial if the money comes from the state or the private as long as it is a profit-making. It can, however, indicate that the body is a policy tool for the state or if the government has regulated the possibility for the entity to take out fees.

4.3 An analysis of the concepts based on the dependency criterion

This part will analyse the concepts based on the dependency criterion, which accounts for the third part of the body governed by public law definition. The dependency criterion is essential for a body governed by public law. If the body is not dependent on the public, then there are less possibilities for the government to affect the rewarding on contracts. As earlier mentioned, being financed by the state is an important factor for bodies governed by public law but a minor factor for the undertaking concept. The other two dependency criteria are vital for the undertaking concept. These are *management supervision from the public or that more than half of the entities’ board is appointed by the public*. The formalistic approach of an undertaking is crucial when it comes to *regulatory bodies* that sometimes perform activities that are not economical. If the public is being able to affect the *nominations or*
have a position on the board of the body that may imply that the regulatory body decision is not emanating from a professional organisation but emanating from the state.

For an entity to be classified as a regulatory body; the public should have a majority of the board just like dependency criterion stipulates in the public procurement legislation. The state can also have influence over a regulatory body by being able to veto legislation or that the body needs to follow a detailed interest when crafting legislation. This can be compared to management supervision criterion in the public procurement legislation. The management supervision criterion is vague; it needs to have the same effect as the other criteria. Therefore, the instructions from the state must be detailed if the body wants to be shielded from competition articles, and not have been given a broad mandate as in OTOC.225

It’s worth remembering that mere ex post facto reviews are not sufficient to fulfil the management supervision criterion. The government must have the possibility by the review, and the powers that come with that, a real possibility to affect the actions of the company. In this case, the rewarding of contracts. The control criterion also applies when it comes to regulatory bodies; the government must have a real chance to affect the regulation before it is put into place. In the OTOC case it was not enough that the state gave OTOC the task of crafting regulation, since the state could not sufficiently control the end result. OTOC was thus an undertaking when it crafted the contested regulation. A comparison can be made with the IVD case where the state could only control that the budget was balanced, but not what the body should spend the money on. That created not enough dependency on the state, which led to that the entity was not being a body governed by public law.

The OPAC case showed how a detailed regulation made it possible for the French state to control companies even if they were formally independent. The ECJ did unfortunately not state which factors were the decisive ones. A comparison can be made with the bodies that are an exercise in public powers; they are heavily regulated, lack discretion and can execute the task which they are given. This occurs especially when the fees are decided by the state, when they have conferred powers and a narrow discretion.

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225 Judgment of 28 February 2013, OTOC, C-1/12, EU:C:2013:127, para 49-50.
The *management supervision* criteria for bodies governed by public law should be interpreted as that the body needed a more general dependency on the government. It does not need to be connected to the rewarding of contracts. For the *undertaking* concept, the entities that want to be classified as operating non-economic activities must be well regulated in areas such as fees, conferred powers or detailed interests that the body should act accordingly. A qualified dependency on the state makes them an executing body and therefore, performing a non-economic activity. *The publics control over the board criterion* is the same for both undertakings that want to be a regulatory body and bodies governed by public law. If the public has a majority on the board, it is a clear indication that the entity is dependent on the public, which can qualify the body to be a “body governed by public law”. For undertakings, the publics majority on the board indicates that the state controls the body and its actions are in practice state measures, which for example means that regulations taken by such an entity are not subject to the competition rules.

In summary, dependency can be achieved by either the public being on the board or that the state has a more qualitative control over the entity. The qualitative control comes from detailed rules and special regulation. The more dependency and regulation, the more likely it will fulfil the management supervision criteria, and it is a body governed by public law that is not fulfilling the exception. Regulation in certain areas indicates that an activity is a non-economical one and the entity that operates in accordance with the regulation is not an undertaking. All of the exceptions from the undertaking definition is based on that the state has ample control over the profit or that the entity is regulated in such a way that it is just applying the law and has a limited discretion. This is especially clear when it comes to regulatory bodies which measure the state influence in a formalistic way. The state dependence and control are criteria that is for both of the concepts.

This has been the comparative analysis of the two concepts where the paper has attempted to answer question three in the paper. An analysis has been made regarding which criteria are important and how they relate to each concept. A general remark regarding legal certainty should be raised as the current case law, body governed by public law and the concept undertaking is significantly broader than the textual reading gives at hand. A revision of the text should mirror the functional approach and make more obvious which of the bodies qualify for the concept.
4.4 Economic analysis of current case law

This part will analyse the current case law from an economical view and give recommendations how the case law can be improved and thereby answer the fourth question. The legislations that this paper has studied are central to the internal market. A functional internal market is in turn a core goal for the EU and it is stated in article 26 of the TFEU. The purpose of the procurement legislation is to open up the market for public contracts and develop an effective competition regime. Opening a market will allow new companies to be established, the contracting entities will have more to choose from and they will likely obtain more value for the money. The process of procurement legislation also to regulate the process and to maximise transparency to make it possible to minimise corruption practices. The aim of competition legislation is to have a functional market with no distortions, which will lead to the state procuring goods economically efficiently. This will be the paper’s starting point when analysing the current case law; if the current case law can be better at achieving a functional internal market.

Procurement is sometimes an economic activity depending on if it has a direct connection to non-economic activity. The case law was developed in the *FENIN* case, where it was seen that the procurement of medicine used in a hospital system, which was run on “principle of solidarity” and the procurement could not be deemed as an economic activity. *That means that procurement which is ancillary to a non-economic activity does not by itself qualify as an economic activity.* This was later developed in the *Selex* case; the ECJ stated that the “subsequent use reasoning” could be applied to other activities than those based on solidarity.\(^{226}\) *The entity performing procurement to a non-economic activity will not be classified as an undertaking and thus will not be subject to the prohibitions of Article 101(1) and 102 TFEU.*

The EU competition rules are aimed at undertakings which are defined in functional terms to generate an even level playing field between public and private undertakings of all sorts. The undertaking concept is an outflow of what constitutes an economic activity and hence,

is able to distort the market. It is therefore logical that all entities, private or public, should be forbidden from distorting the market. Public procurement should be covered by the extensive definition of economic activity as the public can change the market structure by procuring large quantities from the market. The current case law allows for the same kind of market distorting activity to be treated differently if the perpetrator is part of the public or is private.

Procurement activities are still subject to the competition regulation if the goods are used in a following economic activity. However, the analysis of a procurement practice that hurts the competition on the market will in practice depend on the usage of the good. That removes focus from the potential distortions of an anti-competitive procurement practice. One way to assure healthy competition is to have a specific analysis of the public procurement practice. The test would concentrate on the economic effects of the procurement and its effects on competition. Demand and supply are equally important in affecting the internal market. Purchasing goods is thus an economic activity as it affects the demand on the market regardless how the goods will be used, which is an important factor in the current case law. A lack of regulation and monopsony, as government purchase often is, will lead to a reduction in social welfare.

Several problems arise with this case law. The same kind of anti-competitive procurement behaviour can be treated differently depending on the downstream activities carried out by the buyers. The governmental contractors will be less protected when they are delivering goods to an entity that is active in a non-economic activity, if the buyer engages in anticompetitive buying practices. It is also unclear how protected a supplier will be if it delivers to an entity that is active in both economic and non-economic activities. Another legal certainty problem arises if the public procures goods centrally and it is unknown if the goods will be used in a non-economic setting. The current case law thus enables discrimination and creates legal uncertainty for public contractors.

A separation should be made between when the state is providing services and procuring goods. When the state is procuring goods, it will need to act as a rational buyer and needs

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227 The public can distort the market by for example bundling and aggregation of contracts, induced or mandatory subcontracting.

to be regulated so it does not use its power to distort the market. Otherwise it can use its position to assure deals that is favourable for the public but damaging on the market as a whole. By contrast, when it is providing or delegating public services to private parties, it ensures that citizens receive fair and non-discriminatory access to such services. In these cases, the state enjoys powers of public authority, which exist to enable the state to provide the services, and it should not be as restricted when it provides them. Those powers should not be available when the state acts as a purchaser. The ECJ has by this case law blurred the line between when the state act as a purchaser and when it provides services to its citizens, by classifying procurement of goods that will be used in non-economic settings as a non-economic activity.

The ECJ’s approach, where the usage of the good decides if the procurement is an economic activity, can be compared to the rigidity that the ECJ shows when it comes to mixed entities. These entities serve both the public and the private and needs to follow the procurement legislation for all goods it will need, even those that will be used for serving the private sphere. The ECJ has put transparency and rigidity before commercial flexibility in these cases by putting a high bar for separation between serving the public and private. If the entity wants to be sure that it does not need to apply the procurement legislation, it will need to set up a separate legal entity, as the ECJ has not accepted an accounting system that will separate the different markets. This can reduce the commercial flexibility as it put mixed entities at a disadvantage and will reduce commercial pressure in all on the total market. It would be more flexible and better for the internal market if the body needed to show that there were no subsidies from the part that serves the public to the part that serves the private market.

The approach where the usage of a good decides if the procurement is an economic activity together with a lax separation test, creates several problems. The separation test which was analysed in chapter 3.6 can summarised to if there is a direct connection between the non-economical activity and the economical activity, then will the economical activity be seen as non-economical. That separation test shields economical activities from being subject to competition articles by making it difficult to make a separation between economic and non-economic activities, hurts the market. A more functional approach would have a stricter separation test which would separate in a higher degree the non-economic and the
economic activities. The consequence would be a wider application of the competition articles and reduced possibilities for anti-competitive procurement practices. A functional approach would also allow mixed entities to serve both the public and the private sphere. The entity would just need to procure for the public wing if it can show that there are no subsidies from the public wing to the commercial part. The result would be more competition in the internal market.

Separation from the non-economic activities is possible under the current case law, as discussed in chapter 3.6, but the connection between the activities must be indirect and relatively simple to separate if the ECJ will see them as separate activities. However, in practice, it is difficult to envision an occasion where subjecting a public buyer to competition rules regarding procurement, would hinder the achievement of the specific public policy. It would be desirable to have a separate competition analysis of public procurement which could reduce anti-competitive procurement practices and with that a better enforcement.

It is also positive to have an economically efficient enforcement of legislation that will improve the inner market. Regulation can be divided into ex ante and ex post. Both concepts would have better enforcement by having clearer rules than they currently have, which is ex ante regulation. It can be attained by either having a more consequent and better explained case law or a revision of directive which could better incorporate the current case law. A clarification should also be made when it comes to “exercis of public powers” where the ECJ has been vague about what factors were the decisive ones. As earlier stated, the clearance can also be attained by revising the legal text to mirror the actual case law, this would be possible when it comes to bodies governed by public law, where the emphasis should be on the circumstances on how the activity is performed instead of the nature of the activity. This would lead to a lower compliance cost, unnecessary litigation costs for companies and better enforcement from the governments as it would be clear which bodies need to follow the regulation.

Examples of the problems in the litigation has been illustrated by showing case law from Sweden. The case law from Sweden shows that both the court and the augmenting parties find the ECJs case law complicated. In most cases the courts follow the ECJs case law and apply the domestic legislation in accordance with it. However, some of the argumentations
are sometimes problematic, and it shows an incomplete grasp of the concepts. A risk is that the lower courts will be guided by higher courts argumentation which can lead to a higher risk of decisions that is not in line with ECJ current case law. That in turn can lead to legal uncertainty and with that a less effective market. and make faulty decision based on national case law. A clearer and better legislation would be cheaper and create more legal certainty.

Both the competition law and public procurement law have rules regarding damages, which is important for *ex post regulation*. By applying competition articles, suppliers would get a wider possibility to use private litigation against the body governed by public law to receive damages, for anti-competitive buying practices that is not covered by the procurement legislation. This would create bigger incentives for the companies to litigate and force the body to adhere to the legislation and consequently, creating a better functional inner market.²²⁹

A more functional approach would be preferable for the internal market. That approach would need to entail a stricter separation test and less rigidity regarding mixed entities. These two changes would lead to an increased competition on the internal market by reducing anti-competitive procurement behaviour and increasing the incentives for entities to participate in the market. This should be combined with a clearer case-law regarding the exceptions from the undertaking concept and a revision of the procurement directive to mirror the changes in case law. These two actions would lead to a smaller compliance cost and less unnecessary litigation.

4.5 Conclusion

To conclude, the criteria that is essential for both the concepts are financial risk and state control. Within “financial risk” there are several factors that need to be taken into consideration. It needs to be assessed if the entity has any special powers, if it is a tool for the state or if it can take economical significant decisions on the market. That would reduce the financial risk and indicate that the state has a particular interest in that body. The financial risk criterion also encompasses if the entity will act under commercial pressure which means that the government will have less possibility to affect the rewarding of contracts. The

²²⁹ An example of directive that regulate damages to victims of competition law infringements is Directive 2014/104/EU.
financial risk criterion is thus essential when assessing if an entity is under enough commercial pressure to avoid the application of the procurement directive.

The other essential criterion is governmental control, it is connected to financial risk, but it is distinct. State control is a common characteristic for all the exceptions related to the undertaking concept. It appears in different forms, such a non-existent possibility to make profit, a more qualitative control of an entity that provide a special service, or a more formalistic approach to control when it comes to regulatory bodies. In essence, the more power the state has over an entity the more likely is it that the entities actions will be seen as outflow of the state. The activity will thus not be seen as an economic one and the entity is not an undertaking. The state control is also essential for bodies governed by public law. If the body is not controlled by the state then there is no risk that the government will be able to control the rewarding of contracts. However, the analysis has shown that the ECJs case law should be modified. An improvement would be to make the case law clearer, introduce a stricter separation test and finally by making procurement in all circumstances an economic activity. These aforementioned changes would improve the internal market and by that coming closer to the goal that is stated in article 26 TFEU.
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**Law comments**

Kenny Carlsson, Mats Bergman, Konkurrenslagen (29 may 2018, Zeteo) comment to 1 chapter 5§