UNIVERSITÀ DEGLI STUDI DI TORINO

Dipartimento di ……giurisprudenza……

Dottorato di ricerca in DIRITTO, PERSONA E MERCATO
Ciclo _XXIX_

State Owned Enterprises (SOEs) under the regulation of public procurement rules: Both as buyer and as seller

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Anni Accademici _____2018___

Settore Scientifico Disciplinare _ giurisprudenza__

Content

Chapter One: Introduction

1.1 Development of SOEs: tendencies and reasons

1.1.1 Development of SOEs after the Second World War

Since the 1930s, and particularly after World War II, numerous State Owned Enterprises (SOEs) were created in both developed and developing countries. The reasons for this may be analysed by means of various perspectives, including the following:

(a) Economic reasons

The global economic crisis of the 1930s revealed the existence of systemic market failure, and the Second World War tested the potential of government to control and participate in the economy. Both of these events shifted public opinion regarding the appropriate role of the state in economic affairs,. Some governments in Europe and North America at that time believed that governmental intervention in the economy would address the failure of the market. They advocated using SOEs to develop economically lagging regions and provide specialized services that were beyond the expertise or resources of traditional government agencies, or to protect industries that were considered essential to future economic growth.[1] The UK, France and Italy all implemented a series of nationalization exercises during this period.

(b) Ideological and political reasons

Communism and socialism tends to advocate public instead of private ownership for operating the economy. Some countries with socialist governments, including the Soviet Union and its satellite countries, nationalised industrial and service enterprises and collectivized agriculture in order to centrally plan their economies and minimize or eliminate market influences.[2] Nationalisation also occurred in China, especially in heavy industry, after the establishment of the People's Republic of China. In 1956, the ownership structure of companies responsible for China's Gross Industrial Output Value was 67.5% State Owned Enterprises (国营企业) and 32.5 % Public-Private Co-operating Enterprises (公私合营企业).[3] Privately owned industry disappeared almost entirely at that time.

1.1.2 Development of SOEs from 1988 to 2007

Rising corruption, management inefficiencies, overstaffing, inflation and rising account

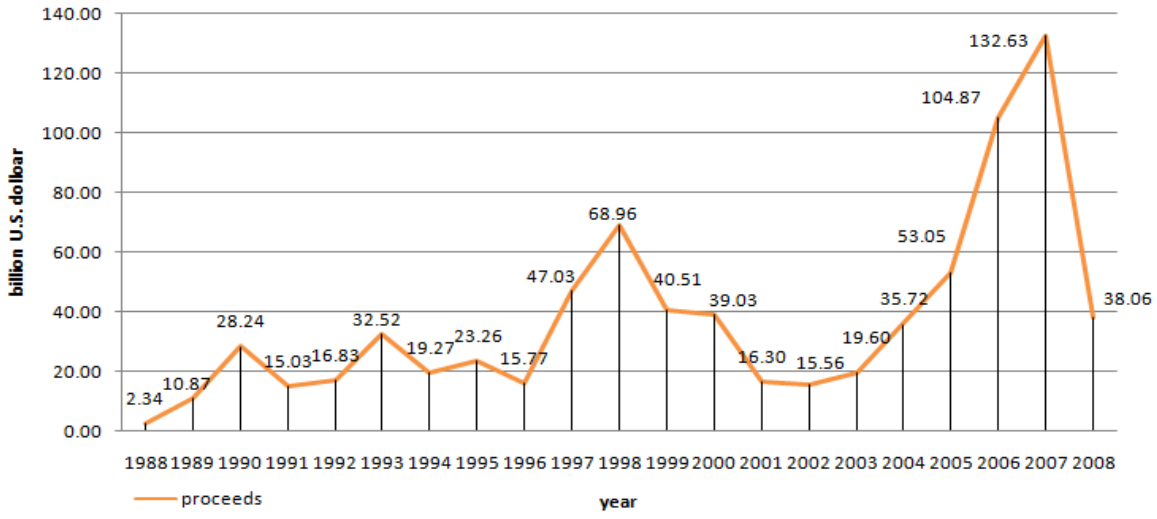
[1]United Nations. Public Enterprises：Unresolved Challenges and New Opportunities, New York, ST/ESA/PAD/SERE/69, 2008, p.22.
[2]United Nations. Public Enterprises：Unresolved Challenges and New Opportunities, New York, ST/ESA/PAD/SERE/69, 2008, p.22.
[3]林毅夫，中国国有企业改革，第 21 页。

deficits in the 1980s made people realize that governments were not immune to failure. Many SOEs suffered from both management deficits and technological shortcomings. As a result of these failures, many governments began to reform the SOEs. One of the most important options was privatisation, which was conducted in many different ways, including "divestiture" and "equitisation".[4] For example, a wave of broad privatisation took place in the United Kingdom during the 1980s and 90s.[5]

Additionally, in 1991 the collapse of the Soviet Union removed ideological and political barriers that had previously hindered capitalist/market-oriented reforms; in the 1980s and 90s large-scale privatisation of SOEs was undertaken in many former Soviet Union Countries.

Global privatisation was paused by the Asian economic crisis of 1999, but overall, the privatisation trend grew sharply from 2003 to 2007. Europe and Asia showed the strongest tendency toward privatisation (see: Graph 1: Global privatisation from 1988 to 2008). For instance, in Europe and Central Asia, the private sector's share of GDP had surpassed 50 percent in 22 of these regions' post-communist countries by 2003—up from only 9 countries in 1994.[6]

Graph 1：Global privatisation from 1988 to 2008



(Source: World Bank Privatisation Database[7])

In addition to privatisation, other policy options exist for reforming SOEs,[8] including the following. (1) Internal governance and management reform, which means improving the

[4]Equitisation means the privatisation of wholly state-owned enterprises by selling a part or all of the assets and liabilities of the SOE to the private sector, thus transforming the SOE into a joint-stock company.
[5]Report "SOEs in EU—lessons learnt and the way forward", July, 2016, p. 20.
[6]Sunita Kikeri and Aishetu Kolo, Public Policy for the Private Sector, Note number 304, February 2006.
[7]http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTFINANCIALSECTOR/0,contentMDK:22936580~menuPK:7994350~pagePK:210058~piPK:210062~theSitePK:282885,00.html.
[8]United Nations. Public Enterprises：Unresolved Challenges and New Opportunities, New York, ST/ESA/PAD/SERE/69, 2008, pp.30-39.

performance of SOEs through internal management reform by strengthening the governance body or imposing hard budget constraints. Several institutional reforms related to the internal governance of SOEs have been undertaken in Sweden since 2007.[9] (2) Commercialisation or marketization; performance of SOEs may be improved through commercialisation or marketization, which emphasizes the deregulation of the market to ensure fair competition for private providers entering the market, as well as fair competition between SOEs and private enterprises. For instance, Italy has introduced unbundled ownership between the gas transmission operators and the gas suppliers; this is a concrete example of profound changes that have been made in the marketplaces in which SOEs operate.[10] (3) Contracting out, which involves SOEs awarding contracts to private enterprise in order to outsource certain functions without changing the public ownership. (4) Public-private partnerships,[11] which are similar to contracted-out or outsourced arrangements, and they combine the advantages of public and private ownership. However, in a public private partnership (PPP), the ownership of the SOE may be changed temporarily or permanently. For instance, if a joint venture is used to provide some kind of public service, the private partner may also hold minority or majority ownership of previous SOEs. However, other types of PPPs, such as concession contracts, may not involve changing the ownership of the SOEs, but may instead simply involve transferring the ownership of the infrastructure.

In China, since the economic reform and opening-up policies began in 1978, SOEs have undergone a long process of gradual and progressive transformation.[12] The reformation of SOEs in China can be divided into several phases. From 1978 to the beginning of 1992, the measure of reform focused on improving the internal management of the SOEs and introducing competition; for instance, advocating separation between the government and the SOEs while leaving in place necessary operating autonomy. However, without a change in the structure of property rights, the effectiveness of such reforms was not realised. Therefore, since the spring of 1992, achieving a "socialist market economy" has become the target of reform. Against this background, although "maintaining the dominant position of public ownership" has been the guiding principle, various forms of whole and partial privatisation have been encouraged. In China, the state share of GDP has dropped dramatically, from 80 percent in 1978 to less than 20 percent in 2003.[13] Furthermore, since the Company Law was introduced in China in 1994, SOEs began to transform themselves into limited liability companies or shareholding companies. Additionally, guided by the principle of "grasping the big, letting go of the small", the central government and local governments have provided different types of authority in terms of controlling SOEs of different sizes and fields. Meanwhile, the government has continued to try to improve the performance of SOEs in the

[9]Report. P.19.
[10]Report. P.21.
[11] United Nations. Public Enterprises： Unresolved Challenges and New Opportunities, New York, ST/ESA/PAD/SERE/69, 2008, P.30 and P.35.
[12]FAN Gang and Nicholas C. Hope, Chapter 16, the role of State-Owned Enterprises in the Chinese Economy, p. 2. See: http://www.chinausfocus.com/2022/wp-content/uploads/Part+02-Chapter+16.pdf.
[13]Sunita Kikeri and Aishetu Kolo, Public Policy for the Private Sector, Note number 304, February 2006.

certain strategic and key sectors of the economy.

1.1.3 Recent development [2008-now]

Economic theories and empirical research have found that ownership is not the determining factor for economic efficiency and that privatisation is not an all-purpose solution.[14] The merits of privatisation are real, but "they are not uniform and they need to be assessed with reference to both the rules of the game and the play of the game".[15] It means whether implementing the privatisation is determined by the basic institutional environment and the governance. The affect of the New Institutional Economics movement has caused governments to change their approach; instead of advocating privatisation, the enhanced corporate governance of SOEs, and improved neutral competition among SOEs and private enterprises, Public Private Partnerships have gradually become the most important option for improving the efficiency of economies that have significant public sector participation.

The following section of this chapter will discuss the development of SOEs in the EU and China during the financial crisis, the size of SOEs and the main activities in which they are involved. Also, the latest developments of SOEs in the EU and China will be outlined..

1.1.3.1 The development of SOEs during the financial crisis

SOEs account for a large share of the output and employment of many countries, and they contributed to the regulation and stabilization of the economy; however, after the outbreak of the economic crisis in 2008, the progress of privatisation was reduced, as noted earlier. Yet, privatisation is still considered a way to reduce public debt in countries characterized by a high level of public debt.[16]

Nevertheless, enhancing the performance and accountability of SOEs continued in the EU countries during the crisis period. For example, Romania introduced corporate governance measures to improve transparency and highlight the costs to society of financially supporting mismanaged companies. To ensure increased transparency, impartiality, accuracy and independence in the recruitment of candidates, Portugal now requires that an independent committee oversee the appointment of SOE board members. In addition, the EU generally has advocated the implementation of PPPs in its member states in order to address the lack of public funds and the weakness of SOE management, infrastructure and public services.[17]

In China, the asset scale of SOEs has increased, and SOEs developed the benefits of the 4 trillion RMB economic stimulus program,[18] announced by China's State Council on November 2008, for minimizing the impact of the global financial crisis. Most of the 4 trillion RMB in funds

[14]Victor Goldberg 1976; Gorge Priest 1993.
[15] Oliver E. Williamson: The New Institutional Economics: Taking Stock, Looking Ahead, Journal of Economic Literature, September 2000, p. 611.
[16]Report, p.21.
[17]http://ec.europa.eu/research/industrial_technologies/ppp-in-research_en.html.
[18] 财政货币政策双管齐下，4万亿资金力撬国内需求，XinHuanet, see: http://news.xinhuanet.com/fortune/2008-11/10/content_10333530.htm, last visited date: 2017-01-14.

and the 10 trillion RMB in supporting bank loans for this fiscal measure were allocated to SOEs. At the same time, the SOEs expanded their activities in competitive markets. However, the reform of the SOEs has been considered stagnant or regressive.[19] For instance, some have suggested that "there have been many subsidiaries of SOEs involved in real estate business that have bid aggressively for land in public auctions in recent years, benefiting from the abundant low-cost capital and bank loans they could get. These actions are seen by the public to have fuelled housing prices that were already too high".[20]

Since the global economic crisis of 2008, many countries have experienced lower economic growth, which challenges the ability of governments with large SOEs sectors to grow. On the one hand, governments may be willing to control important economic sectors through SOEs in order to stabilise the economy and raise the level of employment. On the other hand, extensive SOE activity often diminishes the fiscal margins of those countries. Therefore, governments need to implement measures to make sure their SOE sectors are functioning well.

1.1.3.2 Recent numbers and contribution of SOEs

Although reduced significantly, SOEs continue to have a major presence in many national economies. The following section introduces the size and main fields of activity of SOEs in the Member States of the EU and China.

(1) EU

To describe the situation of SOEs in the EU's 28 Member States, two groups of data have been collected and analysed using the website AMADEUS[21] on the basis of the type of shareholder and the percentages of shares held by certain shareholders. One group (referred to as "Group A") comprises those companies in which public entities—such as public authorities, states and governments—**hold some shares, including minority and majority stakes.** Another group (referred to as "Group B") comprises those companies in which public entities **hold at least 50% of the shares.** This means the companies in Group B are also included in Group A ('Group B' ⊂ 'Group A'). Note that the number of SOEs collected in each Group should be less than the actual number, given the limitations of the database used. For instance, for the numbers of SOEs in Italy, the number included in Group A was 2204 in 2014; however, Istat reports that the total number of active SOEs in Italy was around 7,700 in 2013.[22] Although the figures used in this paper do not precisely reflect reality, the AMADEUS database is still a reliable and available resource for researching SOEs in the EU.

[19] ZHANG weiyin (2015), 为什么国企改革非改不可？(why the reform of SOEs is so necessary?)see: http://finance.sina.com.cn/zl/china/20150908/072623183406.shtml

[20] FAN Gang and Nicholas C. Hope, Chapter 16, the role of State-Owned Enterprises in the Chinese Economy, p. 4. see: http://www.chinausfocus.com/2022/wp-content/uploads/Part+02-Chapter+16.pdf

[21] Adatabase of comparable financial information for public and private companies across Europe, see: https://amadeus.bvdinfo.com/version-2016121/Segmentation.Report.serv?_CID=1735&context=2M1RC5J86CHAL89

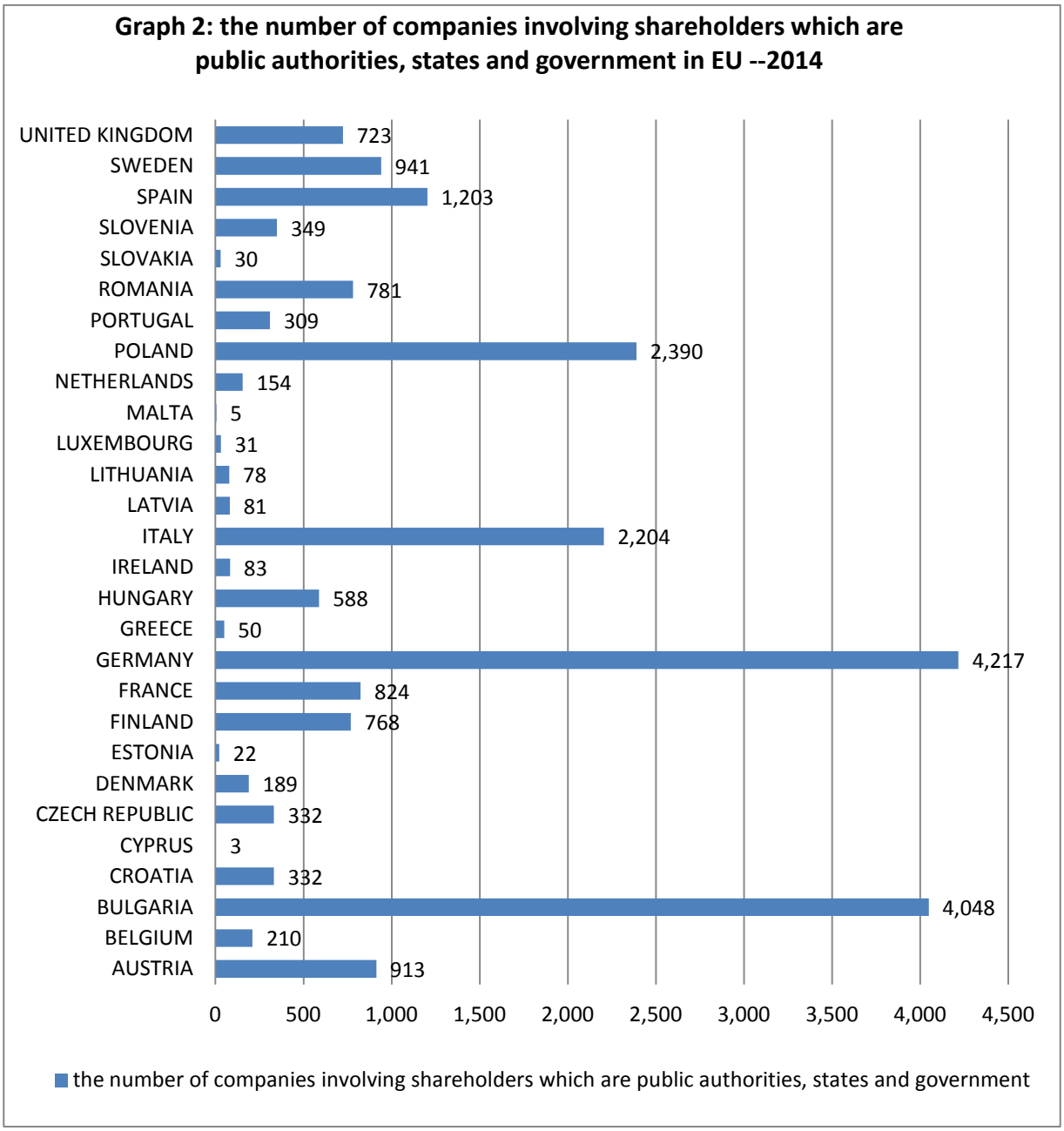
[22] See the number quoted by EU Commission (2016), 'State-owned Enterprises in the EU: Lessons Learnt and Ways Forward in a Post-Crisis Context, European Economy Institutional Paper 031, July 2016, P.73.

The number of companies in Group A is 21,858. Group A may be divided into different levels according to the number of companies in each respective Member State. Germany and Bulgaria represent the highest level; the central and sub-central governments of each have shares in more than 4000 companies. Poland and Italy represent the next level; the government of each holds shares in more than 2000 companies. At the third level are Spain, Sweden, Austria, France, Romania, Finland and the United Kingdom, with government involvement in approximately 1000 companies. In 2014, the total operational revenue of the companies in Group A was around 7.48 trillion Euro,[23] which accounted for approximately 53.59% of the GDP of the EU (28 countries).[24] This means that the Group A companies are accountable for about 53.59% of the EU's total GDP.[25]

[23] AMADEUS only has 79% of those companies' amount of operation revenue, as the difficulty to collect the information, which means the real amount is larger than 7.48 trillion Euro.

[24] In 2014, the GDP in the EU amounted to around 13.958 trillion Euros. See: http://ec.europa.eu/eurostat/tgm/refreshTableAction.do?tab=table&plugin=1&pcode=tec00001&language=en

[25] However, it also should be mentioned that this value also includes the value from the goods, services which provided by the companies' suppliers.



(Source: AMADEUS. Research conducted on 2016-02-01. Most da tabases pr esent the economic situation as of 2014, but some have data for 2015.)

Group B contains 15, 383 companies, the shares of which are mostly held b y public authorities, states and governments. The distribution of the EU Member States' shareholding level in Group B companies is almost the same as for Group A. (See Graph 3--the number of companies in which public authorities, states and governments hold at least 50% of the shares). In 2014, the

total operational revenue of those companies was around 0.776 trillion Euro,[26] which accounted for around 5.56% of GDP in the EU (28 countries).[27]

By comparing these Group A and B percentages for each Member State, and combining the number of Group A and B companies in each country, we may determine the degree of privatisation in each country, which is an indication of the willingness of governments to participate directly in each industry, and of the willingness of governments to control the SOEs by choosing to join the ownership of the enterprise. As shown in Graph 4--percentages of the number of companies in Group B and Group A (%)—Bulgaria (96.15%), Estonia (95.45%) and Latvia (92.59%) are more prone to control a company in which the government has decided to participate. Poland (85.86%), Germany (75.29%) and Spain (72.15%) also have higher numbers for this metric than the average percentage in the EU, which is 70.38%. However, the same parameter in Hungary is 1.36% and in the UK it is 20.6%, which is much lower than the average.

Through this analysis, we find that SOEs are still playing important role in the EU Member States. This conclusion is also supported by the latest report from the EU Commission, titled 'State-owned Enterprises in the EU: Lessons Learnt and Ways Forward in a Post-Crisis Context'.[28] This report states that in Europe, the scope of public ownership in various sectors of the economy is particularly extensive in some of the newer Member States and that SOEs also figure prominently in some of the EU 15 Member States.[29]

Based on the numbers of SOEs mentioned above, new EU Member States Bulgaria, Poland, Estonia and Latvia have more SOEs under the control of the government than other EU members. Among the EU 15, Germany, Italy and Spain have more SOEs under the control of the government. In the UK, France, the Netherlands, Sweden and Finland, certain very large companies are under the control of the governments, but these five countries also have more companies than the EU average in which the governments do not hold the majority share. However, in terms of equity and employment, SOEs are particularly relevant in Finland, Slovenia and France, and, to a lesser extent, in Belgium and Latvia.[30]

[26] AMADEUS only has 64% of those companies' amount of operation revenue, as the difficulty to collect the information. Therefore, this means the real percentage between total operation revenue of those companies and GDP of EU is higher than 5.56%.

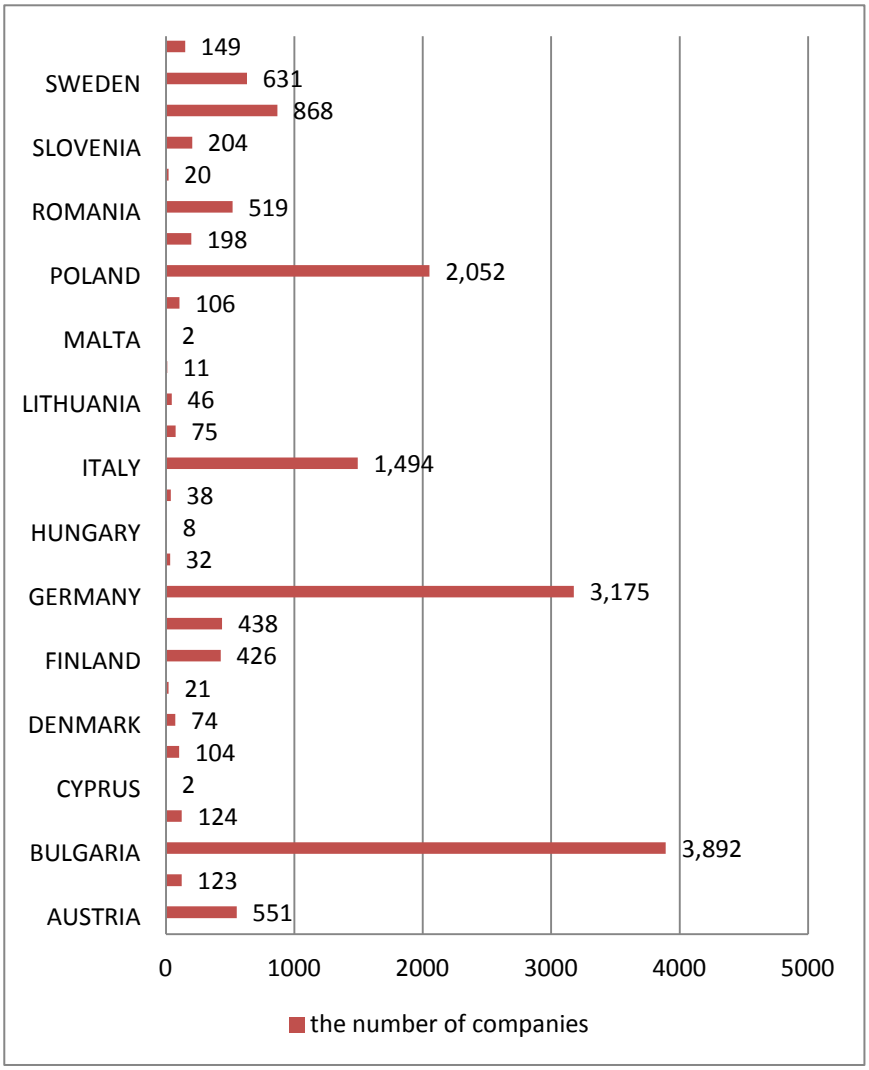
[27] In 2014, the GDP in the EU amounted to around 13.958 trillion Euro. See: http://ec.europa.eu/eurostat/tgm/refreshTableAction.do?tab=table&plugin=1&pcode=tec00001&language=en

[28] EU Commission (2016), 'State-owned Enterprises in the EU: Lessons Learnt and Ways Forward in a Post-Crisis Context, European Economy Institutional Paper 031, July 2016.

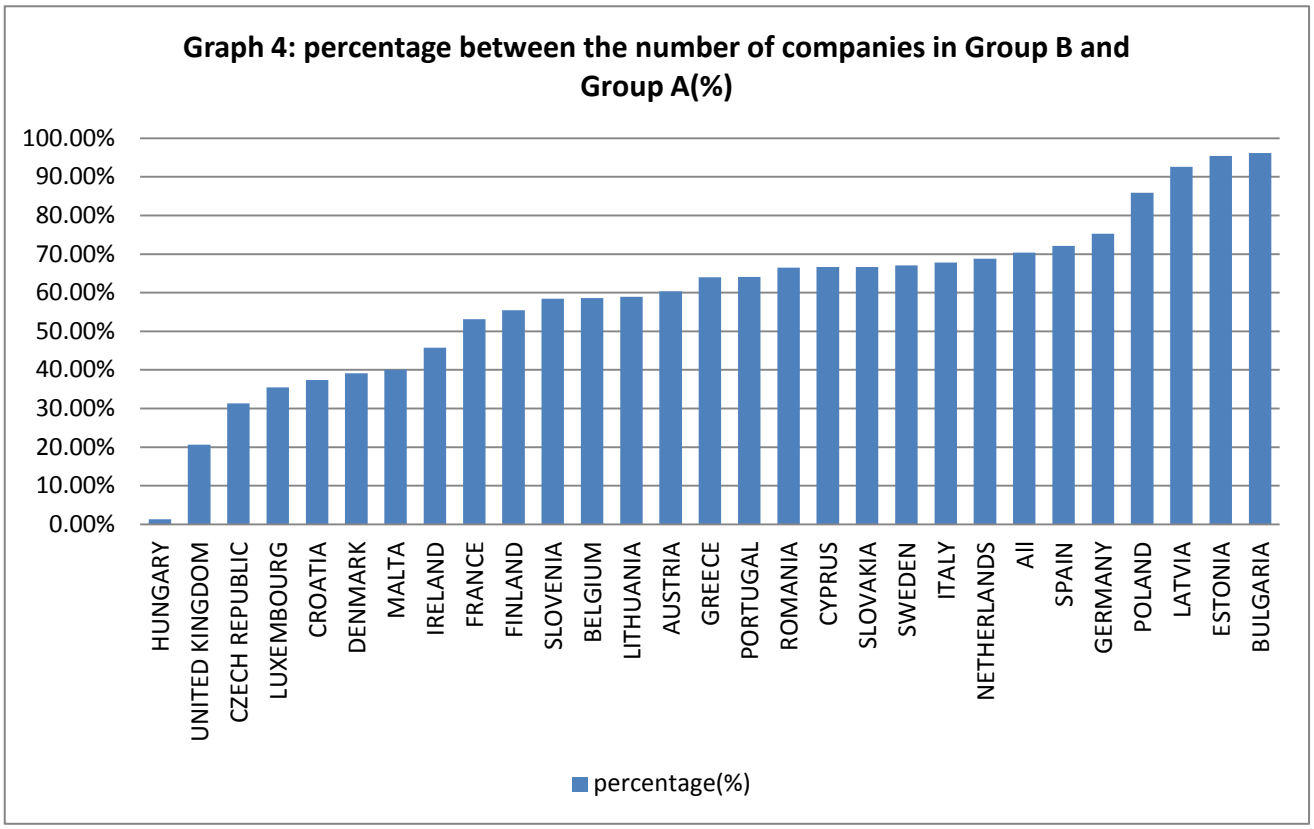
[29] EU Commission (2016), 'State-owned Enterprises in the EU: Lessons Learnt and Ways Forward in a Post-Crisis Context, European Economy Institutional Paper 031, July 2016, P.7.

[30] EU Commission (2016), 'State-owned Enterprises in the EU: Lessons Learnt and Ways Forward in a Post-Crisis Context, European Economy Institutional Paper 031, July 2016, P.7.

Graph 3: The number companies in which public authorities, states and governments holding at least 50% of shares



(Source: AMADEUS. Research was conducted on 2016-02-02. Most databases present the economic situation as of 2014, but some include data from 2015.)



(Source: AMADEUS. Research was conducted on 2016-02-02. Most databases present the economic situation as of 2014, but some have data from 2015.)

(2) China

In 2014, China had 263,348 SOEs,[31] which include two types of enterprise:[32] Pure State Owned Enterprises (纯国有企业) and State Controlled Enterprises (国有控股企业). In a Pure State Owned Enterprises (纯国有企业), the state owns 100% shares of the enterprise. A State Controlled Enterprise (国有控股企业) can be divided into two kinds of enterprises. One is an Absolutely State-Held Enterprise (国有绝对控股企业), which means the state owns 50% or more shares of the enterprise. The other is the Relatively State-Held Enterprise (国有相对控股企业), which means that although the state share is lower than 50%, it is still relatively higher than the percentage of any of the other shareholders, or that the state owns the actual controlling rights in the enterprise according to its shareholding agreement with the enterprise. In 2015, the operational revenue of Pure State Owned Enterprises (纯国有企业) and State Controlled Enterprises (国有控股企业) SOEs was 45.47 trillion Yuan[33] (around 6.40 trillion Euro[34]), which is around 67.19% of

[31] 2015 China Statistical Yearbook, compiled by National Bureau of Statistics of China, http://www.stats.gov.cn/tjsj/ndsj/2015/indexch.htm

[32] http://www.stats.gov.cn/statsinfo/auto2072/201311/t20131104_454901.html this number of enterprises does not include the enterprises which include the state shares, but which doesn't be controlled by the state.

[33] http://qys.mof.gov.cn/zhengwuxinxi/qiyeyunxingdongtai/201601/t20160125_1657262.html

[34] If we use the exchange rate that 100RMB=710Euro, then 45.47 trillion Yuan is equal to 6.40 trillion Euro.

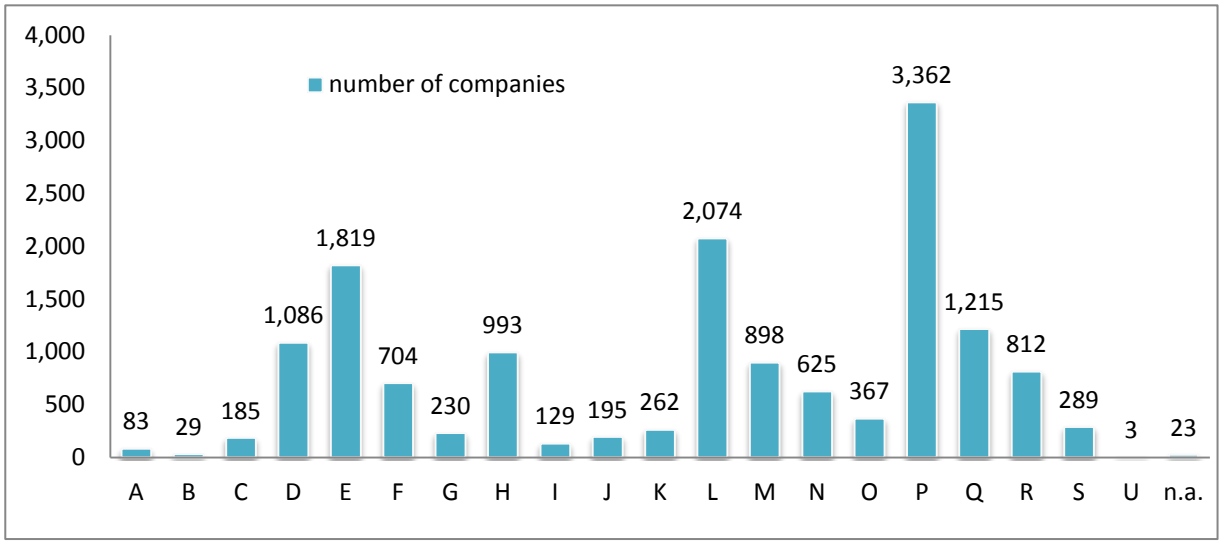
China's GDP.[35]

1.1.3.3 Main sectors presently involved with SOEs

(1) EU

Most of the companies in which public entities hold the majority share (Group B) are in the social service and public utilities sectors. For instance, 21.86% are in public education;[36] 11.82% are in water supply, sewage, waste management and remediation activities; 7.9% are in human health and social work activities; 7.06% are in electricity, gas steam and air conditioning supply; and 6.46% are in transportation and storage. There are some companies that are involved other sectors, such as 13.48% in real estate activities,[37] 5.84% in professional, scientific and technical activities, and 4.58% in construction. This situation shows no significant change when we look into the companies in which the public entities hold some (but not majority) share.

[**Graph 5: The number of Group B companies in each industry sector**]



[35] In 2015, GDP of China is 67.6708 trillion yuan.

[36] There are totally 3582 companies involved in education sector in Group A, while in Group B this number is 3362. However, this 3362 companies are located in the following few countries: Bulgaria(3141); Poland(68); Germany (61); Italy(35); Finland (15); Portugal (12); Spain (9); Sweden (8); Austria (7); Latvia (2); Belgium, France, Lithuania and Slovenia respectively has one. Until now having not found out why the number in Bulgaria is so huge; however, according to other research papers and experience analysis, education services are mostly provided by public sector in EU and it has lower level of marketisation than other sectors, such as water sector.

[37] In European Union Member States, there are plenty of social house project have been implemented through public companies. Hence, it can explain why the number of public companies in this sector is still so high, even though real estate sector has higher level of marketisation.

Industry NACE Version 2.0: A: agriculture, forestry and fishing; B: mining and quarrying; C: manufacturing; D: electricity, gas, steam and air conditioning supply; E: water supply; sewerage, waste management and remediation activities; F: construction; G: wholesale and retail trade, repair of motor vehicles and motorcycles; H: transportation and storage;	I: accommodation and food service activities; J: information and communication; K: Financial and insurance activities; L: real estate activities; M: professional, scientific and technical activities; N: Administrative and support service activities; O: public administration and defence; P: education Q: human health and social work activities; R: Arts, entertainment and recreation; S: other service activities; U: activities of extraterritorial organizations and bodies;

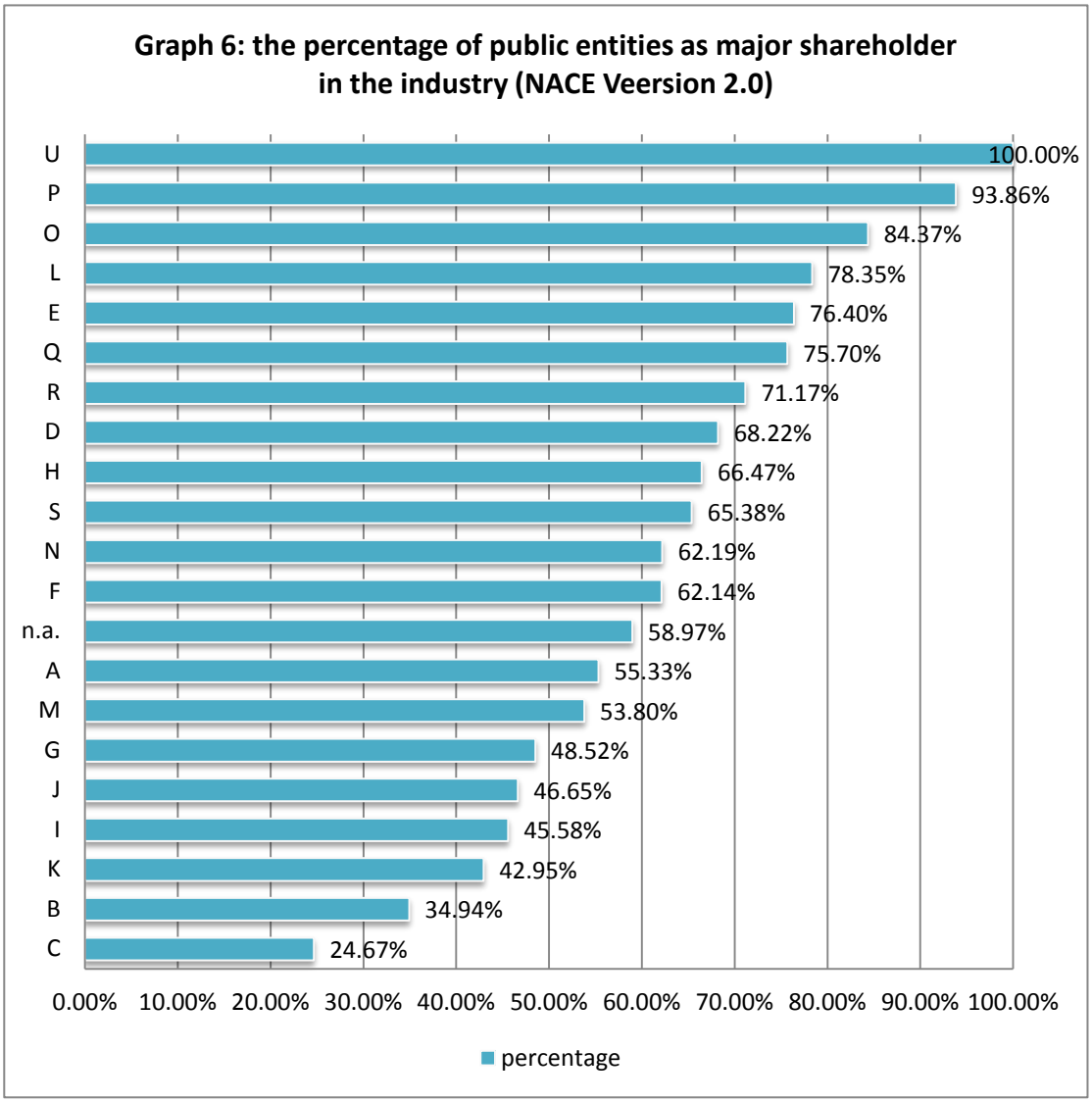
(Source: AMADEUS. Research was conducted on 2016-02-02. Most of databases present the economic situation as of 2014, but some include data from 2015.)

Comparing the number of Group A and B companies in each industry reveals that public entities may hold the major share in each industry. This research found that in general, there is a high possibility of EU Member State governments having majority shareholder control over enterprises in the following industries: the activities of extraterritorial organizations and bodies (100%); education (93.86%); public administration and defence, compulsory social security (84.37%); real estate activities (78.35%); water supply, sewage, waste management and remediation (76.40%); human health and social work (75.70%); and the arts, entertainment and recreation (71.17%). These percentages here do not refer to the possibility of government control over the entire enterprise in each industry. For instance, the percentage noted of 71.17% in the arts, entertainment and recreation means only that in EU Member States, if governments do acquire shares in enterprises that are involved in the arts, entertainment and recreation—such as radio companies, broadcasting companies and casinos, these governments will hold a majority stake in 71.17% of the enterprises in these sectors.

From this analysis, we observe that social service sectors (such as education, health, national security and defence), and public utilities sectors are the two fields in which the governments of EU Member States are most likely to participate and control through SOEs. This conclusion is also supported by the EU Commission's report on SOEs, which quoted the research results of the OECD and stated that 'SOEs play a particularly important role in the network industries'.[38] For instance, in Italy, around 6,000 of 7,700 SOEs are local enterprises. Among them, around 13% of

[38] EU Commission (2016), 'State-owned Enterprises in the EU: Lessons Learnt and Ways Forward in a Post-Crisis Context, European Economy Institutional Paper 031, July 2016, P.7.

local SOEs offer instrumental services in public administration, 23% provide local public services in network industries (such as energy, rail), 43% offer other services of general interest, while more than 21% offers goods or services with no public service obligation.[39]



(Source: AMADEUS. Research was conducted on 2016-02-02. Most databases present the economic situation as of 2014, but some include data from 2015.)

(2) China

In China, SOEs participate in almost every economic sector.[40] From the perspective of the numbers of SOEs, most SOEs are now involved in the rapidly developing service sector. For

[39] EU Commission (2016), 'State-owned Enterprises in the EU: Lessons Learnt and Ways Forward in a Post-Crisis Context, European Economy Institutional Paper 031, July 2016, P.73.

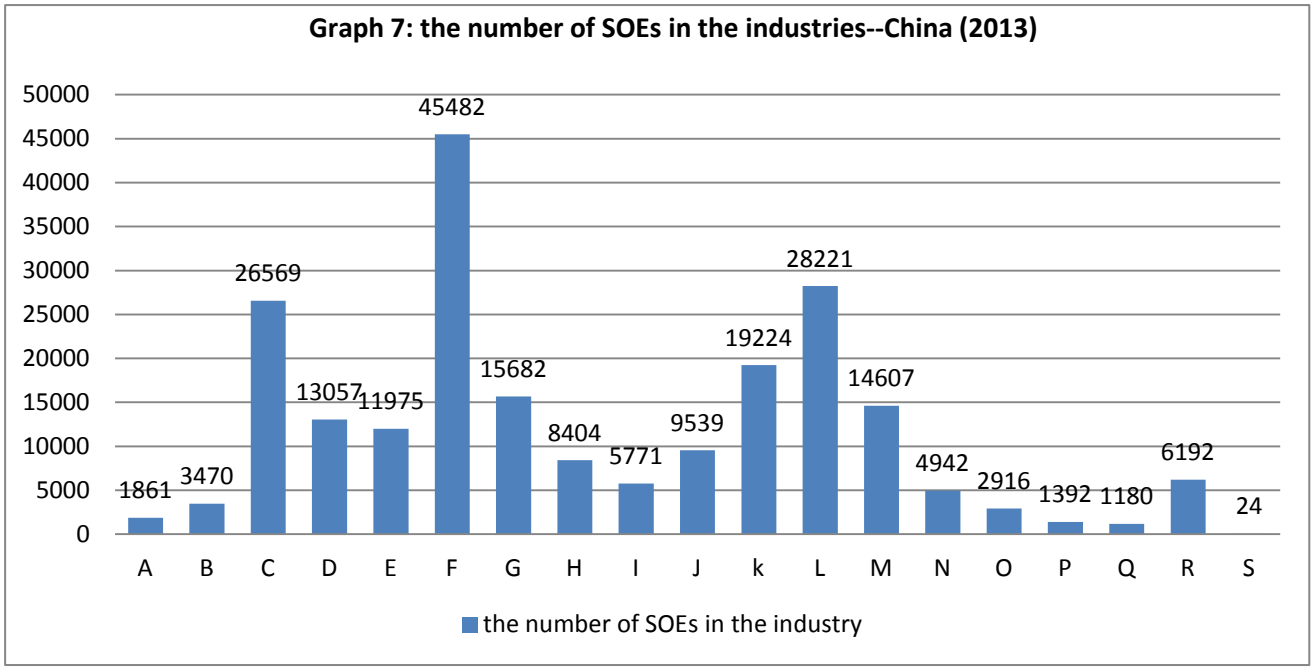
[40] In China, there are two paths to classify the economic sector. One is dividing all industries into three types, which are the first industry, the second industry and the third industry. They usually also have been named respectively Agriculture, Forestry, Animal husbandry and fishery Sector, Industry sector, and Service sector. Another path is dividing all industries into 20 categories, which is called Economic Industrial Classification and similar to the NACE version of EU.

instance, at the end of 2013,[41] there were 165,337 SOEs participating in the service sector; this number accounted for 74.98% of all SOEs. Although only 658 SOEs participated in the agriculture, forestry, animal husbandry and fishery sectors that year, they accounted for 44.28% of the total number of all enterprises in those sectors.

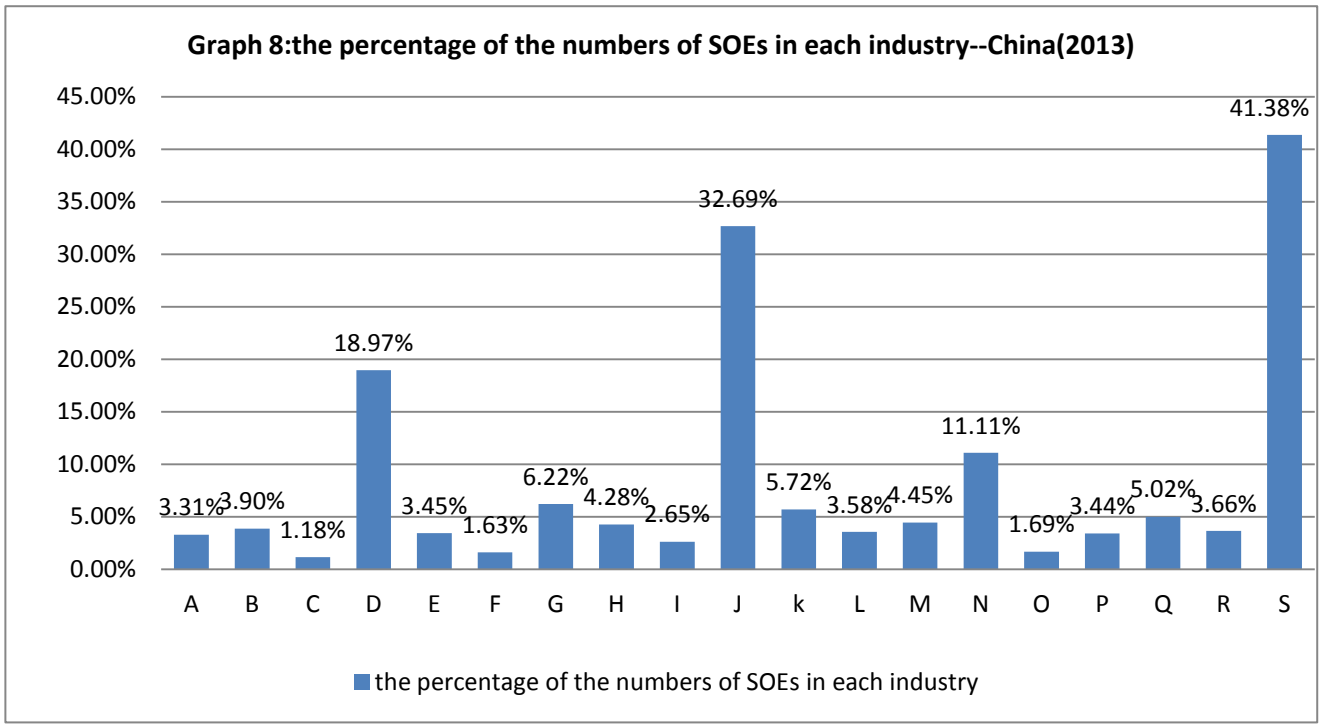
In terms of the number of SOEs in each economic industrial classification, we found that in China, most SOEs participate in "Wholesale and Retail trade activities", in the "Lease and Commercial service industry", and in "Manufacturing". However, comparing the number of SOEs with the total number of enterprises in each industry, we find that "Public administration, social security and social organizations", "Financial service activities", and "Electricity, heat, gas and water production and supply industry" have higher percentages of SOEs.

This analysis shows first that SOEs in China are involved in social service sectors and public utilities sectors as well as in general commercial business. For example, even though 88.37% of the enterprises participating in wholesale and retail trade activities are privately controlled enterprises, there are still 45,482 SOEs that are involved in these activities, and they (the SOEs) account for 11.63% of related enterprises. Second, in China, SOEs compete with the private sector. For instance, both the lease and commercial service industry and the manufacturing industry face competitive pressure from the private sector and also from foreign companies. Third, in China, very few enterprises participate in "public administration, social security and social organizations" activities, as most of these activities are executed by government agencies. Of those few enterprises, 41.38% of them are SOEs, and only 25.86% are enterprises controlled by private entities. Fourth, even though private enterprises are the predominant economic actors in most industries in China, in some industries, there is a relatively high degree of participation by SOEs, as (for instance) in the financial service and public utilities sectors (electricity, heat, and the gas and water production and supply industries). Fifth, even industries that involve neither high numbers nor percentage of participation of SOEs do not necessarily have a high level of privatisation. Instead, in those industries, such as education and human health, most activities are operated by governmental agencies rather than by enterprises or other private actors.

[41] The data is from the third national economic census which has been conducted at the end of 2013.



(Source: National Bureau of Statistics of China[42])



[42]http://data.stats.gov.cn/ifnormal.htm?u=/files/html/quickSearch/pc/pcpczx01.html&h=760&currentName=%E6%8C%89%E8%A1%8C%E4%B8%9A%E5%88%86%E7%BB%84%E7%9A%84%E6%B3%95%E4%BA%BA%E5%8D%95%E4%BD%8D%E6%95%B0

A: Agriculture, Forestry, Animal husbandry and fishery activities (including service activities on these areas) B: Mining C: Manufacturing D: Electricity, heat, gas and water production and supply industry; E: Construction F: Wholesale and retail trade G: Transportation, storage and postal industry H: Accommodation and food service activities I: Information Transfer, software and information technology service industry J: Financial service activities	K: Real estate activities L: Lease and Commercial service industry M: Scientific Research and Technical Service N: Water resource, environment, and public facilities management O: Residence service, repair and other service (居民服务、修理和其他服务业) P: Education Q: Human health and social work activities (卫生和社会工作) R: Culture, sport and entertainment S: Public administration, social security and social organizations

1.1.3.4 Developing tendency of SOEs

The worst period since the 2008 financial crisis has passed, and in order to improve the development of the economy, the reform of SOEs is continuing around the world. The following section of this paper introduces the most recent developments in the reform of SOEs in the EU Member States and in China.

(1) Tendency of SOEs to aid reform in the European Union and its Member States

In EU, the EU Commission has been concerned with the reform of SOEs, as the links between state ownership in SOEs and the state of public finance and public debt have become clear. On the one hand, the participation of government in the capital of public or private corporations can be beneficial for public finances. However, on the other hand, participation in the capital of public corporations comes at a cost and may represent a liability for governments.[43] Therefore, to monitor the potential risks for public finances, some reporting obligations in the EU have recently been established to enhance the transparency of the nexus of public corporations and public budgets. For instance, according to Council Directive 2011/85/EU, Member States shall publish information on the participation of general government in the capital of private and public corporations. Further, the EU commission has pointed out that the principal objective of SOE reform should be to improve accountability and efficiency and privatisation should in most cases be accompanied by market reform. Such modification of the regulatory framework has important implications for SOEs, as exposure to increased competition provides incentives for better management and efficiency gains,[44] according to several specific reports on SOEs in several

[43] EU Commission (2016), 'State-owned Enterprises in the EU: Lessons Learnt and Ways Forward in a Post-Crisis Context, European Economy Institutional Paper 031, July 2016, P.7.
[44] EU Commission (2016), 'State-owned Enterprises in the EU: Lessons Learnt and Ways Forward in a Post-Crisis

Member States and a general report on SOEs in the EU.[45]

Additionally, the EU Commission has pointed out that EU Member States face different reform challenges. For the EU 15 Member States, in which SOEs are still very relevant in network sectors, "the main challenges relate to ensuring a coexistence of SOEs with private players and to implementing public service obligations in a transparent and non-discriminatory manner".[46] For the new EU Member States, due to their historical legacies, SOEs are still a dominant feature in many sectors of their economies. The challenge for them, therefore, is to improve the management of their SOEs, which are facing increasing competition from domestic and global market players. Further, when deciding to privatize SOEs, these countries need to accompany the transition with adequate regulatory reforms to maximize the economic gains.[47]

Italy is one of the EU 15 Member States, but its public debt situation has remained worse than the other EU 15 members since financial the crisis, due in part to the relatively large size and inefficiency of its SOEs. To achieve its commitment to the Europe 2020 Strategy,[48] Italy has established several measures to reform its SOEs by means of its National Reform Programme, which includes the following measures. (1) To restructure local public services by reforming SOEs held by central and local governments and Port Authorities, and to improve the efficiency of public administration, which is essential to improving the investment climate in Italy.[49] Toward this goal, in August 2015, a comprehensive law to reform public administration was adopted, including the restructure and rationalization of SOEs and local public services.[50] In January 2016, drafts were approved of executive legislative decrees for the implementation of the reform of public administration; these drafts have served as the basis for restructuring the rules for government equity investments held by public administrations. Meanwhile, a consolidated act has been adopted with reference to stock companies stipulating a major downsizing of the investments held in unprofitable companies.[51] (2) To privatise SOEs and real estate, to modernise the State-held companies and reduce the public debt. According to the privatisation plan, several SOEs will be privatised using several tools, including IPOs, mergers and selling shares to private companies.[52] Furthermore, for SOEs that provide public utilities at local levels, such as water,

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Context, European Economy Institutional Paper 031, July 2016.

[45] For these publications please visit the following website of EU commission: http://ec.europa.eu/economy_finance/publications/index_en.htm

[46] EU Commission (2016), 'State-owned Enterprises in the EU: Lessons Learnt and Ways Forward in a Post-Crisis Context, European Economy Institutional Paper 031, July 2016, P.2.

[47] EU Commission (2016), 'State-owned Enterprises in the EU: Lessons Learnt and Ways Forward in a Post-Crisis Context, European Economy Institutional Paper 031, July 2016, P2.

[48] For details about the Europe 2020 strategy and national reform program, please visit: http://ec.europa.eu/europe2020/europe-2020-in-your-country/italia/national-reform-programme/index_en.htm

[49] Ministero Dell' Economia e Delle Finanze(2016), Economic and Financial Document 2016, Section II: the National Reform Programme, p. IV, see: http://ec.europa.eu/europe2020/pdf/csr2016/nrp2016_italy_en.pdf

[50] Deleghe al Governo in materia di riorganizzazione delle amministrazioni pubbliche. (15G00138) *(GU n.187 del 13-8-2015)* http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2015-08-07;124

[51] Ministero Dell' Economia e Delle Finanze(2016), Economic and Financial Document 2016, Section II: the National Reform Programme, p. 46-47.

[52] For instance, Fincantieri (acting in the fields of shipbuilding—crusie liners, mega yachts, naval vessels, oil & gas vessels), TAG (gas transportation), CDP Reti (gas transportation and power high voltage), Rai Way, (TLC infrastructure provider for RAI broadcast), ENEL (multi-national power company), Posteitaliane (Postal services, financial services, insurance, ICT, logistics). For more information about the privatisation in Italy, please visit the

electricity, waste collection and management, Italy plans to open them to private control and significantly reduce their numbers through mergers. (3) To extend public procurement procedures to non-covered sectors as one part of an overall public finance reform in Italy. According to a spending review in the 2016 Stability Law, the public procurement procedures extended to Social Security Funds, Fiscal Agencies, National Health System bodies and local-owned companies.[53]

(2) A recently initiated new cycle of reform for SOEs in China

In 2015, the government of China began a new cycle of reform of SOEs to improve internal governance, external monitoring, the efficiency of allocating state capital and the structure of the national economy.[54] To balance between the process of market-led development and the strategic role of SOEs in China, the reform divides SOEs in two types: the commercial type (商业类) and the public interest type（公益类）. These classifications should accord with the development objectives and different roles, situations and development demands of SOEs involved in the development of the economy and society.

Commercial type SOEs should operate commercially on the basis of the requirements of marketization. The main purposes of commercial type SOEs are enhancing the vitality of the state-owned economy, enlarging the function of the state capital and realising the value-keeping and value-adding of state-owned assets. Two kinds of commercial type SOEs have been mentioned by the State Council in the Opinion on Deepening the reform of SOEs[55]: (a) commercial type SOEs involved in fully competitive industries and fields; and (b) commercial type SOEs involved in important industries or fields relevant to national security or the lifeline of the national economy and commercial type SOEs that mainly undertake major special tasks.

Commercial type SOEs involved in fully-competitive industries and fields should principally execute reforms of joint-stock companies that are actively seeking national capital or non-national capital. The state can hold absolute majority shares, or relative majority shares, or just some shares in those companies; the state should also promote the listing of this kind of SOE overall in the stock exchange market.

For the commercial type SOEs involved in important industries or fields relevant to national security or the lifeline of the national economy, or undertaking major special tasks, absolute or relative majority shares should be held by the state. Meanwhile, the Chinese government supports non-national capital participation in this kind of SOE. Among this kind of commercial type SOE, for SOEs pursuing activities in natural monopoly industries, the following reforms should be made:

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following website of the Ministry of Economy and Finance:
http://www.dt.mef.gov.it/en/attivita_istituzionali/privatizzazioni/

[53] Minister of Economy and Finance (2016), Italy's Strategy for Reforms, p.68. see:
http://www.dt.mef.gov.it/export/sites/sitodt/modules/documenti_it/analisi_progammazione/strategia_crescita/0606 2016_Italy_Strategy_for_Reforms.pdf

[54] Guiding Opinions of the Central Committee of the Communist Party of China and the State Council on Deepening the reform of SOEs(《中共中央、国务院关于深化国有企业改革的指导意见》), August 24 of 2015, see: http://news.xinhuanet.com/politics/2015-09/13/c_1116547305.htm

[55] Ibis.

(1) implementation of the separation between government and enterprises（政企分开）, (2) separation between government and capital (政资分开), (3) operating concessions. Improving monitoring will be the main goal of these reforms. According to the characteristics of the industries involved, important reform measures will include implementing separation between network operations and the transportation of goods, opening competitive businesses and promoting the marketization of public resources allocation. SOEs that should be wholly owned by the state should be able to absorb other sources of state capital to achieve diversification of the equity. Additionally, special businesses and competitive businesses should be effectively separated, independently operated and have independent accounting.

The main purpose of public interest type SOEs is safeguarding the wellbeing of the people, serving society and providing public products and goods. Reforms for this type of SOE emphasises introducing market mechanisms to improve efficiency and capability. Public interest type SOEs may take the form of being wholly owned by the State, but they also may advocate for the diversification of investors when applicable. Further, public interest type SOEs are encouraged to purchase public services and use concessions to invite non-SOEs to participate in their operations.

(3) Increasing concerns of SOEs operating in international trade and investment

Excepting those countries with large SOE sectors, we find that a number of countries are paying increasing attention to the foreign SOEs that operate in their jurisdictions—including in the context of trade and investment agreements—with a view to gauging their commercial orientations and likely impacts on the competitive landscape.[56]

1.2 The role of public and private actors in the economy, and their impact on the legal regulation of SOEs

As has been previously discussed, SOEs are still active in different sectors around the world. For example, SOEs are still playing important roles in providing traditional 'public goods and services' in the public utilities and social service sectors: water, transportation, energy, communications, waste collection and healthcare services. Additionally, SOEs are pursuing both commercial and non-commercial activities. Meanwhile, as the development of privatisation in several sectors of countries increases, private companies have entered the utilities sectors and are providing public goods or services. Hence, the distinction between public and private in terms of both the economy and economic actors has become blurred; this distinction used to provide a basis for legal regulation.

1.2.1 The sphere of public and private in economy and their impact on the legal regulation of SOEs

Generally, it is possible that both private enterprises and SOEs could participate in three types of economic sectors.

[56] OECD, guidelines on corporate governance of SOEs (2015).

First, the economic sector that consists of free markets. In this kind of economic sector or market, there is less legal regulation governing the decisions of the participants. For instance, the participants in the market have full autonomy to make decisions for their operations, including the pricing of their products or services and their procurement decisions.

Second, the economic sector that consists of regulated markets. Compared with the free markets, in regulated markets, the decisions of the participants are regulated more broadly and deeply, for various economic reasons based on the characteristics of the sectors. For instance, because of conditions of natural monopoly, certain economic sectors traditionally have been regulated, such as electricity, water supply, rail and telecommunication. The decisions of the participants in these sectors have been limited at certain levels through State or government legislation to protect the interests of customers. From an economic perspective, the State can generally choose between implementing pricing and competition regulations, which are implemented in the form of vertical and horizontal legislation, such as telecommunications laws and competition laws, respectively.

Third, the economic sector that consists of 'State operation sectors'. In some sectors, such as those that concern the public interests, a government may decide to provide certain goods and services itself, including controlling SOEs. For instance, the postal service sector is customarily operated through SOEs, given the reliance of the government on its universal service. As for the development of the economy, certain competitive businesses have also grown up in the 'State operation sectors'; for instance, the several private postal delivery companies that exist around the world. The main legislation regarding these sectors, which are not like the ones in the sectors mentioned above, has more authority over, and contains more rules about, the obligation of the participants. This legislation, instead of market forces, establishes the administrative rules that authorize and monitor the power of the participants in this type of sector.

In terms of procurement regulation, participant behaviour differs on the issue of whether procurement in these sectors should be regulated. First, in the free markets, where participants have the freedom to make their own decisions, including procurement decisions, and customers have the right to choice suppliers in the market; therefore, generally it has been considered that there is no need to regulate the procurement activities of the participants.

Second, regarding the regulated markets, provisions that affect entrance qualifications and price determination are usually contained in the relevant market rules; however, whether procurement activities in the regulated markets should be regulated or not is still controversial. The arguments concern the balance between public interest and the autonomy of companies pursuing profit maximization. Procurement costs contribute to the cost of the product, which will ultimately be paid by the consumer. If the market is a monopoly, the providers will have no incentive to reduce costs and consumers have few or no opportunities to change providers, so it will harm the interest of the consumer for providers to be wholly unregulated. Nevertheless, companies are responsible for their own behaviour and bear the risk of losing profits; they pursue

their freedom to organise their procurements against the risk of losing customers.

Third, the activities involved in the 'State operation sectors' have generally been considered to be one part of the function of the State, and the State undertakes the responsibility to provide certain goods and services to its citizens, for free, or at cost or for some price that is lower than cost. Public funds are supplied to support or make up for the losses of the participants involves in these sectors. Therefore, the procurement activities of these actors are regulated by procurement laws to save public funds and improve the efficiency of the use of public funds.

1.2.2 The distinction between public and private actors in the economy and their impact on the legal regulation of SOEs

According to a consensus of social sciences thinking, there is an approach one may follow to distinguish public actors from private actors, even though there is no universal standard for distinguishing them from each other. Generally, public actors and private actors are regulated by different laws, private laws and public laws. Traditionally, private laws regulate the relationships between equal actors, and public laws are applied to activities between unequal actors, some of which are public actors with administrative powers.

However, since the public and private sectors have begun to overlap in certain industries, the distinctions between public and private entities are less certain. Some public actors are in the 'State operation sectors' and regulated markets also participate in the free market; for example, public universities also provide consultant services in the free markets. Private entities also participate in the former 'State operation sectors' to provide goods and services in the form of concessions or public-private-partnerships.

From the perspective of procurement activities, the procurement activities of private actors and public actors typically have been treated in different ways. Normally, the procurement activities of private actors do not need to be regulated, as private actors take responsibility for their procurement activities, and they assume the burden of the risk of loss and bankruptcy. However, to improve the efficiency of public funds and increase competition, integrity and transparency,[57] many countries over the past centuries have gradually enacted legal rules for regulating the procurement activities of the public sector. Public actors used to demand that firms create government-unique versions of similar goods and services.[58] Also, the purchasing methodologies of public actors have not always been efficient, lacking (for example) competition and preferring direct awards of procurement contracts. Recently, modern rules for public procurement have been enacted that aim to create a procurement market that is similar to

[57] Steven L. Schooner has briefly addressed nine goals frequently identified for public procurement systems: (1) competition; (2) integrity; (3) transparency; (4) efficiency; (5) customer satisfaction; (6) best value; (7) wealth distribution; (8) risk avoidance; and (9) uniformity. See, Steven L. Schooner(2002), Desiderata: objective for a system of government contract law, 11 Public Procurement Law Review.

[58] See：Steven Kelman (1998), Buying Commercial: An introduction and framework, 27 Public Contract Law Journal, 249; Steven L. Schooner, Commercial Purchasing: The Chasm between the United States Government's Evolving Policy and Practice, chapter 8 in Public Procurement: The Continuing Revolution, Arrowsmith&Trybus (eds.), 2003.

commercial procurement. For instance, procurement rules in the United States have supported mimicking the most successful buying practices of business and consumers and relying more heavily upon existing goods and services already produced in the marketplace.[59]

However, there are also some exceptions. If the government decides to provide public goods or services through its internal organizations, it may order internal organizations (public actors) to execute the necessary transactions. For instance, sometimes government decides to award contracts to its internal organizations (public actors), especially SOEs, to provide public service. In some public procurement regimes, such as those of the EU, which respect the autonomy of the Member States to organize their resources, the situation just mentioned would fall outside of the scope of public procurement rules when certain conditions are met.

Some SOEs are located in the middle of these two types (public sectors and private sectors.) In some cases, they are closer to the public sector, such as when SOEs undertake certain functions of government. However, in some other cases, they are closer to the private sectors, such as when SOEs participate in commercial activities and compete with private actors. Therefore, when considering the role of SOEs under public procurement rules, several issues arise.

1.3 Research questions

1.3.1 The different roles of SOEs under public procurement regulations

When dealing with procurement and SOEs, the first distinction that must be made is between a) SOEs acting as buyers and b) SOEs acting as sellers. Concerning a) SOEs acting as buyers, the policy question is whether they should be treated as private economic operators (and as such, free to buy from whomever they choose following any procedure they devise), or rather, and keeping in mind that they are under the control of the State, they should follow public procurement rules? Concerning b) SOEs acting as sellers, they should in principle act according to the rules of the buyer. If the buyer is a private person, the transaction will be ruled by private law. If the buyer is the State, public procurement rules will apply. However, as already noted, in some regimes, procurement from SOEs is treated differently, and public procurement rules may not apply.

1.3.1.1 SOEs as buyer

Up to this point, whether SOEs should be regarded as procurers under public procurement regulations has been uncertain. First, some SOEs may execute some functions of government, which means they should be treated as a part of government. Second, some SOEs may not be regarded as part of government, but they may be influenced by the government in their decisions about public procurement. For instance, the government may direct SOEs to buy national products. In this case, SOEs cannot make their procurement decisions based only on economic considerations as private enterprises pursuing maximum profits. Third, SOEs may be involved in

[59] Steven L. Schooner, Commercial Purchasing: The Chasm between the United States Government's Evolving Policy and Practice, chapter 8 in Public Procurement: The Continuing Revolution, Arrowsmith&Trybus (eds.), 2003.

competition with private entities. As the previous analysis noted, in some industries, SOEs compete with private entities, so they also feel pressure from the market. If these SOEs follow the procedures of the public procurement rules, it may affect their efficiency, as they would lose the freedom to make the best commercial decisions about procurement.

Therefore, further research is needed to determine whether SOEs should be regarded as procurers under public procurement regulations, and which kinds of SOEs should be regulated by public procurement laws. Especially in cases in which the SOEs are not considered part of the government, should these SOEs obey the rules of public procurement?

Additionally, for those countries that already regulate the procurement activities of SOEs, the question arises as to what rules should be applicable to the new PPP type contracts that are used broadly in developed and developing countries for delivering public services.

One important form of PPP is often called an Institutional PPP (IPPP).[60] The government invites market participants—including, potentially, SOEs—to share the capital of an existing SOE or to create a new entity—often called an SPV—by establishing cooperation between private entities and SOEs (or other public entities). Aside from the question of whether the contract that sets up an IPPP should be awarded according to public procurement rules, the problem here is again whether the procurement activities of the SPV should be regulated by public procurement rules.

Additionally, if the procurement activities should be regulated, should the rules applicable to State procurement apply? Or should lighter rules apply in accordance with the commercial or economic characteristics of these SOEs?

1.3.1.2 SOEs as seller

Generally, public procurement rules regulate all the procurement activities of procurement entities (this term refers to all public entities that are regulated by procurement rules). However, some cases, such as when procurement entities award a contract to another entity to provide goods, services and works, are not regarded as public procurements. For instance, a procurement entity may award a service contract to its internal body, which is regarded as an entity that conducts only internal activities and is not normally regulated by public procurement rules. The basic rationale is that this kind of contract or procurement award occurred internally (within the entity), and that the overall entity has the freedom to organize its activities according to its needs and thus may use in-house providers or may choose to outsource. If the entity decides to use in-house providers, it can award a contract directly to its internal organization, and it does not need to outsource the contract.

SOEs typically have close relationships with procurement entities and often provide goods, services and works to procurement entities. Under these circumstances, should an internal

[60] See: Commission interpretative communication on the application of Community law on Public Procurement and Concessions to institutionalised PPP (IPPP) [2008/C 91/02 –008/C 91/02http://eur-lex.europa.eu/.

transaction such as the one just described be regarded as in-house provision? Should it be regulated by public procurement laws? If not, then what kinds of conditions should be met and why?

Further, if a procurement entity decides to outsource a contract, then the transaction should be regulated by public procurement rules. However, in the public market, is there a need to make sure the competition between SOEs and private entities is equal, and if so, how should this be done?

1.3.2 Different levels of public procurement regulation

Public procurement rules can be divided into national and supranational levels. National level rules are rules enacted in one country, either at the central or sub-central level. The supranational level refers to rules that are enacted that affect more than one country, including international rules such as the WTO-Government Procurement Agreement and regional rules such as EU public procurement directives.

Rules at these different levels may have different purposes in terms of regulating the procurement activities of SOEs. For example, at the national level, they may focus more on efficiency to improve the value of public funds, or on diminishing corruption, or they may emphasise a national policy of purchasing domestic goods. However, at the supranational level, rules may put more emphasis on the purpose of opening the public procurement market, including forbidding the implementation of a "buy domestic" policy, which creates national discrimination. The distinct purposes of the national and supranational levels may mutually. Hence, it is necessary to discover how conflicts between the objectives of different levels of procurement rules have been resolved.

Given this background about SOEs, it is necessary to understand how national and supranational rules coincide with each other as they relate to SOEs. Especially in the WTO-GPA, how has this issue has been treated and what problems exist?

1.3.3 Cooperation between horizontal rules regarding awarding public contracts from or to SOEs

From a horizontal perspective, several rules that are relevant to public procurement rules also govern the awarding of a public contract to or from SOEs. First, let us consider the general competition rules of the market. SOEs are one kind of participant in the commercial markets, and they may have special influence on the competitive structure of those markets. Should both public procurement rules and general competition rules apply to the procurement activities of SOEs? For instance, if SOEs operate in one competitive industry, should their procurement activities be regulated by public procurement rules? Or, if SOEs operate in one monopoly industry, should their procurement activities be regulated by public procurement rules?

Secondly, let us consider state aids or subsidies rules. SOEs are usually important recipients of public funds or other kinds of grants from the government; these are usually referred to as state

aids or subsidies. In many countries, the largest share of subsidies is devoted to preserving loss-incurring SOEs.[61] From the buyer perspective, how might state aid influence the scope of public procurement regulations of SOEs? From the seller perspective, the question of whether awarding public contracts to SOEs should be considered a kind of state aids or subsidy remains controversial. Further, how should public procurement rules cooperate with state aid rules regarding awarding public contracts to SOEs?

Additionally, these kinds of cooperation or overlap also exist at the supranational level. For instance, at the EU level, competition laws, state aid laws and public procurement laws have different regulatory purposes. At the international level, cooperation exists between WTO-GATTs and WTO-GPA and other kinds of international trade and investment agreements.[62] How should public procurement rules cooperate with other horizontal rules at the supranational level on the issue of SOEs?

1.4 Why the research questions are relevant

From the discussion in Section 1.1 above, we may observe that SOEs still play important roles in developed countries and developing countries, from the perspective of the quantities of SOEs and the sectors involved. SOEs participate in almost all sectors of the economy, especially the social services and public utilities sectors. In recent years, the reform of SOEs has continued around the world. Enhancing the efficiency and internal governance of SOEs has been considered an important element of reform, along with privatisation. Further, after the recent financial crisis, improving cooperation between public and private entities to support the improvement of infrastructure and public services has been advocated around the world. Therefore, concessions and public private partnerships also have been considered new tools for the reformation of SOEs.

From the economic perspective, regulating the procurement activities of SOEs through procurement rules contributes to reducing the production costs of SOEs, as this injects the element of competition into the procurement rules. However, procurement rules also may impair the efficiency of the SOEs, given the limited time and procedural requirements in the rules.

From the legal perspective, we know that not all SOEs have been regulated by the procurement rules, and not all the procurement activities of certain SOEs have been regulated by the procurement rules. Given the mixed characteristics of some SOEs—i.e., those that are active in all sectors of the economy—we may say that some exist in a grey area between public and private actors. Thus, it is necessary to concentrate on the research questions described above to discuss the new development tendencies of SOEs.

Particularly in China, the question of whether the procurement activities of SOEs should be

[61] OECD Roundtable on competition, state aid and subsidies, 2011. P.9.

[62] For instance Comprehensive and Progressive Agreement for Trans-pacific Partnership (CPTPP), which is a new free trade agreement between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam. see: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/text-texte/cptpp-ptpgp.aspx?lang=eng

regulated by procurement rules is still controversial at both the domestic and international level. At the domestic level, the reform of SOEs has entered a new phase, which focuses different measures of reform on different types of SOEs. The SOEs have been divided into two main types: commercial and public interest, according to the different functions of the SOEs involved. The new reform direction for the SOEs provides an opportunity to consider whether the procurement activities of SOEs, or at least of certain kinds of SOEs, should be regulated by procurement rules. At the international level, the China has been working toward accessing the WTO—GPA since the end of 2006. As a country with large SOEs sectors, whether the SOEs of China should be covered under GPA is a hot issue in the negotiations. Therefore, the research questions involved in this dissertation have great meaning for recognizing and solving the relevant issues related to reform of SOEs in China and to the process of China's accession to the GPA.

This dissertation compares the public procurement rules of the EU to those of China in order to frame the discussion of the research questions that have been proposed. First, this paper covers the diverse situations of SOEs in the EU. In new EU Member States, SOEs participate in almost every sector, and in the EU 15 Member States, SOEs mainly participate in public utilities sectors. Second, EU public procurement rules set the minimum requirements that should be implemented by all Member States. This paper also considers the uniformity of SOE regulation across the EU; namely, whether the determination of which SOEs should be covered by public procurement rules, and the conditions that should be present to determine the coverage of the procurement rules, are the same in all EU Member States. This means asking whether the current EU rules on procurement have resulted from a consideration of all kinds of SOEs in EU Member States, and whether these rules apply to each Member State. Third, the EU public procurement regime has been considered a modernized public procurement regulation model, and it has contributed to several international government procurement regimes, such as WTO-GPA and the UNCITRAL Public Procurement Model Law. Fourth, as a GPA Party, the EU has opened the broadest government procurement market, and it is the loudest voice arguing that China should put include its SOEs under the GPA. The conclusions of this research will provide a certain understanding of the differences and similarities in the roles of buyer versus seller SOE under government procurement rules. Further, it may also provide a potential approach for China to adopt when it decides whether to provide procurement rules for SOEs, and for what kind of SOE. At the international level, this research can help inform Chinese officials about the requirements of the GPA and the logic of the EU's offer regarding SOEs under the GPA. It also may help EU governments understand why China has some reasons to limit the number of its SOEs that fall under the GPA.

1.5 What SOEs are mentioned in this dissertation?

State Owned Enterprises (SOEs) are also called Public Enterprises (PEs)[63] or Government

[63] See: M. Adil Khan, Reinventing Public Enterprises, in United Nations. Public Enterprises: Unresolved Challenges and New Opportunities, New York, ST/ESA/PAD/SERE/69, 2008, p.3. Prahld K. Basu, Reinventing Public Enterprises and Their Management as the Engine of Development and Growth, also in the report mentioned

Controlled Enterprises (GCEs)[64]. There are diverse definitions for each of those terms, as each is used in a vast range of fields.[65]

Generally, SOEs have been defined through two relevant perspectives: ownership and control. From the ownership perspective, Broadly speaking, SOEs can be classified into three types: wholly public share holding enterprises, majority public share holding enterprises and minority public share involved enterprises. More narrowly conceived, SOEs refer only to those enterprises in which public entities hold a whole or majority share, excluding enterprises in which public entities hold a minority share.

However, from the perspective of the economic theory of public enterprise, some research has argued that the type of ownership is not the main distinction between a public enterprise and a private enterprise.[66] It has been argued that 'the main difference is the multitude of political and economic determinants of public enterprises' activities, as compared to the mainly commercial determinants of the activities of private enterprises'.[67]

From legal perspective, ownership is not the only factor, which has been employed for distinguishing SOEs from private enterprises. Even if the entire or a major share of the enterprise is not owned by public entities, the enterprise may still be considered a public enterprise. For instance, under certain conditions, even though the government only holds a minority share, or has no share, of the enterprise, the government may yet control the decisions of the enterprise in certain ways. Therefore, from the control perspective, the fact that the decisions of the enterprises may be controlled by the government is much more important than the ownership element.

In this dissertation, the term "SOEs" refers to the broader definition of "ownership" for the following reasons. First, it is difficult to define the 'control' element. From the legal point of review, it is difficult to set standards for determining the 'control' element; the WTO-GPA has not yet reached agreement on this. Therefore, if the 'control' element is used to define the term 'SOEs' in this dissertation, it will render the boundary of the research uncertain. Second, broad "ownership" is a basic and dominant element for defining SOEs. To a certain extent, the 'ownership' element could be considered as actually having implied the 'control' element.[68] Most of time, holding the whole or a majority of the ownership means controlling the enterprise. Third,

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above, p.11.

[64]Prahld K. Basu, Reinventing Public Enterprises and Their Management as the Engine of Development and Growth, also in the report mentioned above, p.11.

[65] See: Mary M. Shirley 'Managing State-owned Enterprises', World Bank Staff Paper NO.577; Renalto Mazzoline, 'Government Controlled Enterprises' in International Strategic and Policy Decision, John Wilsey & Sons; United Nations. Public Enterprises: Unresolved Challenges and New Opportunities, New York, ST/ESA/PAD/SERE/69, 2008.

[66]For instance, the economic theory of public enterprises, see: Dieter Bös: Public Enterprise Economics: Theory and Application, 3rd version, Elsevier Science Publishers, 2014. It has been argued that the center of an economic theory of public enterprises is the consequences of government objectives and constraints for an enterprise that tries to 'make the best of it'. Price has been considered as the best indicator of the consequence of combining such political and economic determinants of public enterprises. Therefore, price and price regulation have been focused by the relevant researchers.

[67] Dieter Bös: Public Enterprise Economics: Theory and Application, 3rd version, Elsevier Science Publishers, 2014, p.13.

[68] This also has been accepted by OECD, see OECD guidelines on corporate governance of SOEs(2015).p.16

the broader 'ownership' element includes the situation of holding the minority ownership. This means that even though we define the term 'SOEs' through the 'ownership' element in this dissertation, when we discuss the relevant issues, such as the coverage of government procurement rules, the 'majority ownership' element will not be the only element considered. Therefore, throughout the dissertation, the term "SOEs" is only used in relation to enterprises in which public entities hold the ownership, even if only a minority ownership. In some cases, an enterprise in which public entities hold no share, but which is still controlled by public entities, will not be covered under the research scope of this dissertation.

1.6 Literature review

There is no published book or doctoral dissertation that has focused specifically on this research topic, except few articles that discuss the relationships between SOEs and the coverage of the government procurement rules. However, there are still several relevant research papers and books that would provide a good foundation for this dissertation.

1.6.1 Procurement of SOEs and public procurement regulation

Whether the procurement activities of SOEs should be regulated by public procurement regulation is connected with issues about the applicable scope of public procurement rules. This matter has usually been discussed in relation to a specific procurement regime.

Against the background of the EU public procurement regime, the following books or papers are relevant. First, Christopher Bovis (2012),[69] Sue Arrowsmith (2014),[70] Christopher Bovis (2016),[71] Grith Skovgaard Ølykke and Albert Sanchez-Graells (2016)[72] have provided a systematic analysis of this issue, and/or concentrated on a set of new rules in the 2014 EU public procurement regime. Second, M. Bronckers (1996),[73] E. Papangeli (2000),[74] J. Garcia-Andrade and P. Athanassiou (2007),[75] Totis Kotsonis (2008),[76] and Charles Clarke (2012)[77] have discussed the application of EU directives to several specified type of entities, which are relevant to the attributes of SOEs. Third, some papers have discussed the definition of relevant legal terms

[69]Christopher Bovis (2012). EU Public Procurement Law, Second edition, Elgar European Law.
[70]Sue Arrowsmith(2014). The Law of Public and Utilities Procurement, Volume 1: Regulation in the EU and Uk, Sweet & Maxwell.
[71] Christopher Bovis, (eds),(2016). Research Handbook on EU Public Procurement Law, Edward Elgar Publishing.
[72] Grith Skovgaard Ølykke and Albert Sanchez-Graells (eds.) (2016). Reformation or Deformation of the EU Public Procurement Rules, Edward Elgar Publishing.
[73] M. Bronckers, "The Position of Privatized Utilities under WTO and EU Procurement Rules" 1996/1 Legal Issues in European Integration 145
[74] E. Papangeli (2000), "The Application of the EU's Works, Supplies and Services Directives to Commercial Entities" 9 Public Procurement Law Review 201.
[75] J. Garcia-Andrade and P. Athanassiou(2007), "Reflections on the status of independent national authorities under Community public procurement law" 16 Public Procurement Law Review 305.
[76]TotisKotsonis (2008). Regulation of a contracting entity pursuing activities falling in part within the field of application of Directive 2004/17 and in part within that of Directive 2004/18: Ing. Aigner (Case C-393-06), 5 P.P.L.R. NA 197-203.
[77] Charles Clarke (2012). The Meaning and Requirements of the Term 'Contracting Authority' under EU Public Procurement Law: A critique of Development from the ECJ Jurisprudence, 7 EPPPL 57.

under the EU procurement directives based on specified cases that have been raised to the CJEU. For instance, Rhodri Williams (1999),[78] Elisabetta R. Manunza (2003),[79] and Martin Dischendorfer (2003)[80] have done the research on cases that are relate to the definition of "Body Governed by Public law". Jennifer Skilbeck (2003)[81] has discussed the definition of 'public undertakings' under the EU utility procurement directive.

There are also several papers that have discussed the procurement of SOEs in the EU Member States. For instance, Philip Mirabelli (1998)[82] has used case law to discuss the relationship between publicly owned companies and the public procurement rules in Italy.

Against the background of China, there are also some papers that are relevant. For instance, Ping Wang, Christopher H. Bovis and Xinquan Tu (2013)[83] have introduced general rules for the procurement of Chinese SOEs and discussed the procurement practices of several Chinese SOEs operating in the Utilities sector. Ping Wang and Xinglin Zhang (2013)[84] analysed the extent to which the procurement of state enterprises is regulated by national, ministerial and firm-level procurement rules. They argued that some of the procurement activities of SOEs have been regulated somewhat. But in China, most of these regulations are not designed to regulate the procurement activities of SOEs. On this basis, it has been pointed out that considering domestic incentives, for instance the value of money, preventing corruption and fighting against local protectionism, it is necessary to consolidate existing rules in the context of a complicated underlying institutional framework. Bai Zhiyuan and Wang Ping (2015)[85] pointed out that domestic government procurement laws should regulate the procurement activities of SOEs, given that once China joins the GPA, Chinese SOEs included in its opening list will have to carry out the relevant international obligations.

1.6.2 In-house provisions and public procurement regulations

Whether in-house provisions should be regulated by public procurement rules is an explicit issue in the EU and its Member States. Hence, in the EU, a considerable amount of research has been done on this issue.

Before 2004, certain Public Procurement Directives were enacted; the in-house issue has

[78] Rhodri Willams (1999). The 'Arnhem' case: definition of 'body governed by public law', 1 P.P.L.R. CS5-8.
[79] Elisabetta R. Manunza (2003), Privatised services and the concept of 'bodies governed by public law' in EC directives on public procurement, 2 European Law Review, p.273-282.
[80] Martin Dischendorfer (2003), The EBS case: definition of a "body governed by public law", limitation periods, and publicity requirements for scoring methods, P.P.L.R., 2, NA34-40.
[81] Jennifer Skibeck (2003). Just when is a public body an 'undertaking'? Fenin and Bettercare compared, 4 P.P.L.R. NA75-77.
[82] Philip Mirabelli, Publicly owned companies and public procurement in Italy: recent case law, P.P.L.R. 1998, 2, CS74-78.
[83] Ping Wang, Christopher H. Bovis and XinquanTu (2013). A comparative Analysis of Utilities Procurement in the EU and China, A report funded by EU- China Trade Project (II) component 5.
[84] Ping Wang and Xinglin Zhang (2013). Regulating the Procurement of State Enterprises in China: Current Status and Future Policy considerations, Frontiers of Law in China, Vol.8, No.1,p.2-35.
[85] Bai Zhiyuan and Wang Ping (2015). Regulating procurement of State-owned Enterprises in China under the GPA, Comparative Economic & Social Systems, No.1, p. 161-170. 白志远，王平: WTO《政府采购协议》视角下的我国国有企业采购规制研究，经济社会体制比较，2015 年第 1 期。

been discussed by some researchers. For instance, Sue Arrowsmith (1997)[86] has pointed out that in-house bidders that submit tenders in competition with the private sector would create a problem in delimiting the scope of the public procurement directives.

Other work has provided broad analyses on this issue. For instance, Kurt Weltzien (2005)[87] discussed the in-house issue under the 2004 EU public procurement directives and pointed out that legislators missed an opportunity to bring a needed clarification to a difficult issue: the conditions surrounding the in-house awarding of contracts. Fotini Avarkioti (2007)[88] used case law to argue that the "in-house" concept was taken into account by the CJEU as a functional consideration by the CJEU, rather than as a purely organic consideration. It has been argued that the judgments of the CJEU to that date have been consistent and built up systematically; however, there were still issues requiring clarification.[89] Toni Kaarresalo (2008)[90] pointed out that in case of any uncertainty as to the applicability of the in-house exception, a cautious approach would seem highly advisable. Mario Comba and Steen Treumer (2010)[91] collected several papers that deal with the in-house issue from a broader perspective and look to the interpretation, implementation and practice of relevant laws at the national level in a range of EU Member States.

There are also some papers that focus on one specific issue. For instance, Roberto Cavallo Perin and Dario Casalini (2009)[92] focused on the interpretation of the similar control requirement. They highlighted the difference between the situation of an in-house provider that is wholly owned or controlled by a single public authority or a plurality of public authorities, and the situation of a third party that is not involved in the relevant organizational in-house relationship but may influence the decisions of the in-house provider. They underlined the fact that the mere holding of shares in the in-house provider capital does not necessarily prevent an in-house providing relationship, particularly if those shares were awarded by means of a call for tender. Janicke Wiggen (2011)[93] focused on determining what factors may cause a particular instance of cooperation to not constitute a "contract" within the meaning of the directive, when the directive is applied to cooperation between public sector entities. They argued that certain forms of cooperation must be regarded as the out come of the internal organization of a state's public administration, rather than as contractual relationships that are subject to the directive.

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[86] Sue Arrowsmith (1997). Some problems in delimiting the scope of the Public Procurement Directives: privatisations, purchasing consortia and in house tenders. P.P.L.R, 5, p.198/204.
[87] Kurt Weltzien (2005). Avoiding the Procurement rules by awarding contracts to an in house entity/ scope of the procurement directives in the classical sector, P.P.L.R. 2005, 5, 237/255.
[88] FotiniAvarkioti (2007). The application of EU public procurement rules to "in house" arrangements, P.P.L.R., 1, p.22-35.
[89] For instance, the time or other limits for a transaction to be considered as an "artificial construction", the procurement of central purchasing bodies or the right of damages when a contract is awarded "in-house".
[90] Toni Kaarresalo (2008). Procuring inhouse: the impact of the EU procurement regime, Public Procurement Law Review, 6, 242/254.
[91] Mario Comba and Steen Treumer eds. (2010). The in house providing in European Law, Denmark: DJOF Publishing.
[92] Roberto Cavallo Perin and Dario Casalini (2009). Control cover in-house providing organisations, P.P.L.R. 5, 227-240.
[93] JanickeWiggen (2011). public procurement rules and cooperation between public sector entities: the limits of the in-house doctrine under EU procurement law, P.P.L.R, 2011, 5, 157-172.

In addition to the above mentioned research, Adrian Brown (2009),[94] Kristian Pedersen and Erik Olsson (2010),[95] and Mustafa T. Karayigit (2010)[96] discussed a case on public-public cooperation, referred as "in thy neighbour's house". Steven Brunning (2011),[97] Susie Smith (2013),[98] Rory Ashmore (2013),[99] David McGowan (2014)[100], Adrian Brown (2014)[101], Adrian Brown (2017)[102] and Adrian Brown (2018)[103], have dealt with specific case law relevant to in-house providing issues under the public procurement rules.

In 2014, the EU enacted new Public Procurement Directives (referred as "2014 EU directives") that provided clearer rules on in-house issue. Several papers focused on this research issue, including Martin Burgi and Frauke Koch (2012),[104] who evaluated the in-house provision in the EU commission's proposal from a German perspective. Willem A. Janssen (2014)[105] and Charles M. Clarke (2015)[106] pointed out that the in-house provision in 2014 directives, which effectively built upon the developed case law of the CJEU, offers legal certainty; however, they also raise potential uncertainties concerning the exemption of in-house arrangements. Grith Skovgaard Ølykke and Cecilie Fanøe Andersen (2015)[107] have taken a state aid perspective to study the new in-house rule in the 2014 Public Sector Directive. They concluded that the permissive codification of the in-house case law could lead to a distortion of competition between private undertakings and the risk of granting State Aid to the in-house entity, making this entity capable of conducting cross-subsidization, which could distort competition in the markets in which in-house providers compete with other undertakings.

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[94] Adrian Brown (2009). The ECJ upholds an Italian municipality's reliance on the Teckal exemption for in-house contracts: a note on Commision v Italy (C-371/05), P.P.L.R., 1, NA6-7.

[95] Kristian Pedersen and Erik Olsson (2010). Commission v Germany- a new approach to in-house providing? P.P.L.R. 1, p.33-45.

[96] Mustafa T. Karayigit (2010). A new type of exemption from the EU rules on public procurement established: "in thy neighbour's house" provision of public interest tasks, P.P.L.R., p.183-197.

[97] Steven Brunning(2011). English Supreme Court ruling on the Teckal in-house exemption: the decision in Brent LBC v Risk Management Partners Ltd, P.P.L.R., 3, NA77-82.

[98] Susie Smith (2013). In-house awards to jointly controlled companies-satisfying the control test: EconordSpA cases C-182/11 and C183/11. P.P.L.R., 2, NA32-34.

[99] Rory Ashmore (2013). United Kingdom-reminder that contracting authorities can switch to an in-house "plan B" solution if it represents value for money and its done in good faith: Montpellier Estates Ltd v Leeds City Council, P.P.L.R., 3, NA68-72.

[100] David McGowan(2014). Can horizontal in-house transactions fall within Teckal? A note on case C-15/13, TechnischeUniversitat Hamburg-harburg, Hochschul-information-system GmbH v DatenlotsenInformationsysteme GmbH, P.P.L.R., 5, NA120-122.

[101] Adrian Brown (2014). In-house exemption not available due to the presence of private members in the supplier entity: case C-574/12 Centro Hospitalar de Setubal, P.P.L.R., 5, NA133-137.

[102] Adrian Brown (2017). Clarification of the exemption for 'in-house' awards of public contracts: the EU Court of Justice ruling in case C-553/15 Undis Servizi v Commune di Sulmona, P.P.L.R., 2017(3), NA97-NA101.

[103] Adrian Brown (2018). When is a wholly-owned subsidiary of a contracting authority itself caught by the procurement rules? The EU Court of Justice ruling in case C-567/15 LitSpecMet, P.P.L.R., 2018 (1), NA20-NA24.

[104] Martin Burgi and Frauke Koch (2012). In-house procurement and Horizontal cooperation between Public Authorities: an Evaluation of Article 11 of the Commission's proposal for a public procurement directive from a German perspective, 7 EPPLR, 86.

[105] Willem A. Janssen(2014). The institutionalized and non-institutionalised exemptions from EU public procurement law: towards a more coherent approach? 10 Utrecht Law Review 168.

[106]Clarles M. Clarke (2015). The CJEU's evolving interpretation of 'in-house' arrangements under the EU public procurement rules: a functional or formal approach? 10 EPPPL 111.

[107]GrithSkovgaardØlykke and CecilieFanøe Andersen (2015). A state aid perspective on certain elements of Article 12 of the new Public Sector Directive on in-house provision, P.P.L.R., 1, p.1-15.

1.6.3 Public procurement regulations of Public Private Partnerships

The existing researches on the public-private partnership focus on the award procedures for PPPs. For instance, Friedrich Ludwig Hausmann (1999)[108] discussed the regulations on the award of concession contracts. Peter Braun (2001),[109] Christopher Bovis (2006),[110] Michael Burnett (2009),[111] Michael Burnett (2010),[112] Michael Burnett (2011),[113] Demetris Savvides (2011),[114] Christopher Bovis (2013)[115] and Christopher Bovis (2014)[116] have evaluated whether the contract award procedures under public procurement rules are suited to the characteristics of PPPs. Further, there is some research focused on specific issues. For instance, Bruno De Cazalet（2014),[117] Dominique Custos and John Reitz（2010),[118] and Christopher Bovis (2007)[119] focused on the definition of the PPP.

The EU Commission has divided the PPP into two kinds, one is a contractual PPP, and the other is an institutional PPP. The EU Commission has also published interpretative communications about how to apply public procurement rules to IPPPs, after which point, "IPPP" began to be used more commonly in academic research. Until now, the existing research has mostly focused on following aspects. First, the economic theory behind the EU's public policy on IPPPs; for instance, consider the work of Alessandro Marra (2007)[120]. Second, the characteristics of IPPPs; consider for instance the work of Julie de Bruxand Frédéric Marty (2014)[121] that described the challenges and opportunities of implementing IPPPs based on their characteristics. Third, the applicability of public procurement law to IPPPs; consider Michael Burnett (2007)[122] describing some models of IPPP in practice; Micaela Lottin (2008)[123] analysing the interpretative

[108] Friedrich Ludwig Hausmann (1999). Public Private Partnerships and the award of concessions. Public Procurement Law Review, 6, pp: 269-278.
[109] Peter Braun (2001). Selection of Bidders and contract award criteria: the compability of practice in PFI procurement with European law, PPLR, 2001, 1, p.1-14.
[110] Christopher Bovis (2006). The Competitive Dialogue as a Procurement Process of Public Private Partnerships, EPPPL, 14, p.14-18.
[111] Michael Burnett (2009). Conducting Competitive Dialogue for PPP Projects—Towards an Optimal Approach?, EPPPL, 4, p.190-198.
[112] Michael Burnett (2010). Developing a Complexity Test for the Use of Competitive Dialogue for PPP Contracts, EPPPL, 5, p.215-213.
[113] PPP and EU Public Procurement Reform—Time to Change the Rules for Competitive Dialogue? European Procurement & Public Private Partnership Law Review.6, 61.
[114] DemetrisSavvides (2011). The Effectiveness of the Competitive Dialogue under the EU Consolidated Public Procurement Directive (2004/18/EC) as an Award Procedure for Public Private Partnerships, EPPPL, 6, p.23-37.
[115] Christopher Bovis(2013). Efficiency and Effectiveness in Public Sector Management: The Regulation of Public Markets and Public-Private Partnerships and its Impact on Contemporary Theories of Public Administration, EPPPL, 8, 2013, p. 186-199.
[116] Christopher Bovis (2014). Public-Private Partnerships in the European Union, NY & UK: Routledge, 2014.
[117] Bruno De Cazalet (2014). The evolution of the concession and public private partnership legal concepts over the last 20 years under common law influence, International Business Law Journal, 2014, 4, 271-286.
[118] Dominique Custos and John Reitz (2010). Public-private partnerships, American Journal of Comparative Law Supplement 58, 2010, 555-584.
[119] Christopher Bovis (2007). The Notion of Public Concession as a component of Public Private Partnerships, EPPPL, 2007, 12, p.12-16.
[120] Alessandro Marra (2007). The EU policy towards PPPs: a new institutional economics perspective, 8 competition& Reg. Network Indus. 261.
[121] Julie de Brux and Frédéric Marty (2014). IPPP: risks and opportunities, an economic perspective, 9 EPPPL, 13.
[122] Michael Burnett (2007). The application of public procurement law to institutional PPP (IPPP)—some practical considerations, 3 EPPPL 129.
[123] Micaela Lottin (2008). The new interpretative communication on IPPPs: has the issue really been "interpreted"?

communication of the EU Commission; Tobias Indén (2011)[124] discussing the issues in connection with the conclusion of an IPPP project and with the initiation of the public procedure rules concerning the contractual term; and Marta Andrecka (2014)[125] analysing whether public procurement laws should be applicable to IPPPs, if they are to be treated as mixed contracts.

Furthermore, modernising and harmonising existing laws on PPP at the international level also has been discussed. M.T. Adekilekun, C.C. Gan, Cao Fuguo (2018)[126] evaluated several international legislative frameworks for PPP through some core principles or checklists which can help in measuring the adequacy or otherwise of model provisions relating to PPPs, and concluded that there is a need to modify the UNCITRAL Privately Financed Infrastructure Guide and Model Provision.

1.6.4 Regulation of SOEs under the WTO Government Procurement Agreement

When China gained access to the WTO, the question of whether SOEs should be covered by the GPA had already been discussed by some research. For instance, John Linarelli (1994)[127] pointed out that as the state enterprise system at that time produced 90% of the gross domestic product of China, it would be impractical for all of those state enterprises to be deemed to be engaging in "procurement", as that term is used in the GPA.

After China initiated the procedure to access to the GPA, this issue caught the attention of several researchers. For instance, Wang Ping (2007)[128] analysed the 2007 Revised Text of the GPA and noted the challenges that had arisen from the GPA accession of countries with a large state sector; he argued that the lack of a principled approach to entity coverage and the ambiguities surrounding the scope of covered procurement were likely to substantially hinder the negotiating process and prevent the optimal outcome of GPA accession negotiation. He suggested that a 'control' minus 'competition' formula be implemented to guide covered entities and covered procurement. Skye Mathieson (2010)[129] began with the approach proposed by Wang Ping (2007) and explored it in depth. She has elaborated diverse definitions of 'control' and then tried to settle on a factor-based definition of 'control'. She also introduced the definition of 'competition' as it pertains to the EU and proposed to use the HHI method of Calculating Competition for

2 EPPPL 64.
[124]Tobias Indén(2011). IPPP--the long-term perspective: information, due diligence and general principle, 6 EPPPL 130.
[125]Marta Andrecka (2014). Institutionalised public-private partnership as a mixed contract under the regime of the new directive 2014/24/EU. 9 EPPPL 174.
[126] M.T. Adekilekun, C.C. Gan, Cao Fuguo (2018), International legislative frameworks for pu blic-private partnerships: an evaluation, P.P.L.R., 2018(1), p.33-50.
[127] John Linarelli (1994). China and the GATT Agreement on Government Procurement, 8 Journal of Chinese Law, p.185-226.
[128] Wang Ping (2007). Coverage of the WTO's Agreement on Government Procurement: Challenges of Integrating China and Other Countries with a Large State Sector into the Global Trading System, Journal of International Economic Law 10(4), P.887-920.
[129] Skye Mathieson (2010). Accessing China's Public Procurement Market: Which State-influenced Enterprises should the WTO's Government Procurement Agreement Cover?, Public Contract Law Journal, vol. 40, P.233-266.

procurement purposes. But the purpose of that paper was to establish an unofficial rubric to assist in determining which of China's State Influenced Enterprises (SIE) should be covered during its upcoming GPA accession negotiations; therefore, it was short-sighted and did not consider the unprecedented regulation situation of SOEs in China, and it neglected the relationship between national and supra national procurement rules.

1.6.5 Coordination between public procurement law and competition law

There are some papers that have discussed the relationship between public procurement law and competition law, mostly based on EU experience. For instance, Peter-Armin Trepte (1993)[130] has pointed out the potential impact of the basic principles of Community competition law in the area of public procurement. Catriona Munro (2006)[131] mentioned that competition and procurement law and policy both derive from the fundamental principle that, in the long term, competitive markets produce benefits for the economy and for society as a whole. Furthermore, competition law can have an impact on procurement in two main ways: applying to purchasers in some conditions and applying to suppliers when there is collusion. Patrick J. Birkinshaw (2014)[132] examined this relation from an EU public law perspective. Albert Sanchez Graells (2015)[133] provided a comprehensive analysis of the intersection between procurement law and competition law as an instance of how procurement affects the competitive structure of markets. Albert Sánchez Graells and Ignacio Herrera Anchustegui (2016)[134] used the EasyPay case study to show how procurement law facilitates a revision of the current position regarding the direct applicability of EU competition law to entities carrying out public procurement activities and, in particular, as relates to central purchasing bodies.

1.6.6 Coordination between public procurement law and rules on subsidies

Several books have discussed general subsidies issues against the EU background. These include Andra Biondi, Piet Eeckhout and James Flynn eds. (2004),[135] Erika Szyszczak eds. (2011)[136] and Leigh Hancher, Tom Ottervanger and Piet Jan Slot (2012),[137] all of whom have described the legal and practical issues involved in this area. There are also some papers that have introduced the reform or evolution of legal rules regarding services of general economic interest (SGEI), which is a core element of EU state aid rules and public procurement rules. For instance,

[130]Peter-Armin Trepte (1993). Public procurement and the community competition rules, 2 P.P.L.R.,93-114.
[131]Catriona Munro (2006). Competition law and public procurement law: two sides of the same coin? 6 P.P.L.R., 352-361.
[132] Patrick J. Birkinshaw (2014). Competition, Regulation, public Service and the Market, chapter 12 of European Public Law: the Achievement and challenge, Second Edition, Wolters Kluwer: Law and Business, p.579-627.
[133] Albert Sanchez Graells (2015). Public Procurement and the EU competition Rules, second Edition, UK: Hart Publishing.
[134]Albert Sánchez Graells and Ignacio Herrera Anchustegui (2016). Revisiting the concept of undertaking from a public procurement law perspective—a discussion on Easypay and Finance Engineering. E.C.L.R., 37(3), 93-98.
[135]AndraBiondi, Piet Eeckhout, James Flynn eds. (2004). The law of State Aid in the European Union, New York: Oxford University Press.
[136] Erika Szyszczak eds. (2011). Research Handbook on European State Aid Law, UK: Edward Elgar.
[137] Leigh Hancher, Tom Ottervanger and Piet Jan Slot (2012). EU State Aids, the fourth edition, UK: Sweet & Maxwell.

Georgios Kamaris (2012)[138] described the reform of EU aid rules for the SGEI in times of austerity. Wouter Devroe and David Gabathuler (2014)[139] introduced the evolving treatment of the SGEI under EU law.

Additionally, there are several papers that have discussed the relationship between public procurement law and state aid law. Most of these have focused on the following issues:

First, an analysis of whether the award of a public contract can establish state aid. For instance, Andreas Bartosch (2002),[140] Jens Hillger (2003),[141] Sally Janssen (2004),[142] and Alik Doern (2004)[143] have analysed how public procurement rules and State Aid rules cooperate, and they have pointed out possible consequences. Albert Sanchez Graells (2012)[144] examined the EU's proposal for new EU public procurement directives and pointed out that the increased flexibility and broadened scope of negotiations contained in the proposal may influence the control of the state aid implications of public procurement. He suggested there is a need for guidance as to the limits within which contractual conditions must be met in order for them to comply with EU State aid law.

Second, a focus on the general relationship between the rules of public procurement and the rules on subsidies. For instance, Christopher Bovis (2003)[145] and Christopher Bovis (2004)[146] argued that public procurement law and state aids law have a symbiotic correlation link with each other. Phedon Nicolaides and Sarah Schoenmaekers (2014)[147] also held the view that public procurement, public private partnership and state aid rules are in a symbiotic relationship. Any public procurement award procedure or PPP term that favours a particular firm without securing a lower price, higher quality or a higher return infringes on public procurement directives and also constitutes State Aid as defined by Article 107 (1) TFEU. Jayant Mehta (2007)[148] pointed out that State aid and procurement law that share the same objectives have developed largely independently of each other. Still, Mehta argues that is necessary to develop a coherent anti competition law code, one which involves the fundamental concepts of both regimes, to address the existence of duplication and wastage between these two laws. Sarah Schoenmaekers, Wouter

[138] Georgios Kamaris (2012). The reform of EU state aid rules for services of general economic interest in times of austerity. European Competition Law Review, 33(2), p.55-60.
[139] WouterDevroe and David Gabathuler (2014). in S. Schoenmaekers, W. Devroe and N.Philipsen (eds.) State Aid and Public Procurement in the European Union, UK: Intersentia, p.47-76.
[140] Andreas Bartosch (2002). The Relationship Between Public Procurement and State Aid Surveillance – The Toughest Standard Applies, 39 Common Market Law Review, Issue 3, pp. 551–576.
[141] Jens Hillger (2003). The award of a public contract as state aid within the meaning of Article 87(1) EC, 3 P.P.L.R., p.109-130.
[142] Sally Janssen (2004). Services of General Economic Interest, state aid and public procurement, 5 Journal of Network Industries, 139.
[143] AlikDoern (2004). The interaction between EC rules on Public Procurement and State Aid, 3 P.P.L.R., 97-129.
[144] Albert Sanchez Graells(2012). Public procurement and state aid: reopening the debate?6 P.P.L.R., 202-212.
[145] Christopher Bovis (2003). Public procurement, state aid and public services: between symbiotic correlation and asymmetric geometry. Eur. St. Aid. L. Q. 553.
[146] Christopher Bovis(2004). Financing services of general interest, public procurement and state aid: the delineation between market forces and protection, 10 Colum. J. Eur. L. 419.
[147] Phedon Nicolaides and Sarah Schoenmaekers (2014). Public Procurement, Public Private Partnerships and State Aid Rules:A symbiotic Relationship, 9 EPPPL 50.
[148] Jayant Mehta (2007). State aid and Procurement in PPPs—Two faces of a single coin? 2 EPPPL 141.

Devroe and Niels Philipsen eds. (2014)[149] collected several essays, which discuss issues about public procurement rules and state aid rules in the EU. [150] Pernille Edh Hasselard (2017)[151] analysed whether the new EU 2014 public procurement directives pose any threats to the State aid rules, especially the more flexible procedures provided in the new directives. This research made the conclusion that the new public procurement package poses threats to State aid rules, which could amount to competition distortions in the internal market.

Third, some papers focus on specific issue relevant to these two sets of laws. For instance, Alik Doern (2004),[152] H-J. Priessand M.G. Von Merveldt (2009)[153] discussed whether the use of secondary criteria in public procurement procedures will be considered as State Aid or not. Alik Doern (2004)[154] discussed the problematic area of defence procurement in relation to State Aid. Peter Dethlefsen (2007)[155] has shown how State Aid and public procurement rules interact in the area of SGEI, and also discussed whether the transparency obligation/principle of public procurement law has a special meaning, when special or exclusive rights are conferred upon undertakings related to Art. 86(2) EC (now 106(1) TFEU). Grith Skovgaard Ølykke (2011)[156] focused on the provision in the public procurement directive that provides for the possibility to reject a tender as 'abnormally low' when the tender is tainted by illegal State Aid. Dacian Dragos, Bianca Racolța (2017)[157] compared State aid and public procurement as two legal instruments for the promotion of research, development and innovation, and concluded that both of them serve the purpose, although the specifics of legal regimes make their usage desirable in different settings—depending on the level of the policy design.

1.7 Structure of this dissertation

To analyse the research questions laid out above, this dissertation has been structured as follows:

Chapter Two focuses on the issues connected with the SOEs under the public procurement rules as buyer or procurer. First, the general relevant economic and legal theories have been outlined: (1) basic knowledge about the economics of regulation for analysing and summarizing the basic logic behind public procurement law regulation; and (2) analysing whether the

[149] S. Schoenmaekers, W. Devroe and N.Philipsen eds. (2014). State Aid and Public Procurement in the European Union, UK: Intersentia.
[150]Nevertheless,the papers in this book either only focus on public procurement issue or only focus on state aid issue.
[151] Pernille Edh Hasselgard, The Use of Tender Procedures to Exclude State Aid: the Situation under the EU 2014 Public Procurement Directives, EPPPL, 2017(1), p.16-28.
[152]Alik Doern (2004). The interaction between EC rules on Public Procurement and State Aid, 3 P.P.L.R., 97-129.
[153]H-J.Priess and M.G. Von Merveldt (2009), "The Impact of the EC State Aid Rules on Horizontal Policies in Public Procurement" in S. Arrowsmith and P. Kunzlik (eds), Social and Environmental Policies in EC Procurement Law: New Directives and New Directions (Cambridge: Cambridge University Press, 2009), Ch.5, p.249.
[154]Alik Doern (2004). The interaction between EC rules on Public Procurement and State Aid, 3 P.P.L.R., 97-129.
[155] Peter Dethlefsen (2007). Public services in EU—between state aid and public procurement, 3 P.P.L.R., NA 53-64.
[156]Grith Skovgaard Ølykke (2011). The legal basis which will (probably) never be used: enforcement of state aid law in a public procurement context, Eur. St. Aid L. Q. 457.
[157] Dacian C. Dragos, Bianca Racolța Comparing Legal Instruments for R&D&I: State Aid and Public Procurement, EPPPL, 2017(3), p.408-421.

procurement activities of SOEs should be regulated. Second, the EU experience has been taken as case study to determine whether SOEs have been regulated under EU public procurement rules, and if so, why. In addition, as to the development of public procurement, the question of whether EU public procurement rules regulate IPPPs when SOEs are involved, has been discussed. Further, both European Union and Member States levels have been considered in order to discover how public procurement rules at different levels cooperate with each other, and also to point out the limitations of the rules that exist at the EU level. Third, the case of China has been discussed. The Chinese case has concentrated on whether SOEs have been regulated by the related Chinese public procurement rules and what kinds of issues have existed in this aspect. Fourth, conclusions of these research questions and issues have been drawn based on the above theory and case studies.

Chapter Three analyses the issues relevant to SOEs under the public procurement rules as seller or provider. First, the research has elaborated the general economic and administration theories relevant for analysing whether public contracts awarded to SOEs should be regulated by public procurement rules. Second the EU and Chinese experiences have been introduced. As regards the EU, this work has primarily discusses what kind of transactions should be regarded as in-house provisions based on the EU procurement rules level, as well as on the experience at the Member States level. In terms of the Chinese experience, how Chinese law treats the 'in-house' arrangement is discussed. Third, conclusions are drawn on this issue.

Further, Chapter Three analyses the neutral competition issue in which both SOEs and private entities join in one tender as a seller. Both the EU and Chinese experience is discussed, including cooperation in the EU between public procurement and subsidies rules.

Chapter Four focuses on the regulation of SOE procurement activities at the supranational level. The chapter discusses the WTO GPA legal system, which is vitally important to China, since China is working to join the GPA. Other issues discussed in this chapter are: the general theory behind the open public procurement market internationally; normative analysis of GPA text; functional analysis based on existing GPA parties' experiences; and the issues that China faces now. In the conclusion of this chapter, possible solutions are suggested with respect to the GPA to clarify the coverage of entities and to suggest implementable suggestions for China on SOE issues on the basis of the relationship between national and supranational public procurement rules regarding SOEs.

Chapter Five offers several conclusions.

Chapter Two: SOEs under the public procurement rules as buyers

2.1 The role of SOEs as buyers under the government procurement rules: a theoretical analysis

2.1.1 Goods, markets and the role of the state: from the perspective of the characteristics of the entities

2.1.1.1 Four kinds of goods (services)

People consume many different kinds of goods and services. This vast jumble of goods and services can be sorted and classified according to two characteristics[158]: exclusion[159] and consumption.[160] Goods may be classified according to the degree to which they possess these two properties. The result of all of this categorization is four types of goods: individual goods (characterized by exclusion and individual consumption), toll goods (exclusion and joint consumption), common-pool goods (non-exclusion and individual consumption), and collective goods (non-exclusion and joint consumption).[161]

2.1.1.2 Alternative arrangements and the degree of government involvement

The basic participants in the delivery of a good or service may be differentiated into three categories: the consumer, the producer, and the arranger or provider.[162] The producer directly performs the work or delivers the good or service to the consumer. A producer can be a government unit, a voluntary association of citizens, a private firm, a non-profit agency, or, in certain instances, the consumer himself. The arranger assigns the producer to the consumer, or vice versa, or selects the producer that will serve the consumer. With respect to many collective goods, states are essentially the arrangers or providers that decide what shall be done collectively, for whom, to what degree or at what level of supply, and how the goods shall be paid for. For instance, when a municipal government hires a paving contractor to resurface a street, the municipal government is the arranger, the contractor is the producer, and the people who use the street are the consumers of this particular collective good.

Given the difference between providing and producing goods (services), we can identify distinct

[158] Emanuel S. Savas. Privatization and Public-Private Partnerships, Seven Bridges Press, 2000.
[159] Exclusion is relevant to the relationship between consumer and supplier. A good has the property of exclusion if it is acquisition, or the supplier can readily deny its supply to potential consumers.
[160] Consumption is relevant to the relationship between consumers. A good may be characterized as a joint-consumption good or an individual-consumption good, depending on whether it can or cannot be consumed jointly and simultaneously by multiple users.
[161] Emanuel S. Savas. Privatization and Public-Private Partnerships, Seven Bridges Press, 2000. Savas, p. 62
[162] Emanuel S. Savas. Privatization and Public-Private Partnerships, Seven Bridges Press, 2000, P.64

institutional arrangements for delivering services. Both the state (public sector or government) and the market (private sector) can serve as arranger or producer. This leads to four classes of alternative arrangements: (1) public arranger and public producer;[163] (2) pubic arranger and private producer;[164] (3) private arranger and public producer;[165] and (4) private arranger and private producer.[166]

For the same good or service, different countries may have different arrangements, and no arrangement is necessarily ideal. The arrangements differ greatly with respect to various attributes in the following aspects:[167] (1) specificity of the service, (2) availability of producers, (3) efficiency and effectiveness, (4) scale of service, (5) relationship of costs and benefits, (6) responsiveness to government direction, and (7) size of government. For instance, larger governments tend to arrange more common pool goods and collective goods by themselves, instead of letting private sectors arrange and produce. This may explain why the same good or service in some countries has been treated as a public service, while in other countries it is not.

The degrees of government involvement in different arrangements vary. When states arrange and produce, the degree of government involvement is the highest. When the private sector arranges and produces, the degree of government involvement is the lowest. But this does not mean that government involvement does not exist in the latter circumstance. In some industries, the state might regulate the market by controlling prices or setting limitations on entry into the marketplace or exit from it. In these cases, the state maintains the role of a monitor or an administrator when necessary.

2.1.1.3 The roles of the state: state and four kinds of arrangements for providing public goods (services)

Generally, goods and services are considered either 'public goods (services)' or 'private goods (services)' depending on the responsibility and scope of the government. On the basis of the discussion above, generally 'public goods (services)' include goods that have the characteristics of being difficult to exclude and of joint consumption, and these goods generally also have one of these other characteristics: collective goods, toll goods, or common-pool goods. 'Private goods (services)' include goods that have the characteristics of being easy to exclude and of individual consumption, and these goods generally also have one of these other characteristics: individual goods, common-pool goods, and toll goods.

States that provide public goods generally do so according to one of the following four potential arrangements:

Assumption 1: the state could provide public services through departments or the authorities thereof. The state could deliver public services through a government department using its own

[163] For instance, government service, intergovernmental agreements.
[164] For instance, contracts, franchises, grants.
[165] For instance, government vending.
[166] For instance, free market, voluntary service, self-service, vouchers.
[167] Emanuel S. Savas. Privatization and Public-Private Partnerships, Seven Bridges Press, 2000, Page 106.

employees. In this case, the government acts as both the service arranger and the service producer. Or, a local government might hire or pay another government to supply a service. For instance, small communities may purchase library, recreation, and fire-protection services from specialized government units that are organized by, and sell their services to, several general-purpose governments in the region. This would make one government the producer, and another government the service arranger.

Assumption 2: the state could use SOEs to provide public services. In addition to governmental departments, states also might use state-owned enterprises to provide public services. The state decides what kinds of services the SOEs will provide and to whom they will provide them, and the SOEs act like departments of the state.

Assumption 3: The state could provide the public service, but procure it through the market instead of producing it. The state might also decide to contract out certain public services instead of producing them itself. Contracting out has a different practical model, such as awarding a contract and procuring the service through the market. If the market does not exist or is not mature, then the state might even decide to make an award in order to create a market. In this case, the state does not need to produce the goods or services, and the state could award the contract to a mixed entity set up by the state and private sector.

Assumption 4: The state could let the market provide the public service, instead of providing it itself. In certain countries, some goods (services) are provided by the state, while in other countries, these goods (services) are provided by private entities. This means that the same goods (services) might be provided by different entities, which helps to explain the diversity in the scope of 'public goods (services)' in different countries.

2.1.1.4 The role of the state: the state and the potential arrangements for providing private goods (services)

For private goods (services), the private participants in the market generally can produce and provide by themselves. If the state also needs to consume these private goods, for instance office products, it can choose to procure them from the market. However, in certain cases, the state also can produce them itself through its own departments or SOEs. For instance, some administrative agencies have their own specific departments that prepare meals for their staffs.

Additionally, in some countries, certain SOEs may also be active in the market providing private goods (services), and they may join in competition like private companies. These SOEs may be involved only in providing private goods, but they also may be involved in the activities of producing public goods for citizens and/or involve producing private goods for the consumption of the state itself.

2.1.2 Goods, markets, and the role of the state: from the perspective of the characteristics of the market

2.1.2.1 Four kinds of market structures

(1) Market structure 1: free market—perfect competition

A free market or perfectly competitive market has two basic characteristics: (a) there are many buyers and many sellers in the market; and (2) the goods offered by the various sellers are largely the same.[168] As a result of these conditions, any single buyer or seller in the competitive market must accept the price that the market determines, and these economic actors are said to be price takers.

Additionally, under certain conditions, a third condition may characterize the free market: firms can freely enter or exit the market. This ease of access to the market is a powerful force that shapes the long-term equilibrium.[169]The price in a perfectly competitive market always equals the marginal cost of production. In the long-term, entry and exit costs drive economic profit to zero, so prices must equal the average *total* cost.[170]

Changes in demand have different effects over different time horizons. In the short-term, an increase in demand raises prices and leads to profits, and a decrease in demand lowers prices and leads to losses. However, in long-term, the number of firms active in the marketplace will adjust to drive the market back to the zero-profit equilibrium.[171]

(2) Market structure 2: monopoly

If a market has only one seller of a product and no close substitutes for that product are available, the market structure may be classified as a monopoly. The fundamental defining characteristic of a monopoly involves 'barriers to entry', which are caused by three main factors[172]: (a) monopoly resource—a key resource required for production is owned by a single firm;[173] (b) government regulation—the government gives a single firm the exclusive right to produce a good or service;[174] (c) the production process—a single firm can produce output at a lower cost than a larger number of firms.[175]

The monopoly market differs in several ways from the perfectly competitive market; including the marginal revenue being lower than the price, and the marginal cost being lower than the price;

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[168] See: N. Gregory Mankiw(2015), Principles of Economics, 7th version, Cengage Learning, p.280
[169] See: N. Gregory Mankiw(2015), Principles of Economics, 7th version, Cengage Learning, p.280
[170] See: N. Gregory Mankiw(2015), Principles of Economics, 7th version, Cengage Learning, P.296
[171]See: N. Gregory Mankiw(2015), Principles of Economics, 7th version, Cengage Learning, P.296
[172] See: N. Gregory Mankiw(2015), Principles of Economics, 7th version, Cengage Learning, P.300-301.
[173] Although exclusive ownership of a key resource is a potential cause of monopoly, in practice monopolies rarely arise for this reason., as the large scopes of the economies and the development of the international trade.
[174] This kind of monopoly also has been called 'government-created monoplies'. The reasons of the government grants a monopoly could be considering the public interest. for instance, for encouraging innovation, the patent and copyright has been authorized to the authors.
[175] This kind of monopoly also has been called 'natural monopolies', which arises when there are economies of scale over the relevant range of output.

a welfare-maximizing level of output is not produced; the monopoly can earn economic profits in the long-term; and price discrimination is possible.

(3) Market structure 3: monopolistic competition

However, the perfectly competitive market and the monopoly market are extreme forms of market structure. Most markets in the economy are not completely described by either of these forms. Another structure is the 'imperfectly competitive market'. This form falls between a monopoly and a perfectly competitive market. In these markets, the firms face competition, but the competition is not as rigorous (as in a perfectly competitive market), and in this market structure, the firms become the price takers. The firms have some degree of market power, but it is not great enough that the firm can be described as creating a monopoly market.[176]

One type of imperfectly competitive market is called 'monopolistic competition', in which many firms sell products that are similar but not identical. In general, the monopolistic competition market has the following attributes:[177] (1) many sellers—there are many firms competing for the same group of customers; (2) product differentiation—each firm produces a product that is at least slightly different from those of other firms; thus, rather than being a price taker, each firm faces a downward-sloping demand curve; and (3) Free entry and exit—firms can enter or exit the market without restriction; thus, the number of firms in the market adjusts until economic profits are driven to zero.

The long-term equilibrium in a monopolistically competitive market differs from that of a perfectly competitive market in two related ways. First, each firm in a monopolistically competitive market has excess capacity. That is, it chooses to produce a quantity of goods or services that put it on the downward-sloping portion of the average-total-cost curve. Second, each firm charges a price that exceeds its marginal cost.[178]

Meanwhile, the monopolistic competition market structure does not have all the desirable properties of perfect competition. First, there is the standard deadweight loss of monopoly caused by the mark-up of price over the marginal cost. Second, the number of firms may be too great or too small.

(4) Market structure 4: oligopoly

Another type of imperfectly competitive market is called an 'oligopoly', which refers to a market with only a few sellers, each offering a product that is similar or identical to the products offered by other sellers in the market.[179]

Oligopolists maximize their total profits by forming a cartel and acting like a monopolist. If oligopolists make decisions about production levels individually, the result is a greater quantity

[176] Footnote 161, P.330
[177] Footnote 161, P. 331
[178] Footnote 161, P.344
[179] Footnote 161, P.330.

and a lower price than would be found in a monopoly. This means that cooperation between oligopolists is of mutual interest. However, the prisoners' dilemma theory suggests that self-interest can prevent cooperation among oligopolists from being maintained. Additionally, cooperation among oligopolists may reduce competition and thus harm the welfare of society.[180]

2.1.2.2 The role of State in these markets

To achieve the public interest and enhance the welfare of society, the state usually enacts some public policies for regulating the markets. For instance, in the monopolistically competitive market, sellers frequently use advertisements to sell similar goods; therefore, the state enacts advertisement laws to prevent false promotions.

Other than regulation, public ownership is also an important approach that has been employed by many states around the world. For instance, to deal with a monopoly, the state may wholly or partially own and operate public utilities.

However, whether and to what extent the state should regulate markets remains controversial. The following section introduces several relevant theories.

2.1.3 Regulation[181] or not?—State and market as two kinds of resource allocation mechanisms

The state from its inception plays the role of the resource allocation mechanism. The marketplace as a space for transactions to occur always pre-dates the formation of a state. However, the market has only served as a kind of research allocation mechanism since the development of the free market economy. Therefore, states and markets have been regarded as two kinds of resource allocation mechanisms[182] since the development of capitalism. A state mechanism emphasizes plans, guidance, orders, regulations, and even operations of economic activities. Market mechanisms emphasize the interaction between supply and demand to freely determine prices and organize economic activities. In the marketplace, the essence of free enterprise is that individual agents are allowed to make their own decisions.[183] Enterprises decide which products to produce, how much to produce, what price to charge, how much to invest, which inputs to use, and from which suppliers to buy them.[184] The market mechanism has been advocated by the classical economics school as an 'invisible hand' that is generally capable of regulating economic activities.

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[180] Footnote 161, P.366.

[181] In this dissertation, 'regulation' is a broad term used to define the various ways in which the government may intervene in the market in order to influence the allocation of resources.

[182] See: Susan Strange（1998）. They also been respectively regarded as centralized and decentralized mechanism, see: Adam Przeworski (2003). States and markets: a primer in political economy, Cambridge university press;

[183] W. Kip Viscusi, Joseph E. Harrington, Jr., John M. Vernon (2005), Economics of regulation and antitrust, 4th version, the MIT Press, p.357

[184] W. Kip Viscusi, Joseph E. Harrington, Jr., John M. Vernon (2005), Economics of regulation and antitrust, 4th version, the MIT Press, p.357

2.1.3.1 Markets could fail, and then the state could regulate

However, the market could fail. Even the classical economics school acknowledges that there are areas in which the market does not provide the best way to provide public goods.[185] After the first global economic crisis, which occurred at the end of 1920s, the fact that markets could fail was recognized by economists. It has been argued that private sector decisions sometimes lead to inefficient macroeconomic outcomes that require active policy responses from the public sector.[186] Therefore, states may also use coercive power to restrict the decisions of enterprises.

It is assumed that states pursue public interest through regulation and attempt to maximize social welfare. Further, regulation has been treated as an exogenous variable.[187] The basis for government intervention is that under certain conditions—the most common of these being that a particular industry is a natural monopoly or that a particular industry is plagued by externalities—unrestrained competition does not work very well.[188] The problem with a natural monopoly is that there is a fundamental conflict between allocative efficiency and productive efficiency. Productive efficiency requires only one producer; this minimizes the cost of resources required to supply the market. However, a lone producing enterprise will be inclined to set prices above costs to satisfy its objective of maximizing profits. However, in such a case, allocative efficiency is not achieved. To generate allocative efficiency, the marketplace must contain enough firms to generate competition that drives price down to the marginal cost. But, then there is productive inefficiency, because there are too many firms in the marketplace producing the product. This creates an argument for government intervention when a market is a natural monopoly. Problems arising from negative externalities are another reason for government intervention. In general, enterprises, in pursuit of maximum profits, do not consider how their activities reduce resources and thus raise the cost of production for other agents.[189]

2.1.3.2 The state could also fail

However, the state could also fail. Economists have also recognized this, noting the possibility that a regulator could be influenced by interest groups[190], and pointing out the existence of moral

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[185] Smith, Adam (1776) An Inquiry into the Nature and Causes of The Wealth of Nations.

[186] Sullivan, Arthur; Steven M. Sheffrin (2003).*Economics: Principles in action*. Upper Saddle River: Pearson Prentice Hall.

[187] See:
Paul L. Joskow and Nancy L.Rose, The Effects of Economic Regulation, MIT, P.1452, see: https://economics.mit.edu/files/10811

[188] see: Economics of regulation and antitrust, 4th version, p.375; Paul L. Joskow and Roger G.Noll, "Regulation in theory and Practice: An Overview" in Gary Fromm(ed). *Studies in Public Regulation* (Cambridge: MIT Press, 1981).

[189] Economics of regulation and antitrust, 4th version, p.377.

[190] George Stigler made the breakthrough in the theory of regulation occurred in a 1971 article titled "the Theory of Economic Regulation". Stigler assumed that the basic resource of the state is the power to coerce, and that enterprises are rational in the sense of choosing actions that maximize utility. To this point, regulation has been treated as an endogenous variable. Taken together, these two assumptions result in the hypothesis that regulation is one avenue by which an interest group acts to maximize its income; namely, by having the state redistribute wealth from other parts of society to that interest group. Under the research of Stigler, to reach an equilibrium solution between demand and supply of regulation, both politicians and firms are assumed as self-interested maximization and for maximizing utility at the margin..see: Stigler, G. (1971), 'The theory of economic regulation', *Bell Journal of Economics and Management Science*, 2 (1), 3 –21; Michel Ghertman (2009). The puzzle of regulation,

hazard for the principal economic actors. [191]

According to the research through the approach of focusing on the influence by interest groups[192], the presence of a market failure makes regulation more likely, because the gain to certain interest groups is large relative to the loss incurred by other interest groups. In this approach, both regulators and enterprises are assumed to be maximizing utility at the margin out of self interest, according to the research that has focused on the impact of regulation on reaching equilibrium solutions between demand and supply.[193] However, there is an important critique of this approach, which refers to one of its important assumptions; namely, that interest groups directly influence regulatory policies. Thus, this aforementioned research may not reflect reality; not all legislators are the puppets of their interest groups, and the role of the judiciary must not be ignored.[194]

Moral Hazard typically occurs in a Principle-Agent relationship, including the employ contract between the public servants and the government. Public servants are authorized by the government to take certain activities, such as making policies or implementing policies; including the relationships between central government with the local governments for implementing the policies; also including the relationships between the government and their contractors for implementing the public contracts. The inefficiency from these moral hazards could result in the failure of the state as a mechanism of resource allocation.[195]

As the regulation by the state has been pointed out as having lower benefits to Society than market mechanisms, it has been considered as inefficient, the researchers argued for its replacement by market-oriented deregulation.[196] In this case, the national interest was interpreted as a need for as little state intervention as possible.

2.1.3.3 State mechanism or market mechanism? It depends

After recognizing that in real economies, the state may change the regulatory environment to one of de-regulation or to re-regulation. Therefore, even for the same industry, the resource

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deregulation and reregulation, in Claude Ménard and Michel Ghertman (eds.) Regulation, Deregulation, reregulation: Institutional Perspective (Edward Elgar, Cheltenham), p.352.

[191] The concept 'moral hazard' has been considered as originating from the insurance contracts, after which has been entered into by the both parties, the insured person increase their exposure to risk, at the cost of insurance companies. In the economics, this term has been defined as 'post-contractual opportunism', which implies that under the conditions of asymmetric information and self-interest seeking of actors, the parties of the contract deviate from the spirit of an agreement. It has been considered as an inefficient situation because the cost is higher than the gain. See: Williamson, O. (1985). The Economic Institutions of Capitalism. Londn: The Free Press; Baker, T. (1996). On the genealogy of Moral Hazard, Texas Law Review, 75 (2), 237-292.

[192] Economics of regulation and antitrust, 4th version, p.390.

[193] Michel Ghertman (2009). The puzzle of regulation, deregulation and reregulation, in Claude Ménard and Michel Ghertman (eds.) Regulation, Deregulation, reregulation: Institutional Perspective (Edward Elgar, Cheltenham), p.352.

[194] Economics of regulation and antitrust, 4th version, p.390-392.

[195] Through some mechanisms of incentive, the risk of moral hazard could be reduced, such as the life-time responsibilities for policy-maker on their decisions, the performance payment mechanisms in the public procurement contract.

[196] See: Stigler, G. (1982), *The Economist as Preacher, and Other Essays*, Chicago, IL: University of Chicago Press.

allocation mechanism could change between states and markets. To explain this reality, economists began to introduce more practical theories.

Williamson[197] constructed a theory amenable to explaining real economic exchange, instead of remaining in the idealized neoclassical world of perfect competition with firms and their clients reduced to production and utility functions.[198] To approach issues of regulation, he relies on the two main tenets of transaction costs economics[199]. First, '*alternative forms of economic organization—like private monopoly, regulated monopoly, state-owned firms, or franchise bidding—must be evaluated on their comparative merits and failures, rather than being compared to an ideal solution*'.[200] Second, '*this comparative assessment must take into account the redeployability of assets used for transactions in different industries.*'[201] 'In conditions of low asset specificity, deregulation that results in more competition may be advisable. When higher levels of asset specificity exist—such as the levels of asset specificity in the rail, gas and electricity, traditional telecommunications, or water network industries—regulation may be more appropriate.'[202]

The equilibrium is reached when the governance structure chosen among alternative solutions economizes the costs of transaction in the context of the existing attributes of the transactions.[203] When governance choices are modified, because the attributes of relevant transactions differ, the previous equilibrium is replaced by a new one, according to the same normative principle.[204]This line of reasoning applies to re-regulation as well as de-regulation.[205] The state provides the engine by changing the rules of the game to focus on efficiency, so as to offer the right incentives to the players in the market. National interest is interpreted as a need for cost efficiency with pragmatic governance recommendations.

2.1.4 Public procurement rules as one instrument for regulation

In the public procurement field, the state joins the market as a buyer. If we focus on public procurement activities in just one country, and we treat all of the departments, agencies, and public entities of the state as one entity, we observe that transactions in are structured between one buyer

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[197] Williamson, O. (1975), *Markets and Hierarchies: Analysis and Antitrust Implications*, New York: Free Press.

[198] Michel Ghertman (2009). The puzzle of regulation, deregulation and reregulation, in Claude Ménard and Michel Ghertman (eds.) Regulation, Deregulation, reregulation: Institutional Perspective (Edward Elgar, Cheltenham), p.354.

[199] Williamson, O. (1976), egulation, reregulation: Institutional Perspective (Edward with respect to CATVCAT*Bell Journal of Economics*, 7 (1), 73urnal

[201] Michel Ghertman (2009). The puzzle of regulation, deregulation and reregulation, in Claude Ménard and Michel Ghertman (eds.) Regulation, Deregulation, reregulation: Institutional Perspective (Edward Elgar, Cheltenham), p.352.

[201] Michel Ghertman (2009). The puzzle of regulation, deregulation and reregulation, in Claude Ménard and Michel Ghertman (eds.) Regulation, Deregulation, reregulation: Institutional Perspective (Edward Elgar, Cheltenham), p.352.

[202] Ibid.

[203] Ibid.

[204] Williamson (1998) considers that this kind of equilibrium lasts for limited periods and will be replaced by a new one.

[205] Ibid.

and one seller. If we continue to focus on the public procurement activities of just one country, but treat the internal public entities of the state as entities that have their own personalities, then we find that transactions in this field are structured between multiple buyers and sellers. If we expand our scrutiny to the entire world, we find that the numbers of both buyers and sellers increase, particularly the number of sellers.

As for the diversity of the goods and services procured by the government, the government as a buyer joins different types of markets as a market participant. For instance, if the government buys official instruments, it creates a market that would be classified as a monopolistically competitive market. If the government buys certain types of weapon, it may involve the monopoly market. Additionally, in certain markets, the government may be the main or only buyer; for instance, the road construction service industry.

Until now, at both the national level and international level, there are several public procurement rules operating as one instrument used by the state to regulate the relevant public procurement markets. Compared with other rules for regulating the markets, the public procurement rules are special, as they regulate the behaviour of the buyers instead of the sellers.

2.1.4.1 Potential reasons of the public procurement regulations[206]

a. The taxpayers' money

In most modern countries, the state is funded by taxes collected from taxpayers, and the purpose of these funds is to support the public service functions of the state. The state is the agent of the public citizens, and its operation relies on their taxes. One issue at stake in the principal and agent relationship is the necessity of regulating the state's spending behaviour. Public procurement behaviour is part of this consideration. Public procurement rules at the national level exist in order to ensure that public funds are spent efficiently and effectively.

b. The leverage effects of public procurement behaviour

The leverage effects of public procurement behaviour may be explained in terms of the following approaches. First, for some goods and services, the state demands enormous quantities. If the state centrally operates the public procurement behaviour of several agencies, it could have the advantages of economies of scale, allowing it to bargain for better prices. Second, some important domestic industries needs support from the state for development. The state's procurement could provide stable support on the demand side. Third, procurement behaviour could set an example for other consumers in the market. For instance, if the state procures green electricity, this will be a good example for other buyers in the market. Fourth, requirements from the demand side could improve the development of the supply side through market mechanisms

[206] For this general issue, please see the following researches: S. Arrowsmith, J. Linarelli and D. Wallace, Chapter 1 and Chapter 2 of *Regulating Public Procurement: National and International Perspectives* (London: Kluwer Law International 2000); S. Schooner, Desiderata: Objectives for a System of Government Contract Law, P.P.L.R., 2002, 11, p. 103; P. Trepte, Chapter 1 and 2 of Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation, Oxford University Press, 2004.

and the supply chain. For instance, if a certain product never existed before in the market, procurement demand from the state could encourage innovative behaviour on the supply side. These leverage effects have produced modifications in public procurement rules around the world in the recent years.

c. The liberalization of the international trade

Under the influence of Neo-classical liberalization thought, negotiations meant to improve international trade in the area of government procurement began during the establishment of international trade organizations. The general rationale behind such negotiations was that the comparative advantages that exist among various the countries could bring win-win results for international public procurement. However, given the barriers presented by some domestic stakeholders, the process of enacting international public procurement rules to liberalize procurement markets is still developing.

2.1.4.2 Purposes of the public procurement regulations

A. Commercial purposes

Commercial purposes[207] focus on how to enhance the efficiency of public funds for procuring goods and services with the best value. Commercial purposes are related to the economic efficiency of procurement activities, which encourages procurers to analyse costs and efficiency, and to execute publicly funded procurement activities as they would do on their own behalf.

Generally, commercial purposes include the following three aspects:[208] (a) ensuring that the goods, services, and works procured are suitable—they should meet the requirements of the task but not overreach the requirements; (b) including an institutional arrangement for ensuring that the goods, services, and works may be procured under the best conditions possible; and (c) ensuring that the supplier selected has the ability to provide goods, services, and works according to the conditions and terms of the procurement contract.

B. Public policy purposes/horizontal purposes[209]

Further, public policies purposes have been included in public procurement rules. At the earlier stage, they were considered only as secondary purposes. However, as the public policy function of

[207] This is also referred as 'value for money', or 'efficiency'.

[208] Sue Arrowsmith, Understanding the purpose of the EU's procurement directives: the limited role of the EU regime and some proposals for reform, in The Cost of Different Goals of Public Procurement, issued by Konkurrensverket (Swedish Competition Authority), 2012, p. 48 see: http://www.konkurrensverket.se/globalassets/english/publications-and-decisions/the-cost-of-different-goals-of-public-procurement.pdf

[209] For the discussion of the horizontal purposes, please see: J. Arnould, Secondary Policies in Public Procurement: the Innovations of the New Directives, P.P.L.R., 2004(13), P.187; S. Arrowsmith, An Assessment of the New Legislative Package on Public Procurement, Common Market Law Review, 2004(41), 1277; S. Arrowsmith and P. Kunzlik (eds.), Social and Environmental Policies in EC Procurement Law: New Directive and New Directions ,Cambridge: CUP, 2009; C. McCrudden, Buying Social Justice: Equality, Government Procurement, & Legal Change, OUP, 2007; P. Trepte, Public Procurement in the EU: a Practitioner's Guide, Oxford: OUP 2007, p.63-87.

public procurement has been recognized by many countries in recent years, the public policy purposes have been considered horizontal purposes. This means that public policy purposes are as important as commercial purposes.

The rationale behind pursuing public policy purposes is that the procurers in a public procurement regime are public entities; these are different from private entities. The main purpose of private entities is pursuing maximum profits, while the main purpose of public entities is implementing public functions and providing public services to society. Therefore, public entities should consider economic benefit in their procurement activities, and they also must consider implementing public policies that are enacted by the government.

Given the leverage effects of the public procurement behaviour mentioned above, we find that public procurement systems are generally employed to support the following kinds of public policies: (a) promoting the environmentally-friendly development; (b) promoting the fair development of the economy; and (c) promoting the inclusive development of society. Therefore, several sustainable public procurement purposes have been advocated, such as green public procurement[210], public procurement for innovation[211], and public procurement for improving the development of Small and Median Enterprises (SMEs)[212]. Additionally, several other public policy purposes have been included in the national public procurement rules, such as the priority of procuring domestically produced goods.

C. Open public procurement market

The purpose of an open public procurement market is included in most international or regional

[210] For the discussion of green public procurement, see: P. Kunzlik (ed.), The Environmental Performance of Public Procurement (2003), published by the OECD; P. Kunzlik, Green Procurement under the New Regime in R. Nielsen and S. Treumer (eds), The New EU Public Procurement Directives, Copenhagen: Djøf, 2005; S. Arrowsmith and P. Kunzlik (eds.), Social and Environmental Policies in EC Procurement Law, Cambridge: CUP 2009; Roberto Caranta and Martin Trybus (eds.) The law of green and social procurement in Europe, DJØF publishing Copenhagen, 2010; Roberto Caranta. Helping Public Procurement Go Green: The role of International Organisations, EPPPL, 2013(1), p.49; CAO Fuguo, ZHOU Fen. Towards Sustainable Public Procurement in China: Policy and Regulatory Framework, Current Developments and The Case For A Consolidated Green Public Procurement Code, Journal of Malaysian and Comparative Law, 41, 2014; Beatriz Martinez Romera and Roberto Caranta, EU Public Procurement Law: Purchasing Beyond Price in the Age of Climate Change, EPPPL, vol.3, 2017, p. 281; Lina Wedin Hansson, Susanna Johansson. Institutional Incentives for Sustainable Public Procurement: A Case Study of Sustainability Considerations in the Swedish Construction Sector, P.P.L.R., 2017(5), p. 220-235; Pedro Telles, Grith Skovgaard Ølykke. Sustainable Procurement: A Compliance Perspective of EU Public Procurement Law, EPPPL, 2017(3), p.239-252.

[211] For the discussion of promoting innovation and public procurement, see: CAO Fuguo, Government Procurement and Innovation in China: a review of recent developments, P.P.L.R., No.6, 2007; Birgit Aschhoff, Wolfgang Sofka, Innovation on Demand—Can Public Procurement Drive Market Success of Innovations, Research Policy, vol. 38, 2009, p. 1235-1247; Leif Hommen and Max Rolfstam, Public Procurement and Innovation: Towards a Taxonomy, Journal of Public Procurement, Vol.9, 2009, p. 17-56; Charles Edquist, Nicholas S. Vonortas, Jon Mikel Zabala-Iturriagagoitia and Jakob Edler (eds.) Public Procurement for Innovations, Edward Elgar Publishing Limited, 2015.

[212] For discussion of improving the development of SMEs and public procurement, see: CAO Fuguo, Building up SME Programe in government procurement in China: Legal Structure, recent development and the way towards WTO-GPA, Public Procurement Law Review, no. 6, 2013; M. Burgi, "Small and medium-sized enterprises and procurement law - European legal framework and German experiences", P.P.L.R., 2007 (16), 284; Martin Trybus, The Promotion of Small and Medium Sized Enterprises in Public Procurement: A Strategic Objective of the New Public Sector Directive? Chapter in in François Lichère, Roberto Caranta and Steen Treumer (eds.) Modernising Public Procurement: The New Directive (Djøf: Copenhagen, 2014), p. 255-280; Martin Trybus, Marta Andrecka. Favouring Small and Medium Sized Enterprises with Directive 2014/24/EU? EPPPL, 2017(3), p.224-238.

public procurement rules, as well as in bilateral or multilateral trade agreements.[213] Open public procurement is not the first priority of international trade agreements; it is smaller than the commercial trade markets. Also, international free trade barriers, such as tariffs, are seen to more easily achieve agreement among countries. Opening a public procurement market requires that foreign suppliers are treated the same as domestic suppliers. To a certain extent, the purpose of opening a public procurement market is to limit the purposes of public policies. This explains why public procurement rules have not been included in most multilateral trade agreements.[214] Also, until now, the international level of the WTO Government Procurement Agreement (GPA) has been plurilateral and only includes limited WTO members. However, the development of a public procurement regime in EU, the expanding GPA membership,[215] and the increase in public procurement clauses in bilateral trade agreements, prove that opening a public procurement market between nations has been accepted as a way to achieve win-win economic solutions.

2.1.4.3 Coordinating contradictions among various regulatory purposes

(1) Potential conflicts between different regulatory purposes

Coordinating potential conflicts among the various regulatory purposes is an important challenge faced by regulators during the process of regulating public procurements. The potential conflicts could be classified into the following types. (a) Conflicts between improving the efficiency of public funds and improving integrity (anti-corruption). Fighting corruption may support improve the efficiency of public fund usage. If a contract is awarded to a supplier as the result of corruption, this diminishes the efficiency of the use of public funds, even if the supplier has a better competitive advantage in the industry. When a supplier with a weaker competitive advantage wins a contract on the basis of corruption, the damage to the industry might be even worse, as it could lead to a situation in which 'the bad money drives out good'. When a supplier with a better competitive advantage wins a contract on the basis of corruption, it may add the cost of its corruption (i.e., of "buying" the contract) onto the total cost of the goods or services, and therefore the procurer will pay more for the good or service than it would in a situation without corruption. However, conflicts between efficiency and integrity also exist. First, pursuing efficiency could limit the pursuit of integrity; for example, if we consider only the efficiency of public fund usage, a public procurement regime could miss opportunities to carry out negotiations between the procurer and suppliers. However, multiple rounds of negotiations may also increase the possibility of corruption. Second, pursuing anti-corruption could limit the pursuit of efficiency; for example, in certain public procurement regimes, many approval procedures are required to

[213] For the further discussion, see: A. Reich, *International Public Procurement Law*, Kluwer Law International, 1999; S. Arrowsmith, "The National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict?", chapter 1 in S. Arrowsmith and A. Davies (eds.), *Public Procurement: Global Revolution*, Kluwer Law International, 1999; S. Arrowsmith, Government Procurement in the WTO, Kluwer Law International, 2003.

[214] For relevant research, see: Nuno Cunha Rodrigues, The use of public procurement as a non-tariff barrier: relations between the EU and the Brics in the context of the new EU trade and investment strategy, P.P.L.R., 2017(3), 135-149.

[215] See: https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm and also Jean Heilman Grier, An Assessment of WTO GPA Membership: Current Status and Future Prospects, P.P.L.R., 2018(1), NA33-NA48.

pursue integrity. Implementing these approval procedures requires administrative support and the sacrifice of procurement time, which may hamper efficiency.

(b) Potential conflicts between efficiency and improving public policies on matters related to society, the economy and the environment. For instance, to improve the development of SMEs, certain governments require that certain contracts are saved for them. In such situations, the cost of a specific procurement programme may be higher than the cost of procurement without considering the public policy requirement. This case also applies to the implementation of other public policy purposes. Generally, taking the public policy purposes into consideration, we find that the procurement costs of the specific procurement programmes are higher.

(c) Potential conflicts between maintaining an open public procurement market and other purposes. This type of conflict may also be expressed as conflicts between the international regulation and the domestic regulation[216]; the former is usually only included in international public procurement rules. ***Over emphasizing the purpose of an open public procurement market will limit the pursuit of the efficient use of public funds.*** In general, the implementation of an open public procurement market relies on the requirements of transparency and competition. For instance, the minimum time periods required for publishing notices of public procurement are longer than those for domestic procurement rules; this may give sufficient and equal preparation time to both domestic and international suppliers to join the procurement procedure, but it also may let the procurers spend more time and administrative cost on the procurement.[217] ***Potential conflicts between the purposes of an open procurement market and improving public policies related to society, the economy and the environment are fundamental.*** Conflicts between these two kinds of purposes help explain the difficulties of achieving international agreements on public procurement rules. The essential nature of an open public procurement market is to provide foreign suppliers with favourable treatment, while improving public policy usually gives preference to certain kinds of suppliers in domestic industries, and tends not to include foreign suppliers.[218]

(2) How to coordinate the conflicts noted above?

Even though the potential conflictions exist between different kinds of regulatory purposes, there are several approaches that could be used to coordinate them.

(a) Developing more inclusive regulatory purposes and relevant measuring tools

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[216] See: S. Arrowsmith, National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict?, Ch. 1 in S. Arrowsmith and A. Davies (eds.), Public Procurement Global Revolution, London: Kluwer Law International, 1998.

[217] Comparatively, it also has been argued that through promoting the competition in the international public procurement market, it also could reduce the possibility of corruption and thus reduces the cost of the procurement. For instance, one provision of anti-corruption has been provided in the new GPA. For more discussion, see: Robert D. Anderson, William E. Kovacic and Anna Caroline Muller. Promoting competition and deterring corruption in public procurement markets: synergies with trade liberalization, P.P.L.R., 2017(2), p.77-79.

[218] For the conflicts between EU public procurement regime on social responsibility and the GPA could be found in the research: Abby Semple. Socially Responsible Public Procurement (SRPP) under EU law and International Agreements: The GPA, CETA and the EU-Ukraine Deep and Comprehensive Free Trade Area, EPPPL, 2017(3), p.293-309.

Combining several purposes under a single more inclusive purpose is one approach that has been developed under the modern public procurement system; for instance, advocating for a Value for Money (VFM) scheme. VFM considers not just the economic efficiency of a specific procurement project; it also considers the impact on the entire society, including society, the economy, culture, etc. Under a public procurement regime using VFM for an electricity procurement project, spending the lowest amount of public funds was not the only purpose; the impacts of the processes of producing and consuming processes the electricity were also considered.

To implement inclusive regulatory purposes, employing more inclusive standards during the procurement process is necessary. For instance, award contract criteria should include not only the lowest price, but also other comprehensive standards, such as the Most Economic Advantage Standard, which has been used in the EU's public procurement regime. Further, taking a long-term perspective to analyse the cost and benefits of the procurement has also been accepted by several procurement regimes, such as Life Cycle Assessment (LCA) and Life Cycle Cost (LCC).

(b) Respecting and employing the relevant market mechanisms

Public procurement activities are different from normal administrative activities, as they involve transactions and thus share several common characteristics with commercial procurement activities. Integrating relevant market mechanisms into public procurement rules has been considered an effective approach in almost all countries. The competition mechanism in particular has been accepted as a reasonable approach for providing companies with opportunities to join public contracts and for guidance in allocating public sources.

Generally, public procurement rules include two types of competition: (1) competition that allows all potential suppliers to join; and (2) competition among limited numbers of suppliers to ensure effectiveness. Ensuring the maximum extent of the competition is the general requirement of the public procurement rules; however, under certain justified circumstances, reducing the requirement of competition is allowed. The structure of supply and demand in the specific market is the main reason for this. Additionally, an emergency procurement or a complicate procurement could justify lowering the requirements regarding competition.

(c) Improving the balance between fairness and efficiency under the condition of legal certainty

The balance between fairness and efficiency refers to the resources being located fairly and efficiently. The balance between fairness and efficiency in a public procurement regime relies on several elements that are determined by rules, including ' transparency', ' equal treatment and non-discrimination', 'the efficiency of the procedure' and 'the discretion of the procurers'.

First, the condition of legal certainty. By clarifying the rights and obligations of the parties involved, and providing remedies when rules have been breached, public procurement rules create stable anticipation for all parties and allow them to have faith in the procurement process.

Second, the extent of the transparency. Transparency may be understood as partial or whole, and it is defined by these aspects: (a) the contract opportunity is publicised; (b) the rules of each procurement procedure are publicised; (c) the result of the procurement are publicised; and (d) the results of any challenges and complaints are publicised. Transparency enhances the Information Symmetry between procurers and suppliers, among potential suppliers, and between the monitors and the relevant parties.

Third, the extent of equal treatment and non-discrimination. At the international level, 'equal treatment and non-discrimination' emphasizes no discrimination on the basis of the nationality of the suppliers. The international rules focus on the rules on qualification and awarded criteria, which should not include elements related to discrimination on the basis of nationality.

At the domestic level, 'equal treatment and non-discrimination' has a broader scope, referring to equal treatment among all participants, including but not limited to: (a) unreasonable preferences about qualifications; (b) equal access to the information; (c) objective descriptions of the awarding criteria; (d) allowing suppliers to prove that they meet the relevant qualifications, or that their goods and services meet relevant specifications through equivalent evidence; (e) applying the same exclusive reasons to all participants; (f) providing equal time and opportunity to submit and modify tenders; and (g) providing all interested parties an equal chance to remedy any flaws.

Fourth, the extent of the efficiency of the procedure. The efficiency of the procedure requires that there be no unnecessary or unreasonable delay during the procurement process. A high-efficiency procedure emphasizes proportionality between the time and administrative costs and the amount of the procurement project.

Fifth, the type and degree of the discretion granted to the procurers, including the conditions and approaches of implementing this discretion. The discretion of the procurers refers to the rights of the procurers to determine what should be procured and how to organize procurement activities. Authorizing and limiting the discretion of the procurer is the central element of public procurement regulation. More discretion means the procurers are more free to make decisions during the public procurement process; therefore, there are more opportunities for them to act as procurers in the private sector. Meanwhile, there are at least two reasons to limit discretion: (a) to ensure that poor decisions are not made; this amounts to a belief that normative procurement processes, rather than individual and casual decisions, contribute to the parties making reasonable decisions on the basis of experience and wisdom; and (b) to prevent the abuse of power on the part of any party involved in making decisions (i.e., anti-corruption and other forbidden practices, such as giving local suppliers preference). More discretion means more opportunities to harm the integrity and the role of state as it relate to implementing public functions. Making decisions on the basis of procurement rules has been considered a promising approach for supervising procurement decisions.

The authorized types of discretion, and the conditions and approaches of implementing such discretion, are various; thus, procurement rules have been classified as 'rigid' rules versus 'light'

rules. Both rigid and light rules may be included in the same public procurement regime, providing certain types of procurement entities with more rigid or lighter rules than other entities.

Coordinating potential conflicts among various regulatory purposes involves balancing the elements of transparency, equal treatment, procedural efficiency, discretion, different public procurement regimes that focus on the competition mechanism, providing the legal certainty, balancing fairness and efficiency, and structuring trade-offs between the various public procurement purposes.

The value of each public procurement purpose impacts the extent and proportionality of transparency, equal treatment, procedural efficiency, and the limitations of discretion in a public procurement regime. When a public procurement regime emphasizes an open public procurement purpose, it often requires more transparency and equal treatment, allows procurers less discretion, and makes fewer demands for procedural efficiency. When a public procurement regime emphasizes the efficiency of public funds, it makes standard requirements for transparency and equal treatment, and it has more requirements regarding procedural efficiency and limiting discretion. Where a public procurement regime emphasizes improving sustainable public policy purposes, it requires transparency, equal treatment and procedural efficiency, and it affords procurers more discretion.

2.1.5 Issues that arise when considering the role of SOEs under public procurement rules

2.1.5.1 Why should the procurement activities of SOEs be regulated?

As described above, an SOE could play one or more of the following roles: (1) being used by the state to provide a public service; (2) producing and/or providing private goods (services) to the state; and (3) acting in the market to provide private goods (services) and join the competition like a private company. SOEs operate in the public sector as sellers, and also in the private sector as sellers. SOEs provide public goods and services as well as private goods and services. SOEs may be part of a monopoly market, or of oligopoly, monopolistic and free markets.

The reasons for public procurement regulation include spending taxpayers' money in an efficient way, leveraging public procurement behaviour to implement public policies and liberalizing the international public procurement market. Do the reasons for enacting general public procurement rules also apply to SOEs? In other words, it is necessary to regulate the procurement activities of SOEs?

2.1.5.2 What kinds of SOEs should be regulated by public procurement rules?

Assuming it is necessary to regulate procurement activities through public procurement rules, what kinds of SOEs should be regulated? On the basis of the discussion above, we may posit that SOEs may be a part of the 'State' and act as government entities, and at the same they may operate as 'market participants', behaving like market participants but with involving public ownership. Should public procurement rules apply to both kinds of SOEs and why? If not, how may we

distinguish the state type of SOE from the commercial type?

As mentioned above, it is possible that SOEs may join different types of markets. In certain markets, such as free markets and monopolistic markets, the competition level is high. In other markets, such as oligopoly markets, the competition level is low. Is the structure of the market involved relevant to determining whether to regulate the procurement activities of SOEs?

2.1.5.3 What kinds of SOE activities should be regulated?

In addition to considering the characteristics of SOEs as the 'subject' of the procurement activities, should we also consider the 'behavioural' characteristics of the procurement activities of SOEs when discussing the regulatory scope of public procurement rules related to SOEs? As SOEs may provide public and private goods (services) to the state and the markets, the procurement activities of SOEs may be divided into different types: (1) procuring goods and services for self consumption; (2) procuring the production of goods and services to provide or re-sell to the state ; and (3) procuring the production of goods and services to provide or re-sell to the markets. As most public entities are only involved in procurement activities for self-consumption or to provide public services, regulating the procurement activities of SOEs becomes important. What kinds of SOE procurement activities should be regulated? Should regulation include procurement activities for providing private goods (services) to the markets?

Further, if SOEs are involved in both public and private sectors, should public procurement rules be applied equally to both, or only to the activities that occur in the public sector? In other words, do the characteristics of SOE activities impact the regulatory scope of public procurement rules, and do public procurement rules apply only to procurement activities in the public sector, even is an SOE is involved in both the public and private sectors?

2.1.5.4 How to coordinate the potential conflictions among different regulatory purposes?

Potential conflicts among different regulatory purposes reflect the regulation of SOEs under public procurement rules. First, compared with a domestic public procurement regime, requiring open public procurements governed by international public procurement rules tends to cover more SOEs under the regulations. Thus, how to coordinate domestic and international rules regarding the coverage of SOEs is important. Second, compared with general public entities, SOEs have more commercial characteristics; therefore, how does the goal of improving the efficiency of public fund usage rank versus the goal of implementing public policies for general public entities that also apply to SOEs?

2.1.6 Inspirations from the theories

According to the research above, it could be concluded that 'public ownership' is one kind of mechanisms used by the state for resource allocations. The effect of the 'public ownership' is controversial. On the one hand, 'public ownership' has been considered as one instrument for making up the market failure. On the other hand, the inefficiency of the SOEs had been considered

as the result of the 'public ownership', which impacted the reforms of privatisation in several countries in the past several years. Recently, public ownership has not been considered as the 'root' of the inefficiency of public enterprises. It means there are no absolutely advantages between public ownership and private ownership; it depends on the conditions concerned.

If 'public ownership' has been employed by the state in the form of 'SOEs', as an instrument to regulate for making up the failure of the market mechanism, or for other reasons. SOEs as a regulatory instrument itself are also needed to be regulated, deregulated and reregulated. The pricing activities of the SOEs which publicly supply goods[219] and the managing issues of SOEs are the aspects which are mostly focused by the economists. However, whether the procurement activities of the SOEs should also be regulated has not been discussed properly on the theory of economics. Combining the discussions above in Chapter two, several inspirations could be enlightened as followings:

(1) The market structure of the activities pursued by the enterprises is relevant.

Generally, from the view of economics, whether it is necessary to regulate the procurement activities of SOEs is relevant to the issue that whether the procurement activities of the SOEs impact the efficiency of the SOEs. If regulating the procurement activities of SOEs could improve the efficiency of the SOEs, it is reasonable to regulate them.

The procurement cost is a positive correlation with the production cost of the goods or services. If the market structure is competitive, the price of the goods and services is decided by the market. In this case, the individual enterprises will try to lower the product cost and then bring more profits. As the principle of pursuing profits, individual enterprises have the incentive to procure in a better way for reducing the product cost, such as reaching the balance between the fastest time, the highest quality, the lowest cost and the best service. If the market structure is not competitive and the individual enterprises have the influence on setting the price in the market, the individual enterprises will have no or less incentive on reducing the procurement cost, even though they also pursue the profits. It turns out that the market structure of the activities pursued by the enterprises is relevant, no matter the enterprises are owned by public entities or private entities.

(2) 'public ownership' could not be a sufficient condition for regulating the procurement activities of SOEs

However, to what extent 'public ownership' could lead to the inefficient of SOEs on the aspect of procurement activities? Or we could make a conclusion that all SOEs should be regulated by the public procurement rules because they have public ownership?

Generally, in the competitive market, the procurement activities of private entities are not

[219] In this case, individuals consume goods in different quantities and where people who do not pay are excluded from consumption. Therefore, in this case free riding causes the same problem as in the case of private enterprises. See: Dieter Bos, Public Enterprise Economics: Theory and Application, North-Holland, 1985.

regulated by law. Because they are the private players in the market which burden the risk of bankrupt and be dropped out from the market. Thus, the private entities have the internal incentive to control their behaviour in the field of procurement for reducing the procurement cost. The procurement activities of private enterprises may be guided by their internal documents, as the needs of management.

Comparatively, the procurement activities of public entities are regulated by law, mostly as the reason for achieving the efficiency of public funds. The rationale behind is that as the requirement of transparency and competition, the procurement activities of government could spend less money for buying the goods and services. SOEs are wholly or partially owned by the state, therefore there is also involved by public funds. However, private fund or public fund is not the core issue for determining the reason of regulation, as for the procurement all of them have the capability to procure something. The relevant point is the holders of the funds, whether they can impact the efficiency of the procurement behaviour and how to impact.

The observation depends on the answers of the following issues: (a) whether the public entities as the shareholder can impact the procurement behaviour of the SOEs in a way deviating from pursuing the efficiency of the funds. For example, the public shareholders could enforce the SOEs to procure in a way which private shareholders will never do. (b) Whether as there are the public entities as the shareholders, the manager of SOEs doesn't care so much about the cost of procurement? If the examination of the issues above turns out that the public shareholders could not impact the efficiency of the procurement behaviour and the manager of SOEs have the incentive to do a better procurement; therefore the public ownership will not impact the efficiency of the SOEs, and no reason for regulating on it. It means 'public ownership' could not be a sufficient condition for regulating the procurement activities of SOEs. We should not conclude that the SOEs should be regulated by public procurement law as there is the involvement of public ownership. The regulatory reasons should be relevant to the factors which impact the SOEs to procure in an inefficiency way. Assuming that the private enterprises in the same market could procure in an efficient way, the regulatory reasons should be relevant to the factors which make the SOEs differ from private enterprises. Public ownership could be relevant, but also could be not relevant. Other relevant factors could be the multitude of political and economic determinants of SOEs' activities as compared to the main commercial determinants of the activities of private enterprises.

(3) The characteristics of the SOEs should be considered in the process of deciding whether it is necessary to regulate, the scope of the regulation and how to regulate.

As mentioned above, SOEs could play the roles for State to provide public goods and services, and also could play the roles as private enterprises to provide private goods and services. Even for one SOE, it could participate in these two kinds of activities. The procurement activities of SOEs may be divided into different types. Only regulating the procurement activities for self-consuming or also regulating the procurement activities for investment? Only regulating the

procurement activities for providing public goods and services or also the procurement activities for providing private goods and services? There are several concerns relative to these questions: (a) If SOEs compete with the private enterprises, whether the requirements on procurement activities could bring adverse effects to the SOEs, as private partners are not required to comply with the rules? (b) Whether the requirements on procurement activities could improve the neutral competition between SOEs and private partners?

To research the questions posed above in section 2.1.5, the next section of this paper uses the EU public procurement regime and the Chinese public procurement regime as cases studies. Additionally, questions relevant to the international public procurement regime will be discussed in Chapter 4.

2.2 Case study—EU level

2.2.1 Evolution of EU public procurement regulation [when, what, why the current rules] and a reflection of trends in regulating SOEs

2.2.1.1 EU treaty and the relevant rules about public procurement regulations

The silence of the European Economic Community (EEC) Treaty

The original EEC Treaty contained no specific provisions that laid out a general Community regime applicable to public contracts.[220] The following factors may explain this. (1) The nature of the EEC treaty. The EEC Treaty laid down general principals to govern the establishment of a common market and provide for an autonomous institutional decision-making structure, the goal of which was to fill in any 'deliberate' regulatory gaps left by the Treaty. Therefore, public markets were not directly addressed, and their eventual regulation was left to the adoption of secondary legal measures.[221] (2) Reducing tariff barriers was the main concern for dealing with trade liberalisation at the international level.[222] Non-tariff barriers were not deemed significant until the 1960s and 1970s, and especially so after the economic crisis. Further, international competition in economic sectors in which public purchasing is dominant[223] was not as intense when the Treaty was created as it would become later. (3) The economic and strategic importance of public contracts was not recognized. Public contracts were regarded as privileged instruments for intervening in the economy and pursuing a wide range of social, political and economic policy objectives, and Member States were reluctant to include such a sensitive issue on the agenda of

[220] Even though article 132(4) EC is the only provision which explicitly refers to public procurement, its scope is limited to the relationships between Member States and the Overseas Countries and Territories. A general Community legal regime applicable to public contracts cannot be deduced from it. Furthermore, Article 223(1)(b) EC, which provides for a general exemption from the applicability of Community legislation products intended for specially military purposes, directly affects public procurement in the defence sector. See: J.M. Fernandez Martin, *The EC Public Procurement Rules: A Critical Analysis* (Oxford: Clarendon Press 1996), p.5.

[221] J.M. Fernandez Martin, *The EC Public Procurement Rules: A Critical Analysis* (Oxford: Clarendon Press 1996), p.6.

[222] OECD, Government purchasing in Europe, North America and Japan (Paris, 1966); Baldwin: non-tariff distortions of international trade, Washington DC, 1970.

[223] For instance, telecommunications, energy, transport, etc.

the EEC Treaty negotiations.[224]

However, national public procurement regulations were affected by the EC's legal regime, as several other provisions in the EEC treaty were indirectly applicable. For example, Articles 30 to 37 of the EEC treaty regarding the free movement of goods; Articles 59-66 of the EEC treaty regarding the free provision of services; and Articles 52-58 of the EEC treaty regarding the right of establishment provisions. These provisions are the basis for developing secondary community laws regarding public procurement; the details of these secondary laws are discussed in Section 2.2.2.

2.2.1.2 Initial formation of the regulatory framework of public procurement in the EU

Since the 1960s, public procurement regulations have been regarded as an important concern for the common market. In the process of regulating public procurement at EEC level, EEC Commission has played an active role. In terms of prohibiting discriminatory conduct, the provisions in the EEC treaty do not suffice to create a common market. For instance, even though not all of the treaty's provisions and administrative practices are discriminatory, the diversity of rules about public contracts, with different time-limits, procedural requirements, and advertising rules etc., tend to dampen the willingness of economic operators to participate in the public procurement market of another Member State (MS). Therefore, the EEC Commission insisted on adopting positive measures to harmonise the rules about public procurement in the Member States.

(1) Regulating the awarding of public works contracts in the public sector

In 1962, two general programmes[225] for eliminating existing restrictions on inter-state trade were adopted by the Council of Ministers. Among the restrictions to be abolished were rules and practices of Member States that '…exclude, limit or impose conditions upon the capacity to submit offers or to participate as main contractors or subcontractors in contract awards by the **State or legal persons governed by public law**'[226]. Both programmes envisaged a gradual and balanced removal of restrictions in the form of quotas and the coordination of national procedures for the award of public contracts.[227]

(a)Directive 71/305/EEC: the first directive on awarding public works contracts][search Directive 71/304/EEC

At the same time, the EEC had already started to draw up common rules to regulate the awarding of public contracts that would shape Europe's common market.[228] In 1971, the EEC adopted its first directive on public procurement: Council Directive 71/305/EEC, which was the

[224] J.M. Fernandez Martin, *The EC Public Procurement Rules: A Critical Analysis* (Oxford: Clarendon Press 1996), p.5.
[225] See J.O. 1962,36/32.
[226] SEE : See J.O. 1962,36/32.; Bovis, Christopher H. (2007). *EU Public Procurement Law*. Elgar European Law Series. Edward Elgar Publishing, p 17.
[227] Christopher Bovis (1998), the liberalisation of public procurement and its effects on the common market, England: Ashgate, p.53 and 59.
[228] Common Market to 'Europeanize' Public Works Contracts, 12 April, 1962.

primary vehicle for liberalizing public works contracts.[229] The main objective of this directive was the establishment and enhancement of a transparent regime in the public works sector, in which undistorted competition would ensure that contracts were allocated to contractors under the most favourable terms for the contracting authorities.[230]

The first public procurement directive at the EU level regarding the awarding of public works contracts was issued because of the large contract values that these contracts tend to involve. As the main purpose of a public procurement directive was to establish an internal public procurement market, larger contracts, such as work contracts that created more interest from foreign contractors, became the first area that was opened to the public procurement market among the EEC countries.

The concept of public works contracts under the first Works Directive was extensive.[231] It covered those contracts that were concluded in writing between a contractor and a contracting authority for pecuniary interest concerning the execution and design of works related to building, or to the civil engineering activities listed in class 50 of the NACE Classification[232], or to the execution by whatever means of work corresponding to the requirements specified by the contracting authority. Public contracts under the framework of the first Work Directive covered mainly construction projects in the education, health, and sports and leisure facilities sectors, in as much as state, regional or local authorities undertake such projects.

Work contracts in the defence sector, contracts awarded pursuant to certain international agreements and contracts in the utilities sector (transportation, water, energy and telecommunications) were explicitly excluded from Directive 71/305/EEC for two reasons.[233] (1) Authorities entrusted with the operation of public utilities had been subject to different legal regimes in the Member States, varying from being completely state-controlled enterprises to being privately controlled.[234] At that time, the Work Directive did not include contracts in the utilities sector, as the size of the relevant procurement markets were not equal among Member States. For instance, awarding contracts to privately controlled enterprises was not be covered by the Work Directive, as these enterprises did not fall into the definition of 'contracting authority' in the Directive. Therefore, if a contract in the utilities sector were regulated, Member States with more state-controlled enterprises operating in the utilities sector would open larger public procurement markets than would Member States that had more private enterprises acting in these fields. (2)

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[229] Information MEMO, award of public works contracts, Brussels, P-48/64, July 1964.

[230] See: J.M. Fernandez Martin (1996), *The EC Public Procurement Rules: A Critical Analysis* (Oxford:Clarendon Press), p. 12; Christopher Bovis (1998), the liberalisation of public procurement and its effects on the common market, England: Ashgate, p.60.

[231] Christopher Bovis (1998), the liberalisation of public procurement and its effects on the common market, England: Ashgate, p.60.

[232] General Industrial Classification of Economic Activities within the European Communities, see Annex II Directive 71/305.

[233] Article 4 and Article 5 of the Directive 71/305/EC

[234] Christopher Bovis (1998), the liberalisation of public procurement and its effects on the common market, England: Ashgate, p. 65. the Commission also confirmed that the reason given for the exclusion was indeed that some bodies with activities in sectors concerned had public status while others were private, see paragraph 377 In COM (88)376.

Given the purchasing volume and relative magnitude of the contracts involved, public utilities procurement constituted an important domestic industrial policy instrument. Member States have long relied upon preferential and closed utilities procurement in order to sustain certain strategic industries; therefore, many were reluctant to subject the procurement of utilities to international procurement rules.[235]

(b)Directive 89/440/EEC: extending the coverage to awarding work concession contract

Given the significance and specific characteristics of work concession contracts, these work concessions had been used as an alternative approach for avoiding the application of international procurement rules. In 1989, Directive 89/440/EEC was issued, which extended the coverage of the Works Directive and started to regulate the awarding of work concession contracts. However, the work concessions covered by Directive 89/440/EEC were limited, and the relevant regulatory rules were too simple.

(2) Regulating the awarding of public supply contracts in the public sector

(a)Directive 77/62/EEC: the first directive on awarding public supply contracts

Directive 77/62/EEC was the first directive that addressed the awarding of public supply contracts, but its provisions do not apply to contracts awarded by bodies that administer: transport services; the production, distribution and transmission or transportation of water; or the energy and telecommunications services.[236] The modification of the Supplies Directive adopted in March 1988 reformulated these exclusions such that the Directive also does not apply to contracts awarded for: carriers by land, air, sea or inland waterways; contracts that concern the production, transport and distribution of drinking-water; or those awarded by authorities whose principal activity lies in the production and distribution of energy or telecommunications services.[237] The purpose of these changes was to clarify the interpretation of the Directive's text, in particular, to limit the transport exclusion to carriers, as distinct from public providers, of transportation infrastructure such as ports and airports.

(3) Regulating the awarding of public contracts in the utilities sector

Although works and supplies contracts in the utilities sectors were not included in the Work Directive and Supply Directive, the Council asked the Commission to follow the progress of the The European Conference of Postal and Telecommunications Administrations (CEPT) proceedings[238] on harmonisation in the field of telecommunications and to submit a timetable for measures that would ensure effective competition in the field of supply contracts awarded for

[235] European Commission, Statistical Performance Indicators for Keeping Watch over Public Procurement, 1992.
[236] Article 2 of Directive 77/62/EEC
[237] Council Directive 88/295/EEC of 22 March 1988 amending Directive 77/62/EEC relating to the coordination of procedures on the award of public supply contracts and repealing certain provisions of Directive 80/767/EEC
[238] The European Conference of Postal and Telecommunications Administrations (CEPT) was established in 1959 by 19 countries, which expanded to 26 during its first ten years. Original members were the monopoly-holding postal and telecommunications administrations. CEPT's activities included co-operation on commercial, operational, regulatory and technical standardisation issues. Today 48 countries are members of CEPT.See: https://www.cept.org/cept/

telecommunications services.

Additionally, the Commission continued to reiterate the need to liberalise the excluded sectors. It issued communication in 1984[239] to the Council, in which the practical results of the Directive on public supplies were analysed, and it issued a White Paper in 1985[240] on the completion of the Internal Market. Based on the number of notices published in the Official Journal, and the number of contracts awarded to firms established in a Member State other than the awarding State, the Commission stated that 'the impact of the Directives has been marginal' and suggested that there was a lack of 'integration' in the area of public procurement.[241] The narrow scope of the legal measures involved was considered one of the important reasons for their marginal impact. Apart from the procurement of local and regional authorities that fell under the legal thresholds, procurement through 'concession contract', through 'public service contract', and procurement in the defence sector, the utilities exclusions included all economic branches in which the public sector was a major consumer: telecommunications, transport, energy and water. According to the findings of the Commission in these areas, public procurement accounted for more than 70 percept of the total national output for certain related subsectors.[242]

The Commission also stressed the need to ensure European-wide competition in those sectors, and it thoroughly examined the peculiarities of these sectors.[243] The Commission considered the following two sets of consequences and made certain predictions.

(a) ***The nature of the economic effects resulting from the opening up of public contracts.*** The consequences of a static effect (buying from the cheapest)[244], a competitive effect (downward pressure on prices because of stronger competition)[245], a restructuring effect (long-term effect of economies of scale)[246], and the general dynamic effects resulting from greater competition or innovation will create savings for private sector buyers. The macroeconomic consequences of opening up public contracts will spread throughout the entire economy: (i) for the public authorities, opening up public contracts will bring budget savings; (ii) for public undertakings (mainly in the energy, telecommunications and transport services sectors), opening up public contracts will bring cuts in expenditures on investment and intermediate consumption, which should gradually bring down their production costs; this decrease in production costs will benefit the economy as a whole and reinforce European Competitiveness; (iii) for suppliers, increased

[239] COM (84) 717 fin.
[240] COM (85) 310 fin.
[241] COM (86) 375 at 4.
[242] EC Commission COM (86) 375 at 2.
[243] They are published in a Communication in which its overall strategy was defined. See: EC Commission, Communication from the Commission on a Community regime for procurement in the excluded sectors: water, energy, transport and telecommunications, COM (88) 376.
[244] This is the result of purchasing from the suppliers offering the best terms. Public contracting authorities would make savings in the short term on expenditure, assuming their total procurement remained unchanged and there would be increased interpretation of products between the public markets of the Member States.
[245] In the face of more accessible public contracts and keener competition, domestic suppliers would tend to reduce their prices to meet the challenge of imports. Production costs would have to adapt to these price cuts.
[246] In branches where public authorities dominate buying, a change in their purchasing conduct is likely to cause significant structural changes. Under the pressure of competition, restructuring could bring productivity gains. The fall in production costs would bring down in the medium long tem the selling prices of all those producers who remained on the market.

competition will bring about restructuring. The resulting cost cuts will benefit the authorities, public undertakings and the private purchases of the products concerned.

(b) ***Sectoral and structural economic consequences.*** The effect of opening up public contracts will not be the same across all sectors and products. For example, *for manufactured products*—which accounted for one third of public procurement at that time—in the short term, increased competition will tend to align the prices of domestic suppliers with those of most competitive foreign suppliers. This price reduction should bring about ECU 2 billion into a country's economy. In the medium term, a reduction in the number of producers should bring a marked increase in the utilization rates of production capacity. At a later stage, mergers and acquisitions of firms, rationalization of community production and a decrease in development costs resulting from the consolidation of research and development efforts should bring costs down. Additionally, *for construction and public works procurement,* which accounted for approximately 30% off all public procurement in EEC at that time----in addition to small business and frontier-zone firms, highly specialized companies and large firms should find more opportunities in an integrated internal market. Further, according to communication from the Commission, Member States may reap benefits from the perspective of social and regional consequences, SMEs and trade relations with non-member states.[247]

Member States have repeatedly recognized the economic justification and importance of opening the procurement market for utilities. Under pressure to establish an internal market by 1992, the Commission proposed its directive and, in 1990, the Council adopted Directive 90/531/EEC, which laid out procurement procedures for entities operating in the water, energy, transportation and telecommunications sectors.

The regime that this Directive imposed is similar to the Supplies Directives, with some important differences as to the flexibility given to contracting authorities about the choice of methods to be used to make the award process competitive.[248] The Utilities Directive has since been amended by Directive 93/38, which incorporates a newly enacted directive—Public Services Directive 92/50/EEC—into the Utilities regime.

In the draft of Directive 90/531/EEC, the Commission proposed to include rules about public service concessions. However, the Council did not incorporate the relevant rules in the final directive, on the grounds that such concessions existed in only one Member State, and that it would be inappropriate to proceed with their regulation without a detailed study of the various public service concessions granted to the Member States in those sectors.[249]

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[247] P8-p11.

[248] Christopher Bovis (1998), the liberalisation of public procurement and its effects on the common market, England: Ashgate, p.68.

[249] point 10 of document No 5250/90 ADD 1 of 22 March 1990, entitled Statement of reasons of the Council and annexed to the Council's common position of the same date on the amended proposal for a Council Directive on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.

(4) Regulating awarding public service contracts in the public sector

In terms of regulating procurement activities, we must also consider procurement activities in public service fields. The delay in regulating public services may be explained by changing trade patterns from the product manufacturing industries to markets in which the provision of services is the predominant sector of the industry.[250] For instance, at the international level, such as GATT, provisions related to the free movement of goods are addressed, while provisions regulating the provision of services are often described as inadequate.

However, as the service trade develops, trade wars over providing services have taken place at the international trade level. To consolidate the regulation of public contracting activities under secondary Community rules and improve the progress of creating an internal market, in 1992, the Council adopted its first directive on awarding public service contracts—Directive 92/50/EEC. The Directive's coverage of public service contracts has been defined in a negative way, which means contracts for pecuniary interest that are concluded in writing between a service provider and a contracting authority may exclude those public supply contracts and public works contracts that are covered by the Work, Supplies and Utilities Directives, and also certain other specific service contracts.[251]

The Public Services Directive established two different regimes according to the type of services involved. The Directive divided the services into two categories, and applied stricter or almost identical rules as those found in the Works and Utilities Directives to the services listed in Part A of Annex I. This was done because the Council considered that public services enable the full potential for increased cross-frontier trade to be realized. Meanwhile, the Directive applied more flexible rules to the services listed in Part B of Annex I, as those services were deemed less susceptible of being subject to European-wide competition.[252]

The Commission also expressly proposed to include 'public service concessions' within the scope of Directive 92/50/EEC, which covers public service contracts in general. However, the Council eliminated all references to public service concessions, in particular because of the differences among Member States as regards the delegation of the management of public services, which could create imbalances in the opening-up of public concession contracts.[253]

Additionally, remedies directives (Directive 89/665/EEC and Directive 92/13/EEC) and a procurement directive in the defence sector (Directive 2009/81/EC) have also been enacted by the EU. Until 2009, the EU public procurement regime has regulated procurement activities in the public sector, the public utilities sector and the defence sector. Procurement activities in all three sectors apply the uniform remedies directive (Directive 2007/66/EC). As this dissertation will not

[250] Christopher Bovis (1998), the liberalisation of public procurement and its effects on the common market, England: Ashgate, p.74.
[251] Article 1 (a) of Directive 92/50
[252] J.M. Fernandez Martin (1996), *The EC Public Procurement Rules: A Critical Analysis* (Oxford:Clarendon Press), p.31.
[253] see point 6 of document No 4444/92 ADD 1 of 25 February 1992, 'Statement of reasons of the Council and annexed to the common position of the same date

address issues in the remedies and defence sectors, the details of these issues will not be introduced.

2.2.1.3 Upgrades of EU framework for public procurement regulation and the reasons behind them

2004 public procurement directives: consolidating and gradually considering sustainable public procurement (SPP) policies

Directive 2004/18/EC [254] and Directive 2004/17/EC [255] have consolidated the public procurement rules in the public sector and the public utilities sector, respectively. However, awarding service concession contracts is excluded from Directive 2004/18/EC, and the awarding of work concession contracts and of service concession contracts are also excluded from Directive 2004/17/EC.

In the 2004 public procurement directives, several SPP policies are included, indicating that the EU's public procurement regime has recognized that under certain conditions and through certain approaches, SPPs may also be considered to be public procurement activities.[256]

2014 public procurement directives: emphasizing public procurement for SPP policies and separately regulating concessions

After the global economic crisis exploded in 2008, the importance of the public procurement market became evident. To better leverage the influence of public demand on the markets, the modernisation of public procurement rules has been considered to be one of the twelve tools that may be used to improve the EU's single market. Simplifying procurement procedures, enhancing the flexibility of the procurement rules, and encouraging procurement for sustainable development have been considered the main characteristics of the modernisation effort.[257]

Specifically, Directive 2014/23/EU was enacted to regulate concession contracts. This new directive regulates work concessions as well as service concessions; it regulates concessions in public sectors and also in the public utilities sectors. More details about this directive are introduced in Section 2.2.2.3.

2.2.1.4 Observations from the perspective of regulating the public procurement activities of SOEs

(1) Reasons for regulating the public procurement activities of SOEs

Opening the public procurement markets in each Member State to establish an internal market is

[254] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.
[255] Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.
[256] For details, please see: 讨论 2004 公共采购指令可持续公共采购政策的文献。
[257] For details, please see: 讨论 2014 公共采购指令现代化的文献。Roberto Caranta, 'The changes to the public contract directives and the story they tell about how EU law works' (2015) 52 Common Market Law Review, Issue 2, pp. 391–459;

the main purpose of the EU public procurement regime. Thus, harmonising the various public procurement rules has become the main task of the public procurement regime. However, whether SOEs should be regulated under the EU public procurement regime has not generally been a controversial issue. In the initial formation of the procurement directives, 'State' and 'regional or local authorities' were not the only kinds of entities that were regulated. Other public entities have also been regulated, such as the category of 'legal persons governed by public law' mentioned in Directive 71/305/EEC. Some SOEs, among other public entities, have been considered to be entities that should be regulated under the EU public procurement regime. This means that the initial purpose of the EU public procurement regime was to regulate all entities that include legal persons and are governed by 'public law'. Entities governed by 'public law' are generally those public entities that own public power and bear the burden of public obligations; this is why several SOEs were regulated under the initial public procurement directives (i.e., they are governed by public law).

(2) Regulatory coverage of the procurement activities of SOEs

The regulatory coverage of the procurement activities of SOEs has been expanded as a result of the evolution of the EU's public procurement regime. At first, only work contracts awarded by SOEs were regulated, and then the coverage was gradually expanded to supply contracts and service contracts. Additionally, SOEs pursuing activities in the public utilities sectors were regulated by the EU's public procurement regime until the first public utilities procurement directive was enacted.

(3) The possibility of requiring SOEs to pursue public policies under the EU's public procurement regime

To this point in the development of the EU's public procurement regime, pursuing certain public policies through public procurement has been allowed. For instance, a Member State has the discretion to implement green public procurement through green specifications, green award criteria, etc. This means that SOEs may be required by the Member State to pursue certain public policies, just as other public entities may be required to do. However, pursing public policies may not be used as justification for giving domestic suppliers or domestic products preferential treatment.

(4) The criteria for determining which SOEs should be regulated under the EU's public procurement regime are not clear enough

Although SOEs that have been regulated under public laws should be regulated by the initial public procurement directives, the criteria for determining which SOEs should be regulated under the EU's public procurement regime have not been made clear enough. Further, the term 'legal persons governed by public law' has been substituted by other terms in the some directives. To clarify this issue, several ECJ cases have been raised.

The next section of this dissertation addresses the criteria for determining which SOEs should

be regulated on the basis of certain procurement directives and relevant ECJ cases. Additionally, what kinds of SOE procurement activities have been covered by the directives, and specific exclusions relevant to SOEs, will be discussed.

2.2.2 How EU public procurement rules treat SOEs

As mentioned previously, the EU public procurement regimes consists of the Public Sector Directive, the Public Utilities Directive and the Concession Directive. In terms of the different characteristics of the coverage of each directive, the following section will describe the role of SOEs under each directive as buyers.

2.2.2.1 The role of SOEs under the Public Sector Directive

2.2.2.1.1 General coverage of the Public Sector Directive

The general coverage of Public Sector Directives is determined by positive coverage and negative coverage. The positive coverage of the Public Sector Directive depends on the following factors: (1) the coverage and characteristic of the buyer; (2) using or not using the public contract approach for acquisitions; (3) the estimated value of the contract. Negative coverage means that although the procurement fulfils all of the conditions mentioned above, the directive is still not applicable to it. Under the EU's Public Sector Directive, negative coverage includes general exclusions, such as public contracts awarded pursuant to international rules,[258] and special exclusions, such as certain service contracts.[259] The following section introduces the details of positive coverage.

In terms of the coverage and characteristics of the buyer, the Public Sector Directive applies to contracting authorities that have been defined as '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'.[260] *(a) The definition and scope of 'state' and 'regional or local authorities'.* The directive does not provide a definition of 'state' or 'regional or local authorities'.[261] These entities were defined by a list at an earlier point in the development of the regulation, but this list has been abolished. In the new directive, the terms 'central government authorities' and 'sub-central government authorities' were introduced into the directive to coordinate the obligation of the GPA. However, these terms are not the same as the terms 'state' and 'regional or local authorities'; for example, some 'bodies governed by public law' have also been listed as 'central government authorities'. In the ECJ case Beentjes, the Court pointed out

[258] Article 9 of the directive 2014/24/EU
[259] Article 10 of the directive 2014/24/EU
[260] Article 2(1)(1) of directive 2014/24/EU
[261] However, it gives the definition of 'central government authorities' and 'sub-central contracting authorities'. 'central government authorities' means the contracting authorities listed in Annex I of the directive, and in so far as corrections or amendments have been made at national level, their successor entities. After browsing the contracting authorities listed in the Annex I we could find out that the term 'central government authorities' is not equal to the term 'State'. For instance, some Member States list 'universities' in the Annex I, while the 'universities' usually have been regarded as 'bodies governed by public law' under the directive.

that the term 'State' should be interpreted as a functional approach.[262] *(b) The definition and scope of 'bodies governed by public law' (BGBPL).* The definition of 'bodies governed by public law' has been provided for the public sector. According to the conditions mentioned under this definition, SOEs may be considered as 'bodies governed by public law'. Whether and which kind of SOEs are regulated under the Public Sector Directive as BGBPLs will be discussed below.

In terms of the approach used by buyers, the Public Sector Directive only applies to purchasing activities that use procurement, as well as to design contests. 'procurement' has been defined as following:

> *'Procurement within the meaning of this Directive is the acquisition by means of a public contract of works, suppliers or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, suppliers or services are intended for a public purpose'.*[263]

Therefore, several significant points should be highlighted in this definition: (1) *Acquisition by means of a "public contract",* which means contracts for pecuniary interest that are concluded in writing between one or more economic operators and one or more contracting authorities and that have as their objective the execution of works, the supply of products or the provision of services. (2) *Whether the subject matter of the contracts is intended for a public purpose.* This means whether the works, supplies or services acquired or procured by a contracting authority are intended for public purposes. More details are discussed in Section 2.2.2.1.3.

'Design contests' refers to those procedures that enable the contracting authority to acquire—mainly in the fields of town and country planning, architecture, engineering or data processing—a plan or design selected by a jury after offered for competition with or without the award of prizes.[264]

In terms of the estimated value of the contract, the Public Sector Directive sets four kinds of thresholds depending on the type of subject matter of the contract, and the directive is only applicable to procurements with a value-added tax (VAT) that is estimated to be equal to or greater than these thresholds.[265] Generally, the threshold for public works contracts is much higher than the threshold for public supply and service contracts. For public works contracts, the central government authorities and sub-central government authorities should apply the same thresholds. For public supply and service contracts, the threshold for sub-central government authorities is higher than that for central government authorities. There is a special threshold for public service

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263 Article 1 (2) of directive 2014/24/EU

264 Article 2(21) of directive 2014/24/EU

265 (1) EUR 5, 186,000 for public works contracts; (2) EUR 134, 000 for public supply and service contracts awarded by central government authorities and design contests organised by such authorities; where public supply contracts are awarded by contracting authorities operating in the field of defence, that threshold shall apply only to contracts concerning products covered by Annex III; (3) EUR 207,000 for public supply and service contracts awarded by sub-central contracting authorities and design contests organised by such authorities; that threshold shall also apply to public supply contracts awarded by central government authorities that operate in the field of defence, where those contracts involve products not covered by Annex III.

contracts for 'social and other specific services'.[266] Therefore, the acquisition of an SOE that (1) meets the definition of BGBPL through a public contract or design contest, (2) exceeds a certain threshold and (3) does not fall under one of the exclusive situations should be regulated under the EU's Public Sector Directive. Further discussion of how EU public procurement rules treat SOEs is presented below.

2.2.2.1.2 Whether and what kind of SOEs have been regulated by Public Sector Directive as BGBPLs

2.2.2.1.2.1. Normative research based on the development of regulation of BGBPLs under the EU's directives

(1) Under the first directive on public procurement in the EU: there is no definition, and categorisation relies on the list

The first EU directive on public procurement—Directive 71/305/EEC[267]—included three kinds of entities to be regulated: 'the State', 'regional or local authorities' and 'legal persons governed by public law'. However, there was no general legal definition given of 'legal persons governed by public law' under this directive. The scope of 'legal persons governed by public law' depended on Annex I of the directive.

With regard to Annex I, Member States have achieved some agreement on the scope of 'legal persons governed by public law', considering that associations governed by public law formed by regional or local authorities should be regarded as 'legal persons governed by public law'. As mentioned above, in theory, SOEs governed by public law formed by regional or local authorities should be regarded as 'legal persons governed by public law'. The willingness to treat SOEs as one kind of contracting authority is evidenced by the fact that, in the proposal of this directive, 'governments, their local or regional authorities or other public corporations'[268] are mentioned as the awarding bodies.

However, each Member State classifies entities according to their respective understanding. Many approaches have been used to specify the scope of 'legal persons governed by public law'. *First, some countries list the kinds of authorities they recognize.* For instance, the UK listed five kinds of entities: 'local authorities', 'new towns' corporations', 'commission for the new towns', 'Scottish Special Housing Association' and 'Northern Ireland Housing Executive'. However, diverse kinds of entities have been put forward; for example, public universities have been clearly delineated by Italy and the Netherlands, and the social insurance office has been clearly defined by Luxembourg. *Second, no specific kind of body has been given, but rather only mentioned as an 'other administrative body'*, in Denmark and France.[269] *Third, functional conditions have been*

[266] It refers to the specific services listed in the Annex XIV of the directive 2014/24/EU.
[267] The European Communities Council Directive of 26 July 1971 concerning the coordination of procedures for the award of public works contracts, OJ NO L 185 – 16.8.71.
[268] Article 1 of Proposal for a first directive of the Council on the co-ordination of procedures for the conclusion of public works contracts, submitted by the Commission to the Council on 28 July 1964.
[269] Denmark only put 'andre forvaltningssubjekttr', meaning other administrative bodies. France only mentioned 'other administrative public bodies at national, departmental and local levels'.

given. For instance, Ireland provided its own explanation on this category of entity and listed 'other public authorities whose public works contracts are subject to control by the State'[270].

According to the list in Annex I of Directive 71/305/EEC, it is not clear whether the procurements of some SOEs were regulated. For instance, in Ireland, SOEs may be included into the scope of 'legal persons governed by public law', as the general characteristics given by the government; however, this depends on the national law of Ireland. Furthermore, according to the names of the entities that are clearly listed, most are public offices or public agencies rather than public companies or undertakings.

Therefore, according to the wording and the minimum agreement achieved among Member States about the term 'legal persons governed by public law', the procurement of some SOEs should be covered. However, according to the lists provided by the Member States, it is not clear whether the procurements of SOEs have been covered or not. This ambiguity may be explained by the early phases of developing the internal market. At that time, the European Union had just started to achieve some consensus on an open public procurement market. Gradually opening the market to classic public authorities was the easier and first step. It is difficult to achieve agreement on the various definition of the Member States that have diverse legal and economic regimes. For instance, not all EU MSs belong to the Civil Law system; countries like the UK and the Netherlands do not recognize a division between public and private law. Moreover, not all SOEs are governed by public law.

The absence of a general definition of 'legal persons governed by public law' led to an uncertainty about scope. Entities sharing the same characteristics could be treated in different ways if some of them were listed while others were not.

(2) Definitions following the issuance of Directive 89/440/EEC: legal definition plus list

Directive 89/440/EEC[271] altered the situation just described by including a unique legal definition for 'a body governed by public law'[272], which has been used in the most recently issued directives. A body governed by public law was defined to mean any entity that meets the all of the following three criteria: (1) first, '*established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character';*（2）*second, 'having legal personality and';*（3）*Third, 'financed, for the most part, by the state, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies; or having 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.'*

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[270] See Annex I of directive 71/305/EEC
[271] Council Directive of 18 July 1989
[272] See: Article 1(b) of Directive 89/440/EEC

Additionally, as an aid to interpreting the concept of 'bodies governed by public law', the directive provided a list[273] that was as exhaustive as possible[274] of relevant bodies in each Member State. An analysis of that list shows that, in general, the needs in question are those associated with general interests that the State itself chooses to provide, or over which it wishes to retain a decisive influence.[275] The EEC has provided one review procedure for updating the lists of bodies of each Member State.[276] Comparing Annex I of Directive 89/440/EEC[277] with Annex I of Directive 1971/305/EEC, we find that they are fairly similar. This means that SOEs have been clearly included or mentioned in the Annex I of Directive 89/440/EEC .

The relationship between the legal definition of 'a body governed by public law' and the list of bodies is worth noticing. The list is for guidance only, thus bodies that are not on the list but do fall within the general definition are still covered. For instance, the entities argued that they were not on the list, so the public procurement directive did not apply to them. Conversely, those on the list but not within the general definition would not appear to be included.[278] For instance, in the Hans & Christophorus Oymanns Case[279], the statutory medical insurance funds at issue are expressly mentioned in Annex III to Directive 2004/18/EC. The Commission argued that the mere inclusion of a body on the list is a sufficient condition for considering that body to be governed by public law, and that inclusion on the list raises an irrefutable presumption that the body may be so classified. The court did not accept this argument. The court argued that it is necessary to verify whether the inclusion of a given body on the list constitutes a correct application of the substantive criteria laid down in the provision of the directives.[280]

This kind of approach to defining a 'body governed by public law' has been used by all of the following Public Sector Directives.[281] However, the function of the list of bodies has been gradually reduced. For instance, Directive 2004/18/EC does use the lists of bodies and categories of bodies governed by public law,[282] but it does not emphasise that the lists should be 'as exhaustive as possible'; indeed, it has been pointed out that the list is non-exhaustive. This means that the list is only indicative and not prescriptive. Therefore, more attention should be paid to legal definitions of both listed and non-listed entities.

(3) Directive 2014/24/EU: provides a legal definition only

Directive 2014/24/EU does not include the lists of bodies and categories of bodies governed by

[273] The Annex I of the directive 89/440/EEC had listed the bodies and the categories of bodies which fulfil the criteria mentioned above.
[274] Recital of Drective 89/440/EEC.
[275] Paragrapgh 51 of the judgment, case C-360/96.
[276] Article 30o b of directive 89/440/EEC. Amendments to Annex I shall be made by the Commission after consulting the Advisory Committee for Public Works Contracts.
[277] Annex I of directive 89/440/EEC had been updated by the Commission Decision 90/380/EEC on 13 July 1990.
[278] Sue Arrowsmith (1996), the Law of Public and Utilities Procurement, London: Sweet & Maxwell, p.113.
[279]Case C-300/07, Hans & Christophorus Oymanns GbR, Orthopadie Schuhtechnik v AOK Rhienland/Hamburg, Judgment on 11 June 2009.
[280] para.42-45. Of the judgment.
[281] See，Article 1 (b) of directive 92/50/EEC, Article 1(b) of directive 93/37/EEC, Article 1 (b) of directive 93/37/EEC, Article 1 (9) of directive 2004/18/EC and article 2(1)(1)and(4) of directive 2014/24/EU.
[282] Annex III of directive 2004/18/EC.

public law, and only keeps the definition of 'bodies governed by public law'. This could be a result of the development of case law regarding this term and the limited usefulness of the list. In past years, some ECJ cases have been raised for interpretation of the definition of a BGBPL. Therefore, the definition has been given a relatively clear boundary. The definition alone is enough to delimit the *ratione personae* of a BGBPL. Additionally, the list of BGBPLs is indicative and it lacks the resources to create a complete list. To simplify the rules and not influence legal certainty, abandoning the lists and relying on the legal definition and case law system is a wise choice for EU.

2.2.2.1.2.2. Research based on ECJ cases: the development of the boundary of bodies governed by public law (BGBPLs)

(1)General issue: interpreting BGBPLs in functional terms

The general definition of bodies governed by public law is intended to set boundaries for the types of authorities that are subject to regulation outside the traditional structure of government.[283] Therefore, the boundary of a BGBPL is connected to the boundary of the traditional structures of government, including 'State', 'regional authorities' and 'local authorities'. However, there is no specific definition given for these bodies under the directive. For instance, the Beentjes case[284] is related to the definition of the 'State'. In this case, the court pointed out that the concept of a 'contracting authority' acquired a broader meaning in 1989, so that Community rules would not be restricted to legal persons governed by public law in cases in which legal entities—with powers that traditionally formed part of the tasks of the public authorities—in fact failed to satisfy that formal criterion. Further, with a view to giving full effect to the principle of freedom of movement, the court pointed out that the term 'contracting authority' must be interpreted in functional terms.[285] Following this, in the BFI holding case, the court clearly pointed out that the term 'body governed by public law' should be interpreted in functional terms.[286]

(2) The relationship among the three criteria

First, the three conditions set out in the provision are cumulative. In the Mannesmann case, the court clarified that the three conditions set out therein were cumulative.[287] This means that the three conditions should be met at the same time to determine if the entity in question belongs to the category of BGBPLs. Only in the third condition, which includes three alternative criteria, would an undertaking that satisfies any of three criteria be considered as meeting the third condition in the definition.

[283] Sue Arrowsmith (1996), the Law of Public and Utilities Procurement, London: Sweet & Maxwell, p.115.
[284] Case 31/87 Beentjes v Netherlands state [1988] ECR 4635, paragraph 11; Case C-360/96, [1998], ECR, praragraph 62.
[285] Case 31/87 Beentjes v Netherlands state [1988] ECR 4635, paragraph 11; Case C-360/96, [1998], ECR, praragraph 62.
[286] Case C-360/96, Gemeente Arnhem v Gemeente Rheden [1998], ECR, praragraph 62. This view has been accepted by the following cases.
[287] Paragraph 21 of the judgment.

Furthermore, in the BFI case[288], the national court raised the question about how to interpret the relationship between the terms 'needs in the general interest' and 'not having an industrial or commercial cha racter'.[289] The na tional c ourt w as c onfused about the wording o f t he first condition, and it was not sure whether there was a need to distinguish 'between needs in the general interest and needs having an industrial or commercial character' or 'between needs in the general interest not having an industrial or commercial character'. The court asked in particular whether the latter expression was intended to limit the term 'needs in the general interest' to those needs that were not of an industrial or commercial character or, on the contrary, whether it meant that all needs in the general interest were by definition therefore not industrial or commercial in character. The ECJ court clarified that the absence of an industrial or commercial character is a criterion intended to clarify the meaning of the term 'needs in the general interest' as used in that provision.[290] Therefore, it confirmed that not all needs that are in the general interest are thus by definition not of an industrial or commercial character, and that some needs in the general interest could have an industrial or commercial character. **Following this view, all relevant cases in the EU have accepted an approach that first determines whether the undertaking was established to meet general interest needs and then determines whether this general interest need has an industrial or commercial character.**

(3) First criteria

A. Meeting "needs in the general interest"

The procurement directives do not give a definition of 'needs in the general interest'. According to the case law, it should be understood according to the following aspects:

(a) 'Needs in the general interest' is an autonomous concept of Community law.[291] The court in the Adolf Truley case[292] pointed out that the term 'needs in the general interest' must be i nterpreted i n l ight of t he c ontext a nd pur pose of t he di rectives.[293] Even if the te rm i s interpreted in accordance with Community law, national law is not irrelevant, since the legal and actual circumstances of the individual case must be considered when this abstract legal concept is applied to particular situations.[294]

Further, even though the Court of Justice has not yet adopted a generally applicable definition, in the case law, a number of needs of general interest have been recognized: the production of

[288] Case c-360/96, Gemeente Arnhem and Gemeente Rheden v BFI Holding BV, judgement of the Court on 10 November 1998.
[289] Paragraph 23, paragraph 31 of Judgment, Case C-360/96.
[290] First, this interpretation is clear from different language versions on this provision; second, this is the only interpretation capable of guaranteeing the effectiveness of the subparagraph of article 1(b) of Directive 92/50 is that it creates, within the category of needs in the general interest, a sub-category of needs which are not of an industrial or commercial character; third, if the community legislature had considered that all needs in the general interest were not of an industrial or commercial character it would not have said so because, in that context, the second component of the definition would serve no purpose.
[291] Paragraph 45 of the judgment of case c-373/00, 27 February 2003.
[292] Case c-373/00, judgment of 27.2.2003.
[293] Paragraph 40 of Case c-373/00, judgment of 27.2.2003.
[294] Paragraph 44 of the Advocate General of Case C-373/00.

official printed documents such as passports, driving licenses and identity cards; the removal and treatment of household refuse; the management of national forests and woodland industries; the management of a university; the operation of public telecommunications networks and the provision of public telecommunications services; the activities of providing low-rent housing and the organization of fairs and exhibitions,[295] and the supply of public passenger transport services[296].

(b) 'Needs in the general interest' is connected to activities that directly benefit the public, rather than to the interest of individuals or groups. In the Mannesmann case, the Advocate General Léger held the view that[297] the concept of 'general interest' can be approached in the same way as the concept of 'general economic interest' in Article 90(2) of the Treaty[298] from the point view of '…activities of direct benefit to the public', rather than the interests of individuals or groups.[299] For instance, in the Agorà and Excelsior case, the court pointed out that affording an opportunity to promote goods and merchandise and providing information to consumers are activities that stimulate trade, and that the results of this may be considered to fall within the scope of general interest.[300] The Advocate General Léger of the Adolf Truley case also pointed out that these examples settled in previous cases concern circumstances that in principle benefit the general public, instead of just individuals.[301] The court of Korhonen and Others case[302] followed the explanations from the Agorà and Excelsior case and put forward a similar consideration. The court stated that, with respect to the activity concerned, the undertaking was not acting solely in the individual interest and was also acting on behalf of the interests of the town of Varkaus.[303] In this case, the Finnish government explained that according to the Finnish law, publicly-owned undertakings must serve the interests and needs of the inhabitants of a municipality and be of relevance to the entire community. Thus, national law requires that municipalities' activities benefit their inhabitants. The Advocate General Léger of this case held that the activities of municipal companies should always be classified as being in the general interest. Additionally, the court in this case mentioned that general interest is not measured by the number of direct users of an activity or service.

In some cases, it is difficult to confirm which activities are for the general public and which are just for individuals. For instance, in the Adolf Truley case, the entities involved proposed that a

[295] Paragraph 64 of the advocate general of Adolf Truley
[296] Paragraph 27, 37 and 38 of the Judgment of the Court in Case c-567/15, 'LitSpecMet' UAB v 'Vilniaus lokomotyvu remonto depas' UAB, on 5 October 2017.
[297] Paragraph 65 of general opinion, case c-44/96. This opinion is from Advocate General Van Gerven in case C-179/90[1991] Merci Convenzionali Porto di Genova[1991] ECR-I 5889.
[298] The recent provision is
[299] Paragraph 27 of Advocate General of case C-179/90[1991] Merci Convenzionali Porto di Genova[1991] ECR-I 5889.
[300] Paragraph 34 of the judgment.
[301] Paragraph 65 of the advocate general of Adolf Truley
[302] Case C-18/01, judgment of 22.05.2003. In this case, the operation of the undertaking is consisted in acquiring design and construction services in connection with a building project relating to the construction of several office blocks and multi-storey car park, follows from the local authority's decision to create a technological development centre on its territory. The undertaking's stated intention is to buy the land from the town once the site has been parcelled out, and to make the newly constructed buildings available to firms in the technology sector.
[303] Paragraph 44 of the judgment of case c-18/01

distinction should be made between funeral services in the narrower sense (cemetery activities, burial and exhumation) and funeral services in the wider sense (taking care of the grave, laying out the body, obtaining certificates, placing death notices in newspapers), and it was argued that the entities involved undertake only activities that are part of funeral services in the wider sense and do not therefore meet any needs in the general interest.

The advocate general analysed the activities falling under the wider sense of funeral services, and noted that the emphasis was less on the general interest of health protection than on the interest of the individual in the observance of funeral rites. This interpretation might argue for the proposed distinction.[304] However, the relevant law indicated that the two areas cannot be separated.[305] Therefore, it is impossible to divide the various activities into those that were undertaken in the general interest and those that were undertaken in the interest of an individual.[306] The court pointed out that such a distinction would be artificial, as all or most of the services provided are normally provided by the same undertaking or public authority.[307]

(c) 'Needs of general interest' may be carried out by private undertakings and also may be conducted by state-owned undertakings. Let us consider the following question: if in one country, one kind of general interest may could be carried out by private undertakings and also by state-owned undertakings, does this mean that state-owned undertakings that may classified as bodies governed by public law must be ruled out? For instance, in the BFI case, we learned that more than half of the municipalities in the Netherlands entrust the collection of waste to private economic operators. The court in the BFI case clarified the following interpretations on this issue[308]: (1) **First, the provisions of the public procurement directive refer only to the needs that the entity must meet and does not state whether those needs may also be met by private undertakings.** (2) **Second, the purpose of the public procurement directive is to avoid the risk of preference being given to national tenderers or applicants when a contract is awarded by the contracting authorities.** The fact that there is competition between private undertakings and state-owned undertakings is not sufficient to exclude the possibility that a body financed or controlled by the State, territorial authorities or other bodies governed by public law may choose to be guided by something other than economic considerations. For instance, such a body might consider it appropriate to incur financial losses in order to follow a particular purchasing policy of the body upon which it is closely dependent. (3) **Third, it is hard to imagine any activities that could not in any circumstances be carried out by private undertakings; thus, a requirement that there should be no private undertakings capable of meeting the needs for which the body in question was set up would likely render meaningless the term 'body governed by public law'.** Therefore, the court concluded that the definition of 'body governed by public law' may apply to a particular body even if some private undertakings meet, or may meet, the same

[304] Paragraph 67-68 of the advocate general of Adolf Truley
[305] Paragraph 68-69 of the advocate general of Adolf Truley
[306] Paragraph 64 of the advocate general of Adolf Truley
[307] Paragraph 54 of the judgment of Adolf Truley
[308] Paragraph 38 to 53, case C-360/96.

needs. Thus, the court concluded that the term does not exclude needs that are or can be satisfied by private undertakings.

B. 'Not having an industrial or commercial character'

It is difficult to draw a line between the activities in the general interest that have an industrial or commercial character and those that do not. According to settled case law, the following factors have been discussed for determining how to distinguish industrial or commercial characteristics:

(a) *Competition: is it a necessary factor?*

In the Mannesmann case, the competition factor was considered as one way to determine whether the entity involved has an industrial or commercial character. The Advocate General Léger pointed out that in determining which entities are subject to the public procurement legislation, the legislature used the criterion of 'needs in the general interest, not having an industrial or commercial character'. It noted that entities that were found to not be subject to the public procurement laws are those that are subject to competition from other traders that discourages them from selecting their contractual partners on the basis of discriminatory criteria.[309] Even though the court in the Mannesmann case did not clearly refer to 'competition' as a general factor, it mentioned that the undertaking concerned was established on an exclusive basis.

In the BFI Holding case, the court pointed out that the absence of competition is not a condition necessarily to be taken into account in defining a body governed by public law. However, it emphasized that the existence of competition is not entirely irrelevant to the question of whether a need in the general interest is something other than industrial or commercial. The existence of significant competition, and in particular the fact that the entity concerned is faced with competition in the marketplace, may be indicative of the absence of a need in the general interest, not evidence of the undertaking having a industrial or commercial character. For instance, in the Agorà and Excelsior case, the court confirmed that the undertaking concerned operated in a competitive environment, because the activity was pursued at the international level by a number of different operators established in large cities in various Member States that were in competition with each other.

However, in some cases, even though there is competition, the body may still be classified as a body governed by public law. The Adolf Truley case discussed this situation. In the Adolf Truley case, more than 500 undertakings were active in the funeral-services sector in Austria, but there was no competition in the local market in Vienna. The national court asked whether the existence of significant competition was itself sufficient to justify the conclusion that there was no need in the general interest, not about whether the entity involved had an industrial or commercial character. It also asked whether account should be taken of the relevant legal and factual circumstances in each individual case. The court followed the wording used in the judgment of the

[309] Paragraph 69 of general opinion, case c-44/96.

BFI holding case that although not entirely irrelevant, the existence of significant competition did not, in itself, permit the conclusion that there was no need in the general interest nor did it stipulate whether the entity had an industrial or commercial character.[310] The national court must assess whether or not there is such a public interest need, taking into account all the relevant legal and factual circumstances, such as those prevailing at the time for the entity concerned and the conditions under which it exercised its activity.[311] Therefore, competition was found to be only one of the relevant factors that determined whether the entity has this characteristic, and it is only indicative rather than decisive.[312]

Referring to the competition factor, competition is considered the real operating circumstance of the entity concerned, rather than the assumed general market situation of the activities involved. For instance, in the Mannesmann case, the principal activity of the undertaking was providing printing services.[313] In the SIEPSA case, the activities of the undertaking involved constructing public prisons and the sale of the state's prison properties. If we focus only on the general market situation of those activities, we would discover that all of the activities could be subject to market competition, as all of the activities could also be provided by other publicly-owned undertakings or privately-owned undertakings. However, we should explore more details about the relevant operational circumstances to discover whether the entity involved is subject to market competition. For instance, in the Mannesmann case, the undertaking concerned owned exclusive rights to providing print services to the state. In the SIEPSA case, the undertaking did not offer services related to the relevant market, but rather acted as the representative of the state administration to assist in tasks of a typically state nature: the construction, management and selling of prison properties. The Commission claimed that SIEPSA's activity could not be compared with private sector activity. The court also confirmed this argument and stated that an activity such as paying the costs of the establishment of prisons, which was among SIEPSA's primary objectives, was not subject to market competition. The court opined that the company could not, therefore, be regarded as a body that offers goods or services in the free markets in competition with other economic agents.[314] Therefore, when determining the competition factor, we should consider the general character of the activities concerned, and we should also examine the operational circumstance of the entity when it pursued the activities. In this regard, when publicly-owned undertakings operate general commercial activities, they may still be considered as having a non-industrial and commercial character.

(b) Relevant legal and factual factors (the possibility of being guided by other than purely economic considerations)

[310] Paragraph 61.
[311] Paragraph 66.
[312] In Case c-567/15, the Court also pointed out that the existence of significant competition does not, of itself, allow the conclusion to be drawn that there is no need in the general interest, which is not of an industrial or commercial character. See, paragraph 45 of the Judgment of the Court in Case c-567/15, 'LitSpecMet' UAB v 'Vilniaus lokomotyvu remonto depas' UAB, on 5 October 2017.
[313] Paragraph 41 of the judgment of case C-18/01.
[314] para.87 of the judgment of case C-283/00.

Apart from competition, there are other relevant legal and factual factors that have been considered in certain settled cases to determine whether the general interest needs involved have an industrial or commercial character. The fact that an entity's primary aim is not to make profits, or that it does not bear any fiscal risk associated with its activities, or that it may receive public financing[315] were also considered.

(i) Profit-making, bearing economic risk and receiving offsets

Is the pursuit of profits necessary for determining whether an undertaking has industrial or commercial characteristics?

How does the pursuit of profits affect whether an entity should be considered as having an industrial or commercial character? For instance, in the SIEPSA case, the Spanish Government noted that the Community legislature was aware that many undertakings in the private sector possess the form of a public undertaking, while specifically pursuing a wholly commercial objective despite their dependency on the State. Further, some of these entities operate in the marketplace in accordance with the rules of free competition and in conditions of equality with other private undertakings that operate strictly for the purpose of making profits.[316]

However, following the explanation from the Agorà and Excelsior case, the lack of a **profit-making** focus is not a necessary factor for confirming whether an undertaking has an industrial or commercial character. In the Agorà and Excelsior case, the court pointed out that even if the undertaking is not profit making, it still should be considered as having industrial or commercial characteristics basing on other factors.[317]

Also, in the SIEPAS case, the Commission claimed that even if SIEPSA's objective was profit, that aim did not prevent the company from meeting needs in the general interest nor of having an industrial or commercial character. In the opinion of the Commission, while the pursuit of profit may be a distinguishing feature of the company's activities, it is not stated in the text of the Directive that this goal makes it impossible to declare that the general-interest needs that SIEPSA was created to meet have no industrial or commercial character.

Therefore, pursuing profit is not a necessary condition for determining whether an undertaking has an industrial or commercial character. Even if the undertaking pursues profit, it still may be deemed to meet the needs of general interest and have no industrial or commercial character.

Is a primary pursuit of profits necessary to determine a classification of an undertaking without considering its industrial or commercial characteristics?

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[315] For instance see the summarize of the court of SIEPSA case in the paragraph 81 of the Judgment. These factors also have been summarized by the Court in paragraph 43 of the Judgment of the Court in Case c-567/15, 'LitSpecMet' UAB v 'Vilniaus lokomotyvu remonto depas' UAB, on 5 October 2017.

[316] Paragraph 38 of judgment of Case C—283/00, 16.10.2003.

[317] The court of Agorà and excelsior case pointed out that even if the body in question is non-profit-making, it does operate according to criteria for performance, efficiency and cost-effectiveness. Since there is no mechanism for offsetting any financial losses, it bears the economic risk of its activities itself. See Paragraph 40 of the judgment.

As the Finnish Government stated in the Korhonen and Others case, it is not impossible that the activities of publicly-owned companies may generate profits. However, according to the law of some Member States, such as Finland, such publicly-owned undertakings must always aim primarily to promote the general interest of the inhabitants of the local authority area concerned, and the making of such profits can never constitute the principal aim of such companies.[318] This statement is consistent with the assumption of the Agorà and Excelsior case; however, it introduces a new issue: can an undertaking be determined to have an industrial or commercial character if it aims primarily at making a profit? The Court in this case concluded that evaluating an undertaking that does not aim primarily at making a profit should include taking particular account of other facts when determining whether the general need that the undertaking fulfils has no industrial or commercial character.[319]

In this conclusion, the court did not directly state that an undertaking that is not focused primarily at making a profit is thus by definition an undertaking that does not have the characteristics of being industrial or commercial. The court also did not state that an undertaking aimed primarily at making profits must then by definition have industrial or commercial characteristics. The legal framework of Finland shows that in Finland, publicly-owned undertakings may not be primarily aimed at pursuing profits. In the circumstance of Finland, it is impossible that a publicly-owned undertaking with industrial or commercial characteristics be primarily focused on pursuing profits. However, in Finland, publicly-owned undertakings are considered to be bodies governed by public law if they meet the requirement of not having industrial or commercial characteristics, not because they do not primarily aim at pursing profits. In other words, the fact that the undertakings do not primarily aim at profits is still not a decisive factor in determining whether they do or do not have industrial or commercial characteristics. **It is not clear whether the fact an undertaking primarily aims at pursuing profits is decisive for determining that the undertaking has industrial or commercial characteristics.**

Is bearing the economic risk of its activities an important factor in determining the classification of an undertaking?

In the cases previously mentioned, the courts were more focused on the factor of whether the undertaking bore the economic risk of its activities. For instance, the ECJ court in the Agorà and Excelsior case pointed out that even if the body in question is not profit-making, the undertaking concerned does operate according to criteria for performance, efficiency and cost-effectiveness. Additionally, since there is no mechanism for offsetting any financial losses, the ECJ considered that the undertaking concerned " **[bore] the economic risk** of its activities itself".[320] In the Agorà and Excelsior case, the ECJ Court held the view that the undertaking concerned was not a BGBPL. However, it is difficult to conclude that bearing economic risk is decisive for determining whether an undertaking has industrial or commercial characteristics. The ECJ Court also

[318] Paragraph 54 of the judgment of case c-18/01
[319] Paragraph 59 of the judgment of case c-18/01
[320] Paragraph 40 of the judgment.

considered other factors, such as competition, in making its judgment.

However, there is a difference between bearing economic risk in theory and in practice, as the Finnish Government mentioned in the Korhonen and Others case. It pointed out[321] that from a legal point of view, there are few differences between publicly-owned undertakings and limited companies owned by private operators, in that they bear the same economic risks and may similarly be declared bankrupt. However, in practice, the public authorities to which the publicly-owned undertakings belong rarely allow such a thing to happen, and they will, if appropriate, recapitalize publicly owned undertakings, so that they can continue to look after the tasks for which they were established. This means that even if publicly-owned undertakings bear economic risks, in the reality, they rarely bear this burden alone or without a state-supplied safety net. Therefore, it is important to discover whether publicly owned undertakings bear economic risk in reality.

Under which conditions should an undertaking be regarded as bearing economic risk?

Regarding the conditions under which an undertaking may be regarded as bearing economic risk, several ECJ courts have mentioned the factor of 'offsetting any financial losses from public authority'. For instance, the ECJ court in the Agorà and Excelsior case pointed out that the undertaking involved **bore the economic risk** of its activities[322] based on the fact that it had no mechanism for offsetting any financial losses. In the Korhonen and Others case, the Advocate General Léger pointed out more directly that[323] if a company is not required to bear the economic risk of its activity alone, because there is a possibility of losses being offset by the public authority, then the general interest need for which the company was established has no industrial or commercial character. Therefore, having mechanisms for **offsetting financial losses** is an indicative factor for analysing whether the undertaking bears economic risk.

(c) Is the legal regime of the body relevant?

It has been argued that the legal regime of an entity is relevant to determining whether it has industrial or commercial characteristics, such as the approach taken by Spain in transposing the terms of BGBPLs into its national law.

When Spain transposed the EU's directive into its national law,[324] it excluded "**public bodies constituted under private law**", which in the Spanish legal system is a category composed of commercial companies under public control, from the scope *ratione personae* of the Spanish rules governing procedures for awarding public contracts.

The Spanish government considered that in order to define the term 'body governed by public law', it is first necessary to specify the commercial or industrial nature of the 'need in the general interest' that the entity was designed to meet. In that respect, in the Spanish legal system, public

[321] Paragraph 53 of the judgment of case c-18/01
[322] Paragraph 40 of the judgment.
[323] Paragraph 84 of the Opinion of Advocate General of case c-18/01
[324] Article 1(3) of law 13/1995 (Spanish legislation)

commercial companies have, in principle, the task of meeting needs in the general interest, which explains why they are under public control. However, those needs are considered to have a commercial and industrial nature because, if that were not the case, they would not be included in the activities of a commercial company.[325]

The Spanish Government maintained that it is difficult to dispute that commercial or industrial companies, or the needs they meet, are commercial or industrial in nature, because they are so in every respect. In that regard, the government language refers to (1) their legal form, which is private; (2) the legal rules applicable to their activities, which are commercial rules; (3) the fact that the object of those companies is always a commercial activity and (4) their aim, which is to make a profit unrelated to the general interest served by associations, foundations and bodies governed by public law, which never affects the private interests of the members.[326]

However, the commission argued that *the interest or needs the entity pursued are more important than the legal regime of the body.* The Commission considered its interpretation in accordance with the broad logic of the provisions in question. If the Community legislature had wanted to link the absence of an industrial or commercial nature to a **body's legal regime**, rather than to **the interest it pursued**, the words 'not having an industrial or commercial character' would not have been inserted into the definition of the needs being met, but would instead appear in the preceding line in order to characterise the body directly.

The ECJ court held the view that *the body's legal regime does not constitute a criterion.* Based on settled case law, the ECJ court pointed out that ascertaining whether those entities fulfilled the three cumulative conditions set out in the directives was relevant. According to the case law, an entity's private legal status did not constitute a criterion for precluding it from being classified as a contracting authority.[327] The ECJ court opined that if the entity's legal regime became a criterion, Member States might automatically exclude commercial companies under public control from the scope *ratione personae* of the directives. Therefore, the court upheld the complaint of the Commission.

C. "Established for the specific purpose of meeting"

From the wording of the directive, only the purpose for which the body was established is relevant in determining whether it should be considered to be a 'body governed by public law'.[328] However, certain settled cases raise some interesting questions on this point.

(a) If a contracting authority which has been regarded as carrying out the activities for meeting needs in the general interest, establishes a subsidiary company, then whether this company also could be regarded as pursuing the activities for meeting needs in the general interest?

[325] Paragraph 41 of judgment of case C-214/00, 15. 5. 2003.
[326] Paragraph 42 of judgment of case C-214/00, 15. 5. 2003.
[327] Paragraph 55 of the judgment.
[328] Paragraph 73 of opinion of Advocate General, case c-44/96.

In Case c-567/15, Vilniaus lokomotyvų remonto depas' UAB ('VLRD') is a commercial company which was established following a restructure of Lietuvos geležinkeliai' AB (Lithuanian Railways, the State railway company; 'LG'), and its object is the manufacture and maintenance of locomotives and railway carriages. VLRD is a subsidiary of LG, which is its only partner company.[329]

The supply of public passenger transport service, which is one of the activities pursued by LG, is regarded as being carried out to meet needs in the general interest and the LG must be classified as a BGBPL. Accordingly, the LG is a contracting authority, which should be governed by the public procurement rules.[330]

In this case, the VLRD supplies goods and services to 'enable [its parent company] to carry out its activity of passenger and freight transportation'.[331] The Court has determined that the VLRD was established for the specific purpose of meeting the needs in the general interest, because 'VLRD was established with the specific aim of meeting its parent company's needs and that the needs which VLRD was tasked with meeting constitute a condition necessary to the parent company's carrying out of activities in the general interest, which it is, however, for the referring court to ascertain.'[332]

It turns out that the fact that being a subsidiary of a contracting authority is not sufficient to determine that the company pursues the activity for meeting needs in the general interest. In the scenario of this case, the activities of the subsidiary company could not be directly determined as for needs in the general interest from its characteristic. The Court has examined the relationship between the activity pursued by the subsidiaries and the activity in the general interest pursued by the parent company. As the subsidiary company works to enable the parent company to carry out of activities in the general interest, the subsidiary company has been determined by the Court to meet the condition of 'established for the specific purpose of meeting the needs in the general interest'. Therefore, not all subsidiaries of the contracting authority should be assumed as pursuing the activity for meeting needs in the general interest.

(b) What if those activities form only a part of the undertaking's activity, and the undertaking in addition participates in the market as a commercial entity?

Generally, entities do not participate in only one kind of activity. For instance, the Mannesmann case focused on an undertaking that was established for the purpose of meeting needs in the general interest that did not have an industrial or commercial character; however, the entity in question also pursued other activities[333] and acquired holdings in other undertakings.[334] In these

[329] See, paragraph 9 and 10 of the Judgment.
[330] Paragraph 27 of the Judgment.
[331] Paragraph 37 of the Judgment.
[332] Paragraph 39 of the Judgment.
[333] Such as the production of other printed matter and the publication and distribution of books, newspapers,ect.
[334] In fact, ÖS took over Strohal Gesllschaft mbH, whose activities consisted of rotary 'heatset' printing. And Strohal set up SRG, in which it holds 99.9% of the share capital, with the object of producing printed matter using the abovementioned process in printing works.

circumstance, should the undertaking still be determined to be a body governed by public law?

First, the court in the Mannesmann case pointed out that it is immaterial that such an entity is free to carry out other activities in addition to its general interest related tasks. The ECJ court clarified the condition that the body must have been established for the "specific" purpose of meeting needs in the general interest, but that this does not mean that the entity should be entrusted only with meeting such needs.[335] This means that a body governed by public law may pursue other activities in addition to its specific task. Therefore, an undertaking that is established to meet the needs of general interest and have a non-industrial or commercial character may also participate in other activities, including industrial or commercial activities.[336]

Second, the proportion of activities that meet the general interest and have non-industrial or commercial characteristics is irrelevant. In some cases, meeting needs in the general interest constitutes a relatively small proportion of the activities pursued by the undertaking. The ECJ court in the Mannesmann case pointed out that the proportion of each kind of activity is irrelevant, provided that the undertaking continues to attend to the needs it is specifically required to meet.[337]

The reasons for this opinion may be summarized in the following two ways. (1) Legal reasons. The ECJ court in the Mannesmann case held that interpreting the first condition such that its application would vary according to the relative proportion of the entity's activities pursued to meet needs that did not have an industrial or commercial character would be contrary to the principle of legal certainty, which requires Community rules to be clear and their application foreseeable by all concerned.[338] (2) Economic reasons. In the BFI holding case, the Advocate General La Pergola provided an economic perspective to support the opinion of the court in the Manesmann case.[339] From an economic point of view, general interest activities account for a small proportion of the functions that the entity performs that have no appreciable effect on its financial structure. However, since the undertaking depends on the contributions that municipalities make to its budget, this rules out the possibility that any other activity it performs might actually be run on specifically commercial lines. The municipalities' financial contributions radically alter the element that forms the basis of all commercial relationships; namely, the endeavour to achieve the best and most effective ratio between costs and remuneration. La Pergola also pointed out that in any event, the entity succeeds in balancing its books as a result of the assistance it receives from the municipalities, and that there is consequently no element of risk, meaning that the entity's activities cannot be regarded as being competitive in any real sense.

Third, it is impractical to require an entity to establish a single independent financial

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[335] Paragraph 26.
[336] For instance, in Case C-567/15, the Court mentioned that a company does not carry out only activities intended to meet needs in the general interest through internal transactions with LG, but also other profit-making activities is irrelevant in that regard. See: paragraph 41 of the Judgment of the Court in Case c-567/15, 'LitSpecMet' UAB v 'Vilniaus lokomotyvu remonto depas' UAB, on 5 October 2017.
[337] Paragraph 25.
[338] Paragraph 34.
[339] Paragraph 46 of Opinion of Advocate General, case-360/96.

structure to accommodate both kinds of activities. It has been argued that[340] if the proportion of an entity's commercial activities is much higher than that of its non-commercial activities, and the entity could establish one independent financial structure for both of these kinds of activities, then when pursuing commercial activities, the entity may fall out of the scope of the public procurement rules. In theory, it is not problematic to provide an exception for cases in which it may be demonstrated that an entity governed by public law maintains complete economic, financial and accounting separation between the different types of activities it pursues. However, economic activities and business relationships are highly complex, which makes it extremely difficult to effect such a radical separation. Even though accounts are kept separately and cross-subsidisation is excluded, strategic management, structural decisions and assets are generally combined, and there is nothing to guarantee that the different spheres of activity are watertight or that, in crisis situations, the rules of conduct of a closed market will not have an impact on those of an industrial or commercial nature. This may cause a contracting entity governed by public law to be guided by 'sub-economic' criteria.[341] Additionally, there are other practical obstacles. For example, it would be necessary to establish a method for verifying that the different areas of activity are completely separate. However, this approach complicates the intricate Community system of public procurement, and it would not be appropriate to adopt a solution without bestowing on the entity any economic benefit whatsoever or jeopardizing a fundamental principle such as that of legal certainty.[342]

Fourth, whatever the nature of a public procurement contract entered into by an entity classified as a body governed by public law, the contract should be considered a public procurement contract under the EU procurement rules. This has been called 'contagion theory'[343] in the legal literature. When an undertaking has been classified as a body governed by public law, no distinction is made between public procurement contracts awarded by a contracting authority for the purpose of fulfilling needs in the general interest and those that are unrelated to that kind of need.[344] Therefore, if the undertaking has a plan to award a public procurement contract, then this award should fall within the scope of the public procurement rules, and it does not matter if the purpose of the award is to serve public needs or to serve commercial activities.

The rationale behind this argument is based on the objectives of the procurement directives and the principle of legal certainty as it relates to the directives. The intention is that those with the capacity to award contracts should be guided by economic criteria, thereby avoiding the temptation to follow other guidelines that give preference to national (domestic) entities to the detriment of foreign entities. Therefore, contracting authorities that are capable of avoiding market forces must in all cases comply with the procurement directives.[345] However, interpreting the provision according to the relative proportion of activities that are pursued for the purpose of

[340] See paragraph 68 of the Opinion of Advocate General Jacobs in *Impresa Portuale di Cagliari case.*
[341] Paragraph 64 of the Opinion of Advocate General in case C-393/06
[342] Paragraph 65 of the Opinion of Advocate General in case C-393/06
[343] Paragraph 19 of the judgment of Case C-393/96
[344] Paragraph 32.
[345] Pargraph 61 of the Opinion of Advocate General, case C-393/06.

meeting needs that do not have an industrial or commercial character would be contrary to the principle of legal certainty and to ensuring that its application is foreseeable by all concerned.[346]

However, there is also a different view. The Advocate General Léger held the opinion that the 'extension of the application of that legislation to activities of a purely industrial or commercial nature is a nonerous constraint and may seem unjustified since it does not apply to bodies established in order to carry out identical activities.'[347] Then, he argued that this disadvantage can be avoided by selecting the appropriate legal instrument for the objectives pursued by public authorities. He insisted that in the present case, applying public procurement rules to those activities of the entity that are purely industrial or commercial in nature is too restrictive.[348]

(c) How shall entities that were not established for 'meeting the needs of general interest and having non industrial or commercial character', but were entrusted with such tasks after being established, be handled? How shall entities that do not pursue the needs for which they were established be handled?

The settled cases provide some interpretations of these issues. The entity involved in the Commission vs. Ireland case was a private company that carried out forestry and other related activities on a commercial basis. The Irish Government transferred land and other property to the entity, and in return for those assets, the entity issued shares to the Minister for Finance, who thus became its majority shareholder.[349] The court did not focus on the commercial conditions of the undertaking, but instead focused on the conditions of the entity after the transfer of the properties. After the transfer, the entity was entrusted with specific tasks, consisting principally of managing the national forests and woodland industries, and of providing various facilities in the public interest.[350] Moreover, the Minister's power to give instructions to the entity, in particular requiring it to comply with state policy on forestry to provide specified services or facilities, and the powers conferred by the entity to the Minister in financial matters, gave the State the possibility of controlling the economic activity of the entity.[351] Therefore, even though the undertaking was established to meet needs that have an industrial or commercial character, it still could be considered to be a body governed by public law, for which the conditions were changed and the entity became a body pursuing the general interest needs and having an industrial and commercial character.

The key issue is whether the undertaking is currently pursuing activities that meet the needs of public interest and have no industrial or commercial character. The previous activities or purposes that the undertaking once pursued have no bearing on determining the characteristics of the undertaking now.

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[346] Paragraph 43 of the judgment of Case C-44/96 and paragraph 62 of the Opinion of Advocate General, case C-393/06.
[347] Paragraph 78 of Opinion of Advocate General, case-44/96.
[348] Paragraph 79 of Opinion of Advocate General, case-44/96.
[349] Paragraph 11 of Judgment of case c-353/96, 17.12.1998.
[350] Paragraph 37 of Judgment of case c-353/96, 17.12.1998.
[351] Paragraph 38 of Judgment of case c-353/96, 17.12.1998.

(4) The second criteria

In some settled cases, the second condition, having legal personalities, is not a controversial issue. For instance, in the Mannesmann case, the undertaking was regarded as having a legal personality, because the law that set it up provided one.

(5) The third criteria (close dependence)

In Mannesmann, the court summarized the third condition as indicating that the body is closely dependent on the state, regional or local authorities or other bodies governed by public law.[352] Dependence on public authorities must occure quivalently among three alternative criteria: finances, management supervision and the appointment of more than half of the members of the entity's managerial positions.

A. Financed for the most part by the state, or regional or local authorities, or other bodies governed by public law

'SOEs' have been defined in this dissertation as enterprises in which the 'State (broader definition)' holds shares, so it includes the circumstance in which the 'State (broader definition)' has a majority shareholding in an entity. However, **should an undertaking which conducts commercial activities and in which a contracting authority has a majority shareholding position be considered a contracting authority and a body governed by public law?**

As in Mannesmann, in which the court pointed out that the three conditions set out therein are cumulative, the fact that a contracting authority holds a majority shareholding position in an entity is not a sufficient condition to regard the undertaking as a body governed by public law. Determining whether the undertaking is a body established for the specific purpose of meeting needs in the general interest that do not have industrial or commercial characteristics must still be undertaken.

Additionally, SOEs normally take the form of enterprise groups, in which several enterprises are mostly financed either directly by the state or regional or local authorities, or by other SOEs in their enterprise group; this raises another issue. If one undertaking in the enterprise group has been considered to be a BGBPL, them should all of the entities in the group be regarded as contracting authorities? The ECJ Court in the BFI case denied this possibility.[353]

However, the following hypothetical poses interesting questions: would a contract fall into the scope of the public procurement rules when an entity classified as a body governed by public law (hereinafter 'undertaking A') and an entity associated with undertaking A but not falling into the scope of bodies governed by public law (hereinafter 'undertaking B'), enter into a contract on behalf of each other, or transfer to each other the rights and obligations

[352] Paragraph 20 of Judgment of Case C-44/96, Mannesmann Anlagnbau Austria AG and Others vs Strohal Rotationsdruck GesmbH, 15 January 1998.
[353] Paragraph 37 of Judgment of ARNHEM AND Rheden Vs BFI Holding, case 360/96.

generated by a call for tenders.

In Mannesmann, The Court discussed a situation in which undertaking A from the outset awarded a contract on behalf of undertaking B, and when undertaking A transferred its obligation and rights to undertaking B. The court pointed out that when a public procurement contract relates to a project which, from the outset, falls entirely within the objective of undertaking B, and when the contract was entered into by undertaking A on behalf of undertaking B, then the awarding of the contract falls outside the regulatory scope of the public procurement rules. However, the public procurement contract awarded by undertaking A should be regarded as falling within the scope of the public procurement rules, and the contract cannot cease to be a public procurement contract when the rights and obligations of undertaking A are transferred to undertaking B. The court insisted that the aim of the public procurement rules, which is the effective realization of freedom of establishment and freedom to provide services in the field of public procurement contracts, would be undermined if the application of the rules could be excluded on the sole ground that the rights and obligations of a contracting authority in the context of a call for tenders are transferred to an undertaking that does not satisfy the conditions for being classified as a body governed by public law. Additionally, the Advocate General argued that if a 'contracting authority' can be identified as the beneficiary of a contract claimed on behalf of a third party, the public procurement rules will logically apply.[354]

However, Mannesmann did not discuss whether a contract falls under the scope of the public procurement rules in a case in which undertaking B awards a contract on behalf of undertaking A, or undertaking B transfer the obligations and rights under a contract to undertaking A. In practice, there are universal approaches that elude the rules. Based on settled cases, as undertaking A is the beneficiary of the contract in question, awarding a contract should be subject to public procurement rules.

B. Management supervision

When should the management of an entity be regarded as subject to supervision by another?[355] *What degree of supervision over management should be considered as meeting the third criteria? In settled cases, there are two issues relevant for clarifying these criteria.*

First, what kind of management supervision is mentioned by the EU Directive as being administrative in nature or intervening in, or controlling, management decisions? For instance, in the French Republic case,[356] the French Republic argued that various types of supervision are of an administrative nature and must be distinguished from the management or investment controls with which the criteria concerned.[357] The Advocate General of the French Republic case

[354] Paragraph 100 of Opinion of Advocate General, case-44/96.
[355] Paragraph 16 of Opinion of Advocate General on Case C-237/99 Commission of the European Communities v French Republic, delivered on 19 October 2000.
[356] Judgment on Case C-237/99 Commission of the European Communities v French Republic, delivered on 1 February 2001.
[357] Paragraph 12 of Opinion of Advocate General on Case C-237/99 Commission of the European Communities v French Republic, delivered on 19 October 2000.

conducted a semantic analysis based on many languages to generate definitions of 'management' and 'supervision'. For the term 'management', the study describes the act of managing and posits that it is allied with administration, leadership, and organization, all of which connote the exercise of some form of power. He was inclined to the view that supervision that is not linked to the way in which those who hold power in an entity influence its activities cannot be described as management supervision of that body. For the term 'supervision', the analysis suggests that it would not be contrary to the wording of the Directive to consider that control involving the exercise of supervision over how an entity is run, that has no involvement in the actual operations of the entity, is enough for that body to be regarded as a body governed by public law within the meaning of the directive.[358]

In the French Republic case, the court clarified the meaning of 'management supervision'. The court pointed out that it is necessary to consider whether the **various controls** to which the undertakings are subject render them dependent on public authorities in such a way that the latter are able to influence their decisions in relation to public contracts.[359]

However, determining whether the various controls placed on entities truly render them dependent on public authorities is difficult. For instance, in the French Republic case, the activities of entities are supervised by government administration—specifically, by the Minister responsible for finance and the Minister responsible for construction and housing. The provisions of the supervision do not specify the limits within which such supervision is to be exercised, or whether it is to be confined to merely checking the entities' accounts. **Moreover**, the Minister responsible for construction and housing is empowered by law[360] to order that the undertaking be wound up and to appoint a liquidator. This Minister is also empowered by law[361] to suspend the management of the entity and appoint a provisional administrator. Those powers are provided in the event of (1) serious irregularities; (2) gross mismanagement or (3) failure to act on the part of the administrative, managerial or supervisory boards. Both the Advocate General and the court considered that the latter two cases fall within the management policy of the company concerned and exceed the mere verification of legality.[362] However, the French government argued that those various forms of intervention are confined to strictly defined situations that occur in practice very rarely, and they do not give the government the right to establish permanent supervision over the entity.[363] **T**he Minister responsible for construction and housing may also impose a specific course of management action on undertakings, either by requiring that they display a minimum level of dynamism or by placing limits on what may be considered to be excessive activity.[364] **Lastly**, the interministerial task force for the inspection of social housing may, in addition to its

[358] Paragraph 36 of Opinion of Advocate General on Case C-237/99 Commission of the European Communities v French Republic, delivered on 19 October 2000.
[359] Paragraph 48 of Case C-237/99 Commission of the European Communities v French Republic,[2001].
[360] Article L.422-7 of the Code.
[361] Article L.422-8 of the Code.
[362] Paragraph 72 to 75of the opinion of Advocate General, and paragraph 55 of the Judgment.
[363] Paragraph 90 of the opinion of Advocate General, and paragraph 56 of the Judgment.
[364] Paragraph 57 of the judgment

responsibilities for conducting documentary and on-the-spot inspections of the operations of low-cost housing bodies, carry out studies, audits or assessments and draw up proposals for action to be taken following its inspections. This ensures that the persons concerned by its inspections implement measures required by the Ministers to whom they are responsible.[365] Given these provisions, the court pointed out that the management of an undertaking is subject to supervision by public authorities, which allows the latter to influence the decisions of the undertakings in relation to public contracts.[366]

The court held the same view in Adolf Truly, noting that the criterion is satisfied when public authorities supervise not only the annual accounts of the undertaking concerned, but also its conduct from the point of view of proper accounting, regularity, economy, efficiency and expediency, and also when those public authorities are authorized to inspect the business premises and facilities of the entity concerned and report the results of those inspections to a regional authority which holds, through another company, all of the shares of the undertaking in question.[367] These powers enable the public authorities to actively control the management of a company.[368]

Therefore, the criteria of management supervision should be considered to be met when management supervision enables public authorities to influence the decisions of the body in question with respect to public contracts. To determine whether the management of the undertaking is being supervised by the public authorities, it is necessary to examine the details of the various controls.

Second, is the legal framework within which the undertaking operates relevant?

It has been argued in some cases that the legal framework within which the undertaking operates is relevant to the criteria of management supervision. The relationship between these two factors has been clarified in the French Republic case[369]. The Advocate General opined that the legal framework within which the undertaking operates should not be confused with the management supervision to which the directive refers. The existence of the rules, no matter how precise, that an entity must observe is one thing, and supervision over the management of that body is another. This logic behind this assertion is a recognition that if monitoring compliance with rules and sanctions was only a matter for the courts, then one could not speak of supervision by the state, a public body or a body governed by public law.[370]

However, the Advocate General also agreed that the very strict framework of the oversight provisions cannot be ignored when considering whether an undertaking is in a situation of close

[365] Paragraph 58 of the judgment
[366] Paragraph 59 of the judgment
[367] Paragraph 70-74.
[368] Paragraph 73.
[369] Judgment on Case C-237/99 Commission of the European Communities v French Republic, delivered on 1 February 2001.
[370] Paragraph 65 of Opinion of Advocate General on Case C-237/99 Commission of the European Communities v French Republic, delivered on 19 October 2000.

dependence on public authorities. If the rules of the management are very detailed, simply observing them would likely result the public authorities having a degree of control, in the sense that management will be guided by the public authorities, and supervision will be merely a means of furthering the government domination provided for in the rules.

For instance, in the French republic case, the activities of undertakings are very narrowly circumscribed. The type of the client to which the undertakings may offer their services is fixed by law, and the technical characteristics and cost of the housing they may deal with is also set by administrative decision. The objectives of those undertakings and the transfer of shares must be consistent with the standard clauses of the model statutes set out in the Code.[371] If a profit is made, the dividend payable may not exceed a fixed maximum.

The court in the French Republic case confirmed that since the rules provided for government oversight of the entity's management are very detailed, the mere supervision of the entity's compliance with them may in itself lead to significant influence being conferred on the public authorities.[372]

C. Appointment of more than half of the members of an undertaking's management.

In the settled cases, there was no debate on this issue.

2.2.2.1.2.3 Discussion and comments

Through the development of the EU's public procurement regime, we find that at first, certain SOEs were meant to be regulated; then, as the directives began to be enforced, their impact on defining the boundaries of SOE's procurement activities gradually became clear. From a single legal term that was mentioned in the initial procurement directives, a general definition of BGBPL was ultimately developed through the observance of the directive. The list of BGBPLs provided by the Member States evolved from exhaustive to indicative, until it was later abolished; meanwhile, the development of ECJ cases gradually provided a clarification of each condition.

According to the settled ECJ cases, SOEs meeting the following cumulative conditions are covered by the Public Sector Directive as BGBPLs:

First, the SOE must be established for the specific purpose of meeting needs in the general interest and not have an industrial or commercial character. This condition may be interpreted according to the following aspects:

(1) SOEs should be established to meet the needs of the general interest. The notion and scope of 'needs in the general interest' should be interpreted in light of the context and purpose of the directives, but any interpretation is also subject to the national laws of the Member States. The

[371] Article R.422-1 OF The Code.
[372] Paragraph 52 of the judgment on Case C-237/99 Commission of the European Communities v French Republic.

term ‘needs in the general interest’ is connected to activities that are of direct benefit to the public, rather than to the interest of individuals or groups. ‘Needs in the general interest’ may be fulfilled out by private undertakings as well as SOEs; thus, if private undertakings carry out certain activities in the market concerned, one cannot deny the possibility that the activities pursued by SOEs are being conducted to meet needs in the general interest.

(2) Meanwhile, the specific activities pursued by SOEs should not have an industrial or commercial character. It is difficult to draw a line between the activities in the general interest that have an industrial or commercial character and those that do not. In the settled case law, several factors have been used to make this determination. (a) Competition is the most important factor mentioned. ‘Competition’ refers to the real operating circumstances of the SOEs concerned, instead of to an assumed general market situation. Competition is only one of the relevant factors used to determine whether the activities pursued by SOEs have an industrial or commercial character, meaning that the concept of competition is only indicative and not decisive. In some cases, even though there is competition, an SOE may still be classified as a BGBPL. (b) In addition to competition, there are other relevant legal and factual factors mentioned by the ECJ case law, including profit-making, bearing economic risk and receiving offsets or public financing. Even if a SOE pursues profit, it still could be determined that it meets the needs of general interest, and its activities have no industrial or commercial character. Further, not aiming primarily at pursuing profit is also not decisive on this issue. Apart from profit making, bearing economic risk also has been considered as a factor, but it is also not a decisive one. Even if an SOE bears economic risk in theory, in reality, public authorities rarely allow an SOE to struggle or fail because of economic losses. Having mechanisms for offsetting financial losses, or not having such a safety net, is indicative for analysing whether the undertaking bears economic risk. Overall, no single factor—competition, pursuing profit, bearing economic risk or obtaining offsets from public financing—is decisive for determining whether an SOE meet the condition of being a BGBPL. The determination should be based on all of the factors.

(3) The legal regime under which the SOE was constituted is irrelevant. In the initial procurement directive, the character of the legal regime was mentioned by means of terms such as ‘legal person….by public law’ and ‘a body governed by public law’. However, in the settled ECJ case law, it has been clarified that an entity’s private law status does not constitute a criterion that would preclude it from being classified as a contracting authority. Therefore, even though SOEs are constituted under private law, such as commercial company law, they may still be classified as BGBPLs.

(4) The SOEs should be ‘established for the specific purpose of meeting’ needs in the general interest, and their activities should not have an industrial or commercial character. ECJ case law has clarified that SOEs that are established to meet the needs of general interest and do not have a an industrial or commercial character may also participate in other activities, including industrial or commercial activities. Second, the proportion of activities that meet the needs of general interest and have a non-industrial or commercial character is irrelevant. In evaluating the legal

certainty and practicality of establishing an independent financial structure for these two kinds of activities (commercial and industrial), the proportion of the activities is irrelevant. Even if only a small percentage of an SOEs activities are conducted to meet the needs of general interest, it is still possible that the SOE could be considered a BGBPL. Third, all contracts awarded by the SOEs that have been determined to be BGBPLs should be covered by the EU's public sector procurement directive. Given the diverse activities of most SOEs, the purpose for which a contract is awarded has no impact on the application of the EU's public sector procurement rules. Fourth, the key point is whether or not the undertaking is currently pursuing activities intended to meet the needs of public interest and that have no the industrial or commercial character. In certain cases, SOEs that were established for to pursue needs of public interest end up changing into different kinds of entities pursuing different fulfilment goals. According to the settled ECJ case law, previous activities or purposes that an SOE has pursued have no bearing on determining the character of the current status of the SOE.

Second, the SOE should have a legal personality. Meeting the condition of 'having legal personality' can usually be confirmed by the rules of the law according to which the SOE was set up.

Third, the SOE should meet one of these three conditions: (a) financed, for the most part, by the state, or regional or local authorities, or other bodies governed by public law; (b) being subject to management supervision by those bodies; or (c) having an administrative, managerial or supervisory board, more than half of whose members are appointed by state, regional or local authorities or by other bodies governed by public law. ECJ case law notes that any one of these three conditions indicates that an SOE is closely dependent on state, regional or local authorities or on other BGBPLs.

In the ECJ case law, several issues relevant to these three conditions have been clarified. First, meeting only one of these three conditions is not sufficient for determining that the SOE is a BGBPL. For instance, the state holding the majority of an SOE's shares does not automatically make that SOE a BGBPL. The previous two conditions must also be fulfilled. Second, one SOE in an enterprise group being classified as a BGBPL is not sufficient for considering all of the SOEs in the enterprise group to be BGBPLs. Third, in an enterprise group in which an SOE classified as a BGBPL enters into a contract with an SOE that is not a BGBPL, or transfers its rights and obligations in the context of a call for tenders, whether the SOE classified as a BGBPL is a beneficiary of the contract is a key factor in determining whether the awarding of the contract should be covered under the public procurement regime. Fourth, it has been clarified that 'management supervision' should be understood from the perspective of various controls, instead of evaluated by means of the administrative characteristics. Further, it is necessary to consider whether the various controls to which the undertakings are subject render them dependent on public authorities in such a way that the latter are able to influence the undertakings' decisions in relation to public contracts. Determining whether these various kinds of controls exist should include analysing several details, and the relevant case law has not yet achieved consensus about

these details. However, the ECJ Court did point out that if the criterion of close dependence on public authorities is satisfied, it is not necessary for the public authorities to exercise any real influence on the decisions of the bodies in question about the awarding of contracts.[373]

In summary, under the EU's public procurement regime, SOEs that pursue activities for meeting the needs of public interest, that do not have an industrial or commercial character, that have a legal personality, and that are closely dependent on the public authorities should be governed by the EU's public sector procurement directive as BGBPLs. An SOE that operates in normal market conditions, that aims to make a profit, and that bears economic losses resulting from the exercise of its activity should not be considered a BGBPL, since the needs in the general interest that it was set up to fulfil can be deemed to have an industrial or commercial character. SOEs that pursue activities to meet the needs of public interest and have no industrial or commercial character but are not closely depend on public authorities should not be determined to be BGBPLs. SOEs that are closely dependent on public authorities but do not pursue activities intended to meet the public interest, or the needs they are fulfilling do have an industrial or commercial character, also should not be considered to be BGBPLs.

However, the case law related to classifying an entity as a BGBPL is still not clear enough on the following aspects:

(1) The notion and scope of 'the needs of general interest'. Although it has been clarified that the notion and scope of the term 'the needs of general interest' should be interpreted in light of the context and purpose of the directives, the meaning and the scope of this term remains unclear.

(2) The notion of 'having no industrial or commercial character' and the relevant criteria. Determining whether SOEs have industrial or commercial characteristics depends on the comprehensive consideration of all aspects of the marketplace in which the entities are operation, including competition, pursuit of profits, bearing economic risk, receiving offsets, etc. All these aspects are relevant, but none is decisive. Further, it is not clear that to what extent the characteristic could be considered as existing.

(3) The relevant criteria for determining the three conditions related to close dependence. The criteria for determining 'subject to management supervision' by public authorities are not clear, and determining the existence of the various controls is based on uncertain factors. Ascertaining whether various controls give public authorities the ability to influence the entities' decisions related to public contracts has been the main approach taken.

(4) The relationship between the first condition and the third condition. Given the discussion above, it is interesting to note that the first condition and the third condition are relevant to each other, especially when determining whether the activities pursed by the SOEs have industrial or commercial character and when determining whether the SOEs are mostly

[373] Paragraph 55 of Judgment of Case C337-06 Bayerischer Rundfunk and others, 13.12.2007.

financed by public authorities or are subject to management supervision by public authorities. For instance, if an SOE does not bear economic risk by itself, it should receive the support of public finance from public authorities. In this situation, it is not clear whether the SOE also could be considered to have a close dependence to the public authorities. Because the SOE only receives public finance to make up a loss, most of its financing may not come from public authorities. However, if the SOE relies on public authorities to make up an economic loss, how it could not be considered to have close dependence on the public authorities? Therefore, there may yet be some space to interpret the condition of close dependence.

Based on the definition of BGBPL and the relevant ECJ case law, several general observations may be made:

(1) The purpose of the EU public procurement law impacts the interpretation of the definition of a BGBPL. In ECJ case law, the purpose of creating an internal public procurement market has been mentioned frequently. A functional approach has been adapted to explain which entities should be governed by the procurement's directives. It seems that SOEs that implement public functions should be regulated by the public sector procurement directive. When SOEs implement public functions like other public authorities, then the SOEs' decisions about public contracts may be influenced by public authorities, and it is possible for them to discriminate against suppliers from other Member States. To prohibit any such discrimination, SOEs should be treated as BGBPLs. Therefore, SOEs being controlled or closely dependent on public authorities is a decisive aspect in the EU's public procurement regime.

(2) Along with the development of ECJ case law, the definition of a BGBPL has become clearer than it was before, but it is still determined on a case-by-case basis. There is a lack of uniform criteria that may be used to draw clearer boundaries. The reason for this is the diversity of situations among the Member States. However, under the EU's regime, the ECJ may clarify the EU public procurement rules through individual EU cases, which provides an approach for clarifying the boundaries of the BGBPL definition and also provides a measure for remedies.

2.2.2.1.3 What kinds of procurement activities have been covered?

As mentioned above, the term 'procurement' has been defined as the acquisition by means of a public contract of works, supplies or services by one or more contracting authority from economic operators chosen by the contracting authority, whether or not the works, supplies or services are intended for a public purpose.[374] Not all activities of SOEs should be regulated by the EU's public sector procurement directive, which only covers purchasing activities that use procurement as well as design contests. In this dissertation, the definition of 'procurement' will be introduced.

2.2.2.1.3.1. The acquisition by means of a public contract of works, supplies or services

As a key term for interpreting the meaning of 'procurement', 'public contract' has been defined

[374] Article 1 (2) of directive 2014/24/EU

by the directive through the following determining factors:[375] (1) 'for pecuniary interest'; (2) concluded in writing; (3) between one or more economic operators and one or more authorities; (4) having as the object the execution of works, the supply of products or the provision of services.

(1)'For pecuniary interest'. The term 'pecuniary interest' in the UK's Public Contracts Regulation has been transposed to 'consideration',[376] which in English contract law refers to one of the requirements for a valid contract; specifically, it requires that a contract take the form of an 'exchange' rather than being a gratuitous promise made by one party.[377] However, the term 'consideration' in English contract law does not match completely with the term 'pecuniary interest' under the EU law.[378]

At the EU level, Advocate General Léger has stated in La Scala[379] that if something is provided without benefit to the provider there is no potential for the favouritism that the directives seek to prevent. This means there is a benefit to attracting providers to join the competition, and that there is an exchange between the parties involved in the contract.

Further, given that the objective of the EU public procurement directives is to create an internal market, 'pecuniary interest' should be an economic benefit.[380] Additionally, according to the UK Chandle case, non-economic and other indirect benefits are insufficient to constitute a 'public contract' under the public procurement rules. This suggests the need for direct economic benefit to the core activities of the provider.

'Pecuniary interest' need not take the form of a financial payment. In some cases, the parties in a contract are not exchanging works, services or goods for financial payment. For instance, a private firm may provide equipment to a public university, while the university provides research services to the private firm. In this transaction, the 'pecuniary interest' takes the form of the provision of services rather than financial payment.[381] However, it may still be treated as one kind of 'pecuniary interest'.

The financial payment made by a contracting authority need not be paid from its own funds.

It is not necessary that the 'pecuniary interest' be paid directly by the contracting authority. Some scholars argue that the 'pecuniary interest' should be given by a contracting authority.[382] This view may be influenced by the previous interpretation of distinguishing between 'public contract' and 'concession'. At first, 'consumers pay' instead of 'governments pay' was considered

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[375] Article 2(5) of directive 2014/24/EU
[376] In the recital (4) of the directive 2014/24/EU, 'consideration' also has been employed for describing the notion of procurement.
[377] Sue Arrowsmith, p. 394.
[378] Sue Arrowsmith, p. 394.
[379] Opinion of Mr Advocate General Léger delivered on 7 December 2000 on Case C-399/98.
[380] P.395
[381] P.395
[382] For instance, Christopher Bovis held the view that 'the crucial characteristics of a public contract, apart from the obvious written format requirement, are: i) a pecuniary interest consideration given by a contracting authority and ii) in return of a work, product or service which is of direct economic benefit to the contracting authority. See: Christopher Bovis (2012), EU public procurement law, p.333.

an one important characteristic for defining a 'concession'. However, the provision of the Public Sector Directive has not enforced this limitation. The 2014 Concession directive clarified that bearing operational risk is the most significant characteristic for defining a 'concession'. Both 'public contract' and 'concession' would include the element that 'consumers pay'. Therefore, under the notion of a 'public contract', 'pecuniary interest' would be directly paid by the government or the consumers. For public contracts, payment could be made by third parties, like consumers, to the providers, if the contracting authorities eliminate the operational risk to providers by (for instance) recouping the investment made and costs incurred.[383]

The concept of 'pecuniary interests does not preclude the application of the procurement rules merely because the arrangement in question does not provide for a profit element, but rather was constructed to reimburse costs to the party providing the goods, works or services to the contracting authority.[384] This has been clearly confirmed by the ECJ in Case C-159/11, Ordine Degli Ingegneri Della Provincia Di Lecce and Others.[385] In this case, the ASL and the university argued that, in accordance with Italian Law, a consultancy contract constitutes a cooperation agreement between public administrations with respect to activities of general interest, and participation for pecuniary interest is only meant for remuneration that is limited to the cost incurred.[386] The Advocate General in this case insisted that a broad interpretation should be given to the notion of 'pecuniary interest', to the effect that it would cover any kind of remuneration that has monetary value.[387] **First**, the absence of profit alone does not render the contractual agreement gratuitous, and it continues to be a contract for consideration from an economic point of view, especially since the recipient is given a non-cash benefit. **Second**, a broad understanding of the notion of 'pecuniary interest' is consistent with the purpose of the procurement directives, which is to open up the markets to genuine competition.[388] **Third**, it is also in line with the broad definition adopted by the Court concerning the freedom to provide services under Article 56 TFEU. The Public Sector Directive is intended to provide fundamental freedoms in the internal market; therefore, it would seem logical to have a broad understanding of the notion of 'pecuniary interest'. In accordance with that broad interpretation, the service provider may not be absolutely required to be a profit-making enterprise. Rather, it should be sufficient, for the pecuniary interest requirement to be satisfied, for the service provider to receive cost-covering remuneration in the form of reimbursement of costs. The notion of pecuniary interest is thus also intended to cover

[383] Abby Semple in the book 'A practical guide to public procurement' also mentioned that 'it doesn't appear, however, to extend to payments made by third parties to the economic operator, if the contracting authority does not incur any economic detriment.' See: Abby Semple (2015). A Practical Guide to Public Procurement, UK: Oxford University Press, p.4.

[384] Paragraph 29 of the judgment.

[385] It refers to a proceeding between Local Health Authority of Lecce (ASL) and the university of Salento (the university), on one hand; and the order of architects of the Province of Lecce an others, on another hand, concerning the consultancy contract concluded between the ASL and the university, and relating to the study and the evaluation of the seismic vulnerability of hospital structures in the province of lecce.

[386] Paragraph 18 of the judgment.

[387] Paragraph 30-34 of the Opinion of the Advocate General

[388] Only in this way it is possible to guarantee the effectiveness of the procurement directives and to prevent the circumvention of procurement law by agreeing other forms of remuneration which are not readily recognizable as profit-making, for example through swaps or the waiver of reciprocal claims existing between the contracting parties.

simple reimbursement.

(2) 'Concluded in writing'. The Public Sector Directive only applies to contracts that have been concluded in writing. This means that contracts that are verbally concluded will not be covered. Considering efforts being made to improve electronic procurement, contracts concluded by electronic means will also be covered by Public Sector Directive. However, Sue Arrowsmith pointed out that this provision could give rise to difficulties of interpretation in some situations; for instance, in cases in which a verbal contract refers to certain standard written terms, it is difficult to see any justification for limiting the directive to written contracts.[389]

(3) 'Between one or more economic operators and one or more authorities'. This provision refers to the characteristics of the contracting parties. The types and definitions of the contracting authorities covered by public sector authorities have already been discussed above.

'Economic operators' means any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market. It is possible for public entities to participate in tendering procedures for public contracts, in parallel with the participation of private economic entities. A non-restrictive interpretation of the concept of 'economic operator' complies with the objectives of the EU's public procurement regime, which is to attain the widest possible opportunity for competition.[390] Such an interpretation also suits the interests of the contracting authority by providing it with greater choice. Classifying contracts concluded between contracting authorities and entities that are primarily not profit making as mutual agreements instead of 'public contracts' would be at odds with the objective of the EU's rules on public procurement.[391] Many different kinds of operators, including public universities and research institutes and public university hospitals, are able to participate, as recognised by several judgments from the ECJ cases[392]. Publicly-controlled enterprises, which have more economic characteristics, also could become 'economic operators'.[393] Therefore, it follows from both the EU rules and the case law that any person or entity who/which, in light of the conditions laid down in a contract notice, believes that he/it is capable of carrying out the contract is eligible to submit a tender as a candidate, regardless of whether he/it is governed by public law or private law, or is active as a matter of course on the market or only on an occasional basis.[394] Moreover, the Member States have the discretion as to whether or not to allow certain categories of economic operators to provide certain services. This means the Member States determine whether or not the entities that are not profit making are

[389] P.394.
[390] The judgment in Bayerischer Rundfunk and others, C-337/06, paragraph 39.
[391] Judgment in CoNISMa, paragraph 37 and 43; Judgment in Datat Medical Service, C-568/13, paragraph 34.
[392] For instance, the ECJ judgment in Teckal, C-107/98, paragraph 51; ARGE, paragraph 40; CoNISMa, C-305/08 paragraph 38; Ordine degli Ingegneri della Provincia di lecce and others, C-159/11, paragraph 26; Data Medical Service, C-568/13, paragraph 35.
[393] This issue will be discussed in the chapter 3 of the dissertation.
[394] CoNISMa, C-305/08 paragraph 42; Data Medical Service, C-568/13, paragraph 35.
[394] This issue will be discussed in the chapter 3 of the dissertation.

authorised to operate on the market.

When public entities participate in a contract as economic operators, such as public universities and research institutes, another issue arises: whether the arrangements meet the exclusion conditions for 'in-house provision' or 'public-public cooperation'. This will be discussed further in Chapter 3.

(4) 'Having as their object the execution of works, the supply of products or the provision of services'. This provision refers to the objects of the contracts, which may be classified as one of three kinds: the execution of the works, the supply of products and the provision of services. According to the type of object, public contracts have been subdivided into three kinds: public works contracts[395], public supply contracts[396] and public service contracts[397].

In the definition of '**public works contracts**', three varieties of objects have been mentioned: (1) the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex II of the directive[398]. The activities covered by this list mainly refer to work on buildings and construction in the civil engineering, transportation and water sectors.[399] The execution, or both the design and execution of these works have been covered. (2) The execution, or both the design and execution of **'a work**'. (3) The realisation, by whatever means, of **a work** corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work.

The 'work' mentioned in the first and second variants has no important relationship to the precise definition of 'a work' given by the directive that **'a work'** means the outcome of building or civil engineering work taken as a whole, which is sufficient in itself to fulfil the economic or technical function.[400] Because the reference to a 'work' in the first part of the definition does not add anything to the reference to 'works', carrying out a 'work' involves, by definition, the carrying out of 'works'.[401] While the definition is relevant to the application of thresholds, separate contracts relating to a single work must be aggregated.

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[395] According to the article 2(6) of the directive 2014/24/EU, 'public works contracts' means public contracts having as their object one of the following: (a) the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex II; (b) the execution, or both the design and execution, of a work; (c) the realization, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work.

[396] According to the article 2(8) of the directive 2014/24/EU, 'public supply contracts' means public contracts having as their object the purchase, lease, rental or hire-purchase, with or without an option to buy, of products. A public supply contract may include, as an incidental matter, siting and installation operations.

[397] According to the article 2(9) of the directive 2014/24/EU, 'public service contracts' means public contracts having as their object the provision of services other than those referred to in the definition of 'public works contracts'.

[398] It lists the catalogues of activities through employing both NACE and CPV. Where any difference of interpretation between them, the CPV nomenclature will apply.

[399] Mainly, the list of activities covers construction of new buildings and works, restoring and common repairs, site preparation, building of complete constructions or parts thereof; civil engineering; general construction of buildings and civil engineering works; erection of roof covering and frames; construction of highways, roads, airfields and sport facilities; construction of water projects; building installation; building completion, etc.

[400] article 2(7) of the directive 2014/24/EU

[401] Sue Arrowsmith, P.402.

The works mentioned in the first variant may also be included in the second variant; therefore, the difference between first and second variants is not related to the type of work involved, but rather to the quantity of the work, and in particular, of a single work or several single works. For a single work, the contracting authority has to make the award through one contract, instead of through several contracts. If the work does not constitute a single work, the contracting authority has the discretion to make awards through multiple contracts. In the practice, considerations for determining a single work seem to rest on the nature of the contract and on the circumstances surrounding the award.[402]

The third variant was introduced to bring within the directive cases in which a builder or developer arranges for the construction of a work on land that is not owned by the contracting authorities, including cases in which the land and structure will be transferred or leased to the authority later, or never, and provided that the authority obtain direct economic benefit from the works or work. Additionally, it covers the situation of an entity going through a principal agent to procure works. For instance, a contracting authority engages another as its agent to issue contracts for realisation of a particular work. As the 'principal' contracting authority exercising a decisive influence on requirements, such as the type or design of the work, this contract still could be considered a public work contract.

In the definition of '**public supply contracts**', the objective is to purchase, lease, rent, or hire-purchase, with or without an option to buy, products. There is no definition of 'products'. Except for special exclusions in the directive, for instance land, public supply contracts cover all kinds of products. The issue of exclusion is considered in the Section 2.2.2.1.4. Further, existing or installation operations may be included in a public supply contract as incidental matters.

The notion of acquisition has been understood broadly in the sense of obtaining the benefits of the works, supplies or services in question. Therefore, various forms of acquisition have been accepted in a broad way. Several contractual forms for procuring products have been mentioned, and they include (but are not limited to) the purchase, lease, rent, or hire-purchase, with or without an option to buy, of works. This means that the acquisition need not require a transfer of ownership to the contracting authorities.[403] However, the directive also pointed out that '*the mere financing, in particular through grants, of an activity, which is frequently linked to the obligation to reimburse the amounts received where they are not used for the purposes intended, does not usually fall within the scope of the public procurement rules.*'[404] Situations exist in which, without any selectivity, all operators that meet certain conditions are entitled to perform a given task; these should not be understood as procurement but rather as simple authorisation schemes, for things like licences for medicines or medical services.[405]

In the definition of '**public service contract**', the objective has been mentioned in a negative

[402] For instance, the ownership of the land relevant to the works, etc.
[403] Recital (4) of the directive 2014/24/EU
[404] Recital (4) paragraph 2 of the directive 2014/24/EU
[405] Recital (4) of the directive 2014/24/EU

way—the provision of services other than those falling under the definition of a public works contract. Compared with the definition in the 2004 Directives, in which the scope of services was listed in Annex II of Directive 2014/18/EEC, the 2014 directives extended the objectives of public services contracts, such that they are no longer limited to several kinds of services. The scope of services now includes all services except those covered under a public works contract. At least two groups of services should be included. First, service attached to works. Services that are relevant to buildings or construction, such as building maintenance services, should be treated as services under the public service contract, even if they are not listed in Annex II of the directive. Second, pure services. Services like educational and consultant services may be also included in the directive. However, certain specific types of services are excluded from the directive, such as broadcasting services[406] and certain financial services[407]. *Mixed procurement.* In some situations, one public contract may include several objects; for example, a construction contract could involve procuring design services, monitoring services, goods, the execution of the construction and maintenance services. To deal with this issue, the directive provides rules for mixed contract.[408] For instance, in the sphere of property management services, may, in certain circumstances, include works. However, in so far as such works are incidental to the principal subject matter of the contract, and are a possible consequence thereof, or a complement thereto, the fact that such works are included in the contract does not justify the qualification of the public service contract as a public works contract.[409]

2.2.2.1.3.2. Whether or not the works, supplies, or services are intended for a public purpose

The 2014 Public Sector Directive expressly confirms that there is no requirement that the purchase in question must be made for a public purpose. However, the specific meaning of 'public purpose' is not clear enough. According to the relevant activities of SOEs, at least the following three circumstances are relevant: (1) First, the works, supplies or services procured by SOEs may for self-consumption. This part of the procurement has traditionally been regulated by the procurement rules; for example, in a case in which the SOE procures supplies or services to distribute to its employees. It is difficult to claim that these activities are connected with a 'public purpose'. (2) Second, the works, supplies or services procured by SOEs could be for the purpose of providing certain public services to citizens. For instance, an SOE that is in charge of providing urban transportation services to citizens may procures buses. This procurement could be considered as being for a 'public purpose' as it is made in order to provide public services. (3) Third, the works, supplies or services procured by SOEs may be for the purpose of reselling or reproducing. SOEs that are involved in industrial or commercial activities may procure supplies and services for resale or for reproducing. This kind of procurement activity is not done for a

[406] Recital (23) of the directive 2014/24/EU has explained the reason of this exclusion as following: " the awarding of public contracts for certain audiovisual and radio media services by media providers should allow aspects of cultural or social significance to be taken into account, which renders the application of procurement rules appropriate."
[407] Recital (26) of the directive 2014/24/EU has explained the reason of exclusion the financial instruments.
[408] See article 3 of directive 2014/24/EU
[409] Recital (8) of the directive 2014/24/EU

'public purpose', but rather for 'commercial profits'. According to the literal meaning of the phrase, this kind of procurement activity should be covered by the EU's public sector procurement activities. This conclusion has been supported by the ECJ case law[410] mentioned above.

2.2.2.1.3.3 Discussion and comments

In general, all the procurement activities of SOEs should be regulated under the EU's public sector procurement directive, whether or not they are for public purposes. The only requirement from the public sector procurement directive is that the procurement should occur by means of awarding a 'public contract'. The term 'public contract' has been defined according to the following aspects: (a) for pecuniary interest. In the ECJ case law, the term 'pecuniary interest' has been considered a kind of direct economic benefit, but it is not necessary for it to take the form of a financial payment, nor must it be paid directly by the contracting authority. Additionally, if an arrangement does not provide for a profit element, but merely for the reimbursement of the costs incurred by the party providing the goods, works, or services to the SOEs as a contracting authority, this arrangement still could be regulated by the EU public procurement rules. (b) Concluded in writing. (c) Between one or more economic operators and one or more authorities. (d) Having as its object the execution of works, the supply of products or the provision of services. According to the types of subject matter, the term 'public contract' under the EU public procurement rules includes three kinds of contracts: public works contract, public services contract and public supplies contract. The main reason for distinguishing these three kinds of contracts is that the EU public procurement regime sets different thresholds for the three kinds of contracts. In certain circumstances, one public contract including more than one kind of subject matters is called a 'mixed procurement'. The EU public procurement regime has provided several rules for indicating the rules that apply to these mixed procurements.

The logic of the public sector procurement directive is that once the SOEs have been determined as BGBPLs, then all their procurement activities should be regulated. As discussed above, SOEs may participate in different kinds of activities, including those intended to pursue the needs of general interest and those intended to pursue private interests. This means that whether or not the procurement activities are for public purposes, they should be regulated under the EU public sector procurement directive. While this has yet to be specified, in general, the procurement of SOEs that have been classified as BGBPLs of any good or service meant for resale or reproduction also should be regulated.

2.2.2.1.4 Specific exclusions relevant to SOEs under the Public Sector Directive

Even when an SOEs procurement activities meet all the conditions mentioned above, some situations have been excluded from the Public Sector Directive.

[410] See: paragraph 19 and 32 of the judgment of Case C-393/96

2.2.2.1.4.1 Contracts in the water, energy, transportation, and postal service sectors.

This variant of contract refers to: (1) **public contracts awarded by contracting authorities that have already been covered by the Public Utilities Directive.** It is impossible that the same contract should comply with both the public sector and the Public Utilities Directives. To coordinate the Public Sector Directive and the Public Utilities Directives, procurement activities that fall into the scope of both will only be subject to the Public Utilities Directive. However, other procurement activities of the same contracting authority will still be covered by the Public Sector Directive. For instance, contracts awarded by contracting authorities in the context of their operation of maritime, coastal and river transportation services fall within the scope of the Public Sector Directive.[411] (2) **Contracts that have been excluded from the Public Utilities Directive,** such as contracts awarded for the purpose of resale or lease to third parties (Article 18 of the Public Utilities Directive); for example, contracts awarded by certain contracting entities for the purpose of water, for the purpose of supplying water used to make energy or supplying fuels used for the production of energy (Article 23 of Public Utilities Directive); and activities directly exposed to competition (Article 34 of Public Utilities Directive). These issues are considered at greater length in Section 2.2.2.2.4. (3) **Further exclusion for a contracting authority that provides postal services**[412] **and for contracts awarded for the pursuit of certain other activities.**[413]

2.2.2.1.4.2 *Specific exclusions in the field of electronic communications*

The directive shall not apply to public contracts and design contests undertaken for the principal purpose of permitting the contracting authorities to **provide or exploit public communication networks or to provide to the public one or more electronic communications services.**[414] This exclusion only applies to contracts for the public provision or exploitation of such networks and services, as opposed to a situation in which a public body purchases services for its own use. The justification for this exclusion is the exposure of this sector to competition, as well as the desire to facilitate rapid dissemination of broadband internet services in particular.[415]

2.2.2.1.4.3 *Public contracts awarded and design contests organized pursuant to international rules*

There are two kinds of exclusions included in these circumstances. First, if the EU is bound by international agreements, contracting authorities covered by these international agreements have the obligation to award public contracts in accordance with these international agreements, particularly with respect to the different rules about procurement procedures. Second, if the public contracts are fully financed by an international organization or an international financing

[411] Recital (21) of directive 2014/24/EU
[412] Within the meaning of point (b) of article 13(2) of directive 2014/25/EU (Public Utilities Directive).
[413] Specifically, according to the article 7 of directive 2014/24/EU, it includes the following activities: added value services linked to and provided entirely by electronic means, financial services, philatelic service, logistics services.
[414] Article 8 of directive 2014/24/EU.
[415] Abby Semple, p.11-12.

institution, then the awarding of public contracts shall not be subject to the EU public sector procurement directive. In the case of public contracts that are mostly financed by an international organization or international financing institution, the parties shall agree on the applicable procurement procedures. However, in the above two situations, if the contracts involve defence or security aspects that are awarded pursuant to international rules, the exclusion rules above will not apply. The EU public sector procurement directive provides other rules for this situation.[416]

2.2.2.1.4.4 *Specific exclusions for service contracts*

Several services have been clearly excluded from the application of the EU's procurement rules for the following reasons:

(1) The characteristics of the service make it inappropriate to apply the procurement rules. (a) The necessity of taking into account certain aspects of cultural or social significance render the application of the procurement rules inappropriate to, for example, **certain audio-visual and radio services fulfilled by media providers.**[417] (b) A**rbitration and conciliation services** provided by bodies or individuals that have been selected in a manner that cannot be governed by procurement rules are excluded from the directive.[418] (c) **Certain legal service** provided by bodies or individuals designated or selected in a manner that cannot be governed by procurement rules, such as the designation of State Attorneys in certain Member States, are excluded from the directive.[419] (d) Employee contracts. (e) The acquisition or rental of land, existing buildings or other immovable property. (f) In general, political parties have not been regarded as 'contracting authorities' by the procurement directive; therefore, they are not subject to its provisions. However, political parties in some Member States might fall within the notion of bodies governed by public law, and they then should fall into the scope of the directive.[420] Certain services, such as propaganda films and video-tape productions are so inextricably connected to the political views of the service provider when provided in the context of an election campaign that these service providers are normally selected in a manner that cannot be governed by procurement rules. Therefore, **political campaign services** when awarded by a political party in the context of an election campaign[421] are excluded from the application of the directive.

(2) Certain services are excluded in order to clarify the relationship between the procurement directives and other EU rules. (a) Since the creation of the European Financial Stability Facility and European Stability Mechanism, operations conducted within that Facility and Mechanism are excluded from the scope of the directive; for instance, **loans and other financial instruments.**[422] (b) To promote cooperation between the public procurement directives and EC Regulations on public passenger transportation services by rail and road, public service

[416] Article 17 of the Directive 2014/24/EU
[417] Recital 23 and article 10(b) of the directive 2014/24/EU. However, this exclusion should not apply to the supply of technical equipment necessary for the production, co-production, and broadcasting of such programmes.
[418] Recital 24 and article 10(c) of the directive 2014/24/EU
[419] Recital 25 and article 10(d) of the directive 2014/24/EU
[420] recital (29) of the directive 2014/24/EU and Article 10 (j) of the directive 2014/24/EU
[421] Article 10 of the directive 2014/24/EU
[422] recital (26) of the directive 2014/24/EU and Article 10 (e) (f) of the directive 2014/24/EU

contracts and service concessions for **public passenger transportation by rail or metro** continue to be subject to the regulation. Therefore, procurement directives (including the 2014 concession Directive) will still apply to public service contracts and other service contracts for public passenger transportation service by bus or tramway. However, the regulation gives Member States' the discretion to refer to their own national laws and depart from the rules laid down in the regulation for these services. Member States may provide in their own national laws that public service contracts for public passenger transportation services by rail or metro are to be awarded by a contract award procedure following their general public procurement rules.[423]

(3) Certain services are excluded from the regulation to protect special interests. To preserve the particular nature of non-profit organizations or associations that perform certain emergency services, the directive should not apply to certain emergency services performed by these organisations, including certain civil defence, civil protection, and danger prevention services.[424] However, patient transportation (ambulance) services should not be excluded from the regulation, but rather should be subject to the special regime (light regime)[425] set out for certain social and other special services.[426]

2.2.2.1.4.5 *Service contracts awarded on the basis of exclusive right*

In certain cases, a contracting authority or an association of contracting authorities may be the sole source for a particular service. In respect of the provision made for those entities that have an exclusive right pursuant to laws, regulations or published administrative provisions that are compatible with the TFEU, the directive need not apply to the award of **public service contracts** from a contracting authority to the contracting authority or association providing the services in question.[427]

2.2.2.1.4.6 *Public contracts between entities within the public sector*

There is considerable legal uncertainty as to the extent to which contracts that are concluded between entities in the public sector should be covered by public procurement rules. The 2014 procurement directives clarified in which cases contracts concluded within public sector are not subject to the application of public procurement rules.[428] The sole fact that both parties to an agreement are themselves public authorities do not as such rule out the application of the procurement rules. However, the application of public procurement rules should not interfere with the freedom of public authorities to perform the public service tasks conferred on them by using their own resources, which includes the possibility of cooperation with other public authorities. Further, it should be ensured that any exempted public-public operation does not result in a distortion of competition from private economic operators, nor should it place any particular

[423] recital (27) of the directive 2014/24/EU and Article 10 (i) of the directive 2014/24/EU
[424] If the services providers had to be chosen in accordance with the procedures set out in the directive, it would be difficult to preserve the particular nature of these organisatons. See recital (28) of the directive 2014/24/EU.
[425] Article 74-77 of directive 2014/24/EU
[426] recital (28) of the directive 2014/24/EU and Article 10 (h) of the directive 2014/24/EU
[427] recital (29) of the directive 2014/24/EU and Article 12 of the directive 2014/24/EU
[428] Article 12 of the directive 2014/24/EU

provider of services in a position of advantage vis-à-vis its competitors.[429] It is also interesting to discuss the correlation between the exemption of in-house arrangement and the determination of contracting authorities. The details of this specific issue will be discussed in Section 3.2.1.

2.2.2.1.4.7 Discussion and comments

Generally, the procurement activities of SOEs determined to be BGBPLs should be regulated by the EU's public sector procurement directive, whether or not they are meant for a public purpose. However, for various reasons, some procurement activities are exempted from the public sector procurement directive; factors that lead to exemption include the characteristics of the service, the characteristics of the procurers, cooperation between different rules and the characteristics of the relevant market structure.

Considering the characteristics of the SOEs, the following specific exclusions should be explored further:

First, when SOEs pursue in the public utilities sector as well as other economic sectors, the application of the procurement directives should be determined according to the characteristics of the procurement activities. For instance, if one SOE determined as BGBPL pursues activities in the transportation sector that are covered by the Public Utilities Directive, and also pursues activities in river transportation services that are not covered by the Public Utilities Directive, then the procurement of the first kind of activity should be governed by the public utilities sector directive, and the procurement of the second kind of activity should be governed by the Public Sector Directive. However, in practice, it is often difficult to distinguish which procurement activities are for which kinds of purposes. This brings legal uncertainty to the application of the procurement directives.

Second, contracts awarded for the purpose of resale or lease to third parties only applies to the part of the procurement activities that are involved in the pursuit of activities in public utilities sector. An SOE involved in the same situation as the SOE mentioned just above, for activities pursued in the public utilities sector, procurements for the purpose of resale or lease to third parties are exempted from the application of the Public Utilities Directive. However, for activities pursued in other economic sectors, procurements for the purpose of resale or lease to third parties still need to comply with the Public Sector Directive. This introduces yet more uncertainty about the application of the EU public procurement directives.

Third, for SOEs that pursue activities in the field of electronic communications, procurement activities intended to 'provide or exploit public communication networks or to provide to the public one or more electronic communications services' are exempted from the application of the Public Sector Directive. In the initial Public Utilities Directive, this kind of procurement activity was covered. Since the liberalization of the telecommunications sector in the EU, procurement in

[429] recital (31) of the directive 2014/24/EU

this sector is no longer subject to the Public Utilities Directive. Further, the procurement activities of SOEs determined to be BGBPLs that are intended for the pursuit of activities in this sector are also not covered by the Public Sector Directive. **The competitive situation of the telecommunications market impacts the coverage of the Public Utilities Directive, and it also impacts the coverage of the Public Sector Directive. More importantly, even if an SOE is determined as being controlled by the government, the market structure of the activities concerned could impact whether procurements intended for pursuing activities in this market will be regulated by public procurement rules.** Although this is just one exclusion, the reasoning behind it is interesting; namely, that in order to expose this sector to competition, and to facilitate the rapid dissemination of broadband internet services, the sector is not subject to the directive. This means that legislators in the EU believe that lifting regulations on the procurement activities of SOEs involved in telecommunications will improve competition and liberalisation in this sector.

Fourth, for SOEs that are covered under the international rules, the procurements concerned should comply with these international rules. For instance, the procurements of SOEs listed under the coverage of the EU under GPA should be governed by the GPA.

Fifth, the procurement of projects that are financed fully or mostly by international organizations or international financing institutions may be exempted from the application of the Public Sector Directive. Even if an SOE is financed by public authorities, projects that it procures that are financed fully by international organizations or international financing institutions, for instance the World Bank, are not required to be governed by the EU procurement rules. In the case of projects mostly financed by international organizations or international financing institutions, the applicable procurement rules are determined by the parties.

Sixth, under certain conditions, public contracts awarded by SOEs determined to be BGBPLs to the other entities within the public sector are exempted from the application of the Public Sector Directive as the result of in-house provisions or public-public cooperation. The details of these types of arrangements will be discussed in Chapter Three.

2.2.2.1.5 Conclusion

Generally, under the EU public sector procurement directive, SOEs that meet the conditions of BGBPLs are regulated. The definition of a BGBPL has been provided by the EU public sector procurement directive, while the boundaries of the definition of a BGBPL have been clarified through ECJ case law. Upon analysing the three conditions necessary for an entity to be considered a BGBPL, we find SOEs that are classified as BGBPLs are distinguished from other SOEs based on the following criteria: (1) pursuing the needs of general interest, but not having an industrial or commercial character; (2) having a legal personality and (3) having a close dependence on the public authorities. To interpret these three criteria, the possibility that the government has the ability to control the procurement decisions of the SOEs is a key aspect. Many factors have been mentioned in the ECJ case law as being relevant to interpreting these three

criteria, but no single factor is decisive. The determination of whether an SOE should be classified as a BGBPL should comprehensively consider all relevant factors, such as competition, the pursuit of profits, bearing economic risk, obtaining public financing and the relevant national laws.

If an SOE has been classified as a BGBPL, generally all of its procurement activities should be governed by the public sector procurement directive, whether or not the works, supplies or services procured are intended for public purposes. For SOEs that are involved in various sectors, pursuing both needs that have an industrial or commercial character and those that do not, all procurement activities should be governed. Obviously, procurement activities that support an entity's own (self-consumption) needs also should be covered.

However, for various reasons, the Public Sector Directive has provided specific exclusions, which apply in some cases to SOEs classified as BGBPLs. Among these specific exclusions, several interesting observations can be made. (1) Both the Public Sector Directive and the Public Utilities Directive may apply to the same SOE, if this SOE pursues certain activities that are covered by public utilities and also pursues certain economic activities that are not covered by it. (2) The exclusion of contracts awarded for the purpose of resale or lease to third parties only applies to the part of the procurement activities intended to pursue activities in the public utilities sectors. (3) The exclusion on procurements in the field of electronic communications shows that it is possible to have no regulation on the procurement activities of SOEs classified as BGBPLs in certain economic sectors. This means that under certain conditions, for certain considerations, it is not necessary to regulate the procurement activities of SOEs classified as BGBPLs. (4) The exclusion for coordination between EU procurement regimes and international rules shows that for the procurement activities of SOEs that are by the GPA, where different rules exist between these two sets of rules, the GPA rules will apply. (5) For SOE projects that are fully financed by international originations or international financial institutions, the EU Public Sector Directive does not apply. (6) If SOE contracts that meet the conditions of in-house arrangements or public-public cooperation, then these contracts are not regulated by the EU Public Sector Directive.

2.2.2.2 The role of SOEs under the Public Utilities Directive

2.2.2.2.1 General coverage of the Public Utilities Directive and cooperation between the Public Sector Directive with the Public Utilities Directive

The positive coverage of the Public Utilities Directive depends on the following factors: (1) the coverage and characteristics of the buyer; (2) the "approach" used by the buyer, whether through public contract or design contest and (3) the estimated value of the contract.

In terms of the coverage and characteristics of buyer, the utilities directive uses the term 'contracting entities' to refer to buyers that are covered. 'Contracting entities' include three kinds of entities: (1) contracting authorities that pursue one of a certain list of activities in the utilities

sector;[430] (2) public undertakings that pursue one of these certain activities in the utilities sector and (3) entities that are not contracting authorities or public undertakings, but that have as one of their activities any of the certain activities in the utilities sector, or any combination thereof, and operate on the basis of special or exclusive rights granted by a competent authority of a Member State. Therefore, the Public Utilities Directive does not cover all entities engaged in pursuing these activities. Only contracting authorities, public undertakings and private undertakings operating on the basis of special or exclusive rights granted by a competent authority of a Member State are covered; private undertakings that do not have these special or exclusive rights are ruled out of the utilities directive.

Two factors are considered when including these entities. (1) The rationale behind covering 'contracting authorities' and 'public undertakings' is that this allows national authorities continue to influence the behaviour of those entities, including participating in their capitalization and being represented in the entities' administrative, managerial or supervisory bodies. (2) The rationale behind covering 'private undertakings operating on the basis of special or exclusive rights' lies with the closed nature of the markets in which the entities in certain sectors operate, due to the existence of special or exclusive rights granted by Member States concerning the supply, provision or operation of the networks required to provide the services concerned.[431]

Further, the purpose of the Public Utilities Directive is to ensure a true opening up of the market and a fair balance in the application of procurement rules in the utilities sectors. As the Member States have diverse situations in these sectors, it is necessary for the entities covered to be identified on a basis other than their legal status. Therefore, contracting entities operating in the public sector and those operating in the private sectors will be treated equally.[432]

'Contracting authority' has the same definition in the Public Utilities Directive as it does in the Public Sector Directive and includes 'States', 'regional authorities', 'local authorities', 'bodies governed by public law' and associations thereof. As discussed in Section 2.2.2.1.1 thorough discussion of the definitions and coverage of these entities, **SOEs may also play the role of a BGBPL under the Public Utilities Directive.** Note that the SOEs classified as BGBPLs may be subject to different procurement directives, according to the different types of activities concerned. 'Public undertaking' means any undertaking over which the contracting authorities may exercise directly or indirectly a dominant influence by virtue of ownership, financial participation, or based on the rules that govern it. The details will be discussed below.

Private undertakings with special or exclusive rights are those that hold certain rights granted by a competent authority of a Member State by way of any legislative, regulatory or administrative provision, the effect of which is to limit the exercise of certain utilities activities to one or more entities, and which substantially affect the ability of other entities to carry out such activity.

[430] These activities have been referred in article 8 to 14 of directive 2014/25/EU.
[431] Recital (1) of directive 2014/25/EU
[432] Recital (19) of directive 2014/25/EU

However, rights that were granted by means of a procedure[433] for which adequate publicity was ensured and the granting of which was based on objective criteria shall not constitute special or exclusive rights for the purposes of the directive. This means that if private undertakings are granted special or exclusive rights by the contracting authorities through competitive public procurement procedures, then the procurement activities of those private undertakings for pursuing certain utilities activities will not be regulated by the Public Utilities Directive.

In terms of the "approach" used by buyers, procurement 'contracts' as well as 'design contests' have been mentioned. The definition of 'procurement' provided in the Public Utilities Directive is almost the same as that supplied by the Public Sector Directive, except for the addition of the following condition: 'provided that the works, supplies or services are intended for pursuit of one of the activities referred to in article 8 to 14.' Therefore, not all procurement activities conducted by contracting entities are included under the Public Utilities Directive, which is limited to procurement activities enacted for the pursuit of certain utilities activities. The details of those covered activities will be discussed below in Section 2.2.2.2.3.

In terms of the estimated contract value, the Public Utilities Directive sets up three thresholds: (1) EUR 414, 000 for supply and service contracts as well as for design contests; (2) EUR 5,186,000 for works contracts and (3) EUR 1,000,000 for service contracts for social and other specific services listed in Annex XVII. Therefore, there is no special threshold for social and other specific services, and all kinds of contracting entities apply the same thresholds. The relevant procurement contract with a value-added tax (VAT) estimated to be equal to or greater than those thresholds should apply the Public Utilities Directive.

Apart from positive coverage, the Public Utilities Directive also employs a negative approach to clarify its coverage. The Public Utilities Directive shares several of the same exclusions as the Public Sector Directive, including exclusions for contracts awarded and design organised pursuant to international rules[434] and specific exclusions for service contracts.[435] The special exclusions under the Public Utilities Directive will be discussed below in Section 2.2.2.2.4.

2.2.2.2.2 SOEs under the Public Utilities Directive as public undertakings: the regulatory scope

The definition of 'public undertaking' under the Public Utilities Procurement Directive

Since 1990, the Council of European Community has enacted its first Public Utilities Directive 90/531/EEC,[436] which provides a definition of 'public undertaking'[437] that is also used in the

[433] Such procedures include, but not limited to, (a) procurement procedures with a prior call for competition in conformity with directive 2014/24/EU, directive 2009/81/EC, directive 2014/23/EU or the directive 2014/25/EU; (b) procedures pursuant to other legal acts of the Union listed in Annex II, ensuring adequate prior transparency for granting authorizations on the basis of objective criteria.
[434] Article 20 of directive 2014/25/EU
[435] Article 21 of directive 2014/25/EU
[436] Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.
[437] Article 1(2) of the directive 90/531/EEC.

new Public Utilities Directive 2014/25/EU.[438]

The definition of 'public undertaking' encompasses any undertaking over which the contracting authority may exercise directly or indirectly a **dominant influence** by virtue of ownership, financial participation, or because of the nature of the rules that govern it. A dominant influence on the part of the contracting authorities shall be presumed in any of the following cases in which these authorities, directly or indirectly: (a) hold the majority of the undertaking's subscribed capital; (b) control the majority of the votes attached to shares issued by the undertaking or (c) can appoint more than half of the undertaking's administrative, management or supervisory bodies.

The following observations may be made. First, according to the wording of the definition of 'public undertaking', three circumstances—'ownership', 'financial participation' and 'rules which govern it'—are the only three aspects that are decisive in determining the existence of a 'dominant influence'. Second, the three cases mentioned are the only circumstances in which a 'dominant influence' shall be presumed to exist. This means that it is possible that even though the undertaking does not meet one of those three cases, it may still be considered to be a 'public undertaking'. Meanwhile, the wording 'shall be presumed' suggests that these three cases are only indicative, and not sufficient, for determining the presence of a 'dominant influence'. For instance, it is possible that the contracting authorities hold the majority of the undertaking's subscribed capital, but this alone is not sufficient to determine that the undertaking is a 'public undertaking'. Third, it is not necessary for the contracting authorities to actually exercise the 'dominant influence'. From the wording 'the contracting authority may exercise directly or indirectly a dominant influence', we may understand that in the definition of 'public undertaking', the possibility of exercising a 'dominant influence' has been emphasized, rather than proof of an authority actually exercising the 'dominant influence'. This means that it is not necessary that the contracting authorities *de facto* influence decisions involved in awarding a contract.

The concept of 'public undertaking' under the procurement directives vs. under the TFEU treaty

Before the provision of the term 'public undertaking' in the Public Utilities Directive, the term 'public undertaking' had already been given a definition under the Community law.[439] Sue Arrowsmith argued that although there are some inconsequential differences in wording, the definition in the directive is intended to reflect the concept of a public undertaking as it is used elsewhere in EU Law, in particular in Article 106 TFEU (formerly Article 86 of the EC Treaty).[440]

However, the view held in this dissertation is that the term 'public undertaking' in the TFEU should be broader than the term 'public undertaking' in the Public Utilities Directive, because of the purpose of the provision in the EEC treaty and the special arrangement given in the Public Utilities Directive. Article 106 TFEU[441] is concerned with the obligations of Member States in

[438] Article 4 (2) of the directive 2014/25/EU
[439] Ex article 90 (1) of the EC treaty.
[440] Sue Arrowsmith(1996).the law of public and utilities procurement, Sweet & Maxwell, p.386.
[441] Article 106 TFEU (formerly Article 86 of the EC treaty) provides as follows:
1.In the case of public undertaking and undertakings to which Member States grant special or exclusive rights,

relation to enterprises that are state-owned or controlled, or that enjoy special privileges, and the purpose of this article is to deal with problems that may arise when the state influences the actions of these undertakings, or the market dominance immunises them from commercial pressure and allows them to act in a non-competitive way.[442] Therefore, all state-owned or controlled enterprises should fall under the coverage of this provision (not just those enterprises that act in the utilities sectors. State-owned enterprises that do not act in the utilities sectors but are pursuing public needs and do not have commercial or industrial characteristics, and that meet other conditions of being BGBPLs, should also be regulated under the public procurement rules. On this point, the regulatory scope of the public sector procurement directive complies with the purpose of the provision in the EEC treaty. This means some part of the definition of a BGBPL may also be considered relevant to undertakings as described under Article 106 TFEU (formerly Article 86 of the EC Treaty). The scope of the term 'public undertaking' under the TFEU rules may include undertakings that have been determined to be 'bodies governed by public law' and that have been determined to be 'public undertakings' under the public procurement rules.

BGBPL and 'public undertaking': two distinct concepts

As the public procurement directives provide different rules for undertakings that belong to the category of BGBPL and for undertakings that belong to the category of 'public undertaking',[443] the two definitions should not overlap. If an undertaking may be simultaneously classified into both of these different roles legal uncertainty will ensue. Thus, the term 'public undertaking' in the public procurement directives should include undertakings that meet one of the conditions set out in the directive but do not meet the conditions required for being a BGBPL. For example, a body that was established to meet public needs, that does not have industrial or commercial characteristics, that is mostly financed by a contracting (or public) authority, and that has a legal personality should be considered a BGBPL. Meanwhile, it may also meet the conditions of being a 'public undertaking', as the financial participation of a public authority may allow that public authority to exercise a dominant influence over it, either directly or indirectly. In this case, the undertaking could meet the conditions of BGBPL as well as 'public undertaking'. As the EU public procurement directives provides stricter rules for BGBPLs, the undertakings should be considered as a BGBPL so as to prevent it from eluding the application of the public procurement rules.

Member States shall neither enact or maintain in force any measure contrary to rules contained in this Treaty, in particular to those rules provided in article 18 (formerly Article 12) and Articles 101 to 109 (formerly Articles 81 to 89).

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must be affected to such an extent as would be contrary to interest of the Community.

3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

[442] Sue Arrowsmith(1996).the law of public and utilities procurement, Sweet & Maxwell, p.100.

[443] Here, the 'public undertaking' refers to the term interpreted by EU Public Utilities Directive.

The ECJ case law provides more clarity about these two concepts. In the Commission v Spain case[444], the Spanish government maintained that the Public Utilities Directive (at that time the directive was Directive 93/38 EEC) makes a distinction between the term BGBPL and the term 'public undertaking'.[445] The Commission in this case also pointed out that the concept of 'public undertaking' has always been different from that of BGBPL, since BGBPLs are created specifically to meet needs in the general interest that do not have any industrial or commercial characteristics, **whereas public undertakings work to meet needs of an industrial or commercial character**.[446] The argument of the Commission also could support the view analysed above; namely, that the term 'public undertaking' in the public utilities sector is narrower than the term 'public undertaking' in the TFEU rules. Additionally, the main difference between these two concepts is whether the work being pursued is intended to meet needs of an industrial or commercial nature. However, not et hat 'public undertakings' may include two kinds of undertakings: (1) meeting the general needs and having an industrial or commercial character; (2) not meeting the general needs and having an industrial or commercial character.

In the SIEPSA case, the Court confirmed the observation of the Commission and further pointed out that by employing the concepts of 'public authorities' on the one hand and 'public undertakings' on the other, the Community legislature adopted a functional approach. It was thus able to ensure that all contracting entities operating in the utilities sectors[447] were included in its ambit *ratione personae*, on the condition that they satisfied certain criteria; their legal form and the rules under which they were formed are immaterial in this respect.

However, there are some differences between these two concepts. First, the three circumstances set up under the third condition of the term 'BGBPL' do not completely match the three circumstances provided for the term 'public undertaking'. In the definition of 'public undertaking', three alternative circumstances have been noted: (1) ownership; (2) financial participation and (3) the rules that govern it. Comparing these with the three alternative circumstances in the third condition of the definition of a BGBPL, we find the following issues. (a) The relationship between 'ownership' and 'the rules which govern the undertaking' is not clear. 'Ownership' is not mentioned in the definition of a BGBPL. But 'financial participation therein' is mentioned by both definitions. The criteria 'ownership' and 'financial participation' have close relevance. Financing the greater part of an entity usually means holding the greater part of its ownership. So, why in the definition of 'public undertaking' are both of these criteria mentioned? It is possible that because the relationship among these three circumstances is alternative, citing both ownership and financial participation is done simply for emphasis. Are there other reasons? (b) The meaning of 'rules that govern the undertaking' is not clear, and that criterion is not included in the definition of a BGBPL. Generally, the rules that govern undertakings are legal rules made by the State and

[444] Case c-214/00, Commission of the European Communities v Kingdom of Spain, Judgment of the Court of 15 May 2003.
[445] Paragraph 40 of judgment of case C-214/00, 15. 5. 2003.
[446] Paragraph 44 of judgment of case C-214/00, 15. 5. 2003; also see Paragraph 54 of judgment of Case C—283/00, 16.10.2003.
[447] It pointed to the sectors were regulated by Directive 93/38 at that time.

internal rules made by the shareholders or managers. In the definition of public undertaking, it is not clear whether the term 'rules that govern' refers to both types or rules, or just one type. (c) The third condition of the definition of BGBPL is intended to prove that the entity closely depends on the contracting authorities, and the three circumstances in the definition of 'public undertaking' is intended to prove that the contracting authorities are able to exercise a dominant influence on the decisions of the undertaking. The wording of these concepts differs, but in the circumstances mentioned, they are quite similar. For instance, if the contracting authorities can appoint more than half of the undertaking's administrative, management or supervisory bodies, then the undertaking may be considered to be a 'public undertaking', while in the same conditions, the undertaking could also be considered to have fulfilled the third condition of a BGBPL. Therefore, since it is not clear what the substantive difference is between 'close dependence' and 'dominant influence', why use different criteria?

2.2.2.2.3 Covered activities

A. The general rules

Under the Public Utilities Directive, not all contracting authorities, public undertakings and private undertakings that operate on the basis of special or exclusive rights granted by a competent authority of a Member State and meet the conditions above are regulated by the Public Utilities Directive. This directive only covers the contracting authorities, public undertakings and private undertakings operating on the basis of special or exclusive rights that pursue one of the activities referred to in Articles 8 to 14, including certain activities in the following sectors: gas and heat, electricity, water, transportation services, ports and airports, postal services, extraction of oil and gas and finally exploration for, or extraction of, coal or other solid fuels. This means that not all SOEs that may be classified as BGBPLs or 'public undertakings' are regulated by the Public Utilities Directive. Only SOEs that pursue certain public utilities activities are covered by the directive. The type of activity pursued by the entities is a factor for determining the regulatory scope of the public utilities sector.

B. Activities covered under the Public Utilities Directive

Specifically, if BGBPL-type SOEs and 'public undertakings'-type SOEs pursue the following activities, they should be covered by the Public Utilities Directive:

(1) Gas and heat

The Public Utilities Directive applies to the following activities concerning gas and heat:[448] (a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transportation or distribution of gas or heat and (b) supplying gas or heat to such networks. The 'supply' includes generation/production and wholesale and retail sales.[449] Further, the production of gas in the form of extraction has not been included in this

[448] Article 8 (1) of the Directive 2014/25/EU
[449] Article 7 of the Directive 2014/25/EU.

situation, but it does fall within the scope of the 'extraction of oil and gas and exploration for, or extraction of, coal or other solid fuels', which will be discussed further below.

However, the Public Utilities Directive provides an exception for public undertaking-type SOEs when the supply of gas or heat to fixed networks, which provides a service to the public, is involved. First, note that this exception applies only to public undertaking-type SOEs, and not to BGBPL-type SOEs. This is because the Public Utilities Directive applies more strict rules to contracting authority-type contracting entities than to public undertakings and private undertakings. Second, in applying this exception, the following two conditions should be met:[450] (a) the production of gas or heat by a public undertaking type-SOE is the unavoidable consequence of carrying out an activity other than those referred to in paragraph 1 of Article 8, or in Articles 9 to 11. This means if the production of gas or heat is the unavoidable consequence of carrying out relevant activities in the gas and heat, electricity, water and transportation services sectors, then the Public Utilities Directive still applies. (b) Supplying a public network **is aimed only at the economic exploitation of such production** and amounts to not more than 20% of the public undertaking type-SOE's turnover on the basis of the average for the preceding three years, including the current year.

(2) Electricity

The Public Utilities Directive applies to the following activities concerning electricity:[451] (a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of electricity and (2) the supply of electricity to such networks, including the production and wholesale and retail sales of electricity.

The Public Utilities Directive also provides an exception for public undertaking-type SOEs regarding the activities of supplying electricity to fixed networks that provide a service to the public. To apply this exception, the following conditions should be met:[452] (a) the production of electricity by the public undertaking type-SOE takes place because its consumption is necessary for carrying out an activity other than those relevant to the gas and heat, electricity, water and transport services sectors[453] and (b) supplying a public network depends only on the consumption of the public undertaking type-SOE itself and does not exceed 30% of that SOE's total production of energy, on the basis of the average for the preceding three years, including the current year.

(3) Water

The Public Utilities Directive applies to the following activities concerning water:[454] (a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water and (b) the supply of drinking

[450] Article 8 (2) of the Directive 2014/25/EU
[451] Article 9(1) of the Directive 2014/25/EU
[452] Article 9 (2) of the Directive 2014/25/EU
[453] The activities are referred to in paragraph 1 of Article 9, Article 8, 10 and 11.
[454] Article 10 (1) of the Directive 2014/25/EU

water to such networks. Additionally, as contracting entities that operate in the drinking water sector may also deal with other activities related to water, the directive shall also apply to contracts or design contests awarded or organized by contracting entities that pursue one of these activities and that are connected with one of the following:[455] (a) hydraulic engineering projects, irrigation or land drainage, provided that the volume of water to be used for the supply of drinking water represents more than 20% of the total volume of water made available by such projects or irrigation or drainage installations and (b) the disposal or treatment of sewage.

A similar exemption applies to contracting entities other than the contracting authorities as related to the supply of drinking water to fixed networks that provides a service to the public, when all of the following conditions are met:[456] (a) the production of drinking water by that contracting entity takes place because its consumption is necessary for carrying out an activity other than those referred to in Articles 8 to 11 and (b) supply to the public network depends only on that contracting entity's own consumption and does not exceed 30% of that contracting entity's total production of drinking water, on the basis of the average for the preceding three years, including the current year.

(4) Transport services

The Public Utilities Directive shall apply to activities related to the provision or operation of networks providing a service to the public in the field of transportation by railway, automated systems, tramway, trolley bus or cable.[457]

(5) Ports and airports

The Public Utilities Directive shall apply to activities related to the exploitation of a geographical area for the purpose of the provision of airports and maritime or inland ports or other terminal facilities to carriers by air, sea or inland waterway.[458]

(6) Postal service

The Public Utilities Directive shall apply to activities related to the provision of postal services with two conditions. (a) The first condition stipulates that the services provided include postal services[459] and services other than postal services, provided that: (i) 'other services than postal services' means services provided in the following areas: mail service management services and services concerning postal items[460] and that (ii) such 'other services than postal services' are

[455] Article 10 (2) of the Directive 2014/25/EU
[456] Article 10 (3) of the Directive 2014/25/EU
[457] Article 11 of Directive 2014/25/EU. As regards transport services, a 'network' shall be considered to exist where the service is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service.
[458] Article 12 of Directive 2014/25/EU.
[459] According to the paragraph 2(a) of the article 13 of the Directive 2014/25/EU, 'postal service' means service consisting of the clearance, sorting, routing and delivery of postal items. This shall include both services falling within as well as services falling outside the scope of the universal service set up in conformity with Directive 97/67/EC.
[460] According to the paragraph 2(b) of the article 13 of the Directive 2014/25/EU, 'Postal item' means 'an item addressed in the final form in which it is to be carried, irrespective of weight. In addition to items of

provided by an entity that also provides postal services. (b) The second condition stipulates that the postal services pursued by this entity are not directly exposed to competition.[461]

(7) The extraction of oil and gas and exploration for, or extraction of, coal or other solid fuels

The Public Utilities Directive shall apply to activities relating to the exploration of a geographical area for the purpose of: (a) extracting oil or gas and (b) exploring for, or extracting, coal or other solid fuels.[462] Exploring for oil and gas is not included.[463]

C. Rationale for the coverage of these activities

The Public Utilities Directive cites two reasons for its coverage of the above listed activities.[464] The first reason is that national authorities continue to be able to influence the behaviour of the entities operating in these sectors. For instance, national authorities still participate in the capitalization of the entities involved and are represented in the entities' administrative, managerial or supervisory bodies. The second reason relates to the closed nature of the market in which the entities in these sectors operate. The closed nature of the market is caused by the existence of special or exclusive rights granted by Member States concerning the supplying, provision or operation of networks that provide the services concerned. It seems the first reason intends to explain why contracting authorities and public undertakings that pursue certain activities should be regulated by the directive, and the second reason intends to explain why private undertakings with special or exclusive rights should be regulated by the directive. The regulatory impact on such activities is not clear.

However, the competitive structure of the sectors concerned should be the main reason for regulating procurement by the entities operating in these utilities sectors, instead of in other utilities sectors. This argument is supported by the following facts: (1) in the initial version of Public Utilities Directive, the telecommunications sector was one of the sectors covered; however, as the telecommunications market in the EU has become liberalised, it has been removed from the regulatory coverage of the Public Utilities Directive; (2) 'exploring for oil and gas' was covered under the former utilities directives but was been ruled out of the 2014 Public Utilities Directive. The reason for this is that this sector ' has consistently been found to be subject to such competitive pressure that the procurement discipline brought about by the Union procurement rules is no longer needed'; [465](3) a specific utility sector may be exempted from the coverage of

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correspondence, such items also include for instance books, catalogues, newspapers, periodicals, and postal packages containing merchandise with or without commercial value, irrespective of weight.' 'service concerning postal items' refers to the service which are related to the postal items, but not be included in the scope of 'postal item', such as direct mail bearing no address.

[461] It means it should not satisfy the conditions set out in Article 34(1) of the Directive 2014/25/EU.

[462] Article 14 of the Directive 2014/25/EU.

[463] 'exploration' should be considered to include the activities that are undertaken in order to verify whether oil and gas is present in a given zone, and if so, whether it is commercially exploitable. ' extraction' should be considered as the production of oil and gas. In line with established practice in merger cases, 'production' should be considered also to include ' development', for instance, the setting up of adequate infrastructure for future production, such as oil platforms, pipelines, terminals. See: recital (25) of the directive 2014/25/EU.

[464] Recital 1 of the Directive 2014/25/EU

[465] Recital (25) of the Directive 2014/25/EU.

the directive due to its activities being directly exposed to competition—this situation will be discussed in more detail below and (4) in the 2014 Public Utilities Directive, the cooling sector is not covered; however, certain entities are active in the production, transmission or distribution of both heat and cooling, which lead to some uncertainty about how to apply the procurement rules, as heat is covered under the Public Utilities Directive. For instance, contracts awarded by public undertaking type-SOEs and private undertakings with special or exclusive rights to pursue both heating and cooling activities should be examined in terms of the provisions of contracts for the pursuit of several activities to determine which procurement rules will govern the award. The EU points out in the Public Utilities Directive that 'the situation of the cooling sector should be examined in order to obtain sufficient information, in particular in respect of the competitive situation, the degree of cross-border procurement and the views of stakeholders'[466] before envisaging any change to the scope of the Public Utilities Directive and the Public Sector Directive.

2.2.2.2.4 Relevant exclusions

There are several specific exclusions to the coverage of the Public Utilities Directive. For instance, contracts awarded by certain contracting entities for the purchase of water and the supplying of energy or fuels for the production of energy are excluded from the application of the directive.[467] Water must be procured from sources near the area in which it will be used, and thus it is inappropriate to award a contract to purchase water according to the procurement rules. In the following section, three exclusions will be introduced, as they are connected to the issue of regulating the procurement activities of SOEs.

A. Contracts and design contests awarded or organised for purposes other than the pursuit of covered activities or for the pursuit of such an activity in a third country

In this situation, the Public Utilities Directive differs from the Public Sector Directive, which regulates all procurement activities of the entities, since they have been determined to be 'contracting authorities'. The Public Utilities Directive shall not apply to all procurement activities of 'contracting entities'. When contracts are awarded by contracting entities for purposes other than the pursuit of activities covered by the Public Utilities Directive, or for pursuing such activities in a third country, and if the entities meet certain conditions, they will not be covered by the Public Utilities Directive.[468] The conditions are: (1) the contracts concerned should not involve the physical use of a network or geographical area within the Union and (2) the design contests organised should also not be for such purposes. Therefore, SOEs that have been determined to be 'contracting entities' and operate activities other than the activities covered by the Public Utilities Directive, not all contracts that they award will be regulated by the Public Utilities Directive.

[466] Recital (22) of the Directive 2014/25/EU
[467] Article 23 of the Directive 2014/25/EU.
[468] Article 19 of the Directive 2014/25/EU

B. Contracts awarded for the purpose of resale or lease to third parties

Provided that the contracting entity enjoys no special or exclusive right to sell or lease the matter of such contracts, and other entities are free to sell or lease under the same conditions as the contracting entity, then contracts awarded for the purpose of resale or lease to third parties will not be covered by the Public Utilities Directive.[469]

Certain conditions must be met for this exemption to apply. First, the relevant exemption for resale contracts only applies if the contract at issue falls within the scope of public utilities contracts. For instance, in C-126/03 Commission of the European Communities v Germany,[470] Germany argued that by virtue of the exemption for resale contracts, the subcontract at issue in the case should be excluded from the scope of the Public Service Directive. However, the judgment pointed out that as the contract fell within the scope of Public Service Directive instead of the Public Utilities Directive, it should be still governed by the Public Service Directive. Second, the resale or lease exclusion does not apply if the contracting entities enjoy special or exclusive rights to sell or lease the matter of the contract. Third, the exclusion does not apply if other entities are not free to sell or lease under the same conditions as the contracting entity. Therefore, when a contracting entity has a special right to sell goods, but other entities are also free to sell such goods, the exclusion does not apply.

C. Activities directly exposed to competition

Normative analysis

If the activity is directly exposed to competition in markets to which access is not restricted, then a contract intended to enable activity in these markets shall not be subject to the Public Utilities Directive.[471] Whether an activity is directly exposed to competition shall be decided on the basis of criteria that are in conformity with the provisions on competition found in the TFEU rules. These criteria may include: (1) the characteristics of the products or services concerned, (2) the existence of alternative products or services considered to be viable substitutes on the supply side or the demand side and (3) the prices and the actual or potential presence of more than one supplier of the products or provider of the services in question.[472]

Further, the activity concerned may be intended for a part of a larger sector or to be exercised only in certain parts of the Member States concerned. The competition assessment shall be made with regard to the market for the activities in question as well as to the geographical reference

[469] Article 18 of directive 2014/25/EU. However, the contracting entities shall notify the Commission if so requested of all categories of products or activities which they regard as excluded under this condition. The Commission may periodically publish in the Official Journal of the European Union, for information purposes, of lists of the categories of products and activities which it considers to be covered by this exclusion. In so doing, the Commission shall respect any sensitive commercial aspects that the contracting entities may point out when forwarding information. While until August of 2016, there is no publication on this information from EU.

[470] Commission of the European Communities v Germany, C-126/03, [2004] E.C.R.I-11197 (ECJ). See also: Martin Dischendorfer and Michael Fruhmann(2005).contracting authorities as service providers under the EC public procurement directives, Public Procurement Law Review, 2005, 3, N80-85.

[471] Article 34 (1) of directive 2014/25/EU

[472] Article 34 (2) paragraph 1 of directive 2014/25/EU

market.[473] The geographical reference market shall consist of the area in which the undertakings concerned are involved in the supply and demand of products or services and in which the conditions of competition are sufficiently homogeneous and distinguished from neighbouring areas. This is important because the conditions of competition may be appreciably different in different areas. The assessment of the competitive situation shall take into account: (1) the nature and characteristics of the products or services concerned, (2) the existence of entry barriers or consumer preferences, (3) appreciable differences in the undertakings' market shares between the area concerned and neighbouring areas and (4) any substantial price differences.[474]

Empirical analysis—based on exempted cases in the electricity sector

Following the procedural requirements of the Public Utilities Directive,[475] the EU commission designated specific utilities markets in certain countries as being exempt from public procurement rules.[476] Most of the exemptions relate to postal services, courier and parcel services, exploration for oil and gas, production and wholesale of electricity and retail sales of electricity and gas. In the following section, approved exemptions in the electricity sector will be discussed to explore what kinds of factors have been considered as meeting 'direct exposure to competition' and will list the activities in the electricity sector that have been exempted.

After the implementation of the 2004 utilities directive,[477] the EU commission received applications from eight Member States to for the exemption of certain activities in the electricity sector from the application of the procurement rules. The analysis and assessments of the EU commission are based on the following logic: (1) presuming that the activities concerned in the request are not directly exposed to competition; (2) obtaining the information necessary to make an assessment about an exemption from evidence submitted by the applicant, the independent opinion of competent authorities in the Member State concerned, and other accessible materials and (3) only granting an exemption if the evidence supplied was sufficient to support it.

The EU's analysis and assessment was based on the following indicators, none of which alone was decisive.

(1) The legal aspect. For the legal aspect, the EU considered whether the Member State had implemented and applied the relevant EU legislation[478] when it opened a given sector or exempted a part of it. If the Member State did so, then access to that market was deemed to not be restricted.

(2) The factual aspects of defining the product market and geographical reference market. The EU commission considers the relevant market situations of the activities involved and

[473] Article 34 (1) of directive 2014/25/EU
[474] Article 34 (2) paragraph 2 of directive 2014/25/EU
[475] Article 35 of directive 2014/25/EU
[476] https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/exempt-markets_en
[477] As the rules in article 34 of 2014 Public Utilities Directive follow the rules in article 30 of the 2004 Public Utilities Directive, the research based on these exemption cases will not change the result of analyzing the exclusion as 'activities directly exposed to competition'.
[478] Annex III of directive 2014/25/EU has listed the relevant EU legislations.

then defines the product market and the geographical reference market. (a) The product market definition. Generally, the EU commission divides the electricity market into four areas: (i) production and wholesale of electricity, (ii) distribution of electricity, (iii) transmission of electricity and (iv) retail sales of electricity. Most exemption requests in the electricity sector relate to the production and wholesale of electricity. In the past, the EU did not specify divisions for the production and wholesale of electricity.[479] However, now that electricity may be generated from renewable sources, and differences in the characteristics of the renewable electricity market versus the conventional electricity market are becoming apparent, the EU commission has begun to distinguish these two kinds of electricity markets.[480] (b) The geographic reference market definition. Generally, the defined geographic reference market is national in scope or smaller. Occasionally, a geographic reference market may be larger than a given national market. The main indicators that are considered include ' the saturation of transmission limits between zones in terms of hours of congestion (number of hours during which the transmission limits between two adjacent zones are saturated)', ' the price differences and zonal price competition' and 'the residual demand test defined as the difference between the total demand in each zone and the maximum potential imports from adjacent zones'.

(3) The facts used to assess whether participants in the markets are directly exposed to competition. After defining the product market and the geographical reference market, the EU commission determines the subject matter required to assess the degree of competition. The most relevant indicators considered for assessment include: (a) market share and market concentration; indicators such as ' the aggregate market share of the three largest market participants' and the 'Herfindahl Hirschman Index (HHI)'[481] have been employed to analyse market concentration; (b) the export and import situation; being a net export country or a net import country is considered an indicator for analysing whether electricity producers are facing competition from outside their borders; (c) 'the working of the balancing markets'[482] has been considered as an indicator of production and also of the state of the wholesale and retail markets and (d) price competition and the degree of customer switching; given the characteristics of the electricity concerned and the scarcity or unavailability of suitable substitutes, price competition and price information assume greater importance when assessing the competitive state of the electricity markets. The number of customers switching suppliers is an indicator of genuine price competition.[483]

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[479] For instance, the exemption decision for generation and wholesale market in UK.

[480] For instance, the exemption decision for generation and wholesale market in Germany and Italy.

[481] HHI is a measure of the size of firms in relation to the industry and an indicator of the amount of competition among them. Named after economists Orris C. Herfindahl and Albert O. Hirschman. For further information, see: https://en.wikipedia.org/wiki/Herfindahl_index

[482] Where there is the large spread between the buying price from TSO and selling price, it may be indicative of an insufficient level of competition in the balancing market which may be dominated by only one or two main generators. Such difficulties are made worse where network users are unable to adjust their positions close to real time.

[483] If few customers are switching, there is likely to be a problem with the functioning of the market.

In terms of specific exemption decisions, we find the following conditions. (1) All Member States making applications for exemptions have implemented and applied the specific EU legislation; therefore, there are no restrictions on market access. (2) The competitive situations in these Member States are diverse. Even if market concentrations have been deemed as high or very high in several Member States, their exemption applications may not all be granted. For instance, the Czech Republic, Finland and Sweden are considered to have a very high level of market concentration in the production and wholesale electricity market; however, after comprehensively considering other indicators, the Commission decided that the Czech Republic did not meet the exemption conditions, while Finland and Sweden did. (3) Exemption decisions are made according to the situation in a given Member State at the time of the application. As the markets develop, the dependent conditions will also change, which may make it necessary for the EU to modify previous decisions. (4) In terms of specific exempted activities, most exemptions involve the production and wholesale electricity market, and few refer to the retail electricity markets. Other activities, such as the transmission and distribution of electricity are still not exempted. Further, as the markets that deal in electricity generated from renewable resources have been regulated or controlled by the government—by setting fixed legal prices or authorizing priority to connecting the networks, for example—these markets are still considered as not being directly exposed to competition.

2.2.2.2.5 Discussion and comments

As noted variously above, some SOEs in the EU that are operating in the public utilities sectors are regulated by procurement rules, as the national authorities still have the ability to influence their behaviour. This means although the SOEs conduct public utilities activities, they are still not independent of the 'State', and the 'State' may still influence their procurement decisions.

SOEs regulated by the Public Utilities Directive may be divided in two types: BGBPL-type SOEs and public undertaking-type SOEs. The main difference between them is that public undertakings work to meet needs that have an industrial or commercial character, while BGBPLs do not. However, the substantive difference between 'close dependence' as used in the third condition of the definition of a BGBPL and 'dominant influence' as used in the definition of a 'public undertaking' remains unclear.

Entities determined to be 'contracting entities' should operate in certain public utilities activities that have been defined by the directive. The Public Utilities Directive covers the subject as well as the activities pursued. The public utilities sector covers several kinds of activities; however, it covers only a handful of activities that are related to networks, the exploitation of a geographical area and the postal service. As discussed above, choosing which of these activities are covered is the main result of evaluating the competitive situation of the sector and combining information about the cross-border interest of the procurement and the view of stakeholders. For activities that are covered by the directive, if it can be proved that they directly exposed to competition, they can

be exempted from the application of the Public Utilities Directive.

SOEs that have been determined as meeting the conditions of 'public undertaking' are not regulated if the utilities activities they operate are not covered by the Public Utilities Directive. In other words, if SOEs operate in the competitive utilities sectors and pursue needs with an industrial or commercial character will not be regulated under the Public Utilities Directive, even though they may meet the conditions of 'public undertaking', such as having most of their capital held by the 'State'.

Comparing to BGBPL type-SOEs, public undertaking-type SOEs are exempt from the treaty for several reasons, including involvement in the supply of gas or heat, electricity, and drinking water to the network. However, claiming these exemptions requires proving that a service was the 'unavoidable consequence of' something, or that '[the] consumption [of the good] is necessary for' carrying out other activities, as well as that the amount of the good or service provided is limited to a certain percentage of the entity's total production amount. Generally, BGBPL-type SOEs are in the same situation, but these exceptions (just noted) only apply to public undertaking-type SOEs; BGBPL-type SOE procurement for other types of activities is still regulated by the Public Sector Directive. However, the procurement of public undertaking-type SOEs for pursuing other activities remains out of the scope of the procurement rules. The reason for these exceptions is to create a loose commercial environment for these public undertakings.

Concerning the coverage of procurement activities, the Public Utilities Directive only covers contracts awarded by the contracting entities for the pursuit of covered utilities activities. This means that not all procurement activities of public undertaking-type SOEs are covered by the Public Utilities Directive, which only regulates procurement activities aimed at pursuing the utilities activities covered.

The Public Utilities Directive also does not apply to contracts awarded for the purpose of resale or lease to third parties, when certain conditions are met. First, the awarding of contracts should fall into the scope of the Public Utilities Directive. As the Public Sector Directive does not provide this exclusion, if contracts fall under the Public Sector Directive, they should still be governed. Second, the contracting entity should enjoy no special or exclusive right to sell or lease the subject matter of its contracts. Third, other entities are free to sell or lease under the same conditions as the contracting entity. The application of this exclusion should comply with strict conditions. This is not a general exclusion that excludes from regulation all contracts for resale or lease to a third party by the contracting entities, including BGBPL-type SOEs and public undertaking type-SOEs.

The various exceptions from coverage by the Public Utilities Directive suggest that there is some uncertainty in the application of the directive. The uncertainty shows in the following aspects: (a) when one public undertaking-type SOE is involved in some activities that are covered, and some activities that are not covered, by the Public Utilities Directive. For instance, the SOE operates in both the heat and cooling sectors; (b) when one public undertaking-type SOE operates in utilities activities that are covered but has reasonable reasons for applying the exclusions and (c)

when BGBPL type-SOEs are involved in the activities that are covered and in activities that are not covered by the Public Utilities Directive.

For solving issues involving legal uncertainty, the Public Utilities Directive has provided several measures. For instance, for contracts awarded that cover several kinds of activities, rules for mixed contracts have been provided to determine which kind of procurement rules should be applied. To apply specific exclusions to the contracting entities, for instance the exclusion on awarding contracts for pursuing activities not covered by the directive, the contracting entities are required to notify the EU commission. The EU Commission may periodically publish the exclusions; if it does so, it shall respect any sensitive commercial aspects that the contracting entities may point out when forwarding their information.[484]

Procedural rules are not the research point of this dissertation; however, we do note that, considering the nature of the sectors affected, the EU recognises that the coordination of procurement procedures at the level of the Union should include a framework **'for sound commercial practice and should allow maximum flexibility'.**[485] At the same time, it should safeguard the application of the principles of the TFEU, in particular the three freedoms and the principles derived from them: equal treatment, non-discrimination, mutual recognition, proportionality and transparency.

2.2.2.3 SOEs under the public procurement rules against the background of developing PPP/concessions

2.2.2.3.1 Definition and types of PPP/concessions under the EU's public procurement rules

The definition and types of PPPs: perspective of the EU commission

The terms 'concession' and 'Public-private Partnership (PPP)' are traditional civil law concepts that have been revisited by common law practitioners over the last twenty years to transform them into modern project financing instruments.[486] The term 'Private Finance Initiative (PFI)' is the result of this terminology overhaul in the UK. The term 'Private Finance Initiative' has been exported to other common law countries and re-imported to some civil law countries. For instance, in France, the model of a 'concession'—which was traditionally the contractual technique chosen for many of the partnerships formed between the public and private sectors for the delegation of the management of public services and building infrastructure[487]—has influenced the PFI in the UK. Impacted by the PFI in the UK, France successfully adapted its existing concession practice to project financing and adopted legislation for promoting 'partnership contract (*contrat de Partenariat*)'.

The term 'public-private partnership' has not been defined at the level of EU legislation. It has

[484] Article 19 (2) of the Directive 2014/25/EU
[485] Recital (2) of the Directive 2014/25/EU
[486] Bruno De Cazalet (2014). The evolution of concession and public private partnership legal concepts over the last 20 years under common law influence, International Business Law Journal, 4, p.271.
[487] Ibid.

been given a generic interpretation by policies issued by the EU Commission, which refers to 'forms of cooperation between public authorities and the world of business which aim to ensure the funding, construction, renovation, management or maintenance of an infrastructure or the provision of a service'.[488] This is a very broad interpretation that attempts to include various PPP practices in Member States, including 'PFIs' and 'concessions'.

The Commission has mentioned several common elements for describing the characteristics of the PPP.[489] (1) the relatively long duration of the relationship, involving cooperation between the public partner and the private partner on different aspects of a planned project. (2) The method of funding the project, in part from the private sector, and sometimes by means of complex arrangements among the various players. Nonetheless, public funds—in some cases rather substantial—may be added to private funds. (3) The important role of the economic operator, who participates at different stages in the project (design, completion, implementation, funding). The public partner concentrates primarily on defining the objectives to be attained in terms of public interest, quality of service provided and pricing policy, and it takes responsibility for monitoring compliance with these objectives. (4) The distribution of risks between the public partner and the private partner, to whom the risks generally borne by the public sector are transferred. However, a PPP arrangement does not necessarily mean that the private partner assumes all the risks, or even a major share of the risks linked to the project. The precise distribution of risk is determined case by case, according to the respective ability of the parties concerned to assess, control and cope with this risk.

The Commission divides PPPs into two types: purely contractual PPPs and institutional PPPs (IPPPs). The term 'purely contractual PPP' refers to partnership based solely on contractual links between the different players. 'Purely contractual PPPs' are subdivided into the 'public contract' type and the 'concession' type, according to the different types of contracts under the EU's public procurement regime. Therefore, from the perspective of the Commission, a 'concession' has been considered to be one kind of PPP. The term 'institutional PPP (IPPP)' refers to a cooperation between public and private parties that involves the establishment of a mixed capital entity that performs public contracts or concessions.[490] The commission has clarified that private input into the IPPP consists—apart from the contribution of capital or other assets—in active participation in the operation of the contracts awarded to the public–private entity and/or the management of the public-private entity. Conversely, simple capital injections made by private investors into publicly owned companies do not constitute an IPPP. There are two methods of setting up an IPPP:[491] (1) by founding a new company between contracting entity(entities) with

[488] Green paper on public-private partnerships and community law on public contracts and concessions, COM (2004) 327 final, Brussels, 2004.04.30, p.3.
[489] Green paper on public-private partnerships and community law on public contracts and concessions, COM (2004) 327 final, Brussels, 2004.04.30, p.3.
[490] Commission Interpretative Communication, on the application of Community law on public procurement and concessions to institutionalized Public-private partnerships (IPPP), C(2007)6661, Brussels, 2008.02.05, p.2.
[491] Commission Interpretative Communication, on the application of Community law on public procurement and concessions to institutionalized Public-private partnerships (IPPP), C(2007)6661, Brussels, 2008.02.05, p.4.

private partner(s) through the joint holding of shares and (2) by the participation of a private partner in an existing publicly-owned company that has obtained public contracts or concessions 'in-house' in the past.

Therefore, against the background of the EU public procurement regime, a PPP may be a 'concession type', a 'non-concession type' or a 'public procurement type'. In the 'concession type' PPP, public authorities may use concession contracts to establish the partnership, or they may choose an arrangement of mixed entities to establish the partnership between a public partner and a private partner. In the 'public procurement type' PPP, the public authorities may also choose these approaches.

The definition of concession: according to the 2014 Concession Directive

The Directive 2014/23/EU put an end to the legal uncertainty about the definition of 'concession' by incorporating a specific legal instrument for works and services concessions conducted in the EU.[492] It codifies the ECJ case law and defined the term 'concessions'.[493] Briefly, the factors employed for this definition are: (1) contracts for pecuniary interest; (2) contracts concluded in writing between one or more contracting authorities or contracting entities, with one or more economic operators; (3) by means of the contracts, entrust the execution of works or the provision and management of services other than execution of works; (4) the consideration for contracts consists either solely of the right to exploit the works or services that are the subject of the contract or of that right together with payment.

Compared to the definition of 'public contract', a 'concession' is also a contract for pecuniary interest. The 'contracting authorities' have the same scope as that which is covered in the Public Sector Directive, and the 'contracting entities' have the same scope as that which is covered in the Public Utilities Directive. The object of the contract is the execution of works or the provision and management of services, which also have a similar scope in the Public Sector Directive and the Public Utilities Directive.

The main feature of a concession—which is also the fundamental difference between a 'public contract' and a 'concession'—is the consideration of the contract—the right to exploit the works or services. The first definition of 'public works concessions' provided by Directive 89/440/EC included this verbiage: 'the right to exploit the construction or in this right together with payment'. Comparing these two definitions, we find no substantial difference. As the directive gives no

[492] Francisco L. Hernandez Gonzalez (2016). The evolving concept of works and service concessions in European Union Law, P.P.L.R. 2016, 2, 51-60.

[493] 'concessions' means works or services concessions, as defined in points (a) and (b):
'works concession' means a contract for pecuniary interest concluded in writing by means of which one or more execution of works to one or more economic operators the consideration for which consists either solely in the right to exploit the works that are the subject of the contract or in that right together with payment.
'service concession' means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the provision and management of services other than the execution of works referred to in point (a) to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are subject of the contract or in that right together with payment.

specific detail as to the meaning and scope of the 'right to exploit, the ECJ courts are left with a wide field for interpretation. Early ECJ cases focused on the method of remuneration of the concessionaire—this must derive mainly from operating the construction or service, which entails indirect remuneration from the users.[494] Consider for example the BFI Holding case[495] and the Telekom Austria case.[496] However, since the 2008 judgment of Commission v Italy,[497] there has been a change from focusing on external sources of remuneration to the transfer of operating risk. Later, other cases[498] helped to define the nature and extent of the risk to be assumed by the concessionaire.

On the basis of ECJ case law, recital (18) of Directive 2014/23/EU emphasizes the characteristic of 'transferring operation risk' for clarifying the definition of 'concessions'. It points out that consideration of 'the right to exploit the works and services' always implies the transfer to the concessionaire of an operating risk of an economic nature, including the possibility that it will not recoup investments made and costs incurred in operating the works or services awarded under normal operating conditions.[499] Further, the directive points out that the award of a works or services concession shall involve the transfer to the concessionaire of an operating risk in exploiting those works or services encompassing demand or supply risk or both.[500]

As 'operating risk' is an economic term, the directive provides some explanations as to the scope of 'operating risk'. *First, an operating risk should stem from factors that are outside the control of the parties.* The directive does not interpret what is controllable or non-controllable. According to general economic theory, controllable risks include the 'probability of the risk occurring（风险的发生率）' and the 'consequence of the risk if it occurs (影响)'. For some risks,

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[494] Francisco L. Hernandez Gonzalez (2016). The evolving concept of works and service concessions in European Union Law, P.P.L.R. 2016, 2, 51-60.

[495] Case C-360/96 Gemeente Arnhem and Gemeente Rheden v BFI Holding BV [1998] E.C.R. I-06821, relating to the exclusive award of a contract to a public company for municipal collection of household refuse. The ECJ held it to be a public service contract insofar as remuneration received by the contractor comprised only a price paid by the public authority and not the right to operate the service (para.25).

[496] Case C-324/98 Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG [2000] E.C.R.I-10745, concerning the award of a contract for the provision of the public service of developing and publishing telephone directories to Telekom Austria (whose capital is wholly public), pronounced along the same lines: the ECJ qualified it as a service concession because "the consideration provided by the first undertaking to the second consists in the second obtaining the right to exploit for payment its own service" (para.30).

[497] Case C-437/07 Commission of the European Communities v Italian Republic [2008] E.C.R. I-00153, para.31. it concerns the direct award by an Italian municipality of a concession contract for the design and construction of a municipal tramway. In this case, the ECJ saw the operation as public works contract, instead of a works concession, insofar as the tram service operator had to pay the work contractor a periodic fee calculated to ensure payment of the fraction of cost of the works (equal to 40 percent) not defrayed by the Italian authorities, thereby guaranteeing recoupment of the investment. It established the criterion that the contractor's investment was not guaranteed by the amounts paid by the service operator.

[498] Judgments of 11 June, 2009, Case C-300/07 Hans & Christophorus Oymanns GbR, Orthopädie Schuhtechnik v AOK Rheinland/Hamburg [2009] E.C.R. I-04779, paras 71 to 74; 10 September, 2009, Case C-206/08 Wasser- und Abwasserzweckverband Gotha und Landkreisgemeinden (WAZV Gotha) v Eurawasser Aufbereitungs- und Entsorgungsgesellschaft mbH [2009] E.C.R. I-08377, paras 53 to 77; 15 October, 2009, Case C-196/08 Acoset SpA v Conferenza Sindaci e Presidenza Prov. Reg. ATO Idrico Ragusa and Others [2009] E.C.R. I-09913, paras 37 to 45; 10 March, 2011, Case C-274/09 Privater Rettungsdienst und Krankentransport Stadler v Zweckverband für Rettungsdienst und Feuerwehralarmierung Passau [2011] E.C.R. I-01335, paras 21 to 48; 10 November, 2011, Case C-348/10 Norma-A SIA and Dekom SIA v Latgales plānošanas reāions [2011] E.C.R. I-10983, paras 21 to 48; and 21 May, 2015, Case C-269/14 Kansaneläkelaitos, not yet reported in E.C.R, paras 27 to 41.

[499] Recital (18) of directive 2014/23/EU

[500] Article 5 (1) paragraph 2 of directive 2014/23/EU

the rate of occurrence can be controlled, such as the risk of delays in the delivery of the work or service (延期交付的风险) and the risk of exceeding the budget. For some risks, the consequence of the risk may be controlled by the parties. For example, while an earthquake cannot be controlled, its consequences may be controlled through appropriate design. Therefore, if the private partner takes responsibility for the design, it may reduce the consequences of the earthquake. Risks that can be controlled by the parties fall outside the scope of operating risk. However, apart from operating risk, there are other risks that are outside the control of the parties, including *force majeure*, the risk of changes in relevant legislation such as taxation law and currency risks. Therefore, this indicator is not sufficient to define 'operating risk'.

Second, the directive points out that risks that are inherent in every contract, whether it be a public procurement contract or a concession, are not decisive for the purpose of classification as a concession.[501] For instance, risks linked to bad management, contractual defaults by economic operators or risks linked to instances of *force majeure*. The existence of such inherent risks is not sufficient to determine whether the contract is a concession, and operating risks shall include risks that are not inherent in every contract. Therefore, to distinguish a concession from a public procurement contract, there are at least two kinds of interpretations. (1) Both public procurement contracts and concessions involve operating risk. In public procurement contracts, the public authorities assume the operating risk while in concession contracts, the economic operators assume the operating risk. This means that concessions transfer the operating risk transferred from pubic authorities to economic operators. (2) There is no operating risk in public procurement contracts; operating risk occurs only in concessions. The directive does not mention which approach should be considered. However, as operating risks could exist in public procurement contracts; for instance, the demand for use of a highway exists when public authorities pay all the costs and guarantee profits for the economic operators. Therefore, the first interpretation will be more appropriate.

Third, an operating risk[502] *should be understood as the risk of exposure to the vagaries of the market,*[503] *which may consist of a demand risk or a supply risk, or both.* Demand risk is the risk related to actual demand for the works or services that are the object of the contract. Supply risk is the risk related to the provision of the works or services that are the object of the contract, in particular the risk that the provision of services will not match demand. Apart from demand risk and supply risk, the directive does not mention any other operating risk that is out of the control of the parties or that results from exposure to the vagaries of the market (interest rate risk, for example).[504] The directive should clarify other kinds of market risk. Relevant ECJ cases have

[501] Recital (20) of directive 2014/23/EU

[502] For the purpose of assessment of the operating risk the net present value of all the investment, costs and revenues of the concessionaire should be taken into account in a consistent and uniform manner.

[503] See also the judgment in Eurawasser case (paragraphs 66 and 67); the judgment in case 274/09 (paragraph 37).

[504] Under the concession, private partner usually brings loans from bank or other financial institute and then invests the funds to the projects; therefore the private partner assumes the interest rate risk. While under other kinds of PPP, for instance, public procurement type PPP, the private partner also bring the loans from the bank, but the public authorities could cover the cost of the interest rate risk.

opined that the risk of exposure to the vagaries of the market may consist in: (1) the risk of competition from other operators; (2) the risk that the supply of the services will not match demand; (3) the risk that those liable will be unable to pay for the services provided; (4) the risk that the cost of operating the service will not fully be met by revenue and (6) the risk of liability for harm or damage resulting from an inadequacy of the service.

Fourth, under normal operating conditions, the concessionaire shall be deemed to assume operating risk, where it is not guaranteed to recoup investments made or costs incurred in operating the works or the services that are the subject-matter of the concession. **First**, operating risk is not limited to risks that occur during the operation phase. As the concession usually covers several phases—design, construction and operation—the meaning of 'operating risk' could be understood as the risk of operating all concession projects, and it is not limited to operating the work or service after it has been constructed or prepared. Investments made during the design and contribution phases should be considered when assessing whether the operating risk has been transferred to the concessionaires. **Second**, the concessionaire should not be guaranteed to recoup all investments and costs; its risk is not limited to not being guaranteed to obtain profits. Therefore, if one contract guarantees the economic operators to recoup all investments and costs, it should not be regarded as a concession. For concessions, the concessionaire should assume the risk of generating losses or losing money. **Third**, 'under normal operating conditions' has not been specified under the directive. However, there is one interpretation that states that 'this means that the transfer of risk is compatible with maintaining the financial and economic balance of the concession in unforeseeable situations'.[505] This interpretation is reasonable in so far as the concessionaire cannot be exposed to risks that are not related to market performance.[506]

Fifth, if sector-specific regulation eliminates risk by providing for a guarantee to the concessionaire about breaking even on investments and costs incurred for operating the contract, such contract should not qualify as a concession within the meaning of the directive. This highlights the fact that with a concession, the concessionaire should not be guaranteed to recoup all investments and costs, even though this guarantee stems from regulations instead of from contractual arrangements between contract parties.

Sixth, the risks could be limited from the outset, instead of being eliminated, to qualify the contract as a concession.[507] **First**, the risk could be limited through specific regulation or by contractual arrangement in sectors with regulated tariffs or in which the operating risk is limited by means of contractual arrangements that provide for partial compensation. **Second**, 'the risk' mentioned here includes but is not limited to 'operating risk'. The examples mentioned in the directive for limiting the risk include the fact that a public authority could provide partial compensation in the event of early termination of the concession for reasons attributable to the

[505] See: Francisco L. Hernandez Gonzalez (2016). The evolving concept of works and service concessions in European Union Law, P.P.L.R. 2016, 2, 51-60.
[506] (in which ECJ case the judge stated this?) See: Francisco L. Hernandez Gonzalez (2016). The evolving concept of works and service concessions in European Union Law, P.P.L.R. 2016, 2, 51-60.
[507] Recital (19) of the directive 2014/23/EU

public authority or for reasons of *force majeure*.[508] The fault of the public authority or the occurrence of *force majeure* is not the same as risk that results from exposure to the vagaries of the market, and therefore it should not be considered as 'operating risk'. **Third**, a part of the operating risk could remain with the public authorities (referred to as the 'contracting authority' or 'contracting entities'). Public authorities may not relieve the economic operator of any potential loss by guaranteeing a minimal revenue, equal to or higher than the investments made and the costs the economic operator incurs in relation to performance of the contract; however, through certain arrangements, public authorities could limit the operating risk. The wording of the directive does not specify whether the portion of the operating risk transferred to the concessionaire should be substantial or significant. For instance, certain arrangements which involve exclusive remuneration by public authorities should qualify as concessions when the recouping of investments and costs incurred by the operator for executing the work or providing the service depends on the actual demand for, or supply of, the service or asset.[509] However, another issue arises if the public authorities pay costs according to actual demand, as this situation has the potential to increase demand or eliminate demand risk. Consider a cafeteria in a primary school as an example. The public authorities pay the concessionaire depending on the actual demand, and this payment could cover the costs of this actual demand. The students will choose to have lunch at the cafeteria instead of bringing food from home or purchasing food outside the school, as the public authorities will pay the bills. Therefore, no demand risk is left to the concessionaire. There is another approach—requiring the students to pay certain amount for the food in the cafeteria that is lower than the real cost they would incur if they chose to eat at home. The public authorities recoup the cost of actual demand. Under these conditions, the concessionaire will assume some degree of demand risk.

2.2.2.3.2 The possibility that SOEs could join the PPP as public partners and the applicable rules

According to the previous description of 'concession', a 'contracting authority' and 'contracting entities' may join the concession as public partners. As the definition and scope of 'contracting authority' is the same as in the Public Sector Directive, and 'contracting entities' have the same meaning and scope in the Public Utilities Directive, SOEs may join the concession as public partners if they meet the conditions of 'bodies governed by public law' and 'public undertakings'. The situation is the same for public procurement-type PPPs. In theory, the regulation framework of the EU's public procurement regime does not set special limitations on what kind of public entities may not join the PPP as public partners.

In practice, as has indeed occurred with some PPP projects, SOEs play a role as public partner. For instance, Bracciano Environment S.p.A is a company owned by the city of Bracciano, which holds 100% of the shares.[510] It was founded for providing urban solid waste management for 25

[508] Recital (19) of the directive 2014/23/EU
[509] Recital (19) of directive 2014/23/EU
[510] http://www.braccianoambiente.it/chisiamo.php

municipalities in the region of Lazio. In January of 2016, the company published a public works concession notice for a 20-year concession on the design, construction and management of a waste-treatment plant.[511]

The applicable procurement rules when SOEs join PPPs as public partners depend on several factors, such as the type of PPP, the type of concession or public procurement and the relevant activities, whether related to utilities or not. The EU public procurement regime also has not set special rules for these arrangements.

2.2.2.3.3 Whether EU public procurement rules regulate IPPP-type SOEs

Apart from SOEs joining the PPP as public partners, there is another special situation that involves the possibility of applying public procurement rules. For IPPPs, as the public entity establishes a mixed entity with a private partner, some amount of shares in the mixed entity are held by the public entity. Therefore, whether the EU public procurement rules apply to the procurement activities of the mixed entity is an interesting issue.

Before the 2014 directives

Before the 2014 directives, when works concessions were regulated under Public Sector Directive, there were relevant provisions related to the rules for regulating the procurement activities of concessionaires.

Under Directive 93/37/EEC,[512] work contracts awarded by concessionaire were regulated.[513] This directive divided the concessionaire into two groups: (1) the contracting authority concessionaire—concessionaires that served as the contracting authority under the entities scope of the procurement directive and (2) a concessionaire other than the contracting authority (hereinafter "normal concessionaire"), which falls outside the scope of the procurement directive. For instance, under the contractual PPP model, the private company as the private partner sets up a mixed entity to implement the concession contract, and then this mixed entity falls under the definition of a "normal concessionaire".

Concessionaires in the first group that award contracts to a third person should comply with the full provisions under the procurement directive. At this time, only work concessions were regulated by the procurement directive, and Directive 93/27/EEC coordinated only the procedures for the award of public work contracts. This meant that the contracting authority type of concessionaire needed to follow only the public procurement rules when awarding work contracts.[514] This conclusion is confirmed by Directive 2004/18/EC,[515] which unified the three procurement directives and clarified that only contracting authority type of concessionaire shall

[511] http://ted.europa.eu/udl?uri=TED:NOTICE:21385-2016:TEXT:EN:HTML&tabId=2. However, this concession project was not awarded as the reason of 'no tenders or requests to participate were received or all were rejected. See: concession award notice 2016/S 089-156827.

[512] Council Directive 93/37/EEC of 14 June 1993, concerning the coordination of procedures for the award of public works contracts.

513 Article 3(3) and (4) of directive 93/37/EEC

514 It could be explained by the separate regulation between directives. If the concessionaire meets the conditions of 'contracting authority', it should be regulated also by public supply directive and public service directive. however, after unifying the rules for public works contract, public services contract and public supply contract in 2004 directives, still only awarding works contract has been regulated.

[515] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

comply with the provisions for public works contracts.[516]

For concessionaires in the second group, Member States shall take necessary steps to ensure that normal concessionaires shall apply the advertising rules listed in relevant provisions[517] with respect of the value of the contract that is not less than the threshold.[518] However, if the work contract meets the conditions for using a "negotiated procedure without prior publication of a contract notice,"[519] an advertisement is not required for normal concessionaires.

Both kinds of concessionaires must comply with the public procurement rules only when the concessionaire awards a contract to a third party. Undertakings that have formed a group to obtain concession contracts, or undertakings affiliated with them, shall not be regarded as third parties.[520]

Consequently, the concessionaire is always obliged to make known any intention to award a work contract to a third party, whether or not it is a contracting authority.[521] However, some questions have arisen regarding the arrangements mentioned above: (1) why does the EU procurement regime only regulate awards of work contracts?; (2) why does the EU procurement regime divide concessionaires into two groups and set different obligations? and (3) why does the EU procurement regime only regulate work contracts awarded to third parties?

First, the regulatory history of the EU procurement regime may provide some reasons for why it only regulates the award of work contracts, instead of regulating all procurement activities. Given the importance and influence of creating an internal market, the public works area was the first to have been coordinated by the public procurement directive—Council Directive 71/305/EEC enacted in 1971. However, covering works concessions with the procurement directive was more controversial. Until Directive 89/440/EEC was enacted in 1989, only a few provisions had been applied to works concessions. Compared to regulating the contracts awarded by contracting authorities, contracts awarded by concessionaires may not use public funds and their procurement activities may not be influenced by the state. Therefore, it is more difficult to regulate full provisions to concessionaires. Additionally, service contracts are a more sensitive area for Member States. At this time, social service contracts were ruled out of the directives and service concessions were not regulated by the public procurement directives. The regulation of awards of works contracts was a result of the gradually expanding regulatory scope of the EU procurement regime.

Second, different characteristics among the concessionaires caused the EU procurement regime to divide concessionaires into two groups and to set different obligations for each group. As mentioned above, the EU procurement regime is based on the character of the entities and does not consider the sources of funding. Therefore, the contracting authority type of concessionaire still needs to comply with all obligations under the procurement regime, including the requirements related to competition and non-discrimination.

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[516] Article 62 of Directive 2004/18/EC

[517] It refers to article 11 (4), (6), (7) and (9) to (13), and article 16 of the directive 93/337/EEC.

[518] The threshold is ECU 5 000 000.

[519] Article 7 (3) of the directive 93/337/EEC.

[520] Where identifying 'third parties', the 1993 Public Works Procurement Directive only referred that 'undertakings which have formed a group in order to obtain the concession contract, or undertaking affiliated to them, shall not be regarded as third parties'(Article 3(4)). However, the 2004 Public Sector Procurement Directive, which provided more detailed rules on this, clarified that 'groups of undertakings which have been formed to obtain the concession or undertakings related to them shall not be considered third parties' (Article 63 (2)). The term 'related undertaking' mentioned here is similar to the definition of the term 'affiliated undertaking' in the 1993 Public Works Procurement Directive, except one more situation mentioned for presuming the existence of 'a dominant influence'—control a majority of the votes attached to the shares issued by the undertaking (Article 63 (2).

[521] Constant de Koninck, Thierry Ronse (2008): European Public Procurement Directives and 25 years of jurisprudence by the Court of Justice of European Communities: texts and analysis, Netherlands: Kluwer Law International, p.580.

However, normal concessionaires are economic operators, which have the freedom to purchase as an act of commercial procurement. However, Article 3(4) of the Directive requires them to comply with the obligation to publish the contract opportunity and to observe minimum time periods in which to receive requirements and tenders. This kind of arrangement may be the result of the following considerations. (1) Although concessionaires are not contracting authorities, they receive a sort of monopoly right in certain areas by winning work concession contracts. As the court in Case C-399/98[522] pointed out, in a case concerning the execution of infrastructure works, the directive is complied with if the municipal authorities themselves apply the award-of-contract procedures laid down therein. Article 3(4) of the directive expressly allows for the possibility of the rules concerning publicity being applied by persons other than the contracting authority in cases in which public works are contracted out.[523] (2) The concession contract usually lasts much longer than a general public procurement contract, and it is not easy to monitor the implementation of the contract. (3) It is not appropriate to intervene in the substantial procurement freedom of concessionaires, because they are commercial actors. Therefore, providing an obligation regarding publicizing the work contract opportunity would help public authorities and citizens to monitor the implementation of contracts, and this fits the main purpose of the EU public procurement regime (creating an internal market) without substantially affecting the freedom of the concessionaires.

Third, it makes sense that concessionaires award contracts to affiliated undertakings or members in joint bidding that does not include publicity. In the case of affiliated undertakings, the rationale is similar to that of an in-house provision. As the concessionaire wins a concession contract through competition, it deserves to have the freedom to organise its own resources to implement the contract. Moreover, as the scale of concession projects usually is very large, it is necessary to allow joint bidding. Each company has respective expertise, as for example when the joint bid consists of one company with financial capacity and another company with technical and management capacity. After the joint entity wins the bid, it sets up a mixed entity to implement the contract. The mixed entity has the right to award the contract to its group members, and in this circumstance, there is reason to publish the contract opportunity according to the provisions under the public procurement regime.

Under the 2014 directives

However, the 2014 directives do not contain a specific rule regulating the procurement of concessionaires, which is the result of adapting the new directive to the awarding of concession contracts without needing to provide special rules for concessionaires. Notwithstanding, under the 2014 directives, the following cases should be considered when discussing the issue of regulating the procurement activities of the mixed entity, under a concession contract or a public contract. (1) First, if the mixed entity meets the conditions set under the directives, the procurement activities of the mixed entity still need to follow procurement directives. (2) Second, if the PPP contract involves the utilities sectors, and the mixed entity is a private undertaking, then exemptions could be applicable to this mixed entity. The PPP contract awarded to the mixed entity could be regarded as one kind of exclusive and special right, because it substantially impacts the possibility of other entities to execute this activity. If the contract was awarded by means of a procedure in which adequate publicity has been ensured and was based on objective criteria, for instance, a public procurement procedure,[524] then private undertakings are not relevant for the purposes of determining the contracting entities covered by the directives.[525] This means that even though the

[522] Case c-399/98, Ordine degli Architetti delle province di Milano e Lodi, piero De Amicis, Consiglio Nazione degli Architetti and Leopoldo Freyrie v Comune di Milano, and Pirelli SpA, Milano Centrale Servizi SpA and Fondazione Teatro alla Scala, Judgment of the Court of 12 July 2001.
[523] Paragraph 100.
[524] Article 7 (2) of directive 2014/23/EU,
[525] Recital (22) of directive 2014/23/EU, and recital (20) of directive 2014/25/EU

awarding of PPP contract could create a sort of monopoly in a given market, the competition at the first award phrase provides justification for the exemption of the procurement activities of private undertakings.

Compared with the arrangement under the old EU procurement regime, the current EU procurement regime seems inclined to limit the discretion of contracting authority type concessionaires and to deregulate normal concessionaires. Under the current EU procurement regime, contracting authority type concessionaires should follow the full provisions at all times, not only when they award work contracts. This ensures that the contracting authorities comply with the rules, and prevents situations in which part of a goods or services contract does not follow the EU procurement regime, because it is a concession contract, while another part of the contract does need to comply with the rules, because it is for the procurement activities of a contracting authority. Normal concessionaires do not need to comply with any rules under the EU public procurement regime, including publicity of the contract opportunity. This means that the EU gives more freedom to normal concessionaires in cases involving commercial procurement.

Back to the issue above, the answer is clear. First, it depends on the characteristics of the mixed entity and whether it may be regarded as the contracting authority or contracting entities under the EU procurement directive—in other words, is it a "body governed by public law" or a "public undertaking". Second, if the mixed entity does not fall into the scope of previous types, its procurement activities should not be regulated by public procurement rules, as the special or exclusive right attached to a PPP contract is authorized on the basis of transparency and objectivity. In this case, the mixed entity has the full freedom to award the contract. In summary, the character of a mixed entity is decisive as to whether it should be regulated by EU public procurement rules.

In addition, the fact that the special or exclusive right attached to the PPP contract could lead to a kind of monopoly is not relevant. In the utility sectors, if this kind of right is authorized based on publicity and objective criteria, then the non-contracting-authority type of mixed entity does not need to comply with the EU procurement regime. If this right is not authorized, then the EU procurement regime still applies. However, in the classic sectors, the reason that an on-contracting-authority kind of mixed entity that receives a special or exclusive right attached to the PPP contract does not need to comply with the procurement rules is still not clear.

2.2.2.3.4 Discussion and comments

The EU public procurement regime allow SOEs to join PPPs as public partners, as has been proven by the real cases. The applicable procurement rules depend on the characteristics of the SOEs and the activities involved.

Regarding the procurement activities of IPPP SOEs, whether they should be regulated by the procurement rules, and to what extent they should be regulated, depends on the characteristics of the SOEs. Specifically, this depends on the type of SOEs that have been classified according to the public procurement rules. The EU public procurement regime regulates the procurement activities of IPPP SOEs, but not because of any exclusive or special rights held by the concessionaires. In the previous EU public procurement directives, work contracts awarded by private undertaking type concessionaries were required to comply with certain obligations, such as publishing the contract opportunity and allowing minimum time periods for receiving requirements and tenders. However, in the 2014 public procurement directives, the EU public procurement rules do not apply to private undertaking concessionaires if their specific or exclusive rights have been awarded through public and objective criteria. This means that the current EU public procurement regime does not intend to regulate the procurement activities of concessionaires or other 'private

partners' of PPPs, except in cases in which these entities were originally covered by the procurement regime.

2.2.3 Conclusion

Reason for regulation

Opening the public procurement markets between the Member States for establishing an internal market is the main purpose of the EU public procurement regime. Certain SOEs can be influenced by public authorities with regard to their procurement decisions (such as preferring domestic products or suppliers), and this has been considered to be an obstacle to opening public procurement to other MS of the EU. In this aspect, the influence from the public authorities mostly points to the discrimination to suppliers from other MS, instead of discrimination to domestic suppliers. The assumption behind is that the freedom to procure among the suppliers at the EU level, is more efficient for enterprises. As for certain SOEs, the public authorities could influence their procurement decisions to prefer domestic suppliers, which could lead to the inefficiency of these SOEs; these SOEs are governed by the EU public procurement regime.

What kinds of SOEs have been regulated?

By analysing the process of the reformation of the EU public procurement regime, we find that the regulatory coverage of the procurement activities of SOEs has been gradually expanded. However, there is no specific condition for describing which kind of SOEs should be regulated by the EU public procurement regime.

The coverage of SOEs depends on the conditions provided for determining their status as BGBPLs or as 'public undertakings'. Those conditions have gradually become clearer by means of the cases interpreted by the ECJ. However, to determine whether certain conditions have been met is still determined on a case-by-case basis, and there is no single decisive factor. Through the discussion above, several observations could be obtained as followings:

Firstly, it is important to point out that under the EU public procurement regime, public ownership is not a decisive reason for regulating the procurement activities of SOEs. In some cases, the majority part of shares held by public entities is one of the conditions for determining whether the SOEs should be regulated by the EU public procurement regime. In some other cases, even though there is no majority part of public ownership, the SOEs still could be regulated, as a result of the financing, management factors. Either majority part of public ownership or other relevant factors, are used for determining the entities which have close dependence on public authorities.

Secondly, besides close dependence on public authorities, SOEs should pursue the activities for fulfilling the needs in the general interest and not having an industrial or commercial character. It turns out that the activities are pursued by the SOEs are also one important factor for determining the regulatory scope.

According to the experience of EU, 'close dependence' on public authorities and pursuing certain activities for fulfilling the needs in the general interest and not having an industrial or commercial character, are two factors used to distinguish the SOEs which are similar to 'State' or 'government' from the SOEs which are similar to 'private enterprises'. Satisfying both of these two factors is necessary. For instance, the private enterprises also could pursue the activities for fulfilling the needs in the general interest and not having an industrial or commercial character, but they are not closely dependent on public authorities, thus they are not regulated.

Thirdly, for the SOEs which could not be treated as similar as 'state' or 'government', but which are exercised directly or indirectly a dominant influence from public authorities and pursue the activities in the regulated certain public utility sectors, also are regulated by EU public procurement regime. In this part, the competitive structure of the utility sectors concerned is one important reason for regulation. Not all public utility sectors are regulated, only the sectors in EU lack competitions have been regulated. Furthermore, the public enterprises holding special or exclusive rights are also regulated.

What kinds of activities by SOEs are regulated?

For the kind of SOEs which are closer to the 'State', all kinds of procurement activities are regulated. The EU public procurement regime regulated them almost as the same as other kinds of contracting authorities, such as local authorities.

For the kind of SOEs which are not been treated as similar as 'state' but purse the activities in certain public utility sectors, the procurement for pursuing the activities in these sectors are regulated by the EU public utility directive.

The reasons for exemption

However, several exclusion situations have been provided for the procurement activities of SOEs that should not be regulated, such as in-house arrangements, which will be discussed in chapter 3

Additionally, even though the competitive structure of whole utility sector has not been changed, but the specific market structure has been changed and leads to the activities of the enterprises governed by the public utility directive are directly exposed to the competition, the procurement activities also could be exempted from the regulation.

The goal of public policies which are allowed to pursue by SOEs

while the EU public procurement regime does not allow SOEs or other public entities to implement public policies through their procurements, the " State" still has the discretion to implement public policies that are allowed by the regime—such as green public procurements and promoting the development of SMEs—through the procurement activities of SOEs that are governed by the regime.

How the EU directives coordinate with each other?

Considering how the three main EU public procurement directives treat SOEs, we may observe that these three directives, especially the Public Sector Directive and the Public Utilities Directive, have employed different approaches for determining the coverage of the directive. First, the Public Sector Directive mainly covers SOEs that may be treated as the part of the 'State' or 'government,' while the Public Utilities Directive covers SOEs that are part of the 'State' or 'government' and also covers SOEs that are pursuing commercial or industrial interests. Second, once SOEs have been regulated by the Public Sector Directive, all of their procurement activities should be covered by it. However, once SOEs have been regulated by the Public Utilities Directive, only procurement activities for pursuing certain utilities activities should be regulated by it. Under the Public Sector Directive, the character of the SOEs is the only factor considered, while under the Public Utilities Directive, both the characteristics of the SOEs and the type of activities they pursue have been considered.

Under the concession directive, the coverage of SOEs includes SOEs that have been covered under the Public Sector Directive and the Public Utilities Directive.[526] This means that if the SOEs have been governed by these two directives, they have also been governed under the concession directive. The regulation of the procurement activities of the concessionaires has been deregulated in the concession directive, as compared to the former version of the procurement directives. There is no special rule about the procurement activities of the concessionaires, and whether they should be regulated depends on whether they meet the relevant conditions of the coverage.

2.3 Case study—China

2.3.1 Reform of Chinese public procurement regulations

In China, the primary laws on public procurement are the Chinese Bidding Law (CBL), which was enacted in 1999, and the Chinese Government Procurement Law (CGPL), which was enacted in 2002.[527] The Chinese public procurement system has undergone major reform in the past 20 years.

2.3.1.1 The first wave: from regulations to laws

The primary purpose of China's early bidding regulations was to reform the administration of government investment and finance in order to reduce corruption and inefficiencies created by the non-competitive allocation of projects by government agencies.[528] For example, the award criteria,

[526] Except the concessions in the water sector, which has been excluded from the concession directive as the specific and complex arrangements in this sector between EU MS. See recital (40) of the directive 2014/23/EU.
[527] See: Cao, F.2003. "China's Government Procurement Regulation: From the Bidding Law to the Government Procurement Law." In S.Arrowsmith and M.Tybus (eds), Public Procurement: the Continuing Revolution. London: Kluwer Law International, 61-84.
[528] Cao fuguo and zhou fen, Internationalization of Public Procurement Law and Relevance of International

based on setting base prices, undermined the objectives of economy and effectiveness. Even though the procurer was able to negotiate with the successful bidder before the conclusion of the contract (a general practice at this time), this process was forbidden under the CBL, as it deviated from the principle of using market-based bidding mechanisms and increased the opportunity for corruption.

However, the CBL significantly improved the old bidding measures by embracing the objectives of "economy and quality" in procurement.[529] It further revolutionized the award criteria by abolishing the base price criterion and adopting the market-based criteria found in modern procurement regimes. These improvements, among others, have greatly enhanced the ability of procuring entities to meet the new objectives provided for in the CBL.

Under the CGPL, which was significantly influenced by the UNCITRAL Model Law on Procurement of Goods, Construction and Services,[530] the declared primary policy was to "increase the efficiency and effectiveness of government procurement funding" and to "promote the construction of a clean government." The purpose of these reforms was closely related to the functions and authority of the MOF, either as a means of budgetary reform or of expenditure reform.[531]

2.3.1.2 The second wave: the modernisation of public procurement regulations

The development of Information Technologies, sustainable development and globalization has allowed the regulation and practice of public procurement to meet new challenges and opportunities. Electronic procurement, sustainable procurement and the internationalisation of public procurement have become the frontier issues for Chinese regulators.

To meet the above policy requirements, some modern procurement systems have been established in China. (1) An electronic procurement system, including publishing the procurement information electronically and using electronic procurement methodologies, including promoting the development of electronic auctions and electronic platforms for government procurement. (2) The implementation of a sustainable public procurement system,[532] including government procurement of an energy efficiency product system,[533] an environmental label product system,[534]

Norms and Frameworks: the Case of China, in Chapter 14 of *Internationalization of Government Procurement Regulation*, Aris C. Georgopulos, Bernard Hoekman, and Petros C. Mavroidis (eds.), Oxford University Press, March of 2017, P.371.

[529] Article 1 of the CBL

[530] UNCITRAL (1994). UNCITRAL Model Law on Procurement of Goods, Construction and Services.

[531] Cao fuguo and zhou fen, Internationalization of Public Procurement Law and Relevance of International Norms and Frameworks:the Case of China, in Chapter 14 of *Internationalization of Government Procurement Regulation*, Aris C. Georgopulos, Bernard Hoekman, and Petros C. Mavroidis (eds.), Oxford University Press, March of 2017, P.372.

[532] For more information on sustainable public procurement system in China, please see the following research: Cao, F. and Z.Fen. 2014. "Towards Sustainable Public Procurement in China: Policy and Regulatory Framework, Current Developments and the Case for a Consolidated Green Public Procurement Code."Journal of Malaysian and Comparative Law41(1): 43–68.

[533] Ibid.

[534] Ibid.

an innovation product system[535] and improved development of SMEs.[536] (3) To keep up with globalization, China has begun the process of adhering to the Government Procurement Agreement of the WTO and reformed national regulations to meet the basic requirements of the GPA, including enacting categories of government procurement items.[537]

Meanwhile, at the level of understanding the legal effect of binding documents and coordinating issues between the CBL and the CGPL,[538] China's State Council has enacted implementing regulations for both laws, the Chinese Bidding Law Implementing Regulation (the CBL-IR)[539] and the Chinese Government Procurement Law Implementing Regulation (the CGPL-IR).[540] Several significant improvements have been achieved in these two new implementing regulations, including: (1) applicable rules for construction procurement have been established by coordinating between these two implementing regulations;[541] (2) the CGPL-IR has set up a requirement for making all government procurement contracts public;[542] (3) the CGPL-IR has clearly provided that the term 'service' includes both services that fulfil the demands of the government and public services that the government provides to public citizens.[543]

2.3.1.3 The third wave: the strategy function of public procurement—encouraging private sector participation to improve government governance

With the second wave of the reform still ongoing, a third wave of reforming public procurement regulation is also underway, with the purpose of improving government governance by encouraging private sector participation.

The development of private sector participation has been gaining momentum following a series

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[535] In April of 2007, three documents were issued for providing rules on evaluation, budget, contract management of government procuring innovation products. But these documents were stopped execution in June of 2011 as the pressures from other countries.

[536] December of 2011. See: Cao, F.2013. "Building up SME Programmes in Government Procurement in China: Legal Structure, Recent Developments and the Way Forward towards the WTO-GPA."Public Procurement Law Review6: 211–24.

[537] 财政部印发政府采购品目分类目录（试用）的通知，财库[2012]56 号，2012 年 5 月 22 日；财政部关于印发《政府采购品目分类目录》的通知，财库[2013]189 号，2013 年 10 月 29 日。

[538] See: 曹富国：公共采购法视野下'两法'关系之协调与区别立法，国家行政学院学报，2012（05）。In this paper, it has mentioned that, at the late period of legislation on the CBL, the drafting group intended to expand the coverage of the CBL for including the procurement of goods, services and constructions. However, at that time, the drafting of the CGPL started. As the result of the coordination between the two competent authorities of these two laws, several issues have left. For instance, how to coordinate the procedure rules on the procurement of construction, and how to coordinate the monitor responsibilities between two competent authorities.

[539] The Bidding Law Implementing Regulation, enacted by the State Council and effective on May 1,2013.

[540] The Government Procurement Law Implementing Regulation, enacted by the State Council and effective on March 1,2015.

[541] See, article 7 of the CGPL-IR. It provides that the if the construction and relevant goods and services procured by government through bidding methods, the CBL and the CBL-IR apply; if other procedures has been used for procuring the construction by the government, thus the CGPL and the CGPL-IR apply. Additionally, it emphasizes that the construction and relevant goods and services procured by government should implement the government procurement policies.

[542] Article 50 of the CGPL-IR. It provides that procurer should public the government procurement contract in the media assigned by the financial department of and over provincial government, in 2 working days after signing the contract. However, the context of the contract which involves the national security and commercial secret is excluded.

[543] Article 2 (4) of the CGPL-IR.

of policy initiatives at the central level,[544] and along with this development has come a third wave of Chinese procurement reform and regulation—including a regulatory framework governing the procurement of privately-financed infrastructure projects (PFIP) and the distinctive legislative development of concession regulations in the urban infrastructure and utilities sectors. The Beijing Municipality is taking the lead in promulgating the first concession regulations for its municipal infrastructure, and a number of other local governments have enacted concession regulations related to municipal utilities.[545]

In recent years, the new administration reform has adopted a much more market-oriented approach toward public service provision; additionally, the new urbanization initiative and resolution of the debts of provincial and local governments demands a potentially more important role for private capital. Therefore, national policy initiatives for developing the procurement of public services in the public sectors through public private partnerships are thriving.

Promoting public sectors procuring public services from private sectors

In 2013, the Office of State Council enacted guidance for promoting public sector procurement of public services from private sectors.[546] A series of administrative orders and documents have been issued by the MOF on budget management and other issues to promote the procurement of public services from private sectors. For instance, as bidding and tendering procedures are not suitable for some service procurements, in December of 2013, the MOF issued administrative measures on non-tendering procedures, which has provided more detailed rules for those non-tendering procedures listed in the CGPL.[547] In December of 2014, the MOF and other ministers issued a document that addressed the administrative measures of government procuring public service.[548]

Developing and regulating public private partnerships

(1) Developing a robust PPP market

To develop PPPs in China, at the central government level, the MOF established the PPP Centre

544 For example, the Notice on Publishing the Opinions on Promoting and Guiding Private Investment, issued by the then National Planning Commission on December 11,2001. Some Opinions On Some Policy Measure To Increase The Development Of Service Sectors In the fifteenth Five-Year Period, issued by the then National Planning Commission in January2002; Opinion On Promoting The Marketisation Of Urban Public Utilities, issued by Ministry of Construction on December 27, 2003; Measures on Urban Public Utilities Concession, issued by MOC in 2004; State Council Decision Regarding The Investment System Reform, issued by the State Council in July 2004; the Opinions On Encouraging, Supporting And Guiding The Development of Non-State Sector Economies, issued by State Council in 2005.

545 For a review of the Beijing Municipality regulation, see Cao fuguo (2006). "The Emerging Legal Framework o Private Finance in Infrastructure in China: A Preliminary Review of the Beijing Concession Regulation."Public Procurement Law Review 2, 62-69.; for a review of national development, see Cao fuguo(2007). Regulating Procurement of Privately-Financed Infrastructure in China: A Review of the Recent Legislative Initiatives and the Emerging Regulatory Framework."Public Procurement Law Review3, 147-173.

546 The Guidance for promoting public sectors procuring public service from private sectors, issued by the Office of State Council on September 26, 2013.

547 《政府采购非招标采购方式管理办法》，财政部第 74 号令，经 2013 年 10 月 28 日财政部部务会议审议通过，2013 年 12 月 19 日公布，自 2014 年 2 月 1 日起施行。

548 http://www.cpppc.org/pppyw/3684.jhtml

and the NDRC established the PPP Promotion Office. At the local government level, many provincial and local PPP centres were established.

In addition to setting up administrative agencies to lead the development of PPPs, both central and local level governments are using PPP demonstration projects as an implementation tool. For instance, in the past four years the MOF has selected four batches of national PPP demonstration projects (see Table 1: **The numbers and investment amounts of the MOF's three batches of PPP demonstration projects**). [549] Meanwhile, the NDRC and the local governments have promoted PPP demonstration projects. [550]

Through analysis of these PPP demonstration projects, we may observe that the PPP market has grown rapidly in China in the past four years. From perspective of the economic sector, PPP projects have expanded from municipal engineering to 13 other economic sectors, such as transportation, environment, affordable housing, elder care and health care. Among these, the municipal engineering sector, transportation sector and ecological construction and environmental protection sector are three sectors in which the PPP demonstration projects are heavily involved. Additionally, more and more PPP projects in the field of basic public service, such as education, eldercare, have been developed.

Table 1: The numbers and investment amounts of the MOF's three batches of PPP demonstration projects

		The first batch		The second batch		The third batch			
Sectors	Sub-sectors	The number of projects	The investment amount (one hundred million RMB)	The number of projects	The investment amount (one hundred million RMB)	The number of projects	The investment amount (one hundred million RMB)	The fourth batch	The investment amount (one hundred million RMB)
Municipal engineering		24	1662.9	82	3404	223	3206	163	1999.27
	Water supply	3	32.6	8	89	24	153	12	91.89
	Heating supply	3	26.4	6	61	13	62	13	66.87

[549] At the beginning the first batch covered 30 projects, the total investment of which is 178.6 billion RMB. According to the information provided by the MOF, as some reasons, 6 projects have been gradually taken out from the first batch. Therefore, in the first batch the number of the projects is 22, and the total investment amount is 70.9 billion RMB. The second batch covered 206 projects involving total investment of 658.9 billion RMB. The third batch covered 516 projects, and the total investment was more than 1.17 trillion RMB. The fourth batch covered 396 projects and the total investment was around 758.8 billion RMB. More details of the PPP demonstration projects, See: http://www.cpppc.org/zh/pppsftg/index.jhtml

[550] See: http://tzs.ndrc.gov.cn/zttp/PPPxmk/xmk/

	Waste disposal	1	5.3	12	75	31	124	21	57.60
	Network	1	13.0	12	433	31	839	21	462.64
	Sewage treatment	9	59.1	18	203	40	181	36	149.23
	Municipal roads			6	143	43	577	7	129.39
	Rail transportation	7	1526.5	10	2281	7	851	3	508.63
	Parking lot			0	0	8	45	7	56.43
	“Sponge city”			0	0	5	209	14	222.55
	Drain			3	16	5	45	6	31.62
	Park			1	25	4	44	3	31.82
	Landscape and greening			1	6	4	16	2	14.13
	Natural ga s supply			2	4	2	3	1	4.22
	Public bus system			1	15	0	0	4	18.51
	Electricity supply							1	2.65
	Square/plaza							2	21.03
	others							10	130.06
Transport		2	39.5	20	902	62	5066	41	2375.99
	High way			6	567	26	3689	19	1927.12
	First level road			3	66	16	501	5	147.66
	Second level road			0	0	2	40	1	10.00
	Transport hub			5	73	2	21	4	32.14
	Airport			1	23	1	203		

	Channel							1	10.00
	Tunnel	1	34.34	0	0	1	7		
	Bridge			1	33	4	370	2	33.02
	Port			0	0	3	50	1	54.48
	Railway (not including rail transport)			2	46	3	126	1	11.56
	Warehouse Logistics							3	72.53
	Others	1	5.16	2	94	4	58	4	77.49
Ecological construction and environment protection		2	52.9	13	271	46	811	37	550.62
	Comprehensive environmental management	2	52.9	13	271	38	711	29	413.66
	Wetland protection			0	0	4	40	2	57.09
	Others			0	0	4	59	6	79.90
The comprehensive development of the city				5	326	33	1120	15	1112.09
Water conservancy construction				13	184	17	264	22	166.06
Healthcare		1	5.7	18	112	17	98		
Education				13	90	17	91	17	99.42
Technology				3	33	16	206	8	137.90
Energy				9	36	16	126	5	16.23

Tourism				2	6	14	226	27	349.17
Culture industry				10	254	11	99	18	105.43
Elder care				6	167	25	195	8	45.04
Government Infrastructure								1	1.53
Others		1	25.1	11	503	19	200		
	Sports	1	25.1	3	33	6	77	11	152.24
	Affordable housing			2	32	6	69	3	25.30
	Forestry			0	0	2	25	3	290.59
	Agriculture			0	0	1	2	10	109.54
	Social security			4	32	1	1		
	Others			2	406	3	26	7	52.02
Total		30	1786.1	205	6288	516	11708	396	7588.44

(Source: statistics from MOF's official data[551])

(2) Formulating regulatory rules for PPPs

In November of 2014, the State Council issued a guideline opinion on innovating the investment and financing mechanisms in certain key sectors, and public-private partnerships are among one of the most promoted mechanisms.[552] The MOF and the NDRC are also rigorously promoting the practice of PPPs[553] by formulating new regulations for the competitive selection of private capital (partners).[554] For instance, in December of 2013, the MOF pointed out that the purpose of the government procurement system should change from focusing on saving financial funds and anti-corruption to focusing on value for money (VFM).[555] In December of 2014, the

[551] See the following website: http://www.cpppc.org/zh/pppyw/6433.jhtml

552 The Guidance by State Council on Innovating Investment and Finance Mechanisms in Key Sectors and Encouraging Social Investment, issued by State Council on November26,2014.

553 The Circular by the MOF on Certain Issues of Promoting the practice of PPPs, issued by the MOF on September24,2014; the Circular by the MOF on Guideline of Operating PPPs, issued by the MOF on December 4,2014; the Guidance by NDRC on Developing PPPs, issued by the NDRC on December 2,2014, and attached the Guideline on Standard Contract of PPPs (2014 version).

554 The Administration Measures on Government Procurement of PPPs Project, issued by the Treasury of the MOF on December 31, 2014; the Interim Measures on Competitive Consultation Method of Government Procurement, issued by the Treasury of the MOF on December 31, 2014. The NDRC also issued a regulatory proposal of Administration Provisions on Concession in Infrastructure and Utilities attempting to regulate the concession type of PPPs.

[555] http://www.mof.gov.cn/buzhangzhichuang/bzlk/zywglk/201401/t20140117_1036655.html

MOF introduced the Competitive Consultation Method as a new procurement method for government procurement. In December of 2015, the MOF issued a guideline for PPP VFM assessment.[556] In April of 2015, the Administrative Measures on Concessions of Infrastructure and Public Utilities was jointly issued by the NDRC, the MOF and other ministries. Indeed, the MOF and the NDRC are said to be competing over issuing PPP policy initiatives and regulations in light of the growing importance of PPPs. In 2015, the State Council clarified the respective competencies of the NDRC and the MOF— the NDRC will mainly hold the responsibility of developing PPPs in traditional infrastructural fields, and the MOF will mainly hold the responsibility of developing PPPs in public service fields. In July of 2017, the State Council has issued a proposal of PPP regulation.[557]

After a fast development of the PPP market in China, the government has recognized the important of regulation for the sustainable development of PPP market. In December of 2017 the relevant ministries have issued several policies to ensure better qualities of PPP projects and control the risk of PPP projects.[558] Generally, the policies include the following aspects: （a） improving the instrument of demonstration PPP projects, through gradually improving the selection methods and criteria, introducing a dynamic management system[559], increasing incentive mechanisms; (b) Limiting central SOEs to participate in the PPP markets as private partners[560]; (b) encouraging private enterprises to participate in the PPP markets as private partners[561].

A new legal framework for PPPs is taking shape in China, however, there are still several emerging regulatory issues to be addressed. Issues relevant to SOEs participate in PPP are part of them.

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[556] 财政部关于印发《PPP物有所值评价指引（试行）》的通知，http://www.mof.gov.cn/zhengwuxinxi/caizhengwengao/wg2016/wg201601/201605/t20160516_1992295.htm

[557] See:http://jrs.mof.gov.cn/ppp/gzdtppp/201708/t20170801_2663640.html. Until the end of Feburary 2018, there is no progress of this regulation which has been announced.

[558] 财政部办公厅,《关于规范政府和社会资本合作（PPP）综合信息平台项目库管理的通知》,财办金[2017]92号，2017年11月10日；国资委，《关于加强中央企业PPP业务风险管控的通知》，国资发财管[2017]192号,2017年11月17日；国家发展改革委，《关于鼓励民间资本参与政府和社会资本合作（PPP）项目的指导意见》，2017年11月28日。

[559] It has been clarified that the PPP demonstration projects should be moved from the pool of demonstration projects, if they have been proved with one of following situations: (a) 'Value for Money assessment' and 'finance affordable assessment' have not been implemented or not following the requirements; (b)not suitable to adopt PPP model, including no substantial progress after entering the pool, before entering the process of procurement over the limitation of 10% of the government's financial capability, etc. (c) it has issues of illegal operation, (d) against the rules of loan and guarantee; (e) not disclosure the information according to the rules. Until 7 of February, there are 55 projects which have been moved out from the pool. See: http://www.cpppc.org/zh/pppyw/6436.jhtml

[560] To prevent the business risk of central SOEs in the PPP market, strengthening the control of the group companies on participate in the PPP market as private partners, focusing on the main business filed of the SOE, controlling the amount of the net investment, and other measures are implemented by SASAC.

[561] To advocate and encourage private enterprises join the PPP market, the NDRC has provided its opinions on the following aspects: (a) creating a good environment for the participation of private investment; (b) supporting the participation of private investment according to different characteristics of the PPP projects; (c) encouraging private enterprise use PPP model on exist assets; (d) introducing PPP demonstration projects to private enterprises; (e) setting reasonable criteria for selecting private partners; (f) concluding effective PPP contracts according to the requirements of law; (g) increasing the supports on financing the private enterprises in PPP projects; (h) selecting typical PPP projects in which private enterprises play a role as private partner; (i) improving integrity system of PPP.

2.3.2 How Chinese public procurement rules treat SOEs

2.3.2.1 Does the Chinese Government Procurement Law cover the procurement activities of SOEs?

The regulatory situation under the current law

CGPL is applicable to all government procurement in China. It defines 'government procurement' as '*the purchasing activities conducted with fiscal funds by government departments, institutions and public organization at all levels, where the goods, construction and services concerned are in the centralized procurement catalogue compiled in accordance with law or the value of goods, construction or services exceeds the respective prescribed procurement thresholds.*'[562]

This means that the coverage of the CGPL depends on three factors: entities; the character of the funds; and the scope or value of the goods, construction and services. However, in China, SOEs are not normally classified as 'government departments', 'institutions' or 'public organizations'.[563] Therefore, in theory, the CGPL does not cover the procurement activities of SOEs.

Ongoing discussion of this controversial issue

However, whether the procurement activities of SOEs should also be covered under the CGPL has been a controversial issue. For instance, this issue was discussed during the process of promulgating administrative measures in the municipality of Shanghai, which occurred before the process of legislating national government procurement laws. At this time, there were two views on this issue. One insisted that most of the capital that was used by SOEs came from bank loans and funds collected from society, and that fiscal funds only accounted for very small portion; therefore, the argument held that the procurement activities of SOEs should not be covered by the CGPL. The other view was that all activities that use fiscal funds should be covered by the CGPL.[564] In the end, a compromise to solve this issue was chosen—it identified the 'relevant entities' as one kind of subject (or entity) that fell under the coverage of the CGPL, and it did not directly mention the term 'SOE'. However, it did treat SOEs as one type of 'relevant entity' and then 'SOEs' also fell under the coverage. The reasons for this solution involved considering the future risk of opening the government procurement market to international trade, the diversified ownership of enterprises and the vanishing difference between SOEs and privately-owned enterprises in the future; and the desire to fit the needs of the gradual reform of the government procurement system.

Discussion on this issue has been vigorous and ongoing. During the process of legislating the CGPL, there were different arguments about whether the procurement activities of SOEs should

[562] Article 2 of the CGPL
[563] Wang Ping, Zhang Xinglin, Regulating the Procurement of State Enterprises in China: Current Status and Future Policy Considerations, (2013) 8, Frontiers of Law in China, p.5.
[564] 郑云瑞：政府采购制度若干问题的立法研究，http://www.hflib.gov.cn/law/law/falvfagui2/JJF/LWJ/1331.htm

be regulated in cases in which they used fiscal funds. The CGPL generally only regulates procurement activities that use fiscal funds; therefore, most arguments have focused around this part of the SOEs' activities and have not discussed regulating the procurement activities of SOEs that use non-fiscal funds. Finally, SOEs are considered to be market players that should follow market rules to independently operate;[565] thus, the CGPL has not regulated the procurement activities of SOEs.

After China began the procedure of accessing to the WTO GPA, this issue has come up for discussion again. The nature of this discussion is a conflict over the scale of the opening of the government procurement market. The WTO GPA does not have clear rules about what kind of entities should be listed under the offer, and the SOEs of current GPA parties are different from the SOEs of China in terms of their characteristic, management methods and the numbers. To solve this issue against the background of accessing to the GPA is complicated. This issue will be further discussed in Chapter 4 of this dissertation.

2.3.2.2 Does the Chinese Bidding Law cover the procurement activities of SOEs?

The CBL applies to all tendering and bidding activities in China, including the tendering and bidding activities of entities in the public and private sectors. The CBL's coverage depends on conducting the activities of tendering and bidding, rather than on the characteristics of the entities or the sources of funds. However, the CBL also has imposed obligations for some kinds of construction projects that must procure relevant services, important equipment and materials through tendering and bidding activities, if the construction projects involved are "*(i) concerning public interests or public security such as large infrastructure, public utility and etc.; (ii) fully or partially invested by state-owned funds or financed by state-financed funds; or (iii) financed by loans or aid from international organizations or foreign governments*".[566] This kind of coverage has been called 'compulsory' coverage.

Using the built-in mechanisms of Article 3 of the CBL that further define compulsory coverage, the NDRC enacted the Provisions on the Scope and Threshold of Construction Projects for Bid Invitation Subject to Tendering Requirements, which was approved by the State Council.[567]

Infrastructure projects concerning public interests or public security include:[568] *(i) energy projects, such as coal, petrol, natural gas, electricity, new energy, etc.; (ii) transportation projects, such as railways, highways, pipes, waterways, aviation, etc.; (iii) post and telecommunication projects, such as postal service, telecommunication centres, information networks, etc.; (iv) water resources projects, such as flood control, watering, preservation of water and soil, hydroelectric power centre, etc.; (v) city facility projects, such as roads, bridges, subways, tramways, waste*

[565] http://www.mof.gov.cn/zhengwuxinxi/tianbanli/2014lh/2014rd/201602/t20160216_1705177.html
[566] Article 3 of the CBL
[567] the Provisions on the Scope and Threshold of Construction Projects for Bid Invitation Subject to Tendering Requirements, approved by the State Council on April 4 of 2000 and enacted by the NDRC on May 1 of 2000.
[568] Article 2 of the Provisions on the Scope and Threshold of Construction Projects for Bid Invitation Subject to Tendering Requirements.

control, public parking, etc.; (vi) environmental protection projects and (vii) other infrastructure projects.

Public utility projects concerning public interests or public security include:[569] *(i) municipal infrastructure projects, such as supply of water, electricity, gas, heat, etc.; (ii) projects involving technology, education and culture; (iii) sports and tourism projects; (iv) projects involving public health and social benefits; (v) commercial housing projects*[570] *and (vi) other public utility projects.*

Projects invested in by state-owned funds include:[571] *(i) projects financed by budgetary funds; (ii) projects using specially designated construction funds administrated by the Treasury; and (iii)* ***projects using state enterprises' or institutions' own funds, and over which the contributor of the state asset has de facto control.***

Projects financed by state-financed funds include:[572] *(1) projects using funds raised by the state by issuing treasury bonds; (ii) projects using funds raised by loans taken or guaranteed by the state; (iii) projects using state policy loans; (iv) projects using loans taken by the investing party authorized by the state and (v) projects using loans taken by the procuring entity but specially approved by the state.*

The threshold of compulsory coverage is two million RMB for a single construction contract, one million RMB for a single procurement contract of important equipment and materials, and a half million RMB for a single related service contract. If the overall investment of the project exceeds 30 million RMB, all contracts involved should be conducted by tendering, regardless of their individual value.[573]

Therefore, the procurement activities of SOEs are covered by the CBL in the following two cases. (1) The SOEs use the tendering and bidding procedures in their procurement activities. In this case, it the purpose of the procurement does not matter if it contributes to an infrastructure project or is intended for internal consumption. (2) If the character of the projects for which the SOEs are procuring meets one or more of the conditions listed under compulsory coverage, the procurement activities should apply the CBL.

In the second case, whether the procurement activities of SOEs should be regulated by the CBL depends on the following factors: (1) whether the character of the projects concerns

[569] Article 3 of the Provisions on the Scope and Threshold of Construction Projects for Bid Invitation Subject to Tendering Requirements.

[570] Considering the market competition situation in the commercial housing projects fields, in March of 2014, the NDRC and the Legislative Affairs Office of the State Council has submitted one proposal for moving the 'commercial housing projects' from the coverage of compulsory bidding, and suggested to limit to affordable housing projects. However, until the end December of 2016, the proposal still has not been approved. See: http://www.chinalaw.gov.cn/article/cazjgg/201403/20140300395411.shtml

[571] Article 4 of the Provisions on the Scope and Threshold of Construction Projects for Bid Invitation Subject to Tendering Requirements.

[572] Article 5 of the Provisions on the Scope and Threshold of Construction Projects for Bid Invitation Subject to Tendering Requirements.

[573] Article 7 of the Provisions on the Scope and Threshold of Construction Projects for Bid Invitation Subject to Tendering Requirements.

public interests or public security; (2) whether the funds for the project involve state-owned funds or state-financed funds. The first factor is relevant to the characteristic of the activities of the SOEs. When SOEs pursue activities concerning public interests or public security—activities in infrastructure and public utilities, for example—the relevant procurements should comply with the CBL. In this case, it is possible that private companies must also comply with the rules of the CBL. The second factor is relevant to the character of the funds, which are classified into two kinds—state-owned funds and state-financed funds. The procurement activities of SOEs that use their own funds and *de facto* have the control over the project should comply with the. This does not mean that all procurement activities should be regulated by the CBL, and it also does not mean that all projects in which SOEs have invested funds should be regulated by the CBL. If SOEs only invest a minority portion of the total value of the project, and they do not have control over the projects, then the projects should not be regulated by the CBL.[574] If SOEs use other state-owned funds or state-financed funds, then the project should be regulated by CBL. However, it is not clear that to what extent a project financed by loans from commercial banks taken by a SOE is covered. Article 5 of the Provisions suggests that only those loans 'authorized' or 'specially approved' by the government will count as 'state-financed funds'. However, such authorization or approval is arguably merely an internal administrative procedure and not an objective criterion necessary to define the scope of coverage of a legal instrument.[575]

Therefore, some of the procurement activities of SOEs are regulated by the CBL. However, the reason for this regulation is not that the SOEs are under the control of the government, but rather is related to the characteristics of the procurement activities that concern the public interest or public security, or to the characteristics of the funds used for the procurement.

2.3.3 Relevant normative rules about the procurement activities of SOEs

The framework of public procurement regulation includes some rules that are relevant to the procurement activities of SOEs, or of some kinds of SOEs.

2.3.3.1 Central level

Provisional Regulation on the Administration of the Procurement of Supplies by State-owned Industrial Enterprises

In May of 1999, before the enactment of the CBL and the CGPL, the State Economic and Trade Commission (SETC)[576], which was the supervisor of non-financial SOEs at this time, enacted the **Provisional Regulation on the Administration of the Procurement of Supplies by State-owned Industrial Enterprises**.[577]

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[574] Except, the projects voluntarily employ tendering and bidding for procurement.

[575] Wang Ping, Zhang Xinglin, Regulating the Procurement of State Enterprises in China: Current Status and Future Policy Considerations, (2013) 8, Frontiers of Law in China, p.8.

[576] During the restructuring of the departments of State Council in 2003, the SETC was abolished, and its responsibility as contributor of SOEs has been entrusted to a new administrative agency named State-owned Assets Supervision and Administration Commission (SASAC).

[577] The provisional Regulation on the Administration of Procurement of Supplies by State-owned Industrial

The objective of this regulation was to prevent the loss of state assets. It covers the procurement activities of state-owned industrial enterprises and does not include other kinds of SOEs, like state-owned commercial enterprises. In principle, it also applies to state enterprises operating in other sectors such as 'transportation, construction, exploration, commerce, foreign trade, post and telecommunication, water resources, technology, etc.'[578] It only covers the activities of procuring goods, not including procuring services and construction. The majority of the provisions focus on the SOEs' internal decision-making processes, prices and quality controls. It contains no provisions as to the publication of contract opportunities, or the solicitation, submission and assessment of tenders.

Several Rules on Strengthening the Administration of the Centralized Procurement of Financial State Owned Enterprises

At the central government level, financial SOEs fall under the supervision of the MOF. In 2001, to strengthen the administration of expenditures on the procurement of Financial State Owned Enterprises, and to improve the effectiveness of funds used for procurement,[579] the MOF enacted several rules. These rules define Financial State Owned Enterprises as '*commercial banks, policy banks, insurance companies, financial assets administration companies, stock broker companies, investment trust companies and other financial enterprises that are wholly owned by the State or the controlling shareholder is the state*.'[580] This regulation was enacted after the implementation of the CBL and before the enactment of the CGPL.

The rules involved only regulate centralized procurement, which means the 'purchase or rental of a large amount of supplies, works or services'. Specifically, the several rules provide thresholds for contracts and define the scope of contracts; this constitutes the coverage of compulsorily centralized procurement.

The several rules only provided general requirements for enterprises. Most provisions are related to the obligation of setting up assessment committees for centralized procurement and describe the duties of these committees. The assessment committee has been given almost all-important powers, such as deciding the items, methodologies, timeframe, procedure, agency and the winners of centralized procurement activities.[581] In principle, centralized procurement should be conducted according to open or selective tendering and bidding procedures; the several rules do not provide any rules about how to procure.

On February 5 of 2018, the MOF has modified the rules above and enacted Temporary Rules on the Supervision of the Centralized Procurement of Financial SOEs (referred as 'The Temporary Rules')[582], which is in force from March 1 of 2018. The backgrounds of this modification are the

Enterprises, promulgated on 1 April 1999 and effective as of 1 May 1999.
[578] Article 27 of the Provisions.
[579] Article 1
[580] Article 2
[581] Article 7
[582] MOF, Temporary Rules on the Supervision of the Centralized Procurement of Financial SOEs, February 5 of 2018. See: http://www.mof.gov.cn/pub/jinrongsi/zhengwuxinxi/zhengcefabu/201802/t20180208_2810447.html

following aspects: (a) the rules on the centralized procurement have been improved in the past years, such as the modernization of the CBL and the CGPL; (b) the reforms of financial SOEs are stably progressing, and almost all financial SOEs have established modern enterprise system; (c) as the increasing of price level and the diverse needs of the SOEs, the scale and the degree of complication of the centralized procurement are largely increasing.[583]

Comparatively, the main difference of the Temporary Rules is that the requirements of approval and record by the relevant financial departments are moved out and more requirements on disclosure information are added. It means the supervision of the centralized procurement of SOEs is more transparency and the social or public supervision is enhanced, while the supervision by the government is reduced.

The Provisional Measures on the Supervision and Administration of domestic and international Investments of Central–government-owned Enterprises

In 2003, during the wave of reform of the State Council departments, the SASAC was entrusted with the task of representing the contributor's interest of the State in non-financial central-government-owned enterprises.

In 2006, to fulfil the responsibilities of contributors according to the law, regulating the domestic investment activities of central-government-owned enterprises, improving the scientific and democratic decision-making of central-government-owned enterprises on investment and effectively preventing the risks of investment,[584] the SASAC enacted the *Temporary Provisional Measures on the Supervision and Administration of Investments of central–government-owned Enterprises,*[585] *which was abolished on January 7 of 2017 by the formal provisional measures.*[586] The term 'investment' in this regulation refers to investment in fixed assets as well as equity investments.[587] 'Investment in fixed assets' includes the procurement of fixed assets, and therefore the term 'investment' includes procurement activities. The main provisions of the ministerial order are focused on the supervisory power of the SASAC while preparing the investment, the process of the investment and imposing the relevant obligations on the SOEs. No rule is provided that is relevant to how enterprises should conduct their procurement activities.

In 2012, the SASAC enacted Temporary Provisional Measures on the Supervision and Administration of foreign Investments in Central–government-owned Enterprises,[588] which has been abolished by the Formal Provisional Measures of 7 January 2017.[589] To regulate the foreign

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[583] 财政部金融司：《国有金融企业集中采购管理规定》解读， February 12 of 2018 , see: http://www.mof.gov.cn/mofhome/jinrongsi/zhengwuxinxi/zhengcejiedu/201802/t20180208_2810449.html

[584] Article 1 of Temporary Provisional Measures on the Supervision and Administration of Investments of central–government-owned Enterprises

[585] 《中央企业投资监督暂行管理办法》，SASAC Ministerial Order 16, effective as of 1 July 2006.

[586] 《中央企业投资监督管理办法》，SASAC Ministerial Order 34, enacted and effective on 7 January of 2017.

[587] Article 2 of Provisional Measures on the Supervision and Administration of Investments of Central –government-owned Enterprise, SASAC Ministerial Order 34, enacted and effective on 7 January of 2017.

[588] 《中央企业境外投资监督管理暂行办法,国资委令第 28 号，2012 年 3 月 18 日公布，5 月 1 日起施行。

[589] 《中央企业境外投资监督管理办法》，SASAC Ministerial Order 35, enacted and effective on 7 January of 2017.

investment of these SOEs, including purchasing fixed assets, the main provisions also focus on establishing a supervisory system on foreign investment. These provisions also do not contain rules about how to procure.

General rules on State-owned Assets of SOEs

In May of 2003, the State Council issued an administrative regulation, called the Interim Measures for the Supervision and Administration of State-owned Assets of the Enterprises.[590] In October of 2008, the Law of the People's Republic of China on the State-owned Assets of Enterprises[591] was issued as a basic law in the area of state-owned asset supervision. These laws and regulations, along with other administrative regulations and normative documents at the central and local levels, have formed the legal system for state-owned asset supervision and administration.

These rules provide for such basic issues as the institution performing the duties of the contributor in enterprises funded by the state, a state-owned asset administration system, selection and evaluation of state-invested enterprises and their managers, major issues relating to the rights and interests of the contributor of state-owned assets, state-owned capital operating budgets and state-owned asset supervision.

2.3.3.2 Sub-central level

Generally, the State Council and local governments expect the state to perform certain responsibilities as contributors to the SOEs.[592] For large enterprises that bear responsibilities for the national economic lifeline and state security, and for enterprises involved in fields such as important infrastructure and natural resources, the State Council should perform certain functions as a contributor on behalf of the state. This kind of SOE is usually called a 'central SOE'. For other SOEs, usually called 'local SOEs', local governments shall perform certain functions as contributors on behalf of the state.

The State-owned Assets Supervision and Administration Commission (SASAC),[593] as the state-owned asset supervisory and administrative body under the State Council, according to authorization from the State Council, performs certain functions as contributors to central SOEs. According to the provisions of the State Council, local governments set up the state-owned asset supervisory and administrative body at their level and perform certain functions as contributors. Therefore, local governments have the right to supervise and administrate the local SOEs at their level.

Until now, few local governments have issued legal rules on regulating the procurement

[590] Interim Measures for the Supervision and Administration of State-owned Assets of the Enterprises, State Council order No. 378, May 27 of 2003. It has been revised by Decision of State Council on Abolishing and Amending Some Administrative Regulations, in which the article 27 has been abolished.
[591] Law of People's Republic of China on the State-owned Assets of Enterprises, Order No.5 of the President of the People's Republic of China, October 28 of 2008.
[592] Article 4 of the Law on the State-owned Assets of Enterprise
[593] http://en.sasac.gov.cn/

activities of SOES.[594] The municipality of WenZhou is one that has done so; it issued the Administrative measures of the Municipality of WenZhou on the procurement of SOEs[595] to regulate the procurement activities of local SOEs. Compared with the legal rules mentioned above and issued by ministries, the Administrative Measures are the only rules that regulate the procurement activities of SOEs. The legal basis cited in the Administrative Measures includes the Law on the State-owned Assets of Enterprises, the CBL, and the CGPL.[596]

The purposes of the Administrative Measures are 'to regulate the procurement activities of SOEs, to strengthen the supervision and administration of the assets of SOEs, to save the funds of SOEs, to prevent the loss of the state-owned assets, to prevent the corruption from the original source'[597]. The Administrative Measures apply to the goods and services procurement activities of all SOEs owned by the municipality of Wenzhou. The term 'the procurement of SOEs' in these Administrative Measures refers to the activities in which SOEs use state-owned funds to acquire goods and services that are in the procurement catalogues or go above the threshold by means of contracts. The term 'goods' only refers to 'the items that become fixed assets'. Additionally, the construction procurement activities of SOEs are not covered by these Administrative Measures. If the construction procurement activities of the SOEs require compulsory tender, they should follow the relevant rules, including the CBL.

The Administrative Measures provide several rules that are similar to the rules in the CGPL. They provide (for example) that the procurement activities should comply with the principles of openness, fairness, competitiveness, merit(择优) and integrity（诚信）. The first three principles are clearly stated by the CGPL, and the other principles are also reflected in the provisions of the CGPL. The Measures provide the principles of procurement; the transparency requirement on procurement notices and procurement documents; the rules about conflicts of interest; the allocation of responsibilities among administrative agencies on supervising and administrating the procurement activities of SOEs; the qualifications required; the methodologies and procedures of the procurement, such as open procedures, selective procedures, competitive negotiation, single source, etc.; and the remedy procedures, such as complaint and challenge.

2.3.3.3 Internal procurement rules

In recent years, SOE groups increasingly have adopted internal procurement rules.

The coverage of these internal procurement rules may be classified into the following types. (1) **Those intended to implement the CBL and relevant provisions on bidding and tendering of construction.** For instance, China Mobile Communications Corporation has issued a document on managing the tendering and bidding activities of communication construction.[598] (2) **Those**

[594] In August of 2016, 江苏省苏州市苏州工业园区出台了《苏州工业园区国有企业采购管理办法（试行）》, http://www.lianshi.gov.cn/news/xinwensudi/2016-08-23/10559.html
[595] 《温州市国有企业采购管理办法（试行）》温州市人民政府，3 August of 2012.
[596] Article 1 of the Administrative Measures
[597] Article 1 of the Administrative Measures
[598] 《中国移动通信集团公司招标投标管理办法》，中移采购[2015]146 号。

intended to provide rules for the procurement activities that do not fall under the coverage of the CBL. (a) Some SOE groups have provided rules **for procuring goods—**for example**,** China National Petroleum Corporation (CNPC) has issued internal procurement rules for procuring the raw materials, supplementary materials, equipment, accessories and tools required during the processes of production, construction and management.[599] Some rules are only applicable to important equipment and general materials (重要设备及大宗通用物资), such as the internal procurement rules of China Huadian Corporation (CHD) .[600] (b) Some internal procurement rules have provided unified rules f**or procuring goods, services and constructions.** For instance, China Da Tang Corporation (CDTC) has issued an internal document on managing procurement activities, which includes procuring goods, constructions and services.[601]

The specific rules included in these internal procurement systems show the 'shadow' of the CGPL and the CBL. In some cases, they are just a 'copy' of some of the provisions in the CGPL and CBL. First, they address using a centralized procurement methodology. As centralized procurement could reduce the costs of SOEs and lead to increased profits, it has been comprehensively used by large SOEs,[602] including establishing electronically uniform operational platforms. Second, they provide both tendering and bidding procedures and non-tendering and bidding procedures. The CBL has only adopted tendering and bidding procedures. However, some SOEs [603] have learned non-tendering and bidding procedures from the CGPL, including competitive negotiation, single source procurement, quotations, etc. Third, they provide procedures for procuring in emergency situations. Emergency procurement has been discussed in the CGPL, and it has also been employed by several SOEs.[604] Fourth, they employ the same evaluation criteria as in the CGPL and the CBL.. The lowest price, the comprehensive assessment and ratio of quality and price, required under the CGPL and the CBL, are also required by several internal procurement rules.[605]

Some particular rules are included in these internal procurement rules. The first deals with setting up a specific system for managing suppliers. Several SOEs have established their own systems for managing suppliers. These are different from the 'the list of suppliers' under the CGPL, which is only the list of suppliers qualified to meet the general conditions set by the procurers. Some systems for managing suppliers go further. For instance, China Da Tang Corporation (CDTC) requires suppliers and consumers to mutually assess each other after the performance of the contract, measuring factors like quality, efficiency and level of service, etc.[606] **The second deals with dividing the catalogue of centralized procurement into three types,**

[599] 《中国石油天然气集团公司物资采购管理办法》，第三条
[600] 《中国华电集团公司物资集团化采购管理办法》，第三条
[601] 《中国大唐集团公司采购管理规定（试行）》，第三条
[602] For instance, China Huadian Corporation and China Da Tang Corporation (CDTC).
[603] China Da Tang Corporation (CDTC) even has issued specific rules for implementing non-tendering and bidding procedures.
[604] For instance, 《中国大唐集团公司采购管理规定（试行）》第十章
[605] For instance, Southern Airlines 《中国南方航空股份有限公司采购管理实施办法（试行）》，article 52 to article 57, the version of July of 2015.
[606] 《中国大唐集团公司供应商管理办法（试行）》第二十一条

and each type is organized by a different level of the company. For instance, the China Da Tang Corporation (CDTC)'s catalogue states that items of the first type should be procured by the corporation itself; the second type of items should be procured by the divisions and the third type of item should be procured by the individual corporation. This kind of arrangement could consolidate purchasing power and reduce the cost of the procurement; it also considers the efficiency and flexibility requirements of some items at the basic level. **The third deals with providing that the products or services that are the subject matter of the procurement contract are also produced or provided by other member corporations in the Group, and thus they may be directly procured from these member corporations.**[607] The consideration behind this rule may be that member corporations in the same Group may directly or indirectly hold shares in other member corporations.

However, there are some shortcomings in these internal procurement rules. First, there is a lack of transparency. Generally, the internal public rules lack transparency in the following respects: (1) internal procurement rules are normally not public. For instance, according to information collected from interviews with relevant SOE staff, many SOEs have issued internal procurement rules. However, the number of internal procurement rules that can be found on the internet is limited. (2) The notice of procurement, the procurement contract and information about modifications of the contract are not public. As there are no mandatory requirements for the publication of this information, few SOEs choose to publicize them. Sometimes, to attract more competition, they may publicize a notice of the contract. However, it is difficult for them to publicize the procurement contract or modification information about the procurement contract.

Second, a universal system for procurement rules is lacking. Basing on the internal procurement rules that are publicized online, we find that almost every SOE has its own understanding of the internal procurement rules. The coverage, applicable methodologies and procedures on procurement, procedures and criteria for assessing the contract and the rules regarding the performance of the contract are different from SOE to SOE, and in some cases, many of these rules are missing.

Third, the internal procurement rules may discriminate among the suppliers. If the binding laws do not provide obligations, the internal procurement rules of SOEs may discriminate among different kinds of suppliers. Not all procurement activities of SOEs have been regulated by the CBL or other rules; thus, for procurements that are not covered, SOEs may discriminate among suppliers and choose companies in their system or in their local regions.

2.3.4 The role of SOEs under Chinese PPP rules as buyers

2.3.4.1 Do Chinese PPP rules provide the possibility for SOEs to join a PPP as a public partner?

General rules in the normative documents on PPPs

[607] For instance, South Airlines 《中国南方航空股份有限公司采购管理实施办法（试行）》, article 43 to 45.

The definition and scope of 'public partner' is not a regulatory issue that has been treated by normative documents on PPPs. Generally, the term 'government' has been employed to refer to the 'public partner' of the PPP; however, there is no further provision for interpreting the coverage of entities that have been covered under the term 'government'. For instance, the Administrative Measures on Concessions of Infrastructure and Public Utilities only provide that the competent authorities in governments above the county level, or authorities authorized by the government, may initiate concession projects.[608] Governments above the county level should authorize the relevant authorities or bodies as implementing agencies for taking the responsibilities of implementing the concessions; meanwhile, the authorized scope should be specified.[609]

From the wording of the normative documents, two kinds of roles have been recognized for the 'government'. The government has the responsibility to provide good quality public goods and services with reasonable prices to the public; also, the government as the buyer procures public goods and services from private partners. **However, whether SOEs may play the role of public partners in PPPs has not been mentioned clearly. Given that certain SOEs in China assume the responsibility of providing public goods or services, in theory they also have the possibility of becoming the public partner in a PPP.**

Typical arrangements in practice

There is one kind of typical arrangement in the practice of IPPPs. The municipal government authorizes one competent authority, one administrative agency of the municipality, as the implementing agency responsible for the procuring function. Meanwhile, the municipal government also authorizes one of the municipal government owned enterprises (herein after 'affiliated SOE') to represent itself in the mixed entity as the public shareholder. Therefore, SOEs may also join the PPP as one 'agent' of the municipal government, which is the 'principal'.

However, there is one special issue that would influence the neutral competition between SOEs and private companies in the IPPP model. The affiliated SOE obtains the direct opportunity to become the shareholder of a mixed entity and earns income from the PPP contract. This could give an unreasonable advantage to the affiliated SOE compared to other competitors in the market. As this issue is relevant to the regulation of in-house provision, the details will be discussed in Section 3.2.1 and Section 3.3 of Chapter 3.

2.3.4.2 How do Chinese PPP rules treat the procurement activities of mixed entities under IPPP?

Generally, the CGPL is silent on the procurement activities of the contractor.[610] However, if the procurement activities of the contractor involve construction and fall under the scope of

[608] Article 9(1) of the Administrative Measures on Concessions of Infrastructure and Public Utilities
[609] Article 14 of the Administrative Measures on Concessions of Infrastructure and Public Utilities
[610] But in the practice, as procurers need to pursue horizontal purposes as the requirements under the CGPL, they usually advertise in the procurement documents that the PPP projects should follow these requirements. But how it has been implemented and whether the procurement activities of SPVs should also or already comply with these requirements need further research.

compulsory tender,[611] they should be regulated by the CBL, and they should award construction contracts through competitive procedures. This is the result of pursuing the public interest and ensuring the quality of the construction.[612]

This logic also applies to a PPP contractor. Under the IPPP model, if the mixed entity involves public ownership, whether majority or minority, the procurement activities of the mixed entity need not follow the rules of the CGPL. Because, as mentioned above, the procurement activities of the contractors are not regulated by the CGPL.

Only when the mixed entity awards a construction contract must it follow the rules of the CBL. However, the Regulation on the Implementation of China Tendering and Bidding Law[613] provided a relevant exception, allowing that the project can be legally constructed, produced or provided by the concession project investor selected through the bidding process.[614] This means that if the concessionaires could conduct the construction by themselves, they do not need to follow the bidding procedures for awarding the construction contracts. However, it is not clear whether the affiliated undertakings and the members of the joint bidder should be treated as the concession project investor. Further, it is also unclear whether this exception applies to other kinds of PPP projects.

The current specific normative documents on PPPs also provide no rules on the procurement activities of the mixed entity.

2.3.5 Issues that have arisen in the procurement activities of SOEs in practice

2.3.5.1 Issues that have been exposed by the audit reports of the NAO

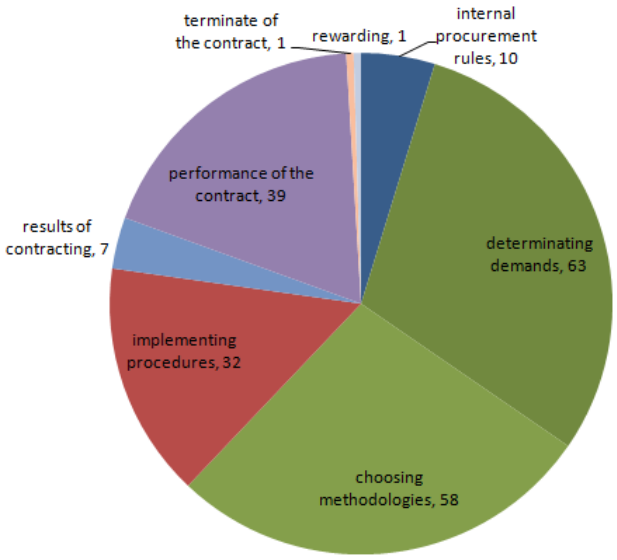
The National Audit Office of China (NAO) has chosen several central SOEs and monitored their recent financial revenue and expenditure situations. From these audit reports, we find some issues relevant to the procurement activities of SOEs in practice. To collect the most recent information, this dissertation surveyed audit reports from 2013 to 2016 for analysis.

During these 4 years, the NAO published 45 audit reports covering 45 central SOEs[615] that play important roles in energy, transportation, telecommunication, etc. As each central SOE may have several levels of hundreds of corporations,[616] the NAO usually chooses only the headquarters and the second level corporations for auditing. 44 of the 45 central SOEs examined displayed some illegal or unreasonable issues in their procuring activities. Approximately 221 issues pointed out in the audit reports may be classified into eight aspects, as shown below (Graph 9: Issues in different aspects of the procurement activities of central SOEs): (1) basic internal procurement rules; (2) determining the demand of the procurement phase; (3) choosing the procurement methodologies; (4) implementing procurement procedures phases; (5) the results of the procurement procedures/contracting; (6) the performance of the contract; (7) the terminating of the contract and

[611] Article 3 of CTBL
[612] Article 1 of CTBL
[613] The Regulation on the Implementation of the Bidding and Tendering Law of the People's Republic of China, as adopted at the 183rd executive meeting of the State Council on November 30, 2011, was hereby issued, and came into force on February 1, 2012.
[614] Article 9(3) of the regulation on the Implementation of China Tendering and Bidding Law.
[615] There are 10 corporation groups in 2016, 14 in 2015, 11 in 2014 and 10 in 2013.
[616] For instance, in 2016 the NAO published the result of auditing financial revenue and expenditure situation of the China Petroleum and Chemical Corporation (Sinopec). Until the end of 2014, Sinopec has 550 whole-owned or controlled subsidiaries, and has participated shares of another 819 corporations.

(8) rewarding the contract. The contract value involved in these 221 issues is around 308.289 billion RMB.[617]

Graph 9: Issues in different aspects of the procurement activities of central SOEs



Issues on the basic internal procurement rules

According to the audit reports, not all central SOEs have established internal procurement rules. In some cases, even though the central SOEs have established internal procurement rules, they have not complied with the compulsory requirements under the law, or these requirements have not been well implemented in practice. For instance, the threshold for applying public tendering procedures is higher than the requirements of the CBL.

Issues related to the phase of determining demand

Lacking rules that monitor the determination of demands for the procurement has proven to be a serious issue for SOEs. **First, procuring luxury goods and services, as well as buildings, is a widespread problem for the central SOEs.** The NAO found 40 relevant issues involving 618.94 million RMB; these issues were related to procuring luxury cars, wine, golf services and offices. **Second, procuring useless or excessive products, services or goods.** For instance, one SOE continued to procure the same materials for four years and the inventory was never used. **Third, procuring large projects without a budget plan.** For instance, one SOE spent 125 million RMB procuring one building for offices without having any budget plan. **Fourth, hiding demand to avoid procurement.** For instance, one SOE sold services to one supplier at a special discount and set up a cooperation fund under the management of the supplier with this special savings; then, the SOE refunded the foreign training and other expenditures paid for by this cooperation fund. **Fifth,**

[617] Some issues just mentioned the general aspect, for instance lacking the internal procurement rules, and didn't pointed out the exact contract values.

fictitious procurement contracts used to lend funds to other corporations or for other purposes. For instance, one SOE signed a lease contract with one of its subsidiaries and paid rent to this subsidiary when there was no actual lease, for the purpose of providing funds to the subsidiary to complete the acquisition of another corporation. **Sixth, not describing technical demands properly or providing no description of the demands whatsoever.** For instance, one SOE did not describe the technical demands of the procurement properly, which led to the import of goods which did not achieve the quality requirements prescribed by the law. Also, one SOE used agency services from foreign corporations without any description of the demand.

Issues related to the methodologies of procuring

In choosing methodologies for procuring, SOEs prefer to limit the competition, and they therefore use non-public procedures or directly awarding contracts without soliciting any competition. For instance, the NAO audit reports mentioned 44 times that SOEs did not use bidding procedures for procurement; these SOEs should have implemented bidding procedures according to the CBL rules or to their own internal procurement rules. This aspect of procurement involved a total contract value of approximately 139.776 billion RMB. Inviting tendering procedures or competitive negotiation procedures were implemented when an open tendering procedure was required.

The NAO also found out that some SOEs directly awarded contracts, valued at approximately 23.208 billion RMB, to suppliers without any competition. Specifically, some of the contracts were directly awarded to related companies, including private companies that were part of the SOEs and were separated during the SOE reform, affiliated companies belonging to the SOE group, companies in which the employees of the SOEs held shares and companies controlled by the relatives of senior managers, including companies chosen by staff without following any procedure.

Issues related to the implementing of the procedures

According to the NAO reports, several other issues were also exposed. **First, a lack of effective qualification procedures.** Several contracts were awarded to suppliers or contractors without qualifications or with expired qualifications. **Second, not strictly following the procedure of open tendering.** In some cases, SOEs began the open procedure after already signing a contract with the suppliers or contractors. In other cases, SOEs awarded contracts to all tenderers. In still other cases, the assessment committees did not comply with the rules or did not follow the results of the assessment to choose the winner. **Third, some SOEs were found to give preferential treatment to specific suppliers.** For instance, one SOE recommended one contractor to the assessment committee, and some SOEs intervened in the results of the assessment or directly changed the assessment results. **Fourth, bid rigging occurred** as a result of loose management of the procuring activities.

Issues related to the results of contracting

High prices were found to be a serious issue in terms of the results of contracting. For instance, one SOE procured six kinds of material at a cost of 4.73 million RMB; this cost was 2.06 million more than the cost calculated according to the centralized procurement price. One SOE procured materials from the agencies of the producer, which increased the cost by 27.29 million RMB. One SOE leased computers at a rental price of 105% of the original price of the computers.

Additionally, some interesting procurements have been discovered by the NAO. For instance, one SOE awarded an equipment supervision contract to a supplier for supervising the design and production procedure of the equipment that would be used in the construction project; then, that SOE also awarded the design contract for the same equipment to the same supplier. This constitutes a conflict of interest, as these two contracts should not have been awarded to the same supplier. Even worse, one SOE transferred a large payment to a supplier when the fee had not yet been determined.

Issues related to the phase of contract performance

Illegally transferring contracts and dividing contracts was found in the procuring activities of the audited SOEs. For instance, one contractor transferred a contract from the SOE to individuals, which is forbidden by the CBL; through several such transfers, the contract was ultimately transferred to a company without qualifications without the permission of the procurers. This divided the construction contract among several sub-contractors appointed by the procurers, allowing the procurer to illegally divide the main object of the construction contract.

For construction contracts, in some cases, the final total payments were found to be much higher than the budgets, and the construction periods lagged. The NAO found 15 budget (over budget) issues involving 15.075.03 billion RMB; in once case, a construction project lagged more than 6 years.

For supply or service contracts, payments were found that exceeded the price written in the contract, and it also found instances in which payment was provided without a contract. It also found instances in which the methodology of payment was altered without being noted in the contract. For instance, a subsidiary of one airline corporation paid an additional 47,700 RMB to its supplier for luggage delivery services. The same subsidiary paid around 270,000 RMB to one service supplier without even awarding a contract. One SOE changed the methodology from finance lease to full payment with its own funds when procuring an airplane, which cost 270 million RMB.

Issues related to the termination of contracts

For one highway project, the SOE as procurer awarded a new contract for the same construction and did not terminate the previous contract with another contractor. Therefore, it paid 5.76 million RMB to compensate for the loss of the previous contractor.

Issues related to rewarding the contracts

In some cases, the SOE as procurer directly extended a contract that had expired, or directly awarded new contracts to previous suppliers without soliciting any competition.

2.3.5.2 Facing the serious challenges of corruption

The issues exposed by examining the financial revenues and expenditures of SOEs may provide some clues for discovering the corruption behind the procurement activities of SOEs. Indeed, corruption is one of the most serious issues facing SOEs in China, and procurement is the worst area of corruption. According to the statistics, from 2014 to May 2015, 115 senior managers of SOEs were reported on the website of the Central Commission of Discipline Inspection (CCDI)[618] for corruption issues. Among these people, positions relative to procurement have a higher risk of corruption; for instance, the 'top leaders' (including Party secretary, Chairman of the director's board, and General manager) of SOEs have the most influence over procurement decisions, such as those figures involved in the corruption scandal discovered in the China National Petroleum Corporation (CNPC).[619] Additionally, according to a report from Guangdong province, 25% of all corruption cases in SOEs in 2015 were connected to the 'top leaders' of the SOEs. 26 of 111 illegal issues found in SOEs in Guangdong province in 2015 were related to construction procurement activities.[620]

Further, a recent report[621] on crime in SOEs provides more details as to how goods, services and small construction procurements are at high risk for corruption. On the basis of these cases, it has been found out that during the process of procuring of goods or services, suppliers gave bribes to the staff of SOEs to win contracts; staff members of SOEs quoted a higher contract price to the suppliers and suppliers gave certain percentages of the price back to the staff; or the leaders of the SOEs outsourced some products or services to a third party in exchange for bribes, even in cases in which the SOEs could provide these products or services themselves. During the process of procuring construction, one manager of an SOE informed a corporation about the tendering information of a construction contract one month before the information was made public and thus helped that corporation prepare its bidding documents. During the performance of a construction contract, an SOE staff member modified the amount of the work to be completed and increased the costs of the construction; after verifying the construction, this person controlled the rest of the payment and the timing of the payment and then requested a bribe from the contractor. Smaller construction contracts that are directly awarded to suppliers are especially susceptible to bribery and corruption.

2.3.6 Regulation under the new round of reforms of SOEs

After a policy of actively developing the mixed ownership economy and promoting SOEs to

[618] http://www.ccdi.gov.cn/

[619] https://cn.nytimes.com/china/20140703/cc03wangqiang/

[620] http://roll.sohu.com/20160420/n445054791.shtml and http://www.gdgz.gov.cn/articleContent/GZYW_ZYXW/14252

[621] It is a research on duty crime cases in SOEs which happened in one district of one city. From January 2012 to 12 of December, there were 20 duty crime cases in SOEs have been judged in this district, involving more than 30 million RMB (around 4 million EURO). http://news.xinhuanet.com/fortune/2016-01/12/c_1117747881.htm

improve the modern enterprise system was decided by the Communist Party of China in November 2013, [622] local governments and central governments have promulgated detailed measures for implementing the reforms. Public procurement, including government procurement of public services, concessions and PPPs, are included in an approach for improving the 'modern system for SOEs'[623] and developing mixed ownership in some fields.

Measures to improve the 'modern enterprise system'

To improve the 'modern enterprise system', these measures focus on how to monitor the activities of SOEs through internal and external mechanisms. For instance, Henan province[624] has required SOEs to establish internal mechanisms for procurement and to enhance their 'discipline inspection supervision' (纪检监督)[625] and patrol supervision (巡视监督)[626] to improve external supervision of corruption. For instance, Shandong province enhanced supervision at different levels: (1) internal supervision of the process of tendering; (2) carrying out an employee review system, which encouraging employees to advocate reasonable comments about the processes and results of tendering and (3) establishing normalized monitor mechanisms. Every year, several SOEs will be chosen for auditing to check whether their tendering prices are obviously higher than the fair market price.[627]

Additionally, some local governments[628] require SOEs to comprehensively implement open tendering systems in their procurement of construction, goods and services. This will expand the applicable coverage of the CBL to all the procurement activities of SOEs.

Measures to develop mixed ownership in given areas

To develop mixed ownership, the State Council has decided that in some fields, non-SOEs may join the marketplace through concessions, government procurement and PPPs. (1) **Implementing State wholly-owned or majority-owned enterprises** in the fields of important communications infrastructure, the hubs of transportation infrastructure, controlling hubs for water conservancy, hydropower, and avionics in major river basins, inter-basin water transfer project and others areas. This **allows non-SOEs that meet certain conditions to join the construction and operational activities of these fields through concessions and government purchases of public**

[622] The Decision on Major Issues Concerning Comprehensively Deepening Reforms was adopted at the close of the Third Plenary Session of the 18th CPC Central Committee on 12 December of 2013.
[623] Establishing 'modern system' for SOEs has been put forward at the third plenary session of the 14th CPC Central Committee, for promoting the SOEs with clear property rights, clear powers and responsibilities between the government and SOEs, separation between the government and SOEs, scientific management. It has been gradually improved in the following years through strategic reorganization of SOEs, new management system on state-owned assets, reforming SOEs into the direction of company system and shareholding system.
[624] http://www.hnrdia.com/sitegroup/kftzglzx/html/40288085539d9f7b0153a18b75a300ef/b447b8f25b84475fa5a32e14a996eac8.html[2016/8/23 20:45:44]
[625] Discipline inspection supervision emphasizes the supervision from the discipline committee of the Party according to the disciplines and rules of the Party.
[626] Patrol supervision emphasizes the supervision from the government.
[627] 省委办公厅省政府办公厅关于深化省属国有企业改革几项重点工作的实施意见, 2015 年 3 月 6 日发布，http://www.shandong.gov.cn/art/2015/3/11/art_285_6967.html[2016/8/23 20:50:41]
[628] For instance Shandong province.

services.[629](2) In the fields of nuclear power, major public technology platforms, basic data collection and utilization fields such as meteorology and hydrology mapping, **state wholly-owned enterprises or absolutely-controlled enterprises should be implemented, while supporting non-SOEs should be allowed to join through investing as a shareholder in the SOEs and participating in concessions or public procurements**.[630] (3) In the fields of national defence and other special industries, the core military capability fields that engage in the research and production of strategic weapons and equipment, those involving national strategy and security, and relating to the State core secrets, **State wholly-owned enterprises or absolutely-controlled enterprises should be implemented.** For other military fields, market access by classification should gradually be opened, competitive procurement institutions and mechanisms should be established, and non-SOEs should be encouraged to participate in the research and production of weapons and equipment and the provision of maintenance services, and they should be allowed to join the competitive procurement as suppliers.[631]

2.3.7 Discussion and comments

The regulatory framework of the procurement activities of SOEs

The procurement activities of SOEs in China have been partially regulated by the CBL, but are not covered by the CGPL. This is because SOEs in China have generally not been classified as a kind of entity that is covered by the CGPL. The compulsory coverage of the CBL is decided by the characteristics of the construction projects involved, such as those concerning public interests or public security, and those that are fully or partially invested in by state-owned funds or financed by state-financed funds; therefore, only some construction procurement activities have been covered by the CBL. For activities that are not subject to compulsory coverage, if SOEs choose to use tendering and bidding procedures for their procurement, the CBL also applies, as it is a general law for tendering and bidding activities.

Apart from the main laws in the field of public procurement, there are also relevant normative rules related to the procurement activities of SOEs. However, these normative rules only cover a small part of the procurement activities, such as the procurement of goods or centralized procurement. Additionally, most only cover the procurement activities of certain types of SOEs, such as SOEs at the central level or in the financial sector. Mostly, these normative rules are not typical procurement rules; the procurement is only a small aspect of the rules, which are mainly relevant to the supervision of competent authorities and SOEs.

There is one exception at the sub-central level. The Municipality of Wenzhou has enacted

[629]重要通信基础设施、枢纽型交通基础设施、重要江河流域控制性水利水电航电枢纽、跨流域调水工程等领域，实行国有独资或控股，允许符合条件的非国有企业依法通过特许经营、政府购买服务等方式参与建设和运营。

[630]核电、重要公共技术平台、气象测绘水文等基础数据采集利用等领域，实行国有独资或绝对控股，支持非国有企业投资参股以及参与特许经营和政府采购。

[631]国防军工等特殊产业，从事战略武器装备科研生产、关系国家战略安全和涉及国家核心机密的核心军工能力领域，实行国有独资或绝对控股。其他军工领域，分类逐步放宽市场准入，建立竞争性采购体制机制，支持非国有企业参与武器装备科研生产、维修服务和竞争性采购。

Administrative Measures for the goods and services procurement of the municipally-owned enterprises. The rules in the Administrative Measures are similar to the rules in the CGPL.

In addition to the legally binding rules, SOEs have gradually adopted internal procurement rules for certain kinds of procurements. Some of these internal procurement rules could be treated as the 'shadow' of the CGPL and the CBL; however, some SOEs also have some particular rules, such as specific systems for managing suppliers and directly procuring from internal member corporations under certain conditions.

In summary, there is no systemic rule in China for regulating the procuring activities of SOEs. Central laws and sub-central laws only provide fragmented rules regarding the partial procurement activities of SOEs. The main reasons for this include the following. (a) SOEs as market players should follow the market rules to independently operate. The direction of the SOE reform is to separate the SOEs from the 'government' and improve the SOEs' standing as independent market players. Therefore, it has been considered necessary to give the SOEs some freedom in the aspect of procurement activities as private enterprises. As the CGPL governs the procurement activities of 'government', it is not proper to regulate SOEs' procurement activities under the CGPL. (b) The character of the CBL is of general procedural rules regarding bidding and tendering activities; it does not cover the procurement activities of certain kinds of entities. The characteristics of the projects, for instance whether the project involves the public interest or public security, are the considerations of the CBL, rather than the attributions of the entities.

Issues that have arisen under the current regulatory framework of regulating the procurement activities of SOEs

However, several serious issues regarding the procurement activities of SOEs have been disclosed through audit supervision. First, several of the internal procurement rules of SOEs do not comply with the compulsory legal requirements. This means that even for those procurement activities that are regulated by the CBL, some legal requirements have not been implemented by the SOEs. Second, the phase of determining demands has not been well regulated, which poses a high risk of losing national assets. Luxury demands, fictitious procurement, and not properly describing the technical demands have been discovered by the audit supervision. Third, many contracts have been directly awarded to suppliers without any competition, including to companies affiliated with the SOE group and companies in which employees of SOEs hold shares, etc. This means that the direct awarding of contract has been used by staff members of SOEs to pursue personal profits. Fourth, the implementing of the procurement procedures lacks effectiveness and fairness, and the lack of effective qualification procedures undermines the results found by assessment committees. Fifth, some contracts are awarded with a much higher price than the market price or with a price obtained through centralized procurement. Sixth, illegally transfers and divisions of contracts are also serious issues in the procurement activities of SOEs. Seventh, some SOEs have been found to be extending or rewarding contracts to previous suppliers without any competition or rules.

This analysis and the NAO audits have discovered the high risk of corruption in the field of the procurement of SOEs, as there is no rule to limit the discretion exercised by SOE personnel. For instance, without any rules to determine the demands of the procurement, the specifications could point to products in which SOE staff or managers have personal interest; contracts may be directly awarded to suppliers that have bribed the leaders of SOEs; and even the price of contracts may be decided by top leaders without considering the market price or other reference prices. This observation has been proven by the reality that SOE procurement has become riddled with corruption.

The necessity of regulating the procurement activities of SOEs from the domestic perspective

The main consideration of not regulating the procurement activities of SOEs under the CGPL is to give SOEs some independence in making decisions about procurement as private market players. At the time of CGPL was legislated, the reform direction of SOEs was to separate SOEs from 'the government'. Therefore, as one basic law for regulating the procurement activities of the 'government', it did not choose to cover the procurement activities of SOEs.

However, through the issues described above, we find that SOEs have abused their discretion to make procurement decisions, and this has become a serious issue. It impels us to rethink the necessity of regulating the procurement activities of SOEs from the domestic perspective.

The view held by the legislators was based on the theory that because SOEs are market players, their decisions could be regulated by the market rules—the competitive pressure from other market players could drive SOEs to make their best choices on the awarding of contracts, the same as private market players would do. The legislators were afraid that the strict rules of the CGPL would hinder the commercial decisions of SOEs.

However, they did not consider the different types of SOEs and the different market structures in which the SOEs are involved. In China, SOEs play roles in both providing public services and providing private goods (services). When the SOEs participate in monopoly markets, like the private companies, they have less incentive to reduce their costs through better procurement, as their costs are fully refunded by the fees collected from the final consumers. When SOEs participate in the free market, the SOEs have less incentive than private companies to reduce costs through better procurement, because they cannot go bankrupt due to bad operational situations. Treating SOEs like market players does not mean it is not necessary to regulate their procurement activities. Protecting the rights of the final consumers in monopoly markets could be a reason for regulating all market participants, including SOEs and private companies. Improving the efficiency of the usage of public funds may become the reason for regulating all SOEs, if they cannot face the same pressure of bankruptcy as private entities in the market.

Additionally, as there is no proper rule on regulating the discretion of the procurers, especially the top leaders of SOEs who have a fundamental impact on the awarding the contracts, the procurement activities of some SOEs have become riddled with corruption. Anti-corruption

become another reason for regulating the procurement activities of SOEs.

The development of the PPP market and the role of SOEs in the PPP model as public partners

The PPP is considered to be one instrument for improving the provision of public services in China. In theory, certain SOEs also bear the responsibilities of providing public services; therefore, they also could use the PPP model for providing better public services. However, the current CGPL does not include a situation in which SOEs join PPPs as public partners, and the current normative documents also have not clarified whether SOEs may join the PPPs as public partners. In practice, the municipal SOEs usually join PPP projects as one of the 'agents' of the municipal government and are represented in mixed entities as public shareholders.

The regulatory framework for the procurement activities of mixed entities in IPPP projects is similar to the regulatory framework of the ordinary SOEs. Only when the procurement activities of SOEs fall under the compulsory coverage of the CBL should the CBL apply. There is an exception to this, in that the CBL will not apply if concessionaires construct works by themselves. However, it is not clear whether affiliated undertakings and members of joint bidding entities should be treated the same as the concession project investor. Additionally, it also remains unclear whether this exception applies to other kinds of PPP projects.

The feasibility of regulating the procurement activities of SOEs

Compared with the political and economic environment that existed during the period of legislating the CBL and the CGPL, it may now be time to consider regulating the procurement activities of SOEs in China. **First, implementing different reforms for different kinds of SOEs could create a chance to reconsider the necessity of regulating the procurement activities of certain types of SOEs.** According to the new reform plans, SOEs have been classified into different types. Certain types of SOEs are closer to the 'government' and could actually be treated as implementing some of the functions of the 'government', such as the SOEs that bear the responsibilities of providing public services. In this sense, these SOEs are part of 'government', and the form 'SOE' is just one of the approaches through which the government carries out its functions. There are other kinds of SOEs that join the commercial markets and face competition. These kinds of SOEs are more similar to 'private' market participants. Therefore, on the basis of SOEs being classified into different types, it is possible that the government could hold different attitudes on regulating the procurement activities of diverse types of SOEs. For instance, SOEs that are closer to 'government' should be regulated, and SOEs that are similar to 'private' market participants, under certain conditions, should not be regulated.

Second, the developing PPP market and the need to enact a PPP law provides a chance to consider the roles of SOEs under the PPP model as public partners. As mentioned above, developing mixed ownership in given areas has been considered an important approach to reforming the SOEs. Non-SOEs have been allowed to join the shares of SOEs through

concessions, government procurements and PPPs. This means the policy has provided possibilities to SOEs to play the role of public partners under the PPP model, cooperate with private entities and provide better public services. However, the current GPL law has not treated SOEs as entities that it should cover. Therefore, the current GPL law will not apply to situations in which the SOEs employ the PPP model for procuring. During the process of legislating PPPs, it is necessary to decide whether SOEs (and which kind of SOEs) could become public partners of PPPs. Further, another issue relevant to SOEs is whether the procurement activities of mixed entities under the IPPP structure should be regulated; this question needs to be resolved in PPP laws.

Third, individual cases on regulating the procurement activities of SOEs at the municipal government level have shown the existence of demand for rules to regulate the procurement activities of SOEs. In China, local governments generally have the motivation and intention to provide rules on issues that require regulation under the framework of laws. The legislative practices at the municipal government level show the necessity of regulating the procurement activities of SOEs at the municipal level and make clear the issues left open by the current regulatory framework.

Fourth, enacting internal procurement rules has paved the road for binding regulation. In recent years, the number of SOEs that have drawn up the internal procurement rules is increasing. Although these internal procurement rules have some shortcomings, they have prepared procurement staff members to follow certain rules.

Fifth, the process of China accessing to the GPA brings the regulatory issue into the spotlight again. As the main parties of the GPA require China to put SOEs in their offer to access the GPA, the question of whether to open the procurement activities of SOEs to the GPA has arisen. However, as the procurement activities of SOEs have not been governed by the CGPL, there are controversial discussions about whether SOEs should be added to the offer when their procurement activities have not been regulated by national public procurement laws.

2.4 Conclusion

The reasons for regulating the procurement activities of SOEs

The EU public procurement regime is a supra-national regulatory framework, the main purpose of which is to open the public procurement markets among EU Member States. Because the procurement decisions of SOEs may be influenced by the 'State', even if the 'State' does not in fact influence procurement decision of the SOEs, the EU public procurement regime has governed the procurement activities of certain SOEs. In comparison, the Chinese public procurement rules focus on promoting national purposes, such as improving the efficiency of using public funds and fighting corruption. As a result of considering SOEs as market participants and intending to separate them from the 'government', the CGPL as the main law of Chinese public procurement does not include SOEs in its coverage, even though the SOEs use public funds. This means that the reasons for enacting general public procurement rules do not necessarily apply to regulating

the procurement activities of SOEs. In China, political decisions are one of the important influencing factors of SOE policies and reforms.

However, now may be the right time for China to reconsider regulating the procurement activities of SOEs. In theory, improving the efficiency of the usage of public funds, realizing more value for taxpayer money, and fighting corruption could be come the main purposes of SOE regulation. As these rules exist at the national level, instead of at the supranational level, it is not necessary to be concerned that the 'government' may influence the procurement decisions of the SOEs. In contrast, national rules could leverage the effects of the procurement behaviour of SOEs to implement their public policies.

The conditions for determining which SOEs should be regulated by the procurement rules

In theory, SOEs are the entities that are located between pure 'government' and pure 'private entities'. Some SOEs are relatively closer to the 'pole' of the government, while some SOEs are relatively closer to the 'pole' of the private entities. Should procurement rules apply to all kinds of SOEs?

According to the EU's experience, in the Public Sector Directive, only those SOEs that are relatively closer to the 'government' have been regulated; while in the Public Utilities Directive, SOEs closer to the 'government' and to 'private entities' have been regulated. Even private entities with exclusive or special rights have been regulated under the Public Utilities Directive.

In comparison, in China, no SOE has been regulated by the CGPL, and the procurement activities of SOEs fall under the coverage of the CBL only when the procurement projects fulfil the conditions provided. However, to implement new policies for SOE reform, it is necessary and feasible that certain types of SOEs will be regulated by public procurement rules.

The EU public procurement regime is intended to open the national public procurement market and creating an internal public procurement market, rather than to enhance the efficiency of the usage of public funds; this being said, are the conditions provided in the directives for determining the coverage of SOEs relevant to the future regulation in China? The response to this question is positive, because the intentions of both are to regulate SOEs that are not relatively closer to 'private' market participants.

First, the conditions for determining the definition of a BGBPL, including certain SOEs, may provide a certain understanding of the criteria for embracing the bodies that implement public functions like other contracting authorities. The logic behind this is that when SOEs implement public functions like other public authorities, their decisions about public contracts may be influenced by the public authorities, and it is possible that they might discriminate against suppliers from other Member States. Meanwhile, implementing the public function could be used as a reason for determining whether the SOEs are relatively closer to 'government'. If SOEs pursue the needs of the general interest and do not have an industrial or commercial character and closely depend on the 'government', they could be treated as relatively closer to 'government'.

However, the Chinese national procurement rules are not required in order to consider whether the procurement decisions of SOEs could be influenced by the 'government'; therefore, it is important to consider that to what extent the factor of 'closely dependent on the government' fits the regulatory purposes of Chinese rules. For instance, if Chinese legislators intend to regulate procurement activities to improve the value of money spent, including implementation of public policies, it may be not necessary for SOEs with only a small amount of public ownership to be ruled in, even if the management of these SOEs is supervised by the public authorities or the public authorities could influence their procurement decisions through other approaches. This means that under the national legislation, whether the procurement decisions of SOEs are influenced or controlled by the public authorities is not the important point. Rather, the core of the regulation concerns whether it is necessary to improve the procurement activities of SOEs through binding procurement rules. Therefore, the criteria for determining the appropriate coverage of SOEs should be relevant to this.

In summary, the following interpretations by the ECJ on the conditions of a BGBPL may be relevant to setting conditions for determining the scope of SOEs that should be regulated by public procurement rules: (a) 'needs of general interest' could be carried out by private undertakings and also by SOEs. Procurement rules are not intended to regulate all of the entities that pursue the needs of general interest. Given the diversity of providing public services, private enterprises also could participate in providing public services, such as through concessions and PPPs. If private undertakings also carry out certain activities concerning public services, the activities pursued by these SOEs are pursued to meet the needs of general interest. (b) Competition is only one of the relevant factors for determining whether activities pursued by SOEs have an industrial or commercial character. In some cases, even though there is competition, the SOEs may still be regulated; for example, if the SOE cannot bear the economic risk of its activities by itself, or when the SOE is likely to receive government support to prevent bankruptcy even if its operations are poor. (c) Whether the SOEs receive offset or public financing from the government is an important factor, but is still not decisive. (d) The legal regime under which the SOEs are constituted is irrelevant. Even though the SOEs are constituted under private law, such as commercial company law, they still could be regulated under the procurement rules.

Second, the notion and conditions of 'pubic undertaking' can provide a certain comprehension of regulating SOEs that work to meet needs of an industrial or commercial character. The aim of the notion and conditions of a 'public undertaking' is to encompass the undertaking over which the contracting authority may exercise directly or indirectly a dominant influence by virtue ownership financial participation, or the rules that govern it. This means the reason for regulating public undertakings under the public procurement rules is that public authorities can directly or indirectly exert a dominant influence on them. Again, this is relevant to the attribution of the EU public procurement regime as a supranational regime for opening the public procurement markets among Member States. When China regulates SOEs from a national perspective, it is necessary to consider whether it is necessary to regulate those that work to meet the needs of an industrial or

commercial character, and also if it is necessary to regulate whether being directly or indirectly influenced is a proper criterion. If the regulatory purpose is to optimize the value received for the money spent, it may be not necessary to consider any direct or indirect 'dominant influence', and ownership or financial participation might be enough to determine the scope of the SOEs that should be regulated.

Additionally, from the notion of 'public undertakings' under the EU Public Utilities Directive, 'public undertakings' may include two kinds of undertakings: (a) meeting the general needs and having an industrial or commercial character; (b) not meeting the general needs and having an industrial or commercial character. However, as the EU Public Utilities Directive only applies to 'public undertakings' pursuing certain public utilities activities that are generally considered to be pursued to meet the needs of general interest, under the EU Public Utilities Directive, only public undertakings that meet the general needs and have industrial or commercial character have been regulated. Further, not all public utilities sectors have been regulated by the EU Public Utilities Directive. One reason for this is that the national authorities continue to be able to influence the behaviour of entities operating in these sectors. The other reason related to the closed nature of the market in which the entities in those sectors operate. Therefore, during the process of regulating the procurement activities of SOEs at the national level, it is necessary to consider whether only SOEs that meet the general needs and have an industrial or commercial character will be regulated. Combining the EU's experience and the realistic situations and demands in China, the competition structure of the economic sectors could be a significant consideration. If the activities of the SOEs are directly exposed to competition, and they face the risk of bankruptcy if they are poorly operated, then it may be not necessary to regulate them, even though they operate in the public utilities sectors.

The coverage of the procurement activities of the SOEs that should be regulated

As SOEs provide public and private goods and services to the 'government' and the markets, the procurement activities of SOEs are also diverse. SOEs could procure goods and services for self consumption, for providing or reselling to the government, for providing public services to the public, or for producing or reselling to the competitive markets. As general public entities only conduct procurement activities for self-consumption or to provide public services, it is necessary to discuss whether only these two kinds of procurement activities should be governed by the procurement rules for SOEs.

The answer to this question is relevant to the definition of 'public procurement' in each procurement regime. In the EU public procurement regime, the term 'procurement' has been defined in the Public Sector Directive as the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, suppliers or services are intended for a public purpose. This means that if the SOEs are regulated by the EU Public Sector Directive, there is no requirement that the purchase in question should be for a public purpose. In other words, the

procurement of works, supplies, or services by SOEs for self-consuming, or for providing certain public services to the citizens, or for the purpose of reselling or reproducing, are covered by the Public Sector Directive. In comparison, in the current Chinese public procurement regime, only procurement work by SOEs for the purpose of providing certain public services to the citizens and the projects that use public funds have been regulated under the CBL. The procurement activities of SOEs for self-consuming and for the purpose of reselling or reproducing have not been covered by the public procurement regime. On the basis of the issues discovered in the field of the procurement activities of SOEs, these two aspects also may invite corruption and the squandering of public funds and national assets. From the national law perspective, it is also necessary to regulate the procurement activities in these aspects.

However, under the EU Public Utilities Directive, contracts awarded for purpose of resale or lease to third parties have been excluded from the coverage if they meet certain conditions. However, the resale or lease exclusion does not apply if the SOEs enjoy the special or exclusive right to sell or lease the subject matter of the contract. If other entities are not free to sell or lease under the same conditions as the SOEs, this exclusion also does not apply. This exclusion only applies to SOEs covered by the Public Utilities Directive, and the contract falls within the coverage of the directive; the exclusion does not apply to SOEs covered by the Public Sector Directive. This shows that SOEs with an industrial or commercial character have been given more freedom to award contracts for resale or lease to a third party; however, this freedom comes with the limitation that compared to other market participants, SOEs enjoy no special or exclusive right to resale or lease and other market participants also are free to sell or lease under the same conditions. Whether this kind of procurement activity should be regulated is related to the market's structure and the subject matter of the contract. If the SOEs have a special or exclusive right to re-sell or lease the subject-matter of the contract, the SOEs will have more influence on awarding the procurement contract. In such cases, the SOEs may make irrational choices during the process of choosing suppliers. The result of the regulation could be treated as a trade-off between the necessary of regulating the procurement activities and meeting the business requirements of the SOEs. Whether regulating the procurement contracts for resale or lease is also a controversial issue at the level of national legislations. Considering the structure of the market in which the goods or services are to be re-sold is a good criterion for determining whether regulation is necessary, as the SOEs may not feel competitive pressure to award a procurement contract under the best conditions if they hold special or exclusive rights in the resale market, and this may lead to a high cost of procurement and a high price paid by the final consumers.

SOEs commonly pursue certain activities both in the public and private sectors; for instance, SOEs may pursue activities not having an industrial or commercial character as well as activities that do. Should the characteristics of the SOEs' activities impact the regulatory scope of the public procurement rules? According to the EU's experience, if the proportion of the commercial activities is much higher than that of the non commercial activities, and the body could establish one independent financial structure for those two kinds of activities, when pursuing commercial

activities, the body will fall out of the scope of the public procurement rules. However, after considering the legal certainty and impractically of requiring the SOEs to establish one independent financial structure for those two kinds of activities, the ECJ has interpreted that the proportion of activities that meet the general interest and have a non-industrial or commercial character is irrelevant. During the process of legislation at the national level, these considerations and arguments are worthy of note. The interpretation of the ECJ is based on its consideration of legal certainty. Even though it would be possible to establish a method for verifying that the different areas of activity are completely separate, this approach might complicate the intricate public procurement system. However, if applying the public procurement rules to those SOE that are purely industrial or commercial in nature, it is also considered too restrictive.

The suitable rules that should be provided for regulating the procurement activities of SOEs

As SOEs are not pure public entities, and they are the market participants, it is necessary to consider whether the procurement rules for them should be as rigid as the procurement rules for pure public entities, or whether it is necessary to provide several different rules. This is not the core research issue of the dissertation given as the limitations of the time and space; however, it may have some relevance for the analysis of the EU and China case. First, SOEs covered by the Public Sector Directive have been provided the same rules as the other public entities covered by the same directive. This means that the slight difference between the SOEs closer to 'government' is not the reason for applying different rules. Second, the EU public procurement regime provides more feasible rules for SOEs covered by the Public Utilities Directive than for SOEs covered by the Public Sector Directive. This is the result of considering the character of the activities pursued in the public utilities sector, instead of considering the character of the entities involved. Third, the public utilities sector applies specific exemptions for the contracting entities other than contracting authorities; for instance, the exemptions for the relevant activities covered. This means that some of the activities of 'public undertaking'-type SOEs and private undertakings with special or exclusive rights are not covered by the directive. On this point, applying different rules to the BGBPL-type SOEs and 'public undertaking-type SOEs is the result of considering the characteristics of the entities. Fourth, from the China case, the internal procurement rules of the SOEs contain some particular rules that are different from the CGPL and the CBL; for instance, the specific system for managing suppliers. This shows the different characteristics of SOEs. In summary, to legislate the procurement activities of SOEs, it is necessary to provide more feasible rules and leave more discretion to the SOEs.

The role of SOEs against the background of developing PPPs as public partners and relevant rules for the procurement activities of IPPPs

The PPP as an instrument for providing better public services through cooperation between public and private sectors has been widely used across the world. The 'SOE' is one approach for making up the failure of the market mechanism to provide public services; could the SOE be the public partner in the PPP model? If the IPPP model has been used, should the procurement

activities of the IPPP be regulated by the procurement rules, as it involves public ownership in the mixed entities?

From the analysis of the EU public procurement regime and practice, we see that SOEs may join PPPs as public partners, and that when SOEs award the PPP contracts, the applicable procurement rules mainly depend on the character of the SOEs and the activities involved. However, in China, the current CGPL cannot include a situation in which SOEs join PPPs as public partners, and the current normative documents also have not clarified whether SOEs may join PPPs as public partners. In practice, the municipal SOEs usually join PPP projects as one of the 'agents' of the municipal government and are represented in the mixed entities as the public shareholders. The difference between these two public procurement regimes may be explained by the different relationships between the public procurement rules and the PPP rules. The EU public procurement regime has been adopted to include complicated procurements, such as awarding PPP contracts, and it applies the same coverage rules for traditional public procurements and PPPs. However, the CGPL has not been adopted to cover the awarding of PPP contracts, and the SOEs are not covered by the CGPL. Under the new SOE reforms, and applying the PPP model to provide better public services, it is necessary for China to provide the possibility of SOEs joining PPPs as public partners.

Regarding the procurement activities of the IPPP kind of SOEs, in the public procurement regime of the EU, whether they should be regulated by the procurement rules and to what extent they should be regulated depends on the characteristics of the SOEs. Specifically, it depends on the type of SOEs that have been classified according to the public procurement rules. In the current EU public procurement regime, there is no intention to regulate the procurement activities of the concessionaires or other 'private partners' of PPPs, except if these entities were originally covered by the procurement regime. The character of the mixed entities in the IPPP projects is the regulatory reason, rather than the fact of their holding exclusive or special rights. In China, the regulatory framework for the procurement activities of the mixed entities in IPPP projects is similar to the regulatory framework of ordinary SOEs. Only when the procurement activities of the SOEs fall under the compulsory coverage of the CBL should the CBL apply. From the perspective of national legislation, if the mixed entities in IPPP projects can bear the operational risk themselves (i.e., the government does not promise any return on the investment), then it is not necessary to regulate the procurement activities of the mixed entities concerned. In contrast, if the mixed entities rely on the support of public finance, such as offsets, it is reasonable to regulate their procurement activities.

Chapter Three: SOEs as seller under the public procurement rules

3.1 Whether SOEs could join as seller in public procurement

3.1.1 Under the background of traditional public procurement market

3.1.1.1 The EU experience

In EU directives on public procurement, the term 'economic operator'[632] is employed to refer to the entities that could become the seller of the contract. The notion of 'economic operator' is broadly interpreted. **Firstly**, an economic operator could be any natural or legal person. This definition implies that an entity, even without a legal personality, could also join the public contracts as a contractor. **Secondly**, the term could refer to any contracting authority or contracting entity. This definition implies that the regulated buyer under the rules of public procurement could also be come the seller and sell goods, services or works to other contracting authorities or contracting entities. **Thirdly**, the term could refer to a group of natural or legal persons and/or entities, including any temporary association of undertakings. Groups of economic operators may participate in award procedures without taking on a specific legal form. A specific form may be required when such groups are awarded the contract. [633] **Fourthly,** offering the execution of works and/or a work, the supply of products or the provision of services on the market is the only requirement to become a seller under the public procurement rules.

The directives do not mention any requirement in legal form of 'economic operator'. Thus, firms, branches, subsidiaries, partnerships, cooperative societies, limited companies, universities—public or private—and other forms of entities than natural persons should fall within the notion of an economic operator.[634] Therefore, under the EU public procurement rules, SOEs are entitled to participate in public procurement as sellers. Even though the contracting authorities and contracting entities have the discretion to set qualifications for individual contracts, they cannot set the qualifications on the basis of the ownership of the enterprise, as the non-discrimination requirement of the directives.

The reason behind this provision is that EU MSs have the freedom to decide on the means for performing works and providing services, and the EU treaty shall in no way prejudice the rules in MSs governing the system of property ownership.[635] This statement means that in EU, MSs could

632 'economic operator' means any natural or legal person, or a contracting entity, or a group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market. see article 2(6) of directive 2014/25/EU,
633 Recital (18) of directive 2014/25/EU,
634 Recital (17) of directive 2014/25/EU,
635 Wolf Sauter and Harm Schepel (2009). State and Market in European Union Law: the Public and Private Spheres of the Internal Market before the EU courts, Cambridge University Press, p.3.

use SOEs to perform works and providing services, and SOEs can participate in public procurement markets as providers and should be treated equally as private enterprises.

In practice, cases arise in which SOEs that have been considered as bodies governed by public law also join the public procurement market as sellers. One example of such an SOE is GTT SpA, a company controlled by the municipality of Turin, Italy. From the buyer perspective, GTT SpA plays the role of a body governed by public law under public sector directives or under public utility directives; from the seller perspective, GTT SpA also provides public road transport service to other contracting authorities. [636]

3.1.1.2 The China experience

Under the CGPL, 'provider' refers to the legal person, other entities or natural person who offers goods, construction or service to the procurer. [637] The CGPL does not require the suppliers to have legal personality. However, the CGPL provides general conditions for the 'provider', which should be met by all suppliers for public procurement in China. The general conditions include the following aspects[638]: (1) having the capacity to independently undertake civil liabilities; (2) having a good business credit and a sound financial and accounting system; (3) having the necessary equipment and professional technical capabilities for performing the contracts; (4) having good records of paying taxes and social security funds in accordance with the law; (5) having no record of a serious violation of law in business operations within three years prior to participating in government procurement activities; (6) other requirements as provided by laws and administrative provisions. Apart from these general requirements, the CGPL also allows procurers to add specific qualifications in terms of the specific characteristics of the procurement items. However, the procurers shall not resort to unreasonable conditions for different or discriminatory treatments to providers. The regulation for the implementation of the CGPL has clarified that illegally limiting the form of ownership, form of organization or location of the provider, should be regarded as one of the an unreasonable conditions.[639] Therefore, either general requirements from the CGPL or specific requirements from the procurers should not treat the providers based on the type of ownerships; SOEs could also theoretically join the public procurement markets as provider or seller.

The CBL lacks a notion similar to 'economic operator' or general seller. It has only emphasised the term 'tenderer'. The legal form of the tenderer shall generally be a legal person or other entities that respond to a bid and participate in competitive bid. Individuals are only permitted to participate in the bidding for projects involving scientific research as the projects allow. The tenderer should satisfy the qualifications as provided by state regulations or as required

636 For instance, in March 1 of 2015, there is a contract award from 'provincia di vercelli—settore edilizia-transporti' to 'R.T.I. ATAP SpA (capogruppo) GTT SpA (mandante)' for providing public road transport services, valued 4,291,057 EUR(excluding VAT). See, contract award notice 2015/S 002-002461 in TED website: http://ted.europa.eu/udl?uri=TED:NOTICE:2461-2015:TEXT:EN:HTML

637 In Chinese it is '供应商'. Article 21 of the CGPL

638 Article 22 of the CGPL. Article 17 to 19 of Regulation on the implementation of Chinese Government Procurement Law (referred as 'Regulation of implementation on CGPL') provide further detail rules.

639 Article 20 (7) of the Regulation of implementation on CGPL

by the tenderee (buyer). [640] Ownership is not a concern in the CBL; therefore, theoretically, SOEs could also join the bidding procedures as tenderers or sellers.

In practice, SOEs can typically join the public procurement as sellers, regardless of the competitive situation of the relevant market. For instance, Beijing Municipal Road & Bridge Group Co., Ltd. (thereinafter 'BMRBG') is a company wholly owned by Beijing Municipality. It has more than 110 wholly owned enterprises or controlled enterprise. A study was conducted by collecting the awarding contract notices on the China Government Procurement website[641]. From September 1, 2015 to September 1, 2016, companies affiliated with BMRBG were awarded 15 public procurement contracts, all of which were awarded by procurer from Beijing Municipality. It could be noticed that the SOEs owned by one municipality, provide the goods and services and execute works for the entities or departments that belong to the same municipality. The study revealed that the same SOEs also join the public procurement market in other municipalities as seller.

3.1.1.3 Comparative analysis

On the basis of the preceding analysis, SOEs are allowed to join the traditional public procurement market as sellers in both the EU public procurement regime and the Chinese public procurement regime. However, whether SOEs have the chance to enter the procurement procedures in an individual procurement project depends on the specific qualifications provided by the procurers in accordance with the law. The type of ownership should not be set as the condition for excluding public entities or private entities from joining public procurement as sellers; such action is against the principles of equal treatment and non-discrimination in public procurement regimes.

However, the motivations behind the public procurement regimes of EU and China are slightly different. In EU, the economic situations amongst the Member States vary. For instance, some Member States prefer SOEs to provide public service, whereas some Member States prefer private enterprises. Therefore, a neutral position on the issue of ownerships should be maintained. Comparatively, in China, although the 'SOE' has been used as that main form for providing public service and even private goods and services, SOEs are treated as market participants and are encouraged to join the competition in the market, including the public procurement market. SOEs are not prioritised to become the suppliers of public procurement contracts. As previously mentioned, even SOEs are to obtain the contract opportunities from the municipalities to which they belong and should join the competition along with other market participants.

3.1.2 Whether SOEs could join the PPP as private partner

Whether SOEs could join PPP as private partner is generally relevant to the legal definition

[640] Article 26 of the CBL

[641] http://search.ccgp.gov.cn/dataB.jsp?searchtype=2&page_index=2&buyerName=&projectId=&dbselect=infox&kw=%E5%8C%97%E4%BA%AC%E5%B8%82%E6%94%BF%E8%B7%AF%E6%A1%A5&start_time=2015%3A09%3A01&end_time=2016%3A09%3A01&timeType=6&bidSort=0&pinMu=0&bidType=7&displayZone=&zoneId=&pppStatus=&agentName=

of PPP. When formulating the legal definition of PPP, legislatures could choose to specify who could become the private partners and the legal qualifications to be fulfilled. However, legislatures can also confer this freedom to their public partners, not limiting their discretion on who could join the PPP as private partner. For countries without specific PPP rules, the procurement of a PPP contract is usually regulated by general public procurement rules. In this situation, SOEs should meet the common conditions under the rules and qualifications set by the procurers.

3.1.2.1 The EU experience

As described in Chapter 2, under the EU-level rules, no specific rules have been set for general PPPs. PPPs have been regulated under the general framework of public procurement rules, including specific rules for the concession type of PPP. Therefore, in general, the entities that meet the definition of 'economic operators' [642] are entitled to join PPPs as private partners. As discussed above, according to EU rules, all kinds of entities in the market—public or private—could be providers in public contracts. Therefore, SOEs could theoretically also join the procurement procedures for awarding PPP contracts if they meet the qualifications described in the contract notices by the procurer and are not affected by the exclusion grounds in the directives.[643]

The national public procurement rules amongst the Member States of EU have confirmed that SOEs could join the PPP as private partners. For instance, France has already transposed the EU public procurement directives into a national law.[644] The broad definition of PPP given by the EU commission includes two models in France—contracting partnership and concession. The new French national regulatory framework of public procurement set the rules for a contracting partnership, which were previously provided through a specific law, as a special chapter in the new general public procurement contract law. This law states that 'contracting partnership is a public contract in which the economic operator or the group of economic operators are entrusted the following tasks: ……' [645]. The French concession law employs the same definitions of 'concession' and 'economic operator' [646] as those found in the EU concession directive. Therefore, following the approach in the EU public procurement directives, French special rules for a 'contracting partnership' and rules for a concession use the term 'economic operator' to cover the entities that could become private partners in a PPP. Thus, in France, SOEs may also act as

[642] In EU public procurement directives, the term 'economic operators' has been used to describe the entities providing the goods, service, or work on the market. See the definitions in Article 5(2) of Directive 2014/25/EU, Article 2 (10) of Directive 2014/24/EU, and the discussion above.
[643] Article 38 of Directive 2014/25/EU, Article 57 of Directive 2014/24/EU, Article 80 of Directive 2014/23/EU.
[644] France has already transposed the EU directives into French national law through Ordinance No. 2015-899, 23 July 2015 on public procurement contracts. Ordinance No. 2016-65, 29 January 2016 on concession contracts, Decree No. 2016-360, 25 March 2016 concerning public procurement and Decree No. 2016-361 , 25 March 2016 concerning public procurement involving defence or security aspects ; Decree No. 2016-86, 1 February 2016 on concession contracts.
[645] Article 67 of Ordinance No. 2015-899, 23 July 2015 on public procurement contracts, https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000030920376.
[646] Articles 5 and 12 of Ordinance No. 2016-65, 29 January 2016 on concession contracts, see:https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000031939947&categorieLien=id

private partners in a PPP.

In practice, cases exist in which SOEs join the PPP as private sectors. For instance, on August 3, 2016, 'Le Mans Métropole', a contracting authority in France, awarded a concession contract to provide district heating services to Dalkia,[647] which is a subsidiary of the Électricité de France (EDF) Group.[648] The EDF Group is a public undertaking governed by public procurement directives, which holds 100% shares of Dalkia. However, normally, fewer SOEs could join PPP as private partners, particularly for a 'body governed by public law' kind of SOE in Europe. This inadequacy results from lack of capital capabilities. For instance, the definition of 'contracting partnership' requires the private partner (economic operator) to assume all or part of the investment of the PPP project. However, SOEs in Europe have no capabilities to invest huge capital in the few years of PPP projects.

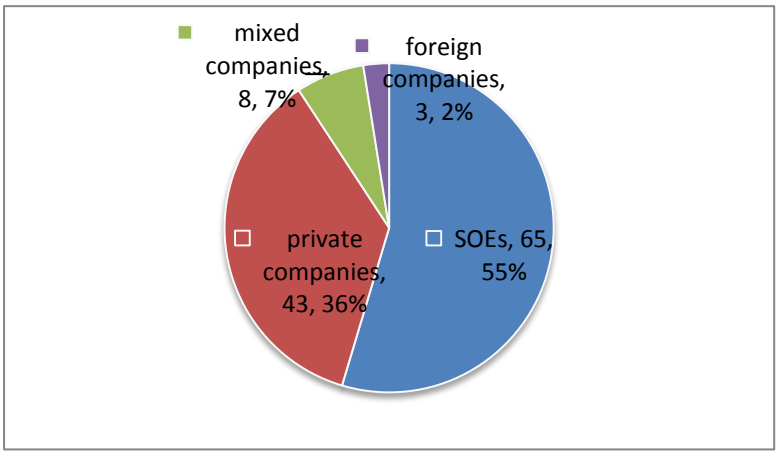
3.1.2.2 The China experience

(1) The situation of SOEs involved in PPP as private partner

A high percentage of SOEs are involved in PPP projects as private partners. For instance, 105 MOF demonstration projects concluded PPP contracts until the end of June in 2016. Information from 82 amongst the 105 demonstration projects has been collected. Those demonstration projects involve 119 'private partners', consisting of 43 private companies, 8 mixed companies (混合所有制), 3 foreign companies, and 65 SOEs (state wholly-owned enterprises and state-controlled enterprises, including SOEs listed in overseas stock exchange). (See, Graph 10: the participation degree of SOEs involved in PPP as private partner)

Graph 10: Degree of participation of SOEs in PPP as private partners

(Source: PPP Center of MOF in China)



In the fourth batch of PPP demonstration projects, even though the percentage of private enterprises participating in as private partners has increased after the encouraging of the policies,

[647] Concession award notice on the TED website: http://ted.europa.eu/udl?uri=TED:NOTICE:268123-2016:TEXT:EN:HTML
[648] https://www.dalkia.fr/en

SOEs still play an important role and share a big part of the PPP market. Among the PPP demonstration projects which already have concluded PPP contracts[649], 42% of private partners are SOEs, which account for 49% of the total investment amount.[650] It means still half of these PPP contracts are awarded to SOEs.

When SOEs join PPPs as private partners, two basic approaches are applied: (1) The public partner awards the PPP contract to SOEs, and the SOEs set up one SPV for implementing this PPP project—similar to the contractual PPP referred to in the EU, or (2) when public partners award the PPP contract to SOEs, they have clarified that in a certain period the SOEs should set up an SPV together with the public partners—similar to the Institutional PPP referred to in the EU. For the contractual PPP, the legal relationship is easier, similar to that in traditional public procurement. The Institutional PPP is more popular in China and is more complicated as the situations of SOEs. In the following section, a typical PPP model will be introduced to explain how SOEs are involved in PPP projects.

(2) Typical Chinese PPP model

A. Basic information of a typical Chinese PPP case

The Municipality of Nanning drafted a plan for managing the watershed of Nakao River. After undergoing Value for Money Assessment and the Fiscal Affordable Evaluation, the Municipality decided to use the PPP model to procure the service. It authorised Nanning Urban River Management Office (南宁市城市内河管理处, referred to as NURMO), an administrative agency of the Municipality, as the implementing agency responsible for procuring function. Meanwhile, it also authorised Nanning Jianning Water Investment Group Limited Corporate (南宁建宁水务投资集团有限责任公司, referred to as NJWIG) to present itself in the mixed entity as the public shareholder.

Under the plan, the 'private partner' should be responsible for the design, finance, built, operation, management and maintenance phrases of the project; the duration of the contract is 10 years; the total investment value is 1 billion RMB; the internal rate of return of total investment is below 8.5%.

As the procurer, **NURMO** used a competitive consultation procedure (竞争性磋商程序) [651] to award the contract. Four companies met the conditions, and after the first round of negotiations, two companies were selected as effective investors (有效投标人), which have the right to submit the final responsive tender. After the final responsive tenders were evaluated, the rank of the effective investor was confirmed. A negotiation work group composed of experts negotiated with the effective investors, according to the rank, on the details of the contract which remained tentative. Beijing Drainage Group (北京城市排水集团, referred to as BDG) which firstly reached

[649] Among the 396 demonstration PPP projects, there are 247 projects has signed PPP contracts.
[650] http://www.cpppc.org/zh/pppyw/6433.jhtml
[651] A new procedure has been developed by the Ministry of Finance, under the authority of Chinese Government Procurement Law, for meeting the requirements of the PPP kind of procurement. See:

agreement with the negotiation work group, became the final investor and was awarded the PPP contract. According to the capital agreement and statutes and articles of association, which have been attached to the PPP contract, BDG and NJWIG have established an SPV named 南宁北排水环境发展有限公司 (referred to as SPV). The registered capital of the SPV is 200 million RMB, of which BDG has subscribed 180 million RMB, holding 90% shares; NJWIG has subscribed 20 million RMB, holding 10% shares.

In this PPP project, the financial reward or return consists of two parts: (i) the government pays the fee for the watershed management service provided by the SPV and (ii) the SPV can share the profits with the government from operating non-watershed management service in the scope of the project facilities—for instance, operating an advertisement service. Having been decided through the competitive consultation procedure, the payment from the government is 218.95 million RMB per year, which could be adjusted according to the performance of the SPV. However, the profits and the sharing percentage of the non-watershed management service have not been negotiated in the competitive consultation procedure and thus, the final results have not been published .

B. Why this is a typical case in China

In this PPP case, to implement the PPP contract, the 'private partner' and the municipality-owned enterprise authorised by the municipality established an SPV. To investigate this kind of PPP model which is highly prevalent in China, a small-scale online study has been conducted.[652] A total of 100 recent PPP projects have been collected on the national website publishing public procurement information. Amongst these 100 PPP projects, 63 are involved in establishing mixed entities between government and a private partner, and 37 are implemented without establishing an SPV or through establishing an SPV by the private partners themselves. This approach suggests that in China, local governments prefer to participate in an SPV as one shareholder.

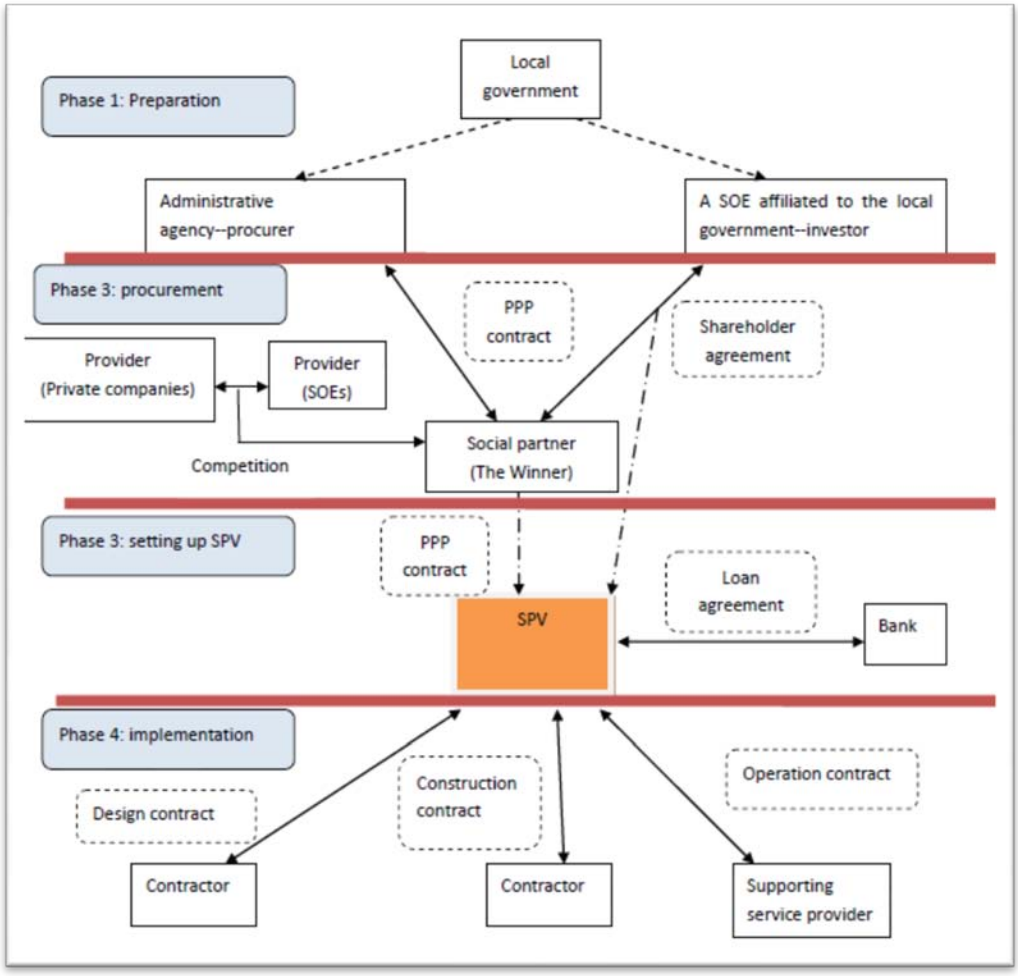
In the previous PPP case, the local government authorised its SOE to represent the shareholder in the SPV. All of the previous 63 PPP projects, except for one, also chose the same approach in which one agency of the local government directly participates in the SPV as the shareholder. Therefore, in China some SOEs would directly join the PPP projects without competition.

Furthermore, looking into the characteristic of the 'private partner' in this PPP case, we found that BDG is also an SOE affiliated with Beijing Municipality. Therefore, in this PPP project, the SPV is established by two SOEs that belong to two different local governments. This scenario frequently occurs in other PPP projects because of a large percentage of SOEs joining the PPP projects as 'social partners'. Therefore, the PPP case described previously is a typical PPP model

[652] On 10 th of May 2016, the information on the unified website for China Government Procurement (http://www.ccgp.gov.cn/) were collected, for 100 PPP recent projects, which are under or just finished the procurement procedures.

that is prevalent in China. (Graph 11: A typical PPP model in China) In the preparation phase, the local government authorises one administrative agency as the procurer and one local government-owned enterprise (one type of SOE) as the investor. In the procurement phase, private companies and SOEs compete to become the 'private partner' under the PPP project; the procurer awards the PPP contract to the winner and decides on the context of the shareholder agreement, as well as the statutes and articles of association for establishing the SPV. After signing the PPP contract, the local government-owned enterprise and the 'social partner' establish the SPV, and the obligations of the social partner under the PPP contract are transferred to the SPV. As a procurer, the SPV awards design contracts, construction contracts and other supporting service contracts to other contractors in the implementation phase.

Graph 11: Typical PPP model in China



(3) Legal analysis based on Chinese public procurement rules

The CGPL, CBL, and relevant regulations have no specific rules on PPPs. As mentioned in Chapter 2, each law has different competent authorities---in this case, MOF and the National Development and Reform Committee (NDRC) for the CGPL and CBL, respectively. These two

competent authorities are responsible for improving the PPP models and issuing several normative documents. Research on the provisions in those normative documents indicate that MOF and the NDRC have slightly different views on whether SOEs could be the 'social capital' (private partners)[653] of PPPs.

Firstly, both MOF and the NDRC have announced that SOEs are within the scope of 'social capital', similar to private capital enterprise and foreign capital enterprise. This inclusion could also be explained by the Chinese definition of 'PPP' in which 'private partner' is understood to mean 'social capital'. Therefore, China intends to be neutral on the sources of capital. Either public or private capital or foreign capital could join PPPs as the 'private partner', thereby opening the possibilities for all market players.

Secondly, compared with the NDRC, the MOF has excluded certain types of SOEs from the scope of 'private partners'. According to the normative documents published by the MOF, the government financial platform companies affiliated with the same level of government as the 'public partner', as well as other controlled enterprises (except for the listed companies), should not join the PPP projects at the same level of government as one 'social partner'.[654].

It further proves that SOEs could join PPPs as 'social partners' but sets as an exception certain types of SOEs. However, the wording of the exception could be understood in two different ways: (1) only the affiliated government financial platform companies and the SOEs controlled by those platform companies should not join the PPP as 'social partners'. (2) Both the affiliated government financial companies and other SOEs controlled by the same level of government should not join the PPP as a 'social partner'. The exclusion scope in the second case is wider than that in the first case.

To understand the exact scope of this exclusion and the underlying reasons, firstly, the notion of 'government financial platform companies' should be discussed. 'Local government financial platform companies' has been defined by State Council as economic entities which own the independent qualification of legal person and assume the financial functions for government investment project, established by local government and its competent departments or bodies, through imputing financial funds, lands or shares.[655] According to Chinese law, local government cannot loan directly from the bank, and the capability of issuing bonds is limited. Meanwhile, the demand for infrastructure is significantly increasing. The purpose of establishing this type of companies is to finance local infrastructure projects through loans from banks or other financial organizations. Although 'local government financial platform companies' exhibit improved local economies, they also bring about several problems. One of these problems is the exacerbation of

[653] PPP is not a original term in Chinese, but when it has been translated to official Chinese term, the "public" has been translated to "government" or "state", and "private" has been translated to "social captial".

[654]"本级人民政府下属的政府融资平台公司及其控股的其他国有企业（上市公司除外）不得作为社会资本方参与本级政府辖区内的 PPP 项目。" see，财政部《PPP 项目合同管理指南（试行）》；以及 2014 年 12 月 4 日，财政部《关于政府和社会资本合作示范项目实施有关问题的通知》，财金[2014]112 号。

[655] 国务院办公厅，国务院关于加强地方政府融资平台公司管理有关问题的通知，国发[2010] 19 号，2010 年 6 月 13 日。http://www.gov.cn/zwgk/2010-06/13/content_1627195.htm

the debt situation of the local government, which illegally provides guarantees for the loans incurred by these companies. For instance, at the end of 2014, the total debts for which the local governments should bear the repay responsibility amounted to about 15.4 trillion RMB, whereas the debts for which the local governments may bear the repay responsibility was about 8.6 trillion RMB.[656] Relative to the figures in mid-2013, the amounts of debts increased by about 42% and 23%, respectively. Therefore, at this time, the reason for the exclusion of 'local government platform companies' from the scope of 'social partner' is possibly related to the debt situation of the local government in China. There have been concerns that the local government will misuse PPPs to increase the debt level.

Subsequently, a normative document issued by the office of State Council[657] has changed this exclusion to provide opportunities to certain 'local government platform companies' that meet certain conditions. The 'local government platform companies'—which have already set up a modern enterprise system and are operating in accordance with market rules, included the assumed local government loans in their financial budget, and clearly announced that they would not undertake the function of bringing finance and loans for local government—could join the PPP projects as 'social partners'.

Additionally, 'the 'local government financial platform companies' could theoretically join the PPP projects as 'social partners' if the PPP projects are administrated by other local governments at other levels or in other regions. However, in practice, if 'the local government financial platform companies' leave the regions in which they are located without the protection of their local governments, their financial situations could not afford the investment requirements of the PPP projects.

Thirdly, the legal form requirements are different for the MOF and the NDRC. The MOF has required that private partners be the enterprises that have legal personality, whereas the NDRC has not set the requirement of legal personality and not limited to the form of the enterprise. The scope of 'social partner' under the framework of the NDRC is potentially larger than that under the MOF. However, both allow joint bidding without any legal form requirement before awarding the contract.

Therefore, market players are generally allowed to participate in PPP contracts as 'private partners'. Regardless of local government debt risks, certain types of SOEs have been excluded from the scope of the entities, which could be the 'private partners' in the PPP projects by the normative documents of the MOF. It could be concluded that in China, SOEs are also allowed to participate in the competition for PPP contracts. For individual cases, it depends on whether SOEs meet the qualifications set by the procurers.

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[656]全国人大常委会批准 2015 年地方政府债务限额为 16 万亿元，
http://www.npc.gov.cn/npc/xinwen/2015-08/31/content_1945486.htm，浏览日期 2015 年 9 月 20 日。

[657] 国务院办公厅，国务院办公厅转发财政部发展改革委人民银行关于在公共服务领域推广政府和社会资本合作模式指导意见的通知，国办发[2015] 42 号。
http://www.gov.cn/zhengce/content/2015-05/22/content_9797.htm

3.1.2.3 Comparative analysis

As the EU public procurement regime mainly regulates PPPs on the basis of providing a single concession directive for concession-type PPPs, as well as modernizing the public sector directive and public utilities directive for other complex PPP procurement methods, the general rules for regulating traditional public procurement methods also apply to PPP projects, including the rules on the coverage of entities. Therefore, the term 'economic operators', which covers the entities that could join the procurement process as sellers, is also used to cover the entities that could join the PPP projects as private partners. Therefore, it provides SOEs the possibilities for participating in the PPP as private partners.

However, the Chinese public procurement regime has not been sufficiently adjusted to cover complex PPP procurement methods; meanwhile, the State Council of the government is preparing to enact a separate PPP law. Currently, the rules for regulating PPP projects are based on the traditional public procurement regime and the relevant normative documents issued by the two competent authorities. Thus, generally, SOEs are allowed to join the PPP projects as 'social partners' (private partners) in the same way that they are allowed to join traditional public procurement as sellers. However, reducing the debts of the local government, which is one of the functions of the MOF, is an important reason for prompting the development of PPPs in China at an early stage; in the normative documents issued by the MOF, certain SOEs are not allowed to join PPP projects as 'social partners'.

Comparatively, the EU and China have allowed SOEs to participate in PPPs as private partners for the same reason, which is to achieve equal treatment amongst all market players, either public providers or private providers. However, the motivations vary, which are comparable to the slight difference discussed in the context of traditional public procurement. In the EU, public procurement rules are provided to create an internal public procurement market. Given the diversity of ownership in Member States, choosing the provider on the basis of the capital nature or ownership could be considered a form of discrimination. In China, public procurement rules are mainly aimed at achieving value for money. SOEs have been regarded as market players, similar to private enterprises. Ensuring effective competition, which is one of the main approaches to achieving value for money, could be improved through equal treatment between different market players. Although SOEs could participate in PPPs as 'private partners' in both the EU and Chinese public procurement regimes, whether they can join in the procurement of individual cases depends on the qualifications set of the procurers, such as financial and technical capabilities. On the one hand, both the EU and China leave the discretion of setting qualifications to procurers; on the other hand, the discretion is limited to not involve discrimination, including the discrimination of ownerships.

In practice, given that the competitive advantages or capabilities are different between SOEs and private companies, the percentages of the SOEs involved in PPPs as private partners are higher in some markets and countries than others. For instance, public utility sectors in China and

private enterprises have less financial capabilities or technical capabilities as SOEs continue to play important roles in the market, hence the higher participation rate of SOEs in PPPs as private partners. Meanwhile, in the field of comprehensive environmental management, private enterprises are more competitive, hence their greater participation in PPPs as private partners.

3.2 Whether the contract awarded to SOEs by public entities should be regulated by public procurement rules

3.2.1 In-house exemption from public procurement rules in EU and the rationale reasons behind it

3.2.1.1 Reasons for in-house exemption from public procurement rules in EU

Article 345 TFEU states that 'the treaties shall in no way prejudice the rules in Member States governing the system of property ownership'. This article is the legal basis for exempting in-house arrangements from the coverage of the EU public procurement directives. Nothing in the directives obliges Member States to **contract out or externalise** the provision of services that they wish to **provide themselves** or to organise by means other than procurement within the meaning of the directives.[658] The Member States have the autonomous right to decide how to organise activities for providing services. For services of general economic interest, the Member States could choose to provide by themselves through public entities, choose to contract out through procurement from the market, or choose to only regulate the relevant market through a license or controlled price and then allow private entities to provide services directly to the citizens. Hence, for not affecting the freedom of the MS and public authorities to perform works or provide services directly to the public, public procurement directives have already provided a certain degree of legal certainty for in-house exemption as provided within the applicable scope.[659]

3.2.1.2. Contracts between entities within the public sector (contracting authorities)

In general, 2014 EU public procurement directives have three kinds of in-house exemption providing for the contract concluded between the contracting authorities: (1) A public contract awarded by a contracting authority to a legal person governed by private or public law when the contracting authority exercises 'similar control' on that legal person.[660] 'Similar control' means that the contracting authority exercises over the legal person concerned a control similar to that which it exercises over its own departments. If a contracting authority exercises **a decisive influence over both strategic objectives and significant decisions of the controlled legal person, then it shall be deemed to exercise 'similar control'.** 'Similar control' may also be exercised by another legal person, which is also controlled in the same manner by the same

[658] Recital (7) of directive 2014/25/EU,
[659] Willem A. Janssen(2014). The institutionalized and non-institutionalised exemptions from EU public procurement law: towards a more coherent approach? 10 Utrecht Law Review 168; Clarles M. Clarke (2015). The CJEU's evolving interpretation of 'in-house' arrangements under the EU public procurement rules: a functional or formal approach? 10 EPPPL 111.
[660] Article 12 (1) of directive 2014/24/EU

contracting authority.[661] (2) A controlled legal person, which is a contracting authority, awards a contract to its controlling contracting authority, or to another legal person controlled by the same contracting authority. [662] (3) A contracting authority, which does not exercise a 'similar control' as previously described but exercises joint control with other contracting authorities.

Notably, these three exemptions only apply to contracts concluded between 'contracting authorities', which refers only to state, regional and local authorities and bodies governed by public law. From the SOE perspective, three exemptions only refer to the SOEs that are regarded as 'bodies governed by public law'. Furthermore, the three exemptions apply not only to public contracts concluded within the public and utility sectors, but also to concession contracts concluded both within public and utility sectors.

3.2.1.2.1 Contracts awarded on the basis of imposing a control similar to that exercised over its own departments [single control/individually control]

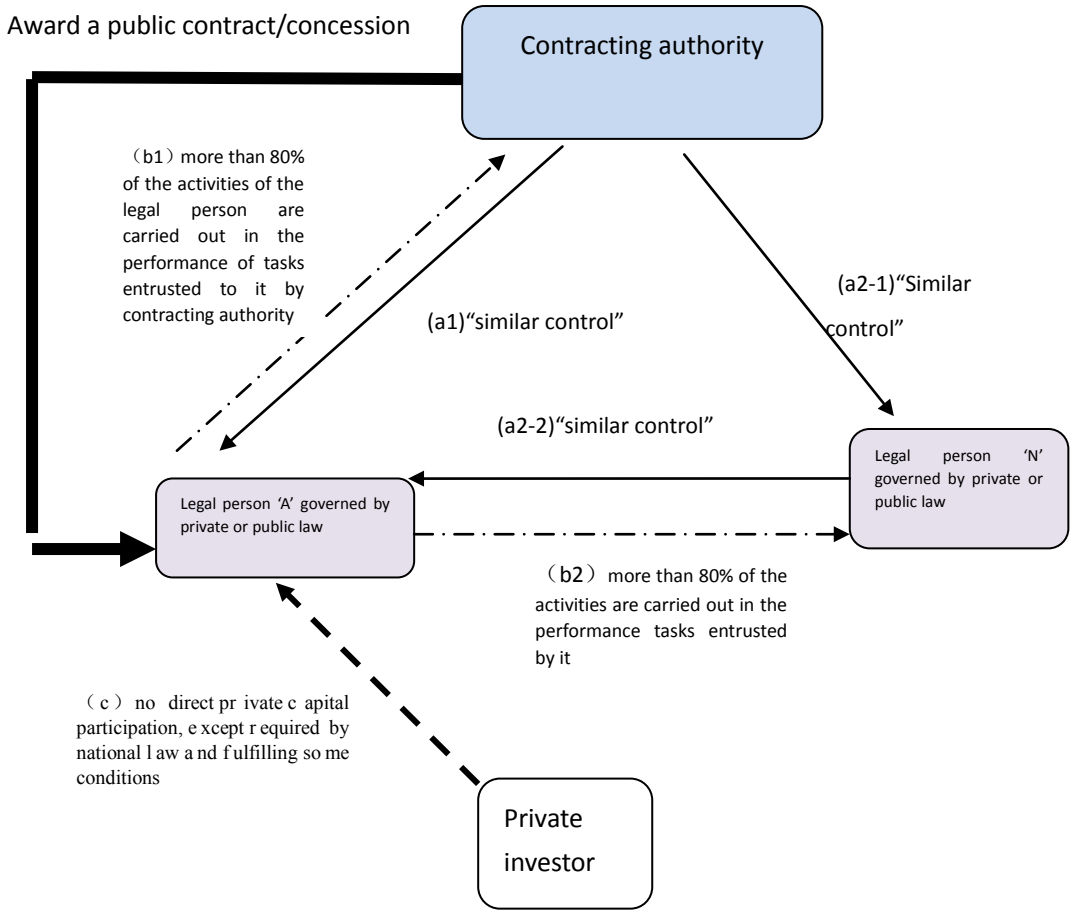
3.2.1.2.1.1 A contract awarded from a controlling contracting authority to a legal person governed by private or public law

A. General rules under the 2014 EU public procurement regime

If a contract awarded from a controlling contracting authority to a legal person governed by private or public law fulfils the following conditions, then the contract will fall outside the scope of public procurement directives (see, Graph 12 below): (a1) the contracting authority exercises over the legal person concerned control similar to that which it exercises over its own departments, or (a2) such similar control is exercised by another legal person, which is itself controlled in the same manner by the contracting authority; (b1) more than 80% of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or (b2) by other legal persons controlled by that contracting authority; and (c) there is no direct private capital participation in the controlled legal person, except for non-controlling and non-blocking forms of private capital participation required by national legislative provisions in conformity with the Treaties, which exert no decisive influence on the controlled legal person.[663]

[661] Paragraph 2 of article 12 (1) of directive 2014/24/EU
[662] Article 12 (2) of Directive 2014/24/EU
[663] Article 12 (1) of Directive 2014/24/EU

Graph 12: A contract awarded from a controlling contracting authority to the legal person governed by private or public law



B. ‘Similar control’ under the single-control scenariosituation

The controlling entity and the controlled entity could be two legally separate persons

The ‘similar control’ condition was established by the Teckal case[664] in 1999, and has been called ‘the first Teckal condition’. Under the Teckal case, the court examined the presence of a ‘public supply contract’ as defined in Article 1(a) of Directive 93/36—specifically, whether there exists a contract for determining whether the contract should be regulated by public procurement

[664] Teckal S rl v Comune di Viano (C-107/98)[1999] E.C.R. I-8121. In this case, Comune di viano directly conferred on AGAC the management of the heating service for a number of municipal buildings by a decision, which was not preceded by any invitation to tender. AGAC is a consortium set up by several municipalities—including Comune di viano, to manage engery and environmental services, pursuant to Article 25 of Law No 142/90.
Under Article 2 of the Decision, at the expiry of the initial one-year period, AGAC undertakes to continue providing the service for a further period of three years, at the request of the Municipality of Viano, following modification of the conditions set out in the Decision. Provision is also made fro a subsequent extension.

rules. Therefore, the purpose is to determine whether the arrangement between the municipality and the supplier constitutes a contract that falls within the scope of 'public supply contract' as defined by the public procurement directive.

In the Teckal case, the court indicated that to examine whether a contract exists, an agreement between **two separate persons**[665] must be determined. It means that the court considered that the contract governed by public procurement law should be concluded between two separate persons. In this regard, the court analysed that *'it is, in principle, sufficient if the contract was concluded between, on the one hand, a local authority and, on the other hand, a person legally* ***distinct from that local authority****. The position can be otherwise only in the case where the local authority exercises over the person concerned a control which is similar to that which is exercised over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities.'*[666] If an entity is formally distinct from the contracting authority and independent of the contracting authority with regard to decision-making,[667] then the contracting authority and the entity could be considered as two separate persons. Therefore, in the Teckal case, the in-house arrangement should be ruled out as the reason the partners of the contract are not regarded as two separate persons, hence the failure to satisfy the definition of 'public supply contract' as provided by procurement directives.

However, in the Stadt Halle case, the court confirmed that even though the contract for pecuniary interest concluded between contracting authorities and an entity legally distinct from the contracting authorities, public procurement rules may not have to be applied. The main reason is that '*a public authority which is a contracting authority has the possibility of performing the tasks conferred on it in the public interest by using its own administrative technical and other resources, without being obliged to call on outside entities not forming part of its own departments.*'[668]

The conclusion in the Stadt Halle case did not conflict with the conclusion in the Teckal case. In the Teckal case, the court intended to justify that the contract, which fell under the public procurement rules, should be concluded between two separate persons. It did not clearly indicate that the contract, even though concluded between two separate persons, could still be ruled out of the public procurement rules. The court in the Stadt Halle only followed the 'similar control' condition mentioned in the Teckal case to form the conclusion, given that exercising control similar to that exercised over its own departments implies that the controlled entity is not owned by the controlling entity and is instead a separate entity.

How to assess whether 'similar control' exists

The court in the Teckal case neither defined 'similar control' nor examined whether the specific relationship between the contracting authority and the entity in this case constituted 'similar control'. Following the conclusions in the Teckal case and the Stadt Halle case, the Court in the

[665] Paragraph 49 of the judgment
[666] Paragraph 50 of judgment
[667] Paragraph 51 of judgment
[668] Paragraph 48 of judgment

Parking Brixen case[669] did not emphasise the formal requirement; it emphasised 'similar control' as a control enabling the contracting authority to influence the decisions of the controlled entities. The Court indicated that 'similar control' must be a case of the power of decisive influence over **both strategic objectives and significant decisions**.[670] This observation has been accepted in cases such as Case C-340/04 Carbotermo and Consorzio Alisei[671], Case C-324/07 Coditel Brabant[672], and Case C-573/07 Sea Srl[673]. Finally, as previously described, this observation has also been codified in the 2014 public procurement regime as the definition of 'similar control'.

The Court in the Parking Brixen case noted that to assess for the existence of 'similar control', **all the legislative provisions and relevant circumstances must be taken into account. From the experience in the ECJ case law[674], the following facts have been considered frequently:**

(1) Holding of capital or ownership

In ECJ cases, public ownership of the company has been cited as a reason for exempting the contract from the EU public procurement regime. However, in the Carbotermo and Consorzio Alisei case, the court clearly pointed out that '*the fact that contracting authority holds, alone or together with other public authorities, all of the share capital in a successful tenderer tends to indicate, without being decisive, that the contracting authority exercises over that company a control similar to that which it exercises over its own departments.*'[675] *(It has also been quoted in Case C-324/07, Paragraph 31.)*

It means that *ownership is not a decisive factor in determining the existence of 'similar control', even though the contracting authority has 100% ownership. For instance, in the* Parking Brixen case,[676] the concessionaire was 100% owned by the contracting authority, but comprehensively considering other facts, the Court still considered that the degree of independence enjoyed by the concessionaire is not possible for the contracting authority to exercise 'similar control'.

Generally, indirect control or ownership of controlled entities weakens the control, compared with direct ownership. For instance, in the *Carbotermo and Consorzio Allies* case, the supplier (provider) as a joint stock company was entirely owned by another joint stock company whose 99.98% shares were held by the contracting authority. The court noted that in this situation, any influence which the contracting authority might have on the decision of the provider is exerted through another holding company, and the intervention of such an intermediary may, depending on the circumstances of the case, weaken any control possibly exercised by the contracting

[669] Case C458/03 Parking Brixen GmbH V Gemeinde Brixen and Stadtwerke Brixen AG, Judgment 13.10.2005.
[670] Paragraph 65 of judgment
[671] Case C-340/04 Carbotermo and Consorzio Alisei [2006], para. 36.
[672] C-324/07, para.28.
[673] Case C-573/07, paragraph 65.
[674] For instance, In Case C-324/07, the following three facts has been considered: (1) the holding of capital; (2) the composition of its decision-making bodies; and (3) the extent of the powers conferred on its governing council. (para.29 of the judgment)
[675] Paragraph 37
[676] Specifically, Parking Brixen case referred to a concession contract awarding from Municipality of Brixen to Stadtwerke Brixen AG for management of two car parks within the municipality.

authority over a joint stock company merely because it holds shares in that company.[677] Therefore, as discussed above, the ownership is not sufficient to constitute 'similar control'; the possibility of exercising 'similar control' under the indirect ownership will be weaker. However, it will be ultimately dependent on specific **legislative provisions and relevant circumstances of individual cases.**

(2)Composition of its decision-making bodies

The composition of the decision-making bodies of controlled entities is also a relevant factor when examining the existence of 'similar control'. However, even though the controlling authorities have the right to appoint a major part of the decision-making bodies, it is still insufficient to determine the existence of 'similar control'. For instance, in the Parking Brixen case, the municipality of Brixen had the right to appoint the majority of the concessionaire Administrative Board members. However, the control exercised by the municipality over the concessionaire was essentially limited to those measures which the company law assigns to the majority of shareholders. This limitation requires further examination of the powers which could be exercised by the controlling contracting authority.

However, in some cases, the Court considered that the contractor or the decision-making bodies of the concessionaire consist of the representatives of the public authorities affiliated with them. This shows that those bodies are under the control of public authorities, which can exert decisive influence over both the strategic objectives and significant decisions of the contractor or concessionaire. One example is the *Coditel Brabant Case C-324/07*.[678] However, the Court in these cases also examined the control exercised by the municipalities concerned on the concessionaire. The Court observed that 'where one or more affiliated municipalities are recognised as constituting a sector or sub-sector of that society's activities, the control that those municipalities may exercise over matters delegated to the sector or sub-sector boards is even stricter than that exercised in conjunction with all the members within the plenary bodies of that society'.[679] This observation implies that the Court in the *Coditel Brabant case determined the existence of 'similar control' not only on the basis of the power to delegate the majority of the decision-making body but also on how many were still controlled by the controlling contracting authorities.*

(3)Managerial power conferred to the board

Even though the contracting authority could appoint the majority of the decision-making bodies, such power could still not be considered as 'similar control', where the boards have been conferred considerablet powers to manage the company. This conclusion could be deduced from the Parking Brixen case in which the concessionaire was a limited liability company converted

[677] Paragraph 39 of the judgment
[678] See paragraph 33-34 of the judgment. In Case *Coditel Brabant Case the concessionaire was an inter-municipal cooperative society whose members are municipalities and an inter-municipal association whose members in turn are solely municipalities, and is not open to private members.*
[679] Paragraph 40 of the judgment

from a specific undertaking named 'Stadtwerke Brixen' by a decision of the Municipality of Brixen.[680] The court compared the power of the contracting authority to exercise control before and after the conversion of the undertaking.

Before the conversion, the specific undertaking 'Stadtwerke Brixen' was a municipal body whose specific function was the uniform and integrated provision of local public services. The municipal council established the general guidelines, allocated the start-up capital, ensured that any social costs were covered, monitored the operating results and exercised strategic supervision, with the undertaking being guaranteed the necessary independence.

After the conversion, 100% of the concessionaire was owned by the contracting authority at the time of the award. By contrast, the conversion rendered the control of the contracting authority tenuous.[681] From the statutes of the concessionaire, the Administrative Board was conferred broad powers to manage the company **as it has the power to carry out all acts which it considers necessary for the attainment of the company objective.** The company has broad independence vis-à-vis its shareholders **because the Administrative Board has the power to guarantee up to EUR 5 million or to affect other transactions without the prior authority of the shareholder meeting.** However, the control exercised by the municipality over the concessionaire is essentially limited to those measures that the company law assigns to the majority of the shareholders.

Therefore, the Court held the view that the conversion considerately attenuated the relationship of dependence that existed between the municipality and the special undertaking Stadtwerke Brixen, and that the degree of independence enjoyed by the concessionaire was not possible for the contracting authority to exercise 'similar control'. The main reason was that the conversion provided excessive independence to the controlled entity, which allowed the controlling authority to lose the power to exercise **a decisive influence over both the strategic objectives and significant decisions of the controlled entities.**

A similar case was *Carbotermo and Consorzio Alise* case[682] in which the board of Directors of the companies was conferred the broadest possible powers for the ordinary and extraordinary management of the company. The Court indicated that this arrangement did not reserve for the contracting authority any control or specific voting power to restrict the freedom of action conferred on the board of Directors. The control exercised by the contracting authority over the companies can be described as '*consisting essentially of the latitude conferred by company law on the majority of the shareholders, which place considerable limits on its power to influence the*

[680] The market-oriented conversion broaden the objects of the company, it started to work in significant new fields, while it retained the wide range of activities carried on by Stadtwerke Brixen, particularly those of water supply and waste water treatment, the supply of heating and energy, waste disposal and road building. The company has the obligation to open the capital of the company to other capital in the short term. The conversion expanded the geographical area of the company's activities to the whole Italy and abroad. Considerable powers have been conferred on its Administrative Board, with in practice no management control by the municipality.

[681] Paragraph 67 of judgment

[682] Judgment of Case C-340/04 Carbotermo and Consorzio Alisei [2006], paragraph 38.

decisions of those companies.'[683]

In *Coditel Brabant Case C-324/07,* the Court also examined the powers enjoyed by the decision-making bodies. The Court noted that the decision-making bodies of the concessionaire enjoyed the widest powers.[684] In particular, it fixed the charges and possessed the power—but was under no obligation—to delegate to the sector or sub-sector boards the resolution of certain matters particular to those sectors or sub-sectors.[685]

(4) Market-oriented

Whether the controlled undertaking is market-oriented is another aspect considered in several ECJ cases. In the Parking Brixen case[686], its market-oriented nature, which renders the control of the municipality tenuous, was one of the aspects assessed by the ECJ on the basis of the following facts[687]: (1) the conversion of the undertaking into a company limited by shares and the nature of that type of company; (2) the broadening of its objects, the company having started to work in significant new fields, particularly those of the carriage of persons and goods, as well as information technology and telecommunications); (3) the obligatory opening of the company, in the short term, to other capital; (4) the expansion of the geographical area of the company's activities, to the entire country and abroad; (5) the considerable powers conferred on its Administrative Board, with no management control in practice by the municipality. The Administrative Board of the company has been conferred considerably broad powers to carry out all acts considered necessary to attain the company objective. Giving sufficient independence to the managers of the company also became one criterion for assessing whether an undertaking is market-oriented.

Market-orientation has also been assessed in the Coditel Brabant case. The ECJ stated that whether the concessionaire had become market-oriented and gained a degree of independence would render tenuous the control exercised by the public authorities affiliated to it.[688] The Court examined the form of the concessionaire[689] and noted that it did not take the forms which were capable of pursuing objectives independently of its shareholders but rather, that which was commercial. The Court also examined the object of the concessionaire, which was the pursuit of the municipal interest, and that the concessionaire did not pursue any interest distinct from that of the public authorities affiliated to it. Consequently, the Court determined that despite the extent of the powers conferred on its decision-making body, the concessionaire did not enjoy a degree of independence sufficient to preclude the municipalities which were affiliated to it from exercising

[683] Paragraph 38 of the judgment
[684] Paragraph 35 of judgment
[685] Paragraph 35 of the judgment
[686] Case C458/03 Parking Brixen GmbH V Gemeinde Brixen and Stadtwerke Brixen AG, Judgment 13.10.2005.
[687] Paragraph 67 of the judgment
[688] Paragraph 36-39 of judgment
[689] The form of the concessionaire took the form of an inter-municipal cooperative society governed by the law on inter-municipal cooperatives, which were not to have a commercial character; instead of taking the forms which is capable of pursuing the objectives independently of its shareholders, such as a *société par actions*, or a *société anonyme.*

control over it similar to that exercised over their own departments.

Discussion under the background of SOEs

The preceding discussion suggests that holding of capital or ownership and the composition of its decision-making bodies are relevant but are not decisive factors in determining the existence of 'similar control'. Even though the SOE is 100% owned by the contracting authority, such ownership is not sufficient to determine whether the contracting authority exercises over the SOE a control similar to that which it exercises over its own departments. The reason is that the SOE may be conferred broad independence from its shareholders.

Comparatively, the managerial power conferred to the board seems to be a more important factor as it is more closely relevant to the degree of independence enjoyed by the SOEs. In the ASEMFO case, the relevant national rules stated that the State Company in its country was an instrument and a technical service of the General State Administration and the administration of each of Autonomous Communities concerned; the State company was required to carry out the orders given by these national rules and was not entitled to fix freely the tariff for its actions. Therefore, the State company had no choice either as to the acceptance of a demand made by competent authorities in question or as to the tariff for its services; the requirement for the application of the directive concerned relating to the existence of a contract was not met.[690] Additionally, in Case C-220/06, the public company was required to implement only work entrusted to it by the General Administration of that State, the Autonomous Communities or the public bodies subject to them.[691] Whether the SOEs have the freedom to fix the tariffs, accept the demands and decide the fields of the activities falls into the coverage of 'strategic objectives and significant decisions'.

Furthermore, whether the SOEs are market-oriented is also a factor in determining the degree of independence. The legal form of the SOEs, geographical area of the activities, participation of the private capital, with the commercial character and pursuing any interest different from that of the controlling public authorities has been considered relevant in determining market orientation in the ECJ case law. Regardless of the widest powers conferred, if the SOE is not market-oriented, then it still does not enjoy sufficient independence from the controlling authorities. Seemingly, although the SOEs have been conferred freedom on significant decisions but not on strategic objectives, the contracting authorities may still be considered as having exercised 'similar control'. That is, although the contracting authorities exert a decisive influence only on the strategic objectives and not on the significant decisions of the SOEs, they may still exercise 'similar control' over them. Arguably, a decisive influence on strategic objectives could be deduced from the pursuit of the public interest by both the contracting authorities and the SOEs.

The issue of 'similar control' not being a limited control (identical control) or comparable

[690] Asemfo, para. 49-53.
[691] Paragraph 52 of the judgment.

control was raised in *Commission v Austria case*[692]. The Commission maintained that the only scenario when directives on public contracts do not apply is when the contracting authority exercises unlimited control over the contractor. The Commission connected 'participation of private capital' with 'similar control' and argued that 'if a private undertaking holds shares in the contracting company, then according to the Commission, the contracting authority is assumed to be unable to exercise over that company 'a control which is similar to that which it exercises over its own departments' within the meaning of that judgment.[693] Whereas the government of Austria considered that the concept of 'control similar to that exercised over its own departments' within the meaning of Teckal means **comparable control and not identical control**, the town retained such control even after the transfer of 49% of the shares in Abfall GmbH. However, the Court did not address this issue directly; it adhered to the conclusions under the Stadt Halle case as a solution. In the other cases, the Court indicated that control is not identical in every aspect[694]; thus, 'similar control' could be regarded as comparable control instead of identical control. Meanwhile, the non-participation of private capital which was mentioned by the EU Commission has been considered a condition for determining the existence of 'in-house' arrangement, in addition to the condition of exercising 'similar control'.

C. Essential part of its activities

The Teckal case also established the second condition that the legal entity must conduct the essential part of its activities with the contracting authority to which it belongs (usually referred to as 'the second Teckal condition'). However, the Teckal case did not specify what was referred to by 'essential part of its activities' and instead vaguely mentioned 'whole activities'? Furthermore, the Teckal case did not clarify the purpose of this condition and how to assess this condition.

Purpose of setting up this condition

The purpose of this condition has been noted in the *Carbotermo and Consorzio Alisei* case[695]. The court stated that this condition was aimed precisely at '*ensuring that Directive 93/36 remains applicable in the event that an undertaking controlled by one or more authorities is active in the market and therefore likely to be in competition with other undertakings*.'[696] **The Court explained that merely because the decisions concerning the undertaking were controlled by the controlling authority, an undertaking was not necessarily deprived of freedom of action if it could still conduct a substantial part of its economic activities with other operators.**[697] Therefore, the services of the undertaking are still considered to be intended mostly for that authority; the awarding of contract could be considered as an 'in-house' arrangement only if the activities of the undertaking were devoted principally to that authority and any other activity was

[692] Case C-29/04, Commission of European Communities V Republic of Austria, Judgment on 10.11.2005.
[693] Paragraph 18 of judgment
[694] parking brixen, para.62; and case c-324/07, para.46
[695] Case C-340/04, Carbotermo SpA and Consorzio Alisei v Comune di Busto Arsizio and AGESP SpA, Judgment of the Court of 11 May 2006.
[696] Paragraph 60 of the judgment
[697] Paragraph 61 of the judgment

only of marginal significance. This point was also clearly indicated in Case C-220/06[698] and Case C-553/15[699]. To ensure that public procurement directives remain applicable in the situation that the controlled entity still carries out a large part of its economic activities with other operators, the requirement on the 'essential part of activities' has been set.

How to assess the condition

In *the Carbotermo and Consorzio Alisei* case, the Court noted that to determine whether the condition was satisfied, both the qualitative and quantitative aspects must be considered. From the qualitative assessment perspective, the Court held the view that **the decisive turnover** was that which the undertaking in question achieves **pursuant to decisions to award contracts taken by the supervisory authority,** including the turnover with users in the implementation of such decisions. The activities of a successful undertaking which must be considered are those activities which that undertaking carries out as part of a contract awarded by the contracting authority, **regardless of the beneficiary (the contracting authority itself or the user of the services), the payer (the controlling authority or third-party users of the services provided under the contract) or the territory in which the services are provided.[700]**

In Case C-220/06[701], as the wholly state-owned company did not execute the essential part of its activities with the contracting authorities[702], a contract directly awarded to a wholly state-owned company as provider of the universal postal service in Spain was not justified on the basis of in-house arrangements. The analysis of the judgment was based on the fact that as the provider of the universal postal service in Spain, the company '*doesn't carry out the essential part of its activities with the Ministerio or with public authorities in general*'[703]; however, the company '*provides postal service to an unspecified number of customers of that postal service*'[704]. The company as the universal postal service provider authorised by the Spanish law has the obligation to provide universal post service not only for the Ministerio or the public authorities in general but also for unspecified customers, such as private companies, individual citizens. Thus, the activities covered in the 'cooperation agreement' between the Ministerio and the company cannot constitute the essential part of the company activities.

Therefore, the factors which are relevant to assess the condition have been clarified by the ECJ as follows:

(1) The examined activities should comprise all activities of the controlled undertaking. In certain circumstances, the undertaking not only provides the service involved in the contract but

[698] Paragraph 62 of the judgment of the case C-220/06.
[699] Paragraph 33 of the Judgment of the case C-553/15.
[700] Paragraph 65-67 of the judgment
[701] This case referred to decision of 'State administration, Ministry of Education, Culture and Sport' to award, without a public call for tenders, postal services to the Correos (public corporation for postal and telegraphical services), which was the provider of the universal postal service in Spain.
[702] In this case, it refers to the Ministerio or public authorities in general.
[703] Paragraph 59 of the judgment
[704] Paragraph 59 of the judgment

other activities as well, including the activities pursued in another province or abroad. When assessing the condition, all activities pursued by the controlled undertaking should be considered.

(2) To assess the 'essential part', the activities related to the contracts awarded by the controlling public authority should be compared with all the activities of the controlled undertaking. The contracts must be awarded by the controlling public authority; however, the payment does not necessarily have to come from the public authority, and the controlling public authority itself does not necessarily have to be the beneficiary. Thus, the activities which provide service for the users, although paid for by the controlling public authority or users if they are awarded by the controlling public authority, should be considered part of the activities devoted to it.

In the 2014 public procurement directives, the condition has been expanded, compared with the ECJ clarification. In the directives, not only the activities relating to the contracts awarded by the controlling public authority should be calculated but all the activities of the controlled entities which are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority. **Specifically, the tasks entrusted to the controlled entities are not limited to through contracts but also include other means, such as a unilateral administrative measure; moreover, the tasks entrusted are not limited from the controlling authority but also from other legal persons controlled by that contracting authority.**

(3) For the qualitative assessment, 'turnover' is observed by the ECJ to determine whether the 'essential part' has been achieved.

In 2014 public procurement directives[705], more feasible approaches have been pointed out to determine the percentage of the activities. The average total turnover or an appropriate alternative activity-based measure[706] for three years preceding the contract award[707] shall be considered.

Discussion in the context of SOEs

Despite the exercise of 'similar control' by the controlling authorities over the SOEs, the latter could still substantially execute their economic activities with other entities. For instance, the SOEs could provide goods or services to other economic entities, including private entities and individuals. According to the aforementioned ECJ case law, in such a situation, the SOEs are not necessarily deprived of the freedom of action. It is not clear whether the execution of a substantial part of its economic activities implies that the undertaking was not deprived of the freedom of action. Regardless, the Court considered 'depriving of freedom of action' to justify in-house

[705] Article 12 (5) of the directive 2014/24/EU

[706] Such as costs incurred by the relevant legal person or contracting authority with respect to services, supplies and works.

[707] Where, because of the date on which the relevant legal person or contracting authority was created or commenced activities or because of a reorganization of its activities, the turnover, or alternative activity based measure such as costs, are either not available for the preceding three years or no longer relevant, it shall be sufficient to show that the measurement of activity is credible, particularly by means of business projections.

arrangement and argued that if the undertaking can still carry out a substantial part of its economic activities with other operators, then it still has the freedom of action. However, in certain circumstances, although the controlled undertaking could execute a substantial part of its economic activities with other operators, it still has no freedom of action as the power of the undertaking to manage power has been controlled by the controlling public authority.

Notably, the condition allows the undertaking to carry out partial activities for other entities. The condition only requires that the essential part of the activities of the controlled SOEs is devoted to the contracting authority. In the 2014 public procurement directives, 'essential part' has been specified to be 'more than 80%'.[708] The phrase means that the marginal part (less than 20%) of the activities could be devoted to other entities. However, the ECJ specified neither the rationale of this definition nor the justification of 'more than 80%'.

Regarding the assessment of the condition, the activities of the SOEs for the performance of tasks are entrusted to them by the contracting authority or by other legal persons controlled by that contracting authority. The form of entrustment is not limited to the awarding of contracts. For quantitative assessment, the average total turnover for the three years preceding the awarding of contract is generally taken into consideration. An appropriate alternative activity-based measure is also allowed.

The characteristics of the activities of the SOEs are not relevant to assess this condition. Assuming that one SOE pursues the activities both for providing public goods and services and providing commercial goods and services, to determine the percentage of activities, all activities should be taken into consideration regardless of the characteristics of the activities. For instance, if the SOE provides healthcare and accommodation both to public authorities and private entities, both types of activities should be considered in the calculation of the percentage.

D. No direct participation of private capital

(1)Why direct participation of private investment is not allowed

The Teckal case makes no reference to 'non-participation of private capital' as in the case when the provider was a consortium consisting of several contracting authorities, of which the contracting authority in question was also a member. However, 'private capital participation issue' has been mentioned firstly in the Stadt Halle case[709]. The legal entity (provider) in this case was a limited liability company with 75.1% of its shares held by one wholly public-owned enterprise and the remaining 24.9% owned by a private limited liability company.

[708] At the beginning in the proposal from EU Commission, the limitation was set up as 'at least 90% of the activities of the legal person'; however, it has been changed to 'at least 80% of the average total turnover of that legal person' by IMCO of European Parliament, and then it has been changed to 'more than 80% of the activities of that legal entity are carried out in the performance of tasks entrusted to it by the controlling contracting authorities or by other legal entities controlled by the same contracting authorities' by the European Council.(doc. 10904/1/13 REV 1, p.212) which has been adopted as the final adopted version.

[709] Case C-26/03[2005]

A question has been raised concerning the particular situation of a 'semi-public' company—that is, whether the public award procedures established in the directive have to be always applied, merely because a private company has a holding, even a minority interest. To answer this question, the Court recalled the principal objective of the public procurement rules of the Community, namely, the free movement of services and opening up to undistorted competition among all Member States. The Court held the view that any exception to the application of the obligation under the public procurement rules must be strictly interpreted as a consequence.

In the Stadt Halle case, the Court ruled that the in-house exemption could not apply where the contractor was an undertaking and part of its share (even if only a minority) was held by private entities. The finding in the Stadt Halle case was based not on the legal form of the private entities constituting part of the contractor or on their commercial purpose but on the following two aspects considered: (1) the fact that those entities adhered to considerations **particular to their private interest,** which were different in nature from the public interest objectives pursued by the awarding authority. The court indicated that the relationship between a public authority, which is a contracting authority, and its own departments is governed by considerations and requirements proper to the **pursuit of objectives in the public interest**. On the other hand, any private capital investment in an undertaking follows considerations proper to private interests and pursues objectives of a different kind.[710] Consequently, the authority could not exercise control over the contractor similar to that exercised over its own services. (2) The awarding of a public contract to a semi-public company without a call for tenders would interfere with the objective of free and undistorted competition as well as the principle of equal treatment of the persons concerned; in particular, such a procedure would offer an advantage to a private undertaking with a capital presence in that undertaking over its competitors.[711] These reasons have been accepted in several cases, including the *Commission v Italy Case c-337/05*[712] and Case C-324/07.

(2) Participation of non-profit entities with private investment or capital

What does private capital mean? Is it necessary to take the form of a private company? How about the private entities participating to pursue non-profits? Case C-574/12 Centro Hospitalar de Setubal[713] discusses this scenario. In this case, the contractor was a non-profit association operating in the public interest, which could choose as partners not only public sector entities but also private social solidarity institutions carrying out non-profit activities and in which, at the date the contract was awarded, the latter formed a substantial part—although a minority—of the number of partners of the contractor association.

The legal form or the commercial purpose of the private entities is irrelevant. The Court noted

[710] Paragraph 50 of judgment
[711] Paragraph 51 of judgment
[712] In *Commission v Italy case c-337/05*, the Court concluded that it didn't meet the conditions for 'in-house' as the provider is a company in part open to private capital, namely the capital of the company was held in part by the State and in part by private shareholders. (para.39-40.)
[713] Centro Hospitalar de Setubal EPE v Eurest (Portugal) - Sociedade Europeia de Restaurantes Lda (C-574/12) (ECJ). In this case, A public hospital concluded a contract with a legal person named SUCH which would supply meals to patients and staff of the hospital over a 5-year-period for a total price of around 6.5 million EURO.

that one of the reasons that prompted its judgment in the Stadt Halle case was based on the fact that the private entities forming part of the contractor considered factors particular to their private interests, which were naturally different from those affecting the objectives of public interest pursued by the awarding authority, instead of the legal form or the commercial purpose of those entities.[714] Concepts, such as 'undertaking' or 'shared capital', have been referred to in the Stadt Halle case judgment as the specific facts of the case. Such references do not imply that the Court intended to restrict its findings to those cases where commercial for-profit undertaking constitute part of the contractor but that the legal forms of the private entities are not relevant factors in examining this condition.

Even though the private entities concerned pursue non-profits, which are still different in nature from the public interest objectives pursued by the awarding authorities and simultaneously act as partners of the contractor. In the Centro Hospitalar de Setubal case, the Court observed that the private partners of Serviço de Utilização Comum dos Hospitais (SUCH) pursue interest and objectives which, however potentially positive from a social perspective, are naturally different from the public interest objectives pursued by the awarding authorities concerned. This approach follows the one in the Stadt Halle case in which private entities pursue objectives different from those of public entities.

Additionally, private entities pursuing non-profits could also compete with other entities. The Court noted that the private partners of SUCH, despite their status as social solidarity institutions conducting non-profit activities, were not barred from engaging competitively in economic activities with other economic operators. Consequently, the direct awarding of a contract to SUCH is likely to offer an advantage for the private partners over their competitors.[715]

In summary, private capital could be formed in any legal form. Contracts with the participation of private entities pursuing non-profit activities should still be considered as contracts with the participation of private capital. Consequently, a contract awarded by a contracting authority to such contractors should not be considered as an 'in-house' operation.

(3) Change of share structure (or participation of private investment) after awarding of contract

In several cases, the participation of private capital starts after the contract is awarded. In such a situation, could the contract still be regarded as 'in-house'?

In the Stadt Halle case, when contract awarding to implement the project was envisaged, no allocation of shares in the awarded company was agreed upon in the company statutes. However, the timing of contract awarding and the share structure were not considered as important issues.

In *the Commission v. Austrian case*[716], at the time the waste disposal contract was entered into

[714] Paragraph 36 of judgment
[715] Paragraph 40 of the judgment
[716] Case C-29/04, Commission of European Communities vs Republic of Austria, judgment of 10 November 2005.

with Abfall GmbH, the shares in the company were wholly owned by the town. After Abfall GmbH was held responsible, exclusively and for an unlimited period, for the collection and treatment of the town waste, nearly 49% of the company shares had been transferred to a private company. Therefore, the government contended that the contract was concluded whilst the shares in that company were still entirely held by the town; in addition, the contract was not intended to establish a relationship between independent legal persons, given that the local authority was able to exercise a 'similar control' over the company.[717]

However, the Court did not uphold the argument of the government. The Court indicated that in determining whether the provisions of procurement directives should be applied, the relevant date is not the actual date on which the public contract at issue was awarded. In addition, the Court also noted that it is not necessary to resolve the issue of whether the government holding of all the entire capital in the company on the date the public contract was awarded is sufficient to establish 'similar control'. The Court considered that the particular circumstances of the case required that the events which occurred subsequently be considered even though for reasons of legal certainty, the possible obligation of the contracting authority should be considered to arrange a public call for tenders in light of the circumstances on the date the public contract was awarded.

The Court in the *Commission v. Austria* case considered the time of transfer and the starting operating time of the company. The transfer of 49% of the shares in the company shortly (2 weeks) after the company was held responsible, exclusively and for an unlimited period, for the collection and treatment of the town waste. The company became operational only after the private company claimed part of its share. The Court concluded that in this case, a public service contract was awarded to a semi-public company with 49% of the shares held by a private undertaking through an artificial construction comprising distinct stages.[718] The awarding of the contract must be examined by considering all those stages as well as their purpose rather than their strict chronological order. Permitting contracting authorities to resort to devices designed to conceal the awarding of public service contracts to semi-public companies would jeopardise the objectives of the directive.

In ANAV case, prior to contract awarding, the contracting authority already decided to transfer 80% of the shares of its wholly owned company to a private partner by initiating a call for tenders. However, one year after the direct awarding of the service contract to its whole-owned company, the contracting authority decided not to act on its previous decision and not to privatise the company.[719] The court noted that for the duration of the contract at issue, if the capital of the

[717] Paragraph 36 of judgment

[718] Namely the establishment of AbfallgmbH, the conclusion of the waste disposal contract with that company and the transfer of 49% of its shares to Saubermacher AG.

[719] In ANAV case, by decision of 18 December 2003, the municipality awarded the service contract in question directly to its whole-owned company for the period from 1 January 2004 to 31 December 2012. While on 27 December 2002, the municipality already decided to transfer 80% of the shares it owned in the capital of that company, and on 21 May 2004, it decided to initiate for that purpose the call for tenders in order to select the majority private partner. On 13 January 2005, the municipality decided not to act on its previous decision and not to privatise that company.

company was open to private shareholders, a public services concession would be awarded to a semi-public company without any call for competition, which could interfere with the objective pursued by Community law.[720]

(4) Non-participation of the private investor regardless of the statute of the public whole-owned company allowing it

In several cases, contracts have been awarded directly to public wholly-owned companies; however, under the statutes of the company, the capital could possibly be open to private investors at a future time. Therefore, whether a contracting authority can exercise over the company a 'similar control' and conclude a contract directly, could private entities invest in the company concerned even though such an event has not previously occurred ?

The Parking Brixen case[721] is similar to the aforementioned issue. When the transaction was executed, the shares of the contractor Stadtwerke Brixen AG were 100% held by the municipality. However, the contractor had the obligation to open the company, in the short term, to other capital.[722] As no particular third party has emerged, the contracting authority had no reason to take into consideration the interests of the private investor[723]. However, the ECJ considered the market orientation of the contractor as a factor, thus rendering the control of the municipality tenuous.[724]

A similar situation was described in *Case C-573/07 Sea Srl v. Comunedi Ponte Nossa*.[725] In this case, the company statute provided that its capital was reserved to public entities; however, the company may issue preferential shares to encourage the widest ownership of shares at the local level by citizens and economic operators or the ownership of employee shares.[726] The Court indicated that selling the shares in a company at any time to third parties is not inconceivable. Nevertheless, to allow that mere possibility of indefinitely suspending the determination of whether the capital of a company awarded a public procurement contract is public would not be consistent with the principle of legal certainty.[727] Therefore, if a company's capital is wholly owned by the contracting authority, alone or together with other public authorities, when the contract in question is awarded to that company, opening the company capital to private investors may not be considered unless there exists, at that time, a real prospect in the short term of such an opening.[728] No sign of any impending opening of the company capital to private shareholders was observed in this case; thus, the mere possibility of private persons holding capital in the company

[720] paragraph 30 of judgment
[721] Case C458/03 Parking Brixen GmbH V Gemeinde Brixen and Stadtwerke Brixen AG, Judgment 13.10.2005.
[722] Paragraph 67 and 72 of the judgment.
[723] Paragraph 60 of the opinion of advocate general.
[724] Paragraph 67 of the judgment.
[725] Case C-573/07 Sea Srl V Comunedi Ponte Nossa, Judgment of the Court, 10 September 2009.
[726] Paragraph 42 of judgment. At hearing, the contracting authorities stated that the provisions relating to open the capital to private investors in the statute actually have been abrogated, and by mistake it had been retained. The ECJ court said it was for the national court to determine the truth. For details see paragraph 43 of the judgment.
[727] Paragraph 49 of judgment
[728] Paragraph 50 of judgment

is not sufficient to support the conclusion that a private investor has participated.[729]

(5) Discussion under the background of SOEs

According to the ECJ, with the following two reasons considered, direct participation of private capital in the contractor could not be considered as an in-house arrangement: (a) private capital pursues objectives different from those of the public capital, which leads to the contracting authority being unable to exercise control over the contractor similar to that exercised over its own departments; (b) assuming it is allowed in an in-house arrangement, it would place a private undertaking with a capital present in that undertaking at an advantage over its competitors. The ECJ believes that the characteristic of the capital determines the type of interests pursued by the entities. The participation of private capital changes the objective of SOEs from pursuing public interest to also considering private interest. Such a change prompts the SOEs and the controlling authorities to pursue different interests; thus, controlling authorities could not exercise 'similar control' over the SOEs. Notably, only the second reason has been mentioned in the recitals of the 2014 public procurement directives.[730]

Whether involvement of private capital changes the objective pursued by the SOEs will not be discussed. However, it is worth noting that although 'identical' control is not required by the ECJ and the 2014 public procurement directives, the SOEs as controlled entities should not pursue objectives different from those of the controlling authorities; both controlled entities and controlling entities should pursue public interests. The question is whether the SOE, which is 100% owned by the contracting authorities, and 19% activities of which are intended for providing goods and services in the market, even internationally, still pursue the same objectives as controlling entities?

In assessing this condition, the following situations have to be noted: (1) Private capital could be formed in any legal form. If private entities pursing non-profit activities similar to NGOs are present, participation in the SOE capital should still be regarded as participation of private capital. (2) If the participation of private capital occurs after contract awarding, all relevant stages and their purposes must be considered. Transfer of shares designed to avoid the application of public procurement rules to contract awarding is not allowed; otherwise, such transfer is allowed. After the transfer, the contracts should be awarded in accordance with public procurement rules.[731] However, these points remain unclear: the manner by which the contracts are awarded before the transfer and during implementation, whether these contracts should be terminated and open to the competition, and whether the selection of private capital should comply with certain competition rules. (3) If private capital has not participated in contract awarding but the statute of the public

[729] Paragraph 51 of judgment
[730] Recital (32) paragraph 2 of the directive 2014/24/EU
[731] In the proposal of EU commission, it has been stated that the absence of private participation shall be verified at the time of the award of the contract or of the conclusion of the agreement. The exclusion as the reason of in-house arrangements should cease to apply from the moment any private participation takes place, with the effect that ongoing contracts need to be opened to competition through regular procurement procedures. see: 10904/1/13 REV1, p.219.

wholly-owned company allows it or the company has the obligation to open its capital in certain periods, then no participation of private capital exists. Potential participation of private capital is not sufficient to satisfy this condition. The 2014 public procurement directives have provided for the indirect participation of private capital in controlled entities. Three aspects needed to be clarified: (1) no direct participation of private capital in 'controlled entities', instead of controlling contracting authorities. This aspect indicates that the participation of private capital in the controlling contracting authorities, such as the private capital in the BGBPL-type of SOEs, does not preclude the awarding of contract from the controlling contracting authorities to the controlled entities without complying with the EU public procurement rules. As it exerts no adverse effect on the competition between private economic operators,[732] (2) no 'direct' participation should be indicated. In the 2014 EU public procurement directive, 'direct' is not clearly defined, but on the basis of its wording, the term could be interpreted to mean no private capital exists in the capital structure of the controlled entities. For instance, if the controlled entity is an SOE, the shares of the SOE should not be held by any private entity, including NGOs. If one of shareholders of the SOE (a controlled entity) is another SOE involved in minority private capital, such should not be determined as a 'direct' participation of private capital. (3) Under certain particular situations, direct participation of private capital is allowed. Another exception is provided by the 2014 public procurement directives on the condition of no direct participation of the private capital. This results from recognizing the particular characteristics of public bodies with compulsory membership, such as organisations responsible for the management or exercise of certain public services.[733] In cases where the participation of specific private economic operators in the capital of the controlled SOE is rendered compulsory by a national legislative provision is in conformity with the Treaties, provided that such participation is non-controlling and non-blocking and does not confer a decisive influence on the decisions of the controlled entities.

3.2.1.2.1.2 The contract awarded from controlled 'contracting authorities' to the controlling contracting authorities or another legal person controlled by the same contracting authorities

Under 'similar control', the exclusion also applies where a controlled legal person which is a contracting authority awards a contract to its controlling contracting authorities or to another legal person controlled by the same contracting authority, provided that there is no direct private capital participation in the legal person being awarded the public contract or concession(see, Graph 13: The contract awarded from controlled 'contracting authorities' to the controlling contracting authorities or another legal person controlled by the same contracting authorities). The same exception of non-controlling and non-blocking forms of private participation also applies.

As in Chapter 2, the exclusion of in-house arrangement from the perspective of the SOE as a buyer has not been discussed. This part also includes a discussion relevant to this aspect. From the perspective of the SOE as a buyer, the following situations are relevant:

[732] Recital (32) paragraph 2 of the directive 2014/24/EU
[733] Recital (32) paragraph 2 of the directive 2014/24/EU

(1) If both the controlling and controlled contracting authorities are SOEs, which are classified as bodies governed by public law, then the public contract or concession award from the controlled SOE (BGBPL) to the controlling SOE (BGBPL) should not be regulated under public procurement directives, provided that the relevant conditions are fulfilled. If the SOEs award the public contracts or concessions to another SOE which is also controlled by the controlling SOEs, these contracts also should not be regulated by the procurement rules. In this situation, the SOEs which have been awarded the contract need not be regarded as BGBPL, implying that the SOE which is 100% owned by the controlling SOE may NOT necessarily pursue general interest needs.

(2) If the SOEs are the controlled contracting authorities, the controlling contracting authorities are not SOEs (for instance, public universities or other contracting authorities), then the controlled SOEs awarding the public contract or concession to the controlling public universities should not be regulated under public procurement directives, provided that the relevant conditions are fulfilled. For example, one SOE awards an education service contract to the university which owns this SOE. The contract awarded from the SOE to another legal person controlled by the public university should also not be regulated if no direct private capital participation exists and other conditions are fulfilled.

From the perspective of the SOE as a seller, the following situations are relevant:

(1) If the SOEs (BGBPL) are the controlling contracting authorities, the contract awarded from the controlled contracting authorities are ruled out of the public procurement rules provided that the relevant conditions are fulfilled. This situation is the other side of the 'same coin', which has been discussed above.

(2) If the SOEs are other legal persons controlled by the same contracting authority, then the contracts awarded from the controlled contracting authority to these SOEs are also ruled out, provided that the relevant conditions are fulfilled. In this case, the SOEs are not necessarily the BGBPL.

Specifically, at least two important issues deserve further discussion.

(1) Should the contract awarded from the SOEs as the controlled contracting authorities to the SOEs as the controlling contracting authorities be determined as an in-house arrangement if the SOEs as the controlling contracting authorities are involved in the direct participation of private capital?

Firstly, according to Article 12(2) of Directive 2014/24/EU, 'provided that there is no direct private capital participation in the ***legal person*** being awarded the public contract with the exception of …, which do not exert a decisive influence on the ***controlled legal person***'. This provision is not clear whether the requirement of 'no direct private capital participation' only applies to 'another legal person controlled by the same contracting authority' or also applies to the 'contracting authorities'. However, on the basis of the definition of the contracting authority, the contracting authority is not required to have 'legal personality'. Thus, the term 'legal person'

could cover a certain number of contracting authorities but not all.

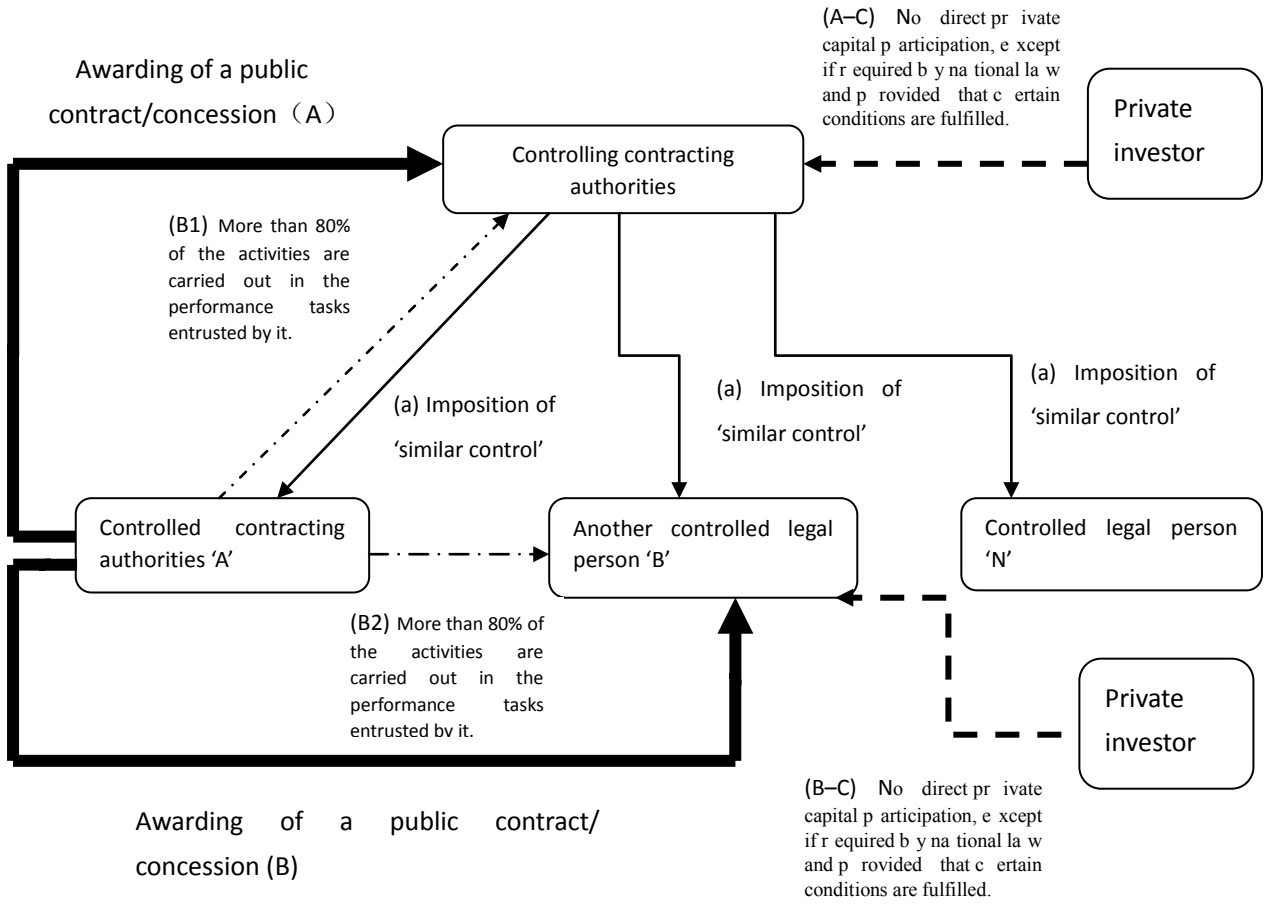
Secondly, the recital (32) of Directive 2014/24/EU provides that '*contracting authorities such as bodies governed by public law,* ***that may have private capital participation,*** *should be in a position to avail themselves of the exemption for horizontal cooperation.*' This sentence is not specifically relevant to the situation discussed in this part; however, the EU confirms that the private capital participating in the contracting authorities does not affect the contracting authorities to whom the contracts are being awarded from other contracting authorities, provided that certain conditions are fulfilled, including vertical in-house arrangement and horizontal cooperation between the contracting authorities, as discussed below.

Combining the two parts from Directive 2014/24/EU, in cases where the controlled contracting authorities award the contracts to the controlling contracting authorities, the 'no direct private capital' condition is not required to determine the in-house arrangements. This rule implies that when the controlled contracting authorities award contracts to BGBPL-type SOEs involved in direct private capital, the contracts may still be exempt from public procurement rules as the result of in-house arrangements. The rule also means that the private capital in this BGBPL type of SOEs could benefit from these contracts without competition. Compared with the similar situation of awarding to 'another legal person controlled by the contracting authority', the justification is unclear.

(3) Why could the contract awarded from the controlled contracting authorities to another controlled legal person, provided all relevant conditions are fulfilled, be determined as an in-house arrangement? Public procurement directives provide that '*such control may also be exercised by another legal person,which is itself controlled in the same way by the contracting authority.*'[734]

[734] Article 12 (1) subparagraph 2 of the Directive 2014/24/EU

Graph 13: The contract awarded from controlled 'contracting authorities' to the controlling contracting authorities or another legal person controlled by the same contracting authorities



3.2.1.2.2 Contracts awarded on the basis of exercising joint control

A. General rules under the 2014 public procurement regime

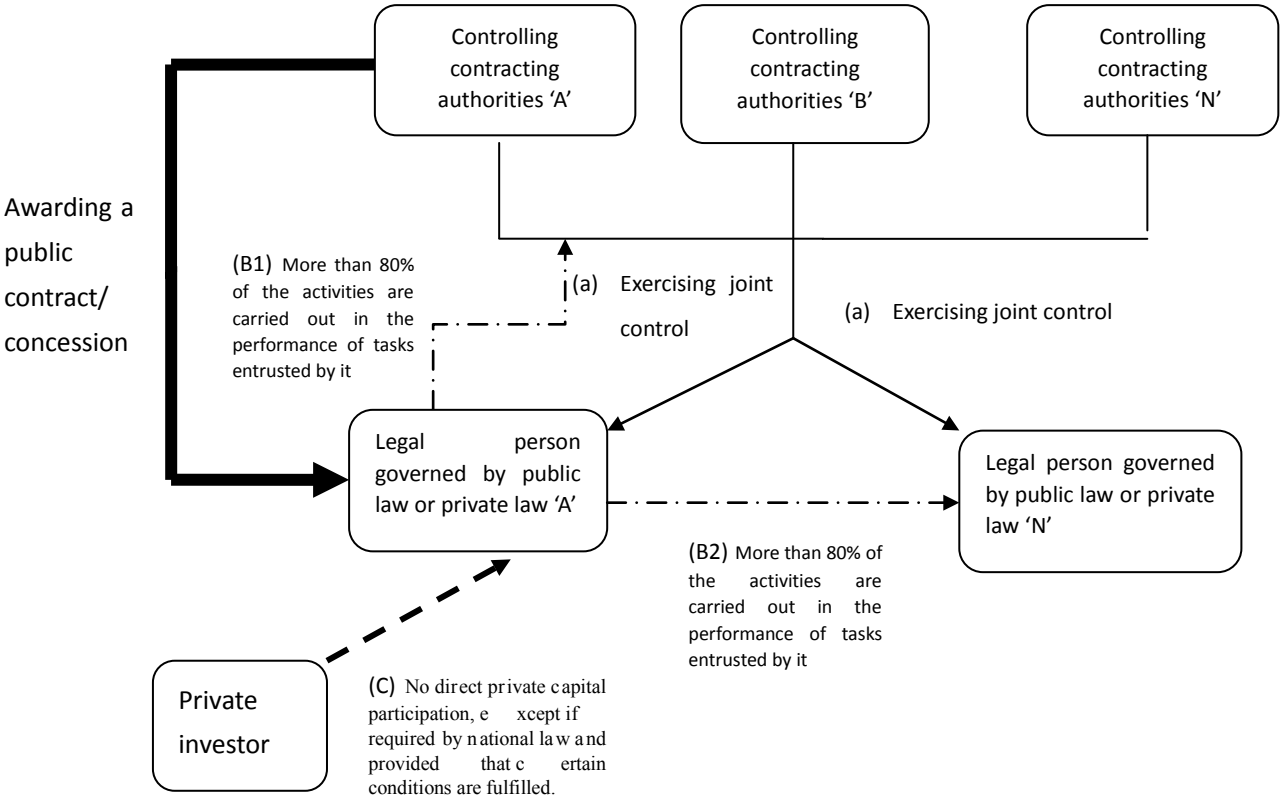
If the contracting authority does not individually exercise 'similar control' as previously defined, the contract may still be awarded without applying the public procurement directives, provided that all of the following conditions are fulfilled[735](see Graph 14: Contracts awarded on the basis of exercising joint control): (a) The contracting authority exercises joint control with other contracting authorities, over that legal person, similar to that exercised over their own departments; (b1) More than 80% of the activities of that legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authorities (b2) or by other legal

[735] Article 12 (3) subparagraph 1 of the directive 2014/24/EU

persons controlled by the same contracting authorities; and (c) no direct private capital participation in the controlled legal person exists—except for the non-controlling and non-blocking forms of private capital participation required by national legislative provisions—in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

'Joint control' exists when all of the following conditions are fulfilled[736]: '*(1) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities. Individual representatives may represent several or all of the participating contracting authorities; (ii) those contracting authorities are able to jointly exert decisive influence over the strategic decisions of the controlled legal person; and (iii) the controlled legal person does not pursue any interests which are contrary to those of the controlling contracting authorities.*'

Graph 14: Contracts awarded on the basis of exercising joint control



[736] Article 12 (3) subparagraph 2 of the directive 2014/24/EU

B. Interpretation of 'similar control' under the background of 'joint control'

In Section 3.2.1.2.1, the interpretation of 'similar control' under the single control or individual control has been discussed. However, if the control is jointly exercised under several contracting authorities, special issues are expected to arise.

(1) Why extending the exemption to 'joint control' is allowed

In the Teckal case, the specific situation was related to individual control, rendering joint control unimportant. However, in the Carbotermo case[737], the Court quoted the statement from the Teckal case that the legally distinct person in question must carry out the essential part of its activities with 'the controlling local authority or authorities', and envisaged the possibility that the exception provided for could apply not only in cases where a single authority controls such a legal person but also where several authorities do so.[738] The statement implies that 'similar control' may be exercised by more than one contracting authority, referred to as 'joint control'.

In Asemfo, the ECJ indicated that 'a body of rules such as that governing the Tragsas which enables, as a public undertaking acting as an instrument and technical service of several public authorities, the execution of operations without being subject to the regime laid down by those directives,….'. It confirmed that the public undertaking could implement the tasks entrusted by several public authorities.[739] In the case *Coditel Brabant C-324/07*[740]*, the Court also noted that the control exercised over the controlled legal entities must be effective; however, such control does not have to be exercised individually.*[741]

The reasons supporting 'joint control' are as follows: (a) the administration has the freedom to carry out tasks with its own services and own human or material resources. Specifically, these internal resources refer not only to those owned by a specific public authority but those from other public authorities as well. (b) On the basis of the collaboration or cooperation between public authorities, public undertakings could provide goods and services for all of these public authorities.

(2) What does 'joint control' mean?

'Join control' has no legal definition. However, from the ECJ case law, 'joint control' could be understood to be an approach through which different contracting authorities create a legal entity to deliver public service. It also refers to the circumstance in which one contracting authority joins

[737] Carbotermo SpA v Comune di Busto Arsizio (C-340/04)[2006]E.C.R.I-4137.
[738] Paragraph 69 of judgment
[739] Paragraph 65 of judgment
[740] In Case *Coditel Brabant C-324/07, the concessionaire was an inter-municipal cooperative society whose members are municipalities and an inter-municipal association whose members in turn are solely municipalities, and is not open to private members.*
[741] Paragraph 46

the legal entity which has been created by another contracting authority. The cooperation between those contracting authorities is exercised by establishing another distinct legal entity instead of a contractual cooperation only; therefore, joint control also has been called 'institutional in-house' arrangement.

(3) How to assess the existence of 'jointly control'?

Is the position of an individual public authority holding a share of the capital in a municipal company a relevant factor for determining the existence of 'joint control'?

Several contracting authorities could comprise one legal entity; however, in certain cases, the shares or the power of the contracting authorities in the controlled legal entities are not equally divided. In most cases, the contracting authority as one of the controlling entities only own a minority interest or even less than 1% of the capital shares of the controlled legal entities. For instance, (1) in the Coname case, one municipality decided to entrust the service covering the management, distribution and maintenance of the methane gas distribution installations for 6 years to a predominantly publicly owned company (concessionaire), in which the contracting municipality only held a 0.97% share in the capital.[742](2) In the ASEMFO case[743], the State company was held 99% by the Spanish State and 1% by 4 Autonomous Communities, a kind of public authority in Spain. (3) *In Case (C-324/07) Coditel Brabant , the concessionaire consisted of an inter-municipal cooperative society whose members are municipalities and an inter-municipal association whose members, in turn, are solely municipalities and are not open to private members.* (4) In Case C-573/07 Sea S rl, the awarding contracting authority was a minority shareholder in Setco, a company limited by shares and owned by a number of municipalities. (4) As in Cases C-182/11 and C-183/11 Econord SpA[744], 36 Italian municipal councils approved an agreement with Varese Municipal Council for acquiring small shares in the company Aspem, which was previously wholly owned by Varese Municipal Council, and then directly awarding the urban hygiene services to Aspem.[745] In fact, at the material time, Aspem's share capital was 173,785 euro, represented by an equivalent number of shares, each with a nominal value of 1 euro.

[742] The Italian Government submitted that most municipalities lacked the resources to provide public service such as that of gas distribution within their territory, through in-house structures, and they were obliged to resort to structures in the share capital of which several municipalities have holdings. The Court held the view that a structure such as a public company predominantly owned by several municipalities (concessionaire), may not be treated in the same way as a structure through which a municipality or a city manages, on an in-house basis, a public service, as the capital of concessionaire was partial open to private investors. See para. 36 of judgment.

[743] Case, C-295/05, Judgment of 19.04.2007.

[744] Joined cases: Econord SpA v Comune di Cagno, Comune di Varese (C-182/11) and Econord SpA v Comune di Solbiate, Comune di Varese (C-183/11) judgment dated November 29, 2012. See: Susie Smith, In-house awards to jointly controlled companies—satisfying the control test: Econord SpA cases C-182/11 and C-183/11, P.P.L.R., 2013, 2, NA32-NA34.

[745] In Econord SpA cases C-182/11 and C-183/11, Varese Municipal Council set up a wholly public owned share company 'Aspem' to manage and deliver a wide range of public services as an in-house provider. In 2005, after Aspem had been set up, two municipal councils, the Comune di Cagno and the Comune di Solbiate, adopted decisions as following: (a) they selected the arrangements for co-ordination with other local authorities permitted under relevant Italian law as their preferred system for managing their urban hygiene service; (b) approved an agreement with Varese Municipal Council for the award of a contract to Aspem to deliver the urban hygiene services to the Comune di Cagno and the Comune di Solibiate; and (c) acquired a holding in Aspem's share capital by purchasing one share each.

Varese Municipal Council held the majority of the share capital with 173,467 shares. The remaining 318 shares were divided between 36 municipal councils, including Comune di Cagno and the Comune di Solbiate, each with individual shareholding varying between 1 and 19 shares. One question was then raised: Is the position of an individual public authority holding shares in a municipal company relevant in determining the existence of 'joint control'?

On the basis of the ECJ case law, two approaches may be taken to solve this issue. Firstly, in the Coname case, the Court considered that a 0.97% interest is extremely small to preclude a municipality from exercising control over the concessionaire managing a public service.[746] Thus, the Court considered that a holding small share cannot enable the contracting municipality to exercise control over a concessionaire running a public service. The view held by the Court in the Coname case indicates that even under an institutional in-house arrangement, the contracting authority still needs to exercise similar control over individual legal entities as it does over its department. Only the contracting authority which held the majority shares may exercise 'similar control' over the controlled legal entity. The public authority which holds the minority share of the legal entity would not exercise 'similar control', and the contract awarded from the public authority to the legal entity should not be considered as an 'in-house' arrangement.

Secondly, *where several contracting authorities jointly create a legal entity, to assess the existence of 'similar control', it is necessary to examine whether the contracting authorities exercise joint control over the legal entity as they do over their own department instead of only considering individual control from each contracting authority.* This approach has been used in *Case C-295/05 Asemfo*[747], i[748], *Case C-573/07 Sea Srl*[749], and others.

In Asemfo, the Court recognised that under certain circumstances, the condition relating to the control exercised by the public authority could be satisfied, where such an authority held only 0.25% of the capital in a public undertaking. Following the Carbotermo and Consorzio Aliesei cases, the Court concluded that *'the contracting authority holds, alone or together with other public authorities, the entire share capital in a successful tenderer tends to indicate, generally, that that contracting authority exercises over that company a control similar to that which it exercises over its own departments.'*[750] Particularly, the Court clarified that the argument could not be accepted if the condition was met only for contracts performed at the demand of the Spanish State (the majority shareholder), excluding those which are the subjects of a demand from Autonomous Communities (minority shareholder) concerning which company must be regarded as a third party. The Court did not directly deny the approach in the Coname case but in fact confirmed that it should consider the whole shares held by public authorities, instead of exact shares held by each contracting authority.

[746] Paragraph 24 of judgment.
[747] Paragraph 56-61 of judgment
[748] Paragraph 52 of judgment
[749] Paragraph 61 of judgment
[750] Paragraph 57 of judgment

The Court in Case C-324/07 Coditel Brabant considered that the court in the Coname case did not deal with the question whether such control could be exercised jointly by several contracting authorities and discussed in greater detail on this view. The analysis was that when a number of public authorities are elected to execute their public service tasks by having recourse to a municipal concessionaire, it was usually not possible for one of those authorities to exercise decisive control over the decision of the entity, unless the authority has a majority interest in the latter; to require control exercised by a public authority in such a case to be individual, it would have the effect of requiring a call for competition in the majority of cases where a public authority seeks to join a group composed of other public authorities.[751] Meanwhile, a result would not be consistent with EU public procurement rules which confirm that a public authority may perform the public interest tasks conferred on it by using its own administrative, technical and other resources, without being obliged to call entities external to its own departments.[752] Consequently, the court indicated that it must be recognised that where a number of public authorities own a concessionaire to which they entrust the performance of one of their public service tasks, the control which those public authorities exercise over that entity **may be** exercised jointly. It means that in the case of a contract awarded from a contracting authority to a legal entity in which the contracting authority only holds minority shares, it still may exist the 'similar control', as the result of considering the joint control from all public authorities, instead of only the control from this contracting authority.

In Case C-573/07 Sea Srl, the court followed the ruling on the previous case and concluded that '*if a public authority becomes a minority shareholder in a company limited by shares with wholly public capital for the purpose of awarding the management of a public service to that company, the control that the public authorities which are members of that company exercise over it may be classified as similar to the control they exercise over their own departments when it is exercised by those authorities jointly.'*[753]

In Cases C-182/11 and C-183/11 Econord SpA, the ECJ commented that to give meaning to the concept of joint control, the control exercised over the entity cannot lie solely on the controlling power of the public authority with the majority shareholding.[754]

Ownership is also only relevant but not decisive in determining the existence of 'similar control'.

However, similar to the concept of 'similar control' under the circumstances of single or individual control, ownership is also only relevant, but not decisive, in determining the existence of 'similar control'. *In* Cases C-182/11 and C-183/11 Econord SpA, the ECJ ruled that the 'control test' is only satisfied when each contracting authority owner not only holds capital in the

[751] Paragraph 47 of judgment.
[752] Paragraph 48 of the judgment. Also see Stadt Halle and RPL Lochau, paragraph 48.
[753] Paragraph 63 of judgment
[754] Paragraph 31 of judgment

entity but also plays a role in the managing bodies of the entity.[755] Therefore, holding the shares jointly is only relevant to the decision on fulfilling the condition on 'joint control'. In this situation, the company shareholding is only a formal cover to exempt a contract for the provision of services from the obligation to initiate a tendering exercise.

Additionally, as indicated by the case law[756], the procedure used by a body to take decisions collectively, in particular recourse to a majority decision, is immaterial. **The core issue on the 'similar control' test under the joint control scenario is the role that contracting authorities play in the managing bodies of the legal entity—for instance, the influence on determining strategic objectives and significant decisions.**

(4) How about when the awarding entity and awarded entity are under the control of the same contracting authority?

Under certain circumstances, could the awarding of the contract concerned be considered an 'in-house' arrangement if both the awarding entity and the awarded entity are under the control of the same contracting authorities?

The similar situation was discussed in Case C-15/13 Datenlotsen Informationssysteme[757]. In this case, Hamburg University of Technology directly awarded a contract[758] to HIS. HIS[759] is a limited company governed by private law, with one-third of its share owned by Federal Republic of Germany and the remaining two-thirds owned by the German Länder; the city of Hamburg has 4.16% of its overall share capital. Hamburg University, classified as a body governed by public law under the EU public procurement regime, is a public higher education establishment of the City of Hamburg. In this case, different approaches were used to treat the relationship between the entities— the Hamburg University of Technology (referred to as the 'University') as the awarding authority, the City of Hamburg and HIS as the contractors.

Approach One: Examining whether the 'similar control' condition was satisfied

In this case, the University as the contracting authority, the vergabekammer of the City of Hamburg (referred as 'Vergabekammer'), a body with jurisdiction at first instance in public procurement cases, the referring national court and ECJ held different views on whether 'similar control' existed, thus allowing the direct awarding of the contract concerned. The *University argued that being commonly controlled could be considered as satisfying the conditions of 'similar-control'; the Vergabekammer considered that the 'similar control' condition was not*

[755] Under the terms of the shareholders' agreement, the shareholders, several municipal councils, established their right to be consulted and to appoint a member of the supervisory council, the right to nominate, in an agreement with the other municipal councils participating in the shareholder's agreement, a member of the management board.

[756] see *Coditel Brabant*, paragraph 51; case Sea Srl, para.61

[757] Case C-15/13 Technische Universität Hamburg-Harburg, Hochschul-Information-System GmbH v Datenlotsen Informationssystem GmbH, Judgment of the Court, 8 May 2014.

[758] The contract was for purchasing an IT system for higher education management, valued at 840,000 Euro.

[759] The object of HIS's business is to support higher education establishments and the competent authorities in their efforts to achieve the rational and effective fulfillment of their higher educational role. HIS's IT systems are used in more than 220 public and religious higher education establishments in Germany.

satisfied under all relationships concerned; the referring national court held the view that 'similar control' was satisfied under the relationship between the University and the City of Hamburg but not between the City of Hamburg and HIS; the ECJ determined that 'similar control' was not satisfied under the relationship between the University and HIS and between the University and the City of Hamburg. The ECJ did not examine the relationship between the City of Hamburg and HIS. In the following part, the reasons and relevant issues behind their views will be discussed.

Does similar control exist in the relationship between the City of Hamburg and the University?

The Vergabekammer examined the relationship between the University and the City of Hamburg. It observed that the University was autonomous and that the power of the City of Hamburg over it in monitoring compliance and expediency in relation to the management of allotted funds was not the same as the managerial power which a contracting authority must possess.[760]

The referring national court also examined the relationship between the University and the City of Hamburg. It stated that in accordance with their statutes, public higher education establishment had a large degree of autonomy in research and education and that the exercise of those autonomous powers was subject only to supervision of legality. However, the referring national court focused on the purchasing activities of the University and noted that the contract concerned fell within the management of funds allotted to the University in which the competent authorities had control, which allowed them to annul or amend decisions related to procurement.[761] The referring national court considered that in the procurement of supplies for public higher education establishments, the 'similar control' condition was satisfied.

The referring national court did not rely on the activities of public higher education, which were the main activities of the University, to determine the relationship between the University and the City of Hamburg. Essentially, it evaluated the relationship concerned only according to the control or influence from the City of Hamburg to the University in the aspect of procurement, which is similar to the criteria used in the definition of 'bodies governed by public law'. However, whether the condition requiring 'similar control' should consider all fields of activities of the subordinate entity was uncertain. If it should, it also considered that restricting that control to supply contracts dismissed the inference that the condition had been satisfied.[762] This approach is also supported by the case law of the court according to which the contracting authority must be able to exercise decisive influence over both the strategic objectives and the important decisions of the subordinate entity.

The ECJ also examined the relationship between the University and the City of Hamburg. It indicated that on the basis of the evidence in the file and in light of the case law established above,

[760] Para.14 of judgment
[761] para.17
[762] para.18

the City of Hamburg was not in a position to exercise 'similar control' over the University.[763] The Court considered that the control exercised by the City of Hamburg over the University extended only to part of its activity—that is, solely in matters of procurement but not on education and research on which the University had a large degree of autonomy—and then held the view that recognising the existence of 'similar control' in such a situation of partial control would run counter to the previous case law.[764] Therefore, the Court confirmed that the 'control test' should be examined on all activities of the University instead of limiting it to the procurement activities.

Whether 'similar control' exists in the relationship between the City of Hamburg and HIS

The Vergabekammer examined the relationship between the City of Hamburg and HIS and indicated that the City of Hamburg did not exercise control over HIS because the city did not have a permanent representative on the supervisory board of that company.[765]

Regarding the control exercised by the City of Hamburg over HIS, the referring court stated that the City of Hamburg owned only 4.16% of the company capital and had no permanent representative on its supervisory board that could militate against the existence of control similar to that which it exercises over its own departments. Therefore, the referring national court held the same view as Vergabekammer. They only focused on the control individually exercised by the City of Hamburg, and did not examine the 'control test' based on 'joint control'. The referring national court also examined the essential part of the contractor's activity. It also considered that the condition was satisfied in the present case because HIS is predominantly devoted to public higher education establishments, and its other business activities are ancillary in nature.[766]

The ECJ did not examine the relationship between the City of Hamburg and HIS.

Whether 'similar control' exists in the relationship between the University (procurer) and HIS (contractor)

The University confirmed that no relationship of control existed between the University and HIS.

The Vergabekammer held the view that the University as a contracting authority was not in a position to exercise control over HIS, similar to that which it exercised over its own departments. It indicated that even though the University was a legal person under public law emanating from the City of Hamburg and that the City had a 4.16% share in the capital of HIS, the University and the City of Hamburg were separate legal entities.[767]

The referring court did not examine the direct relationship between these two entities.

However, the ECJ first examined the relationship between the two parties of the contract

[763] Para.31
[764] Para.32
[765] para.14 of judgment
[766] Paragraph 19
[767] Paragraph 13.

concerned and noted that it was common ground that no relationship of control existed between the University, as the contracting authority, and HIS, the contractor. The University held no share in the capital of that entity and had no legal representative in its management bodies.[768]

Whether the 'similar control' condition could be considered satisfied if the same public authorities exercised similar control over both the procurer and the contractor?

The University justified the direct awarding of the contract on the ground that although no relationship of control existed between the two entities, the 'similar control' condition was satisfied because both parties were under the control of the City of Hamburg. The University intended to justify the direct awarding of the contract between two controlled entities, on the basis of the fact that both parties of the contract concerned are under the control of the same public authority.

The Vergabekammer deliberated that the City of Hamburg having control on both the University and HIS was also insufficient to satisfy that condition as such a form of 'indirect control' had no basis in the case law of the Court.[769] Even though 'similar control' existed in the relationship between the public authorities with the contracting authority and the contractor, 'indirect control' had no legal basis and could not satisfy the 'similar control' condition.

The ECJ indicated that the reason for justifying the recognition of the exception for in-house awards, which was the existence of a specific internal link between the contracting authority and the contractor, was absent in a situation such as that in the main proceedings.[770] ECJ could be found to strictly interpret the rules from a previous case law and only considered the relationship between the contracting authority and the contractor/provider. It could also deduce that the 'joint control' could not encompass the situation of 'common control by the same public authority' even though 'public authority' exercises 'similar control' over both parties of the contract. The 'similar control' condition could not be satisfied by 'indirect control' under the circumstance described in this case.

Approach Two: Examining through the perspective of horizontal in-house transactions

The referring national court also examined the relationship through the perspective of horizontal in-house transactions apart from examining whether the relationship in this case satisfies the 'similar control' condition. 'Horizontal in-house transactions' refers to the awarding of a contract within a relationship between three entities by the referring national court. In ECJ, the term 'horizontal in-house transactions' refers to a situation in which the same contracting authority or authorities exercise 'similar control' over two distinct economic operators, one of which awards a

[768] para.28
[769] Paragraph 14.
[770] Para.29

contract to the other.[771] In academic writings at the national level, it has been keenly debated whether contract awarding within a relationship as a 'horizontal in-house transaction' is covered by the case law stemming from Teckal, which has not been addressed by the case law of Court.[772]

Approach Two was considered by the referring national court to examine the relationship in the following way: Firstly, the referring national court would consider that the spirit and the purpose of the exemption for in-house awards established by that judgment could allow 'horizontal in-house transactions', such as the one at issue in the main proceedings of this case, to fall within that exemption. However, it stated that in the present case, no municipal cooperation fell within the meaning of the case law of the Court[773] because neither the University nor HIS are public authorities, and HIS is not entrusted directly with the performance of a public service task.[774]

On the basis of the relationship between the University and the City of Hamburg, the ECJ noted that the exception concerning the capability of in-house awards to apply to so-called 'horizontal in-house transactions' need not be examined. Therefore, the ECJ did not address the question whether 'horizontal in-house transactions' is covered by the case law stemming from Teckal.

It also mentioned that with regard to the applicability of the case law on the inter-municipal cooperation resulting from *Commission* v *Germany* (EU:C:2009:357) and *Ordine degli Ingegneri della Provincia di Lecce and Others* (EU:C:2012:817), the conditions for the application of the exception provided for in that case law had not been satisfied, given the reasons cited by the referring national court above.[775] Thus, the cooperation between the University and HIS was not aimed at carrying out a public task within the meaning of the case law.[776]

C. How to assess the condition '80% of its activities'?

(a) Under the 'joint control' circumstance, under whose trust are 80% of the activities carried out in the performance of tasks?

Under the 'joint control' circumstance, the legal entities are jointly controlled by several contracting authorities; thus, the requirement on the essential part of the activity should be interpreted as follows: (1) '80% of the activities are carried out in the performance of task entrusted by the contracting authority awarding the contract; or (2) '80% of the activities are carried out in the performance of task entrusted by all contracting authorities which hold shares in the legal entity or participate as members of the legal entity? ; or (3) whether an activity imposed on a contractor by a non-shareholder public authority for the benefit of public authorities which

[771] para.33 of the judgment
[772] David McGowan, Can horizontal in-house transactions fall within Teckal? A note on case C-15/13, Technische Universitat Hamburg-Harburg, Hochschul-Informations-system GmbH v Datenlotsen Informationssyteme GmbH, P.P.L.R. 2014,5, NA120-NA122.
[773] *Commission* v *Germany* (EU:C:2009:357) and *Ordine degli Ingegneri della Provincia di Lecce and Others* (EU:C:2012:817). It will be discussed in the following section.
[774] Paragraph 16
[775] Para.34.
[776] Para. 35 of the judgment. For details, see *Ordine degli Ingegneri della Provincia di Lecce and Others* EU:C:2012:817, paragraphs 34 and 37

are not shareholders of that contractor, and do not exercise any control over it must be taken into account as the part of 'essential part of its activities'?

On the basis of the ECJ case law, the second interpretation should be preferred. For instance, in the ASEMFO case, Tragsa carried out more than 55% of its activities with Autonomous Communities and nearly 35% with the State.[777] Thus, being controlled by several authorities does not require that the undertaking carry out the essential part of its activities only with one or another of those authorities but with all of those authorities together. Accordingly, the activities to consider in the case of 'joint control' are those which the undertaking carries out with all of those authorities together.[778]

Furthermore, in Case C-553/15, the Cogesa as one company, being jointly controlled by several municipalities of the Abruzzo Region in Italy, has been imposed by Abruzzo Region, which is not a shareholder of the Cogesa, through an Integrated Environmental Authorisation, to treat and recover the urban waste of certain municipalities of that region which were not shareholders of the Cogesa.[779] The Abruzzo Region has been regarded by the Court as a public authority which 'is not a shareholder of the Cogesa and also does not exercise any control over it within the meaning of the Court's case law on so-called 'in-house' awards.'[780] The Court pointed that 'in order to determine whether Cogesa performs the essential part of its activity with the local authorities which control it, the activity which that company devotes to non-shareholder local authorities must be regarded as being carried out for the benefit of third parties.'[781] It is interesting to note that, the Coges still can carry out the activities imposed by the public authority through a mandatory order, but just these activities will not be considered as the activities devoted to the in-house arrangement.

(b) If the activities are entrusted by controlling authorities to provide services to other contract authorities which are not controlling authorities or other controlled authorities, should also be calculated as the activities devoted to the in-house arrangement?

In Case C-553/15, the Court determined the activities imposed by the non-controlling authorities to other non-controlling authorities as for the benefit of third parties. However, given the assumption that the activities are imposed by controlling authorities to other non-controlling authorities, whether the activities should be considered as devoted to the in-house arrangement? For instance, if a municipal authority A is one of the controlling authorities of one company B, and the municipal authorities entrust this company to provide service to the villages belong to the municipal authority A. If the entrustment is conducted through awarding contract, whether this part of activities should be considered as devoted to in-house arrangement? From the interpretation by the Court in *the Carbotermo and Consorzio Alisei* case, this part of activities

[777] para.63.
[778] Paragraph 70-71 of judgment
[779] These activities are in accordance with the principles of self-sufficiency, proximity and subsidiarity. See, paragraph 13 of the Judgment.
[780] Paragraph 37 of the Judgment
[781] Paragraph 36 of the Judgment of Case c 553/15.

should be considered as part of the in-house arrangement, as the **beneficiary, the payer or the territory in which the services are provided is irrelevant. However,** if the entrustment is conducted through executive order, whether this part of activities should be considered as devoted to the in-house arrangement? Until now, it is no clarity on this issue.

(c) Whether the activity of the contractor performed for the contacting authorities before such joint control took effect must also be taken into account?

In Case c-553/15, the Court has examined this situation and pointed out that 'account must be taken of all the circumstances of the case, which may include activity carried out by that contractor for those local authorities before such joint control took effect.'[782] Three kinds of scenarios have been mentioned by the Court[783]: (a) for the activities which are still in existence at the time of the award of a public contract, they must certainly be taken into condition; (b) for the activities completed before the joint control took effect may be relevant; (b) for the past activities may also be relevant, because they 'may be indicative of the importance of the activity that Cogesa is planning to carry out for its shareholder local authorities after their similar control has taken effect'.[784] However, this interpretation by the Court has been commented as 'somewhat generous towards the authorities seeking to rely on the exemption'[785].

D. Discussion in the context of SOEs

The preceding discussion indicates that to assess whether contract awarding could be exempted from applying EU public procurement rules as a consequence of the existence of in-house arrangements due to 'joint control', the following aspects have to be determined:

(a) Whether all public authorities relevant jointly exercise 'similar control' to the awarded legal person.

One approach held the view that each contracting authority should individually exercise 'similar control' over the awarded entities; the other held the view that the contracting authorities 'jointly' exercising 'similar control' was sufficient. The second view has been supported by the ECJ because the first requirement would consequently require a call for competition in the majority of cases where a public authority seeks to join a grouping composed of other public authorities.

The context of 'similar' control is the same as that of individual 'similar control'. The contracting authorities should be able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person. The contracting authorities exerting influence on the decision of awarding public procurement contracts is not sufficient to determine the existence of 'similar control'.

Additionally, the public procurement directives state that '*the controlled legal person does not*

[782] Paragraph 43 of the Judgment.
[783] Paragraph 41 of the Judgment.
[784] Paragraph 41 of the Judgment.
[785] See: Adrian Brown, Clarification of the exemption for 'in-house' awards of public contracts: the EU Court of Justice ruling in case C-553/15 Undis Servizi Srl v Commune di Sulmona, P.P.L.R. 2017, 3, NA101.

pursue any interests which are contrary to those of the controlling contracting authorities'. For individual 'similar control', this point has not been mentioned in the directives but specified by the ECJ on the 'no direct participation of private capital' condition, as previously discussed. Comparatively, instead of requiring the controlled legal persons to pursue the same interests as those pursued by the controlling public authorities, the directives only require not pursuing any contrary interests. However, it is unclear from which perspective the contrary interests mentioned are viewed.

The condition requiring 'more than 80% of the activities' of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authorities is the same as the 'single control' requirement. Calculating the percentage of the activities should base on the task entrusted by all controlling contracting authorities and by other legal persons controlled by the same contracting authorities.

The 'no direct participation of the private capital' condition is also the same as the 'single control' requirement.

(b) If 'similar control' jointly exercised by all public authorities is relevant, then the role of the awarding contracting authority in the decision-making bodies of the controlled entities should be determined.

This examination is relevant to the ownership of the controlled entities. In several ECJ cases, it is uncertain whether a contract awarded from a contracting authority which holds only few shares (such as less than 1%) could be exempted as the result of 'jointly control'. The ECJ ruled that the fact that the controlled entities hold shares is inadequate to satisfy the 'joint control' condition. The awarding contracting authorities should also participate as part of the managing bodies of the controlled entities. This requirement implies that the factor of ownership is only relevant and not decisive in determining the excise of 'similar control' because the shareholders may not hold the right to nominate the members of the management board in accordance with the terms of the shareholders' agreement. Thus, even though the contracting authority only holds 1% of the shares of the controlled entity, if it holds the right to nominate the member of the management board, the contract awarded from this contracting authority to the controlled entity could still be determined as an in-house arrangement.

The 2014 public procurement directives also mention the factor, which is the composition of the decision-making bodies, instead of the structure of the ownership. To assess joint control from contracting authorities over a legal person, one of the three conditions to fulfil is that 'the decision-making bodies of the controlled legal person' should be composed of the 'representatives of all participating contracting authorities.' Individual representatives may represent several or all participating contracting authorities. However, whether the scope of 'all participants' is equal to the scope of 'all shareholders' has to be determined. Not all participating authorities are required to be members of the decision-making bodies, although all shareholders may have to be represented in the decision-making body of the controlled legal person.

The 2014 public procurement directives have not provided whether the contract awarded from one controlled contracting authority to another controlling contracting authority or another legal person (which is also under the control of the same group controlling public authorities) could be exempted as an in-house arrangement under 'joint control' compared with 'single control'.

Moreover, the EU public procurement directives have also not provided that if one contract is awarded from one controlled public authority, which is exercised joint control by one controlling authorities with the group A of the contracting authorities; to another legal person which also is exercised joint control by the same controlling authorities but with the group B of the contracting authorities; whether it is possible to be exempted from applying the EU public procurement rules as the reason of in-house arrangement. In addition, it has not provided that one contract awarded from the controlled contracting authorities over which single control is exercised by the controlling contracting authority, to another controlled legal person over which joint control is exercised by the same controlling authority with other contracting authorities, could possibly be determined as an in-house arrangement.

According to the ECJ case law, to assess whether contract awarding meets the conditions of an in-house arrangement, two approaches are considered: fulfilling the conditions of 'similar control' and fulfilling the conditions of 'horizontal in-house arrangements'. Whether in-house exemption has been expanded to these scenarios is undetermined.

3.2.1.2.3 Contract exclusively awarded on the basis of cooperation

A. General rules under the 2014 public procurement regime

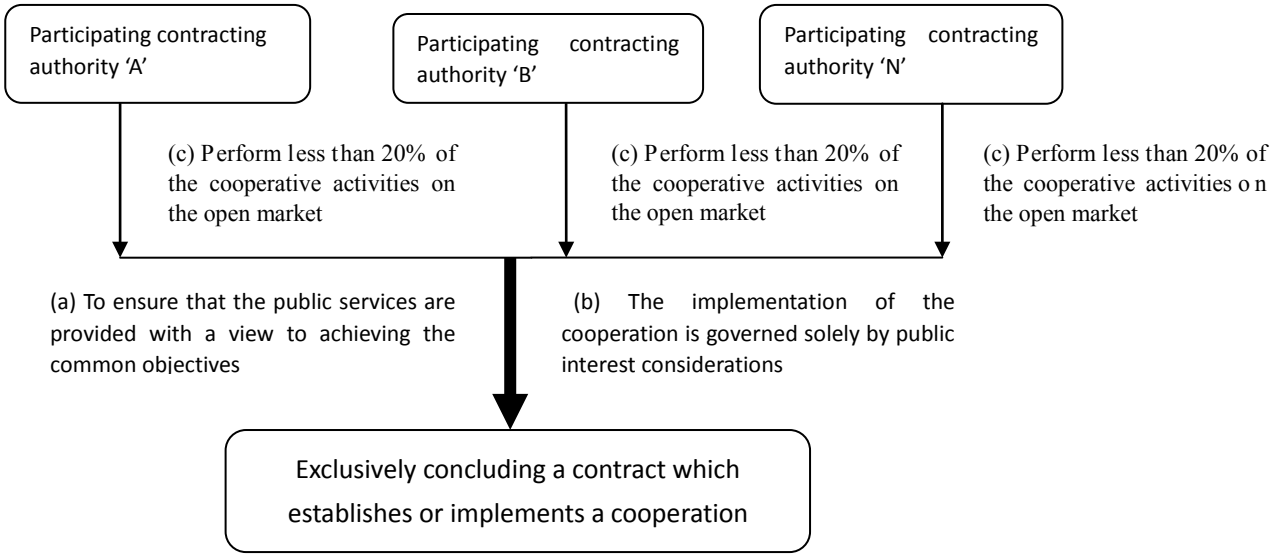
A contract concluded exclusively between two or more contracting authorities shall fall outside the scope of the EU procurement directives, given the following conditions:

(a) The contract establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that the public services are performed in accordance with their common objectives; (b) The implementation of such a cooperation is governed solely by public interest considerations; and (c) The participating contracting authorities perform less than 20% of the activities of the cooperative on the open markets.

This kind of exemption has been referred to as a contractual relationship between public sector entities or public sector co-operation, as no controlling or controlled relationship exists between contract parties. *Commission v Germany* (Case C-480/06)[786] has confirmed this kind of exemption. The relevant issues, combined with the ECJ case law, will be discussed in the following:

[786] Four administrative districts in Lower Saxony of Germany concluded a contract on 18 December 1995 with Stadtreinigung Hamburg (City of Hamburg Cleansing Department) relating to the disposal of their waste in the new incineration facility at Rugenberger Damm, which was to be completed by 15 April 1999.

Graph 15: Contract exclusively awarded on the basis of cooperation



B. Justification of contract exemption from the application of the EU procurement regime

In all previous ECJ cases, the cooperation between public authorities had occurred by creating a body governed by public law which was 'jointly controlled' by the public authorities. This body is entrusted with performing the task in the public interest by concerned local authorities. This kind of cooperation has been referred to as an 'institutional cooperation' in some academic papers[787] as 'institutional PPP (IPPP)'[788] which is similar to the cooperation mentioned by the EU Commission.

The first ECJ case on 'contractual coopeation' between contracting authorities was in *Commission v Germany* (Case C-480/06). In this case, strictly following the conditions for 'in-house' arrangements in previous cases, the EU Commission did not accept that the arrangement between contracting authorities should fall beyond the public procurement rules in the absence of such 'jointly controlled' body for inter-municipal cooperation.[789]

However, the Court firstly followed the conclusion in the Coditel Brabant case[790] and confirmed that using its own resources, a public authority may perform the public interest tasks conferred on without being obliged to call on external entities and that it may do so in cooperation with other public authorities.

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789 Paragraph 21.

790 Paragraph 48 and 49.

Secondly, the Court indicated that cooperation with other public authorities by creating a body governed by public law is not necessary as the Community law does not require public authorities to use any particular legal form to jointly carry out their public service tasks. This ruling implies that contractual cooperations should be treated similarly with 'institutional cooperation'. Furthermore, contractual cooperation between public authorities does not undermine the principal objective of the Community rules on public procurement, where implementation of that cooperation is given solely by considerations and requirements relating to the pursuit of objectives in the public interest. In addition, the principle of equal treatment of the persons concerned is respected so that no private undertaking is in a more advantageous position than any of its competitors.[791]

C. Cooperation between participating contracting authorities: Parties and aims

(1) ***Exclusively*** *conclude* ***a contract*** *which establishes or implements a cooperation* ***between contracting authorities***

From the perspective of **participating entities**, the following aspects are notable: (1) According to the 2014 EU public procurement regime, the contractual in-house arrangement only applies to the cooperation between contracting authorities, namely, the state, regional and local authorities and bodies governed by public law. For instance, in Case C-480/06 *Commission v Germany*, all parties of the contract concerned should be classified as local authorities; (2) Particularly, under this circumstance, 'similar control' between participating contracting authorities is unnecessary. For instance, in Case C-480/06 *Commission v Germany*, the four administrative districts did not exercise any control which could be described as similar to that which they exercise over their own departments; (3) Additionally, the cooperations should exclusively or solely between contracting authorities without the participation of any private party.

From the perspective of **nature of the contract**, as mentioned in Case C-480/06 *Commission v Germany*, the contract at issue must be analysed as the culmination of an inter-municipal cooperation between the parties thereto. It established cooperation between local authorities.

Furthermore, two kinds of relationships need to be distinguished. For instance, in Case C-480/06 *Commission vs Germany*, the two relationships are as follows: (a) the contract concluded between four neighbouring administrative districts and Stadtreinigung Hamburg for reciprocal treatment of waste and (b) the contract governing the relationship between Stadtreinigung Hamburg (as buyer) and the operator of the waste treatment facility Rugenberger Damm, a company whose capital partly consists of private funds. The ECJ noted that **even though the first contract forms both the basis and the legal framework for the second contract,** namely, future construction and operation of a facility intended to perform a public

[791] Paragraph 47 of judgment

service—thermal incineration of waste; **the first contract did not provide for or prejudice the award of any contracts that may be necessary in respect of the construction and operation of the waste treatment facility**.[792] The ruling implies that to assess contractual in-house arrangement exemption, only the first relationship is considered, and the result of the assessment does not influence the second relationship. Consequently, in Case C-480/06 *Commission vs. Germany*, even though the first relationship was determined as a 'contractual in-house arrangement', the contract may still be awarded if the second relationship should apply the public procurement rules.

*(2) The aim of cooperation is to ensure that the **public services they have to perform** are intended to achieve their common objectives.*

Determining the subject matter of the contract. In Case C-480/06 *Commission v Germany*, the subject matter of the contract is primarily the undertaking assigned to Stadtreinigung Hamburg to provide annually a treatment capacity of 120 000 tonnes of waste to the four administrative districts concerned, intended for thermal utilization in the Rugenberger Damm facility.[793] In other words, the subject matter of the contract concerned was tasked to carry out waste disposal, which was also the aim of the cooperation between contracting authorities.*The subject matter of the contract should be the public task which all participating contracting authorities have to perform.* In Case C-480/06 *Commission v. Germany*, , the subject matter of the contract, waste disposal was one public task which all participating contracting authorities had to perform. This public task was related to the implementation of one Community directive[794], which requires the Member States to formulate plans for providing waste management, and encourages waste treatment in the nearest possible installation.[795] In *Case C-159/11 Ordine Degli Ingegneri Della Provincia Di Lecce and Others*[796], the referring court determined that academic research was the relevant public task which both the ASL and the University had to perform. However, as the contract consisted of substantive aspects, with a significant or even major part of it corresponding to the activities typically conducted by engineers and architects, the Court considered that the subject matter of this contract was not academic research despite the academic aspect involved.[797] Consequently, the Court followed the view in *Commission v Germany* and noted that **the public task did not appear in the current contractual cooperation as a subject matter to ensure the implementation of a public task** which both the ASL and the University had to perform.

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[792] Paragraph 44 of judgment

[793] The waste delivery and removal capacity were to be agreed upon for each week between Stadtreinigung Hamburg and a representative designated by those administrative districts.

[794] Council Directive 75/442/EEC of 15 July 1975 on waste, which has been amended by Council Directive 91/156/EEC of 18 March 1991.

[795] For carrying out the task of waste disposal, the cooperation required the City of Hamburg to build and operate a waste treatment facility under the most favourable economic conditions owing to the waste contributions from the neighbouring *administrative districts*, making it possible for a capacity of 320 000 tonnes per annum to be attained. For that reason, the construction of that facility was decided upon and undertaken only after the four *administrative districts* concerned had agreed to use the facility and entered into commitments to that effect.

[796] This case concerned to a decision the Director-General of the ASL on 7 October 2009, in which it approved the specification for the university to carry out a study and evaluation of the seismic vulnerability of hospital structures in the province of Lecce.

[797] Paragraph 37 of the judgment

In *Ordine Degli Ingegneri Della Provincia Di Lecce,* the Advocate General also mentioned that as required, the cooperation serves to perform a common public task. '*It is not therefore sufficient that the statutory duty to perform the public task in question concerns only one of the public authorities involved, whilst the other's role is limited to that of a vicarious agent, which takes on the performance of this external task under a contract.*'[798] The statement implies that the unilateral pursuit of one participant's own interest cannot really be described as 'cooperation'. The subject matter of the contractual cooperation should not only be the 'public task' but the 'public task' for both parties of the contract as well.

(3) The implementation of the cooperation is governed solely by considerations relating to the public interest

As mentioned in Case C-480/06 *Commission v Germany* , the Court indicated that *where the implementation of the contractual cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest, and the principle of equal treatment of the persons concerned is respected so that no private undertaking is placed in a position of advantage vis-à-vis competitors, such contractual cooperation between public authorities does not undermine the principal objective of the Community rules on public procurement.*[799]

To understand the court statement, the relevant parties concerned in this case have to be examined. Firstly, as the Commission argued, the condition relating to the existence of similar control was not fulfilled in this case as none of the contracting bodies concerned exercise any power over the management of Stadtreinigung Hamburg.

Secondly, by contrast, the Federal Republic of Germany observed the need to evaluate the requirement relating to the degree of the control exercised against the yardstick of the public interest. This view was based on the *Stadt Halle and RPL Lochau* case in which '*the relationship between a public authority which is a contracting authority and its own departments is governed by considerations and requirements proper to the pursuit of objectives in the public interest. Any private capital investment in an undertaking, on the other hand, follows considerations proper to private interests and pursues objectives of a different kind.*' In this case, no private undertakings were involved; the cooperation existed only as a contractual cooperation between public authorities. Thus, it considered that the requirement concerned with control was satisfied because the public authorities in this case had exercised **reciprocal control over each other.** It further explained that any divergence from the objectives jointly defined would lead to the complete cessation of the cooperation. It noted that the principle of 'give and take' implied that the participating public contracting authority concerned have an interest in maintaining that cooperation and consequently, in complying with the objectives jointly defined. Therefore, the intention of the Federal Republic of Germany could be viewed as a justification of the contractual

[798] para.75 of the OAG. Of case c-159/11
[799] Paragraph 47.

cooperation between public authorities on the basis of 'joint objectives' between the entities which only pursue public interest. Specifically, the existence of similar control could be sufficiently considered even though no 'similar control' was determined between participating public authorities provided that all participants only pursued public interest and exercised reciprocal control over one another through contractual cooperation to achieve a 'joint objective'. Similar control refers to control similar to the one exercised by participating authorities over their respective departments.

Thirdly, the ECJ on the one hand examined further the implementation of the cooperation. For instance, the parties under the contract must assist each other, if necessary, in performing their legal obligation to dispose of waste.[800] **The contractual cooperation in this case did not lead to any financial transfer between entities other than those corresponding to the reimbursement of the part of the charges borne by the administrative districts but paid by Stadtreinigung Hamburg to the operator.** On the other hand, the ECJ held that on the basis of the *Stadt Halle and RPL Lochau* case, the contract would not out the private undertaking in a better position vis-à-vis competitors because no participation of a private undertaking was determined.[801]

Therefore, the requirement that '*The implementation of the cooperation is governed solely by considerations relating to the public interest*' stems from the fact that in this kind of contractual cooperation only public entities which pursue public interest are involved. Consequently, the implementation of the cooperation will only be governed by the public interest commonly pursued by those entities. This requirement could be intended to emphasise the non-participation of a private undertaking in this cooperation because once the private undertakings are involved, the implementation of the cooperation will not only pursue public interest, thereby putting some competitors in an unreasonably advantageous position.

In *Case C-159/11 Ordine Degli Ingegneri Della Provincia Di Lecce and Others*, this condition was also examined, and another aspect of this requirement was emphasised. In *Case C-480/06 Commission v Germany*, Stadtreinigung Hamburg assumed no responsibility for the operation of the facility and offered no guarantee in that regard. The Court also indicated that the arrangement of the contractual cooperation should not put the private undertakings in a relatively advantageous position. However, in *Case C-159/11 Ordine Degli Ingegneri Della Provincia Di Lecce and Others,* the University could also be considered as an economic operator for providing service in the market; mostly, under the Consultancy Contract concerned, the work was to be conducted through a close collaboration between the Lecce ASL working group and the University working group with the help of highly qualified external staff, if necessary.[802] Accordingly, the Court concluded that the contract at issue may put private undertakings in a relatively advantageous

[800] It was thus provided, inter alia, that in some circumstances, for example where the facility concerned has temporarily exceeded its capacity, the four administrative districts concerned agree to reduce the amount of waste delivered and thus to restrict their right of access to the incineration facility. See the para. 42 of the judgment.

[801] Paragraph 47 of the judgment

[802] para. 13 of the Opinion of Advocate General

position if the highly qualified external collaborators to whom it permits the University to have recourse for carrying out certain services include private service providers.[803]

Therefore, compared with the condition under 'similar control', as discussed in Section 3.2.1.2.1, the condition under the 'contractual cooperation' exemption seems more stringent. In the University concerned, no participation of private capital existed. The Court only relied on the fact that under the contract, the University could ask help from highly qualified external provider to complete the task when necessary to determine that this contract could bring advantage for a private provider.

D. The participating contracting authorities perform on the open market less than 20% of the activities concerned by the cooperation.

This condition has been clearly specified in the 2014 public procurement directives. This requirement is practicable as some contracting authorities, such as BGBPL, also perform on the open market. For instance, the University concerned in *Case C-159/11 could provide education and research for the internal group but could also be the economic operator on the open market.*

However, the meaning of the requirement is unclear. One contracting authority may participate in several activities, such as providing education services and research services. The requirement may not specify that the percentage of the activities performed on the open markets should be less than 20% of the 'all of the activities' or of 'the activities concerned by the cooperation'. If one cooperation is intended to provide training to civil servants of all participating authorities, entrusting this task to a public university which provides education services to normal undergraduate and postgraduate students and to employees of private entities, as well as provides research services to contracting authorities and private entities, then the 20% requirement may not have to be interpreted through any of the following approaches: (a) the provision of education through the public university to the open market, such as employees of private companies, should be less than 20% of the activities concerning the provision of educational services; (b) the provision of education and research to the open market by the public university should be less than 20% of the activities concerning the provision of educational services; or (c) the activities in the two aforementioned scenarios should be less than 20% of the activities concerning the provision of educational services to civil servants by participating contracting authorities. The uncertainty is derived from the fact that in reality, the contracting authority may pursue one kind of activity both within the internal group and on the open market and not only pursue one kind of activity on the open market.

E. Discussion

(1) Justification of contractual in-house (public sector cooperation) exemption.

On the basis of the discussion above, the reasons for allowing contractual in-house exemption

[803] Paragraph 38 of the judgment

from the EU public procurement rules are as follows: (a) Firstly, public authorities may freely perform public tasks by using their own resources. (b) Secondly, public authorities could provide public service either by themselves or through out sourcing. If they choose to provide by themselves, they can perform the public tasks through (i) the internal departments, (ii) the entities over which they exercise 'similar control', (iii) the entities over which they exercise 'joint control' with other contracting authorities, or (iv) with other contracting authorities through contractual cooperation. When the public authorities choose to perform through cooperation with other contracting authorities, no requirements on the forms of cooperation are set. Thus, they can choose either institutional cooperation or contractual cooperation. (c) Thirdly, contractual cooperation does not undermine the principal objectives of the EU public procurement regime if the private undertaking has not been offered an advantage over its competitors.

(2) Requirements on the parties of the cooperation

To be exempted from the EU public procurement rules as the result of the contractual cooperation type of in-house arrangements, the parties to the contractual cooperation should be exclusively or solely between the contracting authorities. As previously mentioned the cooperation should not be involved in private undertakings by not putting the private undertaking in a relatively advantageous position. However, BGBPL, which is possibly involved in private capital and is one kind of contracting authority, can bring the benefits from directly awarding the contract in this circumstance through shares in the private capital through joining the shares of the BGBPL.

(3) The contractual relationship for assessing in-house arrangements occurs between the contracting authorities

According to the ECJ case law, contractual relationships are classified into two: (a) the contract concluded between the contracting authorities for providing public service and the reimbursement of the cost and (b) the contract between the contracting authority entrusted to provide the public service and another legal person for implementing the public service. The first contractual relationship assesses the existence of contractual cooperation, a type of in-house arrangement. Even though the first contract forms the basis for the second, the assessment of the first contract exerts no influence on the second. Thus, even though the contract awarded from certain contracting authorities to a public service contracting authority is exempted from the application of the EU public procurement regime, the contract awarded from the contracting authority to other legal persons, where it is necessary for implementing the contractual cooperation between these contracting authorities, is not necessarily exempted. The second contract should be assessed separately.

(4) Aim of the contractual cooperation

The aim of the contractual cooperation is relevant to the subject matter of the contract. The subject matter of the contract should be the public task to be performed by all participating contracting authorities. One example is waste management. Notably, the subject matter of the

contract should be the common public task for both parties of the contract. If one part of the contract acts as an agent for ensuring the performance of this external task under a contract, then this contractual relationship is not the 'contractual in-house arrangement'. If several local authorities plan to award a waste treatment contract to a BGBPL-type SOE, the said SEO should assume the public task of providing the waste treatment service to fulfill the conditions of a 'contractual in-house arrangement'. Therefore, the contractual cooperation aims that the common public task be performed for all participating contracting authorities.

(5) Governance of the implementation of the cooperation

The ECJ has indicated that even though no 'similar control' exists between the participating authorities reciprocal control is found on the basis of pursuing a common public task. Any divergence from the common objectives would cause the cessation of the cooperation. The parties to a contractual cooperation assist each other in performing the public task. Moreover, the financial arrangement between the parties to a contractual cooperation is not aimed at pursuing the profits and is only limited to the reimbursement of the cost borne for performing the public task. Therefore, the implementation of the cooperation should be governed by the public interest because of its involvement in public authorities for the performance of public tasks. On the other hand, the governance of the implementation should likewise not pursue private interests, such as earning profits. Therefore, the non-participation of private capital in the cooperation is another concern.[804] Additionally, putting private entities in an advantageous position is a relevant concern. The possibility that an external private provider can join in the completion of the contract although the BGBPL has not been involved in private capital has been regarded to 'provide an advantage for the private provider'.[805]

(6) Requirements on the percentage of activities concerning the cooperation on the open market for participating contracting authorities.

This requirement confirms that certain contracting authorities, such as BGBPL-type SOEs, could provide the service both 'in-house' and on open market. However, this requirement is unclear as the scope of activities in the open market and the scope of activities concerning the cooperation are indefinite.

Additionally, 'less than 20%' bears a different meaning from 'more than 80%' to constitute 'similar control' because the factors used for the comparison vary. The former only refers to the activities concerning the cooperation; the latter refers to all activities of the entity concerned.

[804] But as mentioned before, the BGBPL also could involve partial private capital. Therefore, it seems that the participation of the private capital is not necessary to change the interest pursed from 'public' to 'private'.

[805] But whether during the implementation of the cooperation could involve the private entities should be analyzed separated from determining whether the contractual cooperation should be considered as in-house arrangements. Because if the involvement of the private entities during the implementation through public procurement procedures, still doesn't bring unreasonable advantage to the private entities.

3.2.1.3. Contract awarding to an affiliated undertaking

A. Reasons for providing the particular exemption

Since the issuance of Article 13 of Directive 93/38/EEC[806], the EU public procurement regime has exempted service contracts awarded to an affiliated undertaking or to a joint venture.[807] The service contracts excluded are those awarded to an affiliate whose essential purpose is to act as a central provider to the group to which it belongs, rather than to sell its services commercially on the open market.[808]

The explanatory memorandum accompanying the amendment to the Utilities Directive[809] indicates that this provision relates to three types of service provisions within groups. These categories, which may or may not be distinct, include (i) the provision of common services, such as accounting, recruitment and management; (ii) the provision of specialised service embodying the know-how of the group; and (iii) the provision of a specialised service to a joint venture.[810]

According to relevant legislature documents[811], the purpose of providing this exemption under Directive 93/38/EEC could be concluded as follows:

(1) The exemption results from accepting the group structure under which many public and private entities conduct their activities. Firstly, the provision of the aforementioned services within the economic group is often concentrated in an affiliated company. This arrangement includes the limitation of liability, tax efficiency, separate cost control and efficient management. Therefore, the provision of common services to affiliated entities is regarded as a matter of organisational convenience which should not be undermined. Furthermore, the concentration of specialised know-how reflects the commercial and competitive advantage of the group. Particularly (but not exclusively) for private entities, direct access to such services is indispensable. Finally, joint ventures conducting a particular operation are frequently established for the particular project to benefit from the specialised knowledge of the groups forming the joint venture. Depriving them of this access eliminates the reason for establishing the joint venture.

(2) The exemption results from recognizing the particular role of certain service activities in establishing the commercial advantage and common characteristics of the undertakings. The provision of services within the group can differ from the provision of supplies in important respects. The availability of services establishes the characteristics of the group (common management, staffing and accounting) and its competitiveness (know-how to which the group has

[806] Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors. According to the adopt time of the rules, in fact this exemption under the public utilities sector was earlier than the in-house arrangements in public sectors mentioned above.
[807] During the drafting, this kind of exemption has been classified as 'intra-group transaction'.
[808] Point 20 of the document COM (91) 347. Also see: Sue Arrowsmith, A note on the judgment in the Seven Trent case, P.P.L.R., 2011, 1, NA34-40. (Severn Trent Plc v Dwr Cymru Cyfyngedig (Welsh Water Ltd)[2001] C.L.C. 107(QBD (Comm)).
[809] Point 21 of COM (91) 347.
[810] See also in: Christopher Bovis, Public-Private Partnership in the European Union, p. 134.
[811] Paragraph 22 of the document COME (91) 347.

access and which is not made available to others except through group activities as a whole). With respect to these characteristic, providing exceptional treatment on service contracts from supply contracts is justified. On the other hand, the acquisition by group affiliates of a service which is freely marketed is no different from obtaining supplies from a group affiliate. The obligation to procure either of these in an open, competitive context would not undermine the character and competitive advantage of the group.

Therefore, it could be understood why the exemption under Directive 93/38/EEC was only applied to service contracts under the public utilities sector directive, not including supply contracts and work contracts, and not applying to the contracts under the public sector directive. In *Case C-340/04 Carbotermo and Consorzio Alisei*,[812] the national court asked whether the exception provided in Article 13 of Directive 93/38 should be applied by analogy in the scope of the application of Directive 93/36[813] in which the contract at issue falls as a supply contract under the public sector. As exceptions must be interpreted restrictively, the ECJ did not extend the application of Article 13 of Directive 93/38 to the scope of Directive 93/36.[814] However, in this case, the Court did not explain why the exception only applied to service contracts and only applied to the service contracts in public utilities. The Court merely quoted the 2004 EU public procurement directives to prove that in the recent directives, this exclusion also only applies to public utilities.

This issue was intensively discussed during the enactment of Directive 2004/17/EEC. According to the proposal from the Commission, the content in Article 13 of the Directive remained unchanged. However, the Parliament intended to facilitate the awarding of contracts to affiliated undertakings and joint ventures. Under the Amendments by Parliament, the exempted contract has been extended to supply contracts and work contracts. Furthermore, the minimum percentage of the average turnover achieved by the affiliated undertaking or joint venture for the preceding three years from the provision of services to the undertakings to which it is affiliated has been reduced from 80% to 50%.

Some views upheld these changes as they sought to consider the existing range of 'in-house' contracts and to respect the legitimate desire of undertakings covered by the public utilities directive to establish affiliated undertakings, or with other undertakings in the private or public sectors, to establish joint ventures whose principal activity is to supply their joint commercial needs.[815] Other views opposed these changes, arguing that the spread of 'in-house' activities undermined the basic principles of the EU treaty—transparency, non-discrimination and fair competition.[816]

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[812] Case C-340/04, Carbotermo and Consorzio Alisei, the judgment on 11 May 2006.
[813] Paragraph 51 of the judgment
[814] Paragraph 55 of the judgment
[815] Jan M. Hebly (2008), European Public Procurement: Legislative History of the 'utilities' Directive: 2004/17/EC, Kluwer Law International, p.250.
[816] Jan M. Hebly (2008), European Public Procurement: Legislative History of the 'utilities' Directive: 2004/17/EC, Kluwer Law International, p.252.

Particularly, extending the exemption to work contracts has been strongly criticised. 'These provisions reduce the chance of private construction firms participating fairly in tenders for public works contracts'.[817] As a result of public entities (funded or controlled by the contracting entity) receiving preferential treatment, the opportunity for obtaining a public works contract is considerably restricted either because of a lack of an adjudicating procedure or the existence of an invitation tender. Moreover, private undertakings are based on private capital, which provides a completely different basis for calculation compared with the 'state guarantee' enjoyed by public entities (funded or controlled by the public authorities). The financial basis in general and the costs in particular largely differ between private companies and public entities (funded or controlled by public authorities); thus, the latter should be excluded from competition with private undertakings. Therefore, the defenders argued that 'in the case of tenders for construction contracts, any in-house bid must be subject to the same rules and treated in a way equivalent to those received from private tenderers. Thus, any public 'cross-subsidy' must be excluded.'[818]

Finally, the Council has achieved a compromise on this issue. On the one hand, they recognised that many contracting entities are organised as an economic group which may comprise a series of separate undertakings. Each of these undertakings often has a specialised role in the overall context of the economic group. Therefore, the EU holds the view that certain service, supply and works contracts awarded to affiliated undertakings should be excluded. In Directive 2004/17/EU, the exemption has been extended to all contracts, including service, works and supply contracts. On the other hand, to ensure that this exclusion does not distort competition to the benefit of the undertakings affiliated with the contracting authorities, a suitable set of rules are provided. For instance, its principal activity should be the provision of such service, supply or works to the group of which it is part rather than offering them on the market.[819] The relevant percentage has been set to 80% for all contracts, similar to the 80% requirement for service contracts in Directive 93/38/EEC.[820]

In 2014 Directives, the exemption also extend to cover the concession contracts awarded from contracting entities to its affiliated undertakings and relevant joint ventures as the concession contracts have been regulated in both the public sector and public utilities sector. The rules are discussed in detail in the following.

B. Definition of 'affiliated undertakings'

Under the EU procurement regime, undertakings should be considered to be affiliated when a direct or indirect dominant influence exists between the contracting entity and the undertaking

[817] Jan M. Hebly (2008), European Public Procurement: Legislative History of the 'utilities' Directive: 2004/17/EC, Kluwer Law International, p.668.
[818] Jan M. Hebly (2008), European Public Procurement: Legislative History of the 'utilities' Directive: 2004/17/EC, Kluwer Law International, p.668.
[819] Recital (39) of directive 2014/25/EU
[820] During the process, different Member States wanted to set different percentages. For instance, the IRL, NL and UK and S delegations wanted a 80% limit on all contracts. The GR delegation wanted a limit less than 80% limit on all contracts. The GR delegation wanted a limit less than 80% on all contracts.

concerned or when both are subject to the dominant influence of another undertaking.[821] Specifically, the 'direct or indirect dominant influence' could exist in the following three situations: (a) any undertaking may be, directly or indirectly, subject to a dominant influence by the contracting entity; (b) any undertaking may exercise a dominant influence over the contracting entity; or (c) any undertaking, in common with the contracting entity, is subject to the dominant influence of another undertaking by virtue of ownership, financial participation or the rules which govern it.[822]

'Dominant influence' has the same meaning as 'public undertaking'. As described in Chapter 2, in any of the following situations, the 'dominant influence' shall be presumed to (a) directly or indirectly hold the majority of the undertaking's subscribed capital; (b) directly or indirectly control the majority of the votes attached to shares issued by the undertaking; (b) directly or indirectly can appoint more than half of the undertaking's administrative, management or supervisory body.

Notably, in the definition of 'affiliated undertaking', private participation per se should not be relevant. By contrast, the 'in-house' arrangement condition in the public sector requires no participation of private capital. However, the definition of 'affiliated undertaking' sets no limitation of the nature of the capital, public or private. The contract at issue can then be awarded to the affiliated undertakings with private capital, and in certain cases, even with the majority of the private capital. For the contracting entities which operate on the basis of special or exclusive rights granted by a competent authority of a Member State, the affiliated undertakings also could be wholly private undertakings.

The EU considered that the verification of whether an undertaking is affiliated to a given contracting entity should be as easy to perform as possible[823]; thus, the EU procurement regime includes a related provision in the EU rules on consolidated accounts. It provides that if the annual account of the undertaking is consolidated with that of the contracting entity in accordance with the requirements of Directive 2013/34/EU, then this undertaking should be regarded as an 'affiliated undertaking' of that contracting entity.[824] The fact that the annual account of the undertaking and the contracting entities should be consolidated in accordance with the EU rules, the verification of the existence of a direct or indirect dominant influence should be sufficient. However, the EU rules on consolidated accounts are not applicable under certain circumstances, such as when the size of the undertakings involved fail to satisfy the requirement or when certain conditions relating to their legal form are not met. In these cases, the ownership, financial participation or the rules governing the undertakings need to be considered to assess the presence of a direct or indirect dominant influence.

C. Conditions for exemption

[821] Recital (41) of directive 2014/25/EU
[822] Article 29 (2) of directive 2014/25/EU
[823] Recital (41) of directive 2014/25/EU
[824] Article 29(1) of directive 2014/25/EU

Not all contracts awarded to the affiliated undertaking fall within the scope of this exemption. To ensure that this exemption only applies to the undertakings which principally operate for the contracting entity, the EU public procurement regime has provided different conditions based on the subject matter of the public contract or concession:[825]

(a) for supply contracts, provided that at least 80% of the average total turnover of the affiliated undertaking—taking into account all supplies provided by that undertaking over the preceding three years—derives from the provision of supplies to the contracting entity or other undertakings with which it is affiliated, then the exemption shall apply;

(b) for service contracts or service concessions, provided that at least 80% of the average total turnover of the affiliated undertaking over the preceding three years—taking into account all services provided by that undertaking—derives from the provision of services to the contracting entity or other undertakings with which is affiliated, then the exemption shall apply;

(c) for works contracts and works concessions, provided that at least 80% of the average total turnover of the affiliated undertaking—taking into account all works provided by that undertaking over the preceding three years—derives from the provision of works to the contracting entity or other undertakings with which it is affiliated, then the exemption shall apply.

The turnover and the relevant percentage are to be calculated separately for each of the three kinds of contract. This process is to prevent awarding significant works contract being subsequently used to justify awarding a large number of service contracts without any call for competition.[826] The value of the works contract is usually considerably higher than those of the service contract and the supply contract; therefore, considering the whole turnover of the undertaking almost all supply contracts and service contracts would fall within the scope of the exemption. The approach employed also is in line with the characteristics of the affiliated undertaking as they are usually specified in certain fields. Consequently, it could limit the exemption scope under this provision. However, the satisfactory performance of this approach relies on the clear delineation line between service contracts, supply contract and work contracts.

Why 80%? As previously explained, during the adoption of the directives, the delegations of the Member States held different views on setting the percentage of the turnover. Some members agreed on 50%, whereas others agreed on 85% or 90%. A higher percentage required showing a strong intention of limiting the applicable scope of this exemption and implied greater support for an open public procurement market. A lower percentage required a higher intention of encouraging the use of an 'intra-group' transaction and implied less support for an open public procurement market. Representing the tradeoff between these two positions is 80%. This exact number has no economic basis but confirms that the affiliated undertaking could also provide the service, goods and works to other entities; thus, the entity could join the competition with other

[825] Article 29 (4) of directive 2014/25/EU
[826] Jan M. Hebly (2008), European Public Procurement: Legislative History of the 'utilities' Directive: 2004/17/EC, Kluwer Law International, P.663

entities.

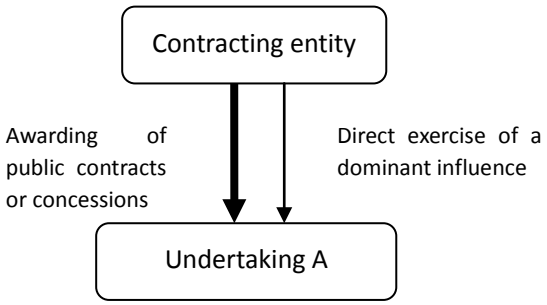
If the turnover is not available for the preceding three years because of the date an affiliated undertaking was created or started its activities, that undertaking may merely show that the aforementioned turnover is credible by presenting business projections.[827] If more than one undertaking affiliated with the contracting entity with which they form an economic group provides the same or similar services, supplies or works, the percentages shall be calculated, taking into account the total turnover derived respectively from the provision of services, supplies or works by those affiliated undertakings.[828]

D. Specific exempted scope

On the basis of the above discussion, the exempted scope of the contact awarded to affiliated undertakings could be divided into four types:

(1) If the contracting entity directly exercises a dominant influence on an undertaking, then the public contracts or concessions awarded from the contracting entity to the undertaking fall outside the applicable scope of the EU public procurement regime.

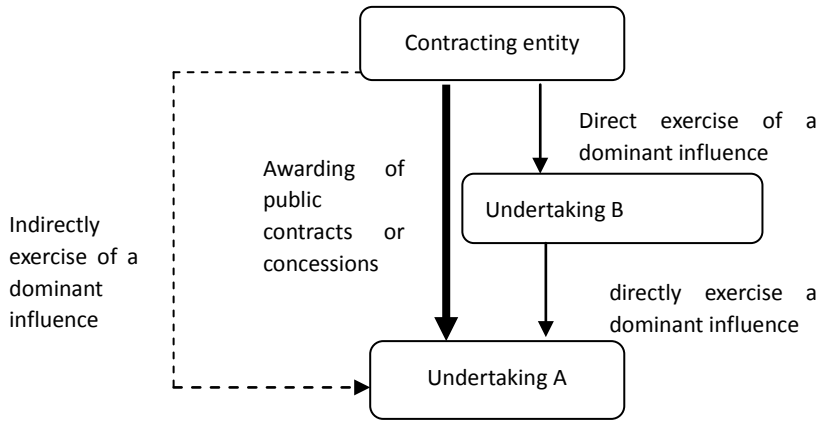
Case 1: The contracting entity directly exercises a dominant influence on Undertaking A



(2) If the contracting entity directly exercises a dominant influence on the undertaking, then the public contracts or concessions awarded from the contracting entity to the undertaking fall outside the applicable scope of the EU public procurement regime.

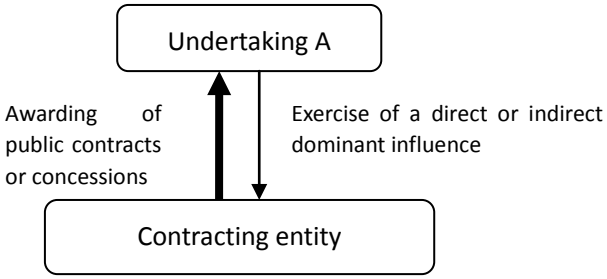
[827] Article 29 (5) of directive 2014/25/EU
[828] Article 29 (6) of directive 2014/25/EU

Case 2: The contracting entity indirectly exercises a dominant influence on Undertaking A



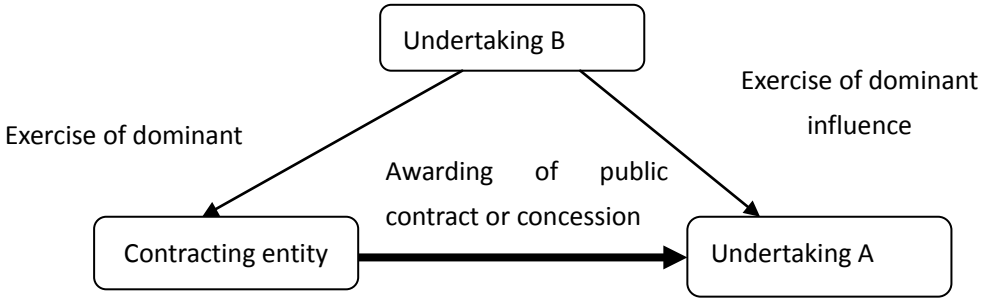
(3) If the undertaking exercises a dominant influence on the contracting entity, then the public contracts or concessions awarded from the contracting entity to the undertaking fall outside the applicable scope of the EU public procurement regime.

Case 3: The undertaking directly or indirectly exercises a dominant influence on the contracting entity



(4) If Undertaking B exercises a dominant influence on Undertaking A and the contracting entity, then the public contracts or concessions awarded from the contracting entity to Undertaking A fall outside the applicable scope of the EU public procurement regime.

Case 4: The undertaking in common with the contracting entity is subject to the dominant influence of another undertaking

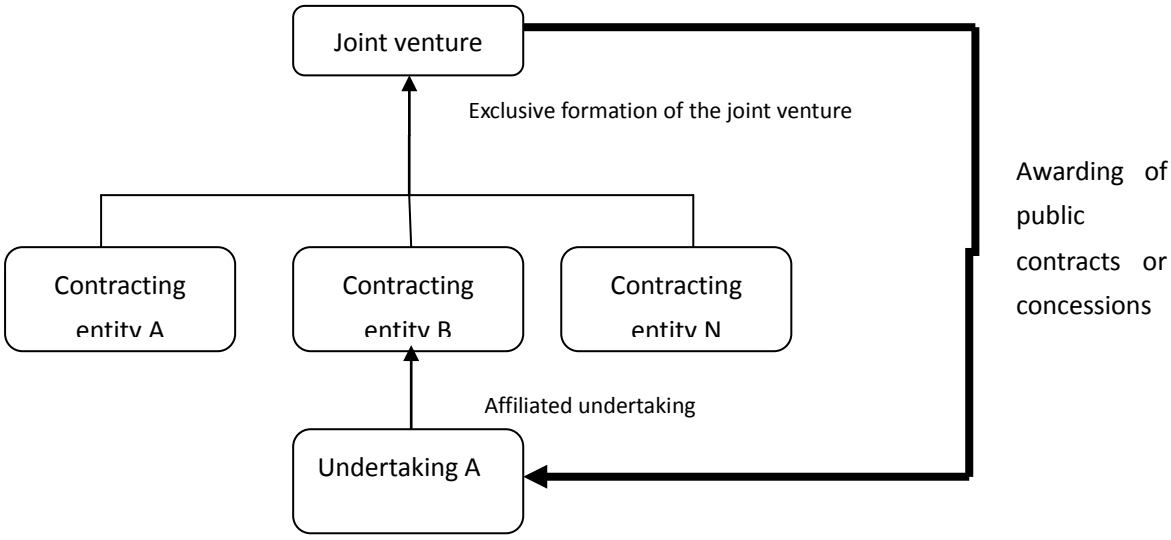


No requirement of the contracting entity and undertaking A should be subject to the dominant influence of another contracting entity. Thus, Undertaking B could be a contracting entity or not, the reason for which is unclear.

(5) Contracts are awarded by a joint venture formed **exclusively** by a number of contracting entities to conduct relevant utilities activities regulated by public utilities directive or concession directive to an undertaking affiliated with one of those contracting entities.

As mentioned above, joint ventures for conducting a particular operation are frequently established so that the particular project may benefit from the specialised knowledge of the groups forming the joint venture. After recognizing this fact, the EU has provided this kind of exemption for service contracts since Directive 93/38/EEC. In addition, the characteristic of 'exclusively' forming the joint venture has been emphasised since Directive 2004/17/EU.

Case 5: A joint venture awards the contract to an affiliated undertaking of one of the contracting entities



This scenario is different from the four aforementioned scenarios as the awarding entity is not a contracting entity but a 'joint venture'. Furthermore, the 'joint venture' does not necessarily have to fulfil the conditions set for 'contracting entities'. However, the 'joint venture' should be exclusively established by the contracting entities to conduct activities regulated by the public

utilities directive.[829] However, whether the 'joint venture' could only pursue these regulated public utilities activities is uncertain. Additionally, the awarded entity is an affiliated undertaking of one of those contracting entities rather than an affiliated undertaking of the 'joint venture'.

E. Notification of information under the request

The Commission may request the contracting entities to provide the following information regarding contracts awarded to an affiliated undertaking without competition[830]: (a) names of the undertakings concerned; (b) nature and value of the contracts involved; (c) proof that the relationship between the undertaking to which the contracts are awarded and the contracting entity complies with the requirements under the relevant EU public procurement rules, as required by the Commission.

F. Discussion

Considering the reality of the group structure under which many public and private entities perform their activities in the public utilities sectors, Directive 93/98/EEC already provided an exception close to the in-house contract. However, this exception was only limited to the scope of awarding the service contracts, as the particular role of certain service activities in establishing the commercial advantage and common characteristics of the undertakings had been recognised.

However, as the reformation of the EU public procurement directives, this exception has been expanded to supply contract and work contract as well although the legislation process involved controversies. On one hand, it is justified by the legitimate desire of the undertakings covered by the public utilities; on the other hand, it is expected to reduce the chance of private firms to participate fairly in tenders for public works contracts and public supply contracts.

The final provision Directive 2004/17/EU is a compromise on this issue. It extends the exemption to all contracts, including service contracts, work contracts and supply contracts while providing a suitable set of rules to avoid distorting the competition. As the enactment of Directive 2014/23/EU on awarding concession contracts, this exemption also applies to concession contracts which fall within the scope of regulated public utilities, awarded to affiliated undertakings.

To fulfil the exemption of 'the contracts awarded to affiliated undertakings', the following aspects should be considered: (1) the classification of the undertaking as an 'affiliated undertaking'; (2) two scenarios; (3) the fulfilment of the conditions of the exemption; (4) the possibility of a request from the Commission on providing relevant information.

To define the scope of 'affiliated undertaking', the term 'dominant influence' has also been employed and has the same meaning as 'dominant influence' which has been used to define 'public undertakings'.[831] When the undertaking should be considered in the presence of a direct or indirect dominant influence between the contracting entity and the undertaking concerned or

[829] Article 29 (3)(b) of directive 2014/25/EU
[830] Article 31 of the directive 2014/25/EU
[831] Article 29(2), subparagraph 2.

when both are subject to the dominant influence of another undertaking. However, no limitation is set with regard to the nature of the capital of the 'affiliated undertakings'. Even though private capital has directly participated in the affiliated undertaking, the contract could still be directly awarded to the affiliated undertaking. Furthermore, the existence of a consolidated annual account between the undertaking and the contracting entities could sufficiently verify the relationship with an 'affiliated undertaking'. However, this approach is not the only verification method available.

This exemption not only includes the scenarios in which the contracts are awarded from the contracting entities to the affiliated undertakings but also those in which the contracts are awarded from the joint venture to the affiliated undertakings. The formation of a joint venture by several contracting entities is also a common practice in the public utilities sectors. However, the composition of the joint venture has been regulated under the following conditions: (a) formed exclusively by a number of contracting entities and (b) intended to conduct regulated utility activities under the public utilities directive. The term 'affiliated undertakings' specifically indicates the undertakings affiliated to the contracting entities that form the joint venture.

The conditions established for this exemption are based on the different types of the public contracts. The percentage of the activities pursued 'intra-group' from the activities pursued in the market is calculated based on the kind of contract. This approach is employed to prevent the awarding of significant works contract being subsequently used to justify the awarding of a large number of service contracts without any call for competition. By fulfilling these conditions, a batch of the contracts could be exempt from the application of the public utilities directive within a certain period instead of an individual contract.

This approach could expand the exemption scope. For an affiliated undertaking of a public undertaking-type SOE, although most of its activities to provide works are for the market, the contract awarded to provide services to the public undertaking-type SOE could still be exempt from the public utilities directive. On the other hand, this approach could limit the exemption scope. Although most activities to provide works are for the intra-group, it exerts no influence on the awarding of supply contracts and service contracts.

However, some issues remains unclear. Firstly, whether the supply contracts, service contracts and work contracts only refer to the contracts which are covered by the public utilities directive. For instance, a service contract on pursuing the electricity provision is intended to be awarded to an affiliated undertaking. The percentage is calculated based on the activities of providing service covered by the public utilities directive or on all activities providing any kind of service. Secondly, the implementation of this exemption is based on the clear standards for distinguishing the difference between public work contracts, public service contracts and public supply contracts.

The implementation of this exemption at the EU level is not strictly monitored. Although the EU public procurement regime has authorised the EU Commission on requesting contracting entities to provide the relevant information; the effect of the implementation becomes dubious because of the uncertainty mentioned previously and the investigative capability of the EU

Commission.

Comparatively, the exemption described in this section is close to the in-house arrangement between the contacting authorities described previously. Both intend to allow supplies, services and works to be provided without competition from entities, which are part of a single organisation, whilst legally separated. However, the exemption on the contracts awarded to the affiliated undertakings has a wider scope.[832] The non-participation of private capital in the affiliated undertaking is not required.

3.2.1.4. Contracts awarded to a joint venture or to a contracting entity forming part of a joint venture

Before the public sector directive, the public utilities directive provides exemptions for the 'in-house' arrangement between contracting authorities and relevant legal entities. In Directive 2004/17/EU, the EU has considered it appropriate to exclude certain service, supply and works contracts awarded by a contracting entity to a joint venture of which that entity is part; this venture is formed by a number of contracting entities to conduct utility activities covered by the public utilities directive and the concession directive.[833] The reason for exclusion is to respect the common practice in the utilities sector and to ensure that a compromise between the different legal requirements and traditions in Member States has been reached.

To ensure that this exemption does not lead to distortion of competition to the benefit of the joint ventures affiliated with the contracting entities, the public utilities directive and the concession directive provide a suitable set of rules for this exemption.[834]

A. Applicable conditions for the exemption

The EU procurement regime has established several conditions for the application of this exemption, as follows: Firstly, the joint venture should be formed exclusively by a number of contracting entities. Secondly, the joint venture should be formed to conduct certain 'utilities activities'. Thirdly, the joint venture has been established to conduct the utilities activity for at least three years. Fourthly, the instrument setting up the joint venture stipulates that the contracting entities which form it will be part thereof for at least the same period.

Regardless of the conditions concerning the composition and duration of joint ventures, the EU indicated that these conditions do not prevent the formation of a joint venture which has a different composition or a different duration. In such cases, the provision implies that no contracts with, for example, a party to a joint venture, which is not a contracting entity, may be awarded without a call for competition.[835]

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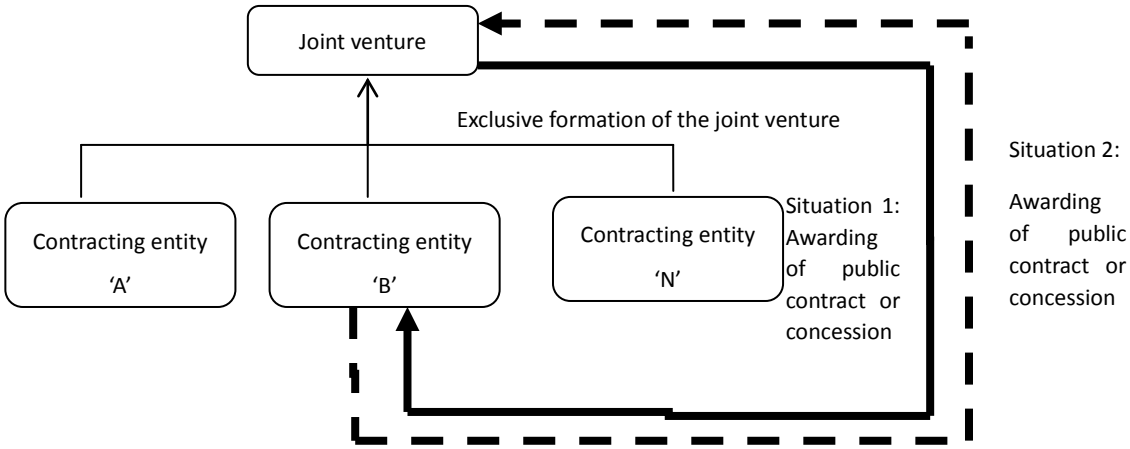
[832] Roberto Caranta, Gunilla Edelstam, Martin Trybus. EU Public Contract Law : Public procurement and beyond, section 2.2.2 page. X.
[833] See: Recital (32) of Directie 2014/17EU and it also has been provided in Recital (39) of directive 2014/25/EU .
[834] Article 30 of Directive 2014/25/EU, and Article 14 of Directive 2014/23/EU
[835] P.663

B. Specific scope for exemption

This exemption refers to two specific situations: (1) situation 1: Contracts awarded by the joint venture which is exclusively formed by the contracting entities, to one of those contracting entities. (2) situation 2: Contracts awarded by a contract entity to such a joint venture of which it forms part.

Graph 16: Specific scope for exemption



C. Discussion

Compared with the fifth scenario in which the contracts are awarded from the joint venture to the affiliated undertaking of one of the aforementioned contracting entities, although the composition required of the joint venture is the same, the stability of links between the joint venture and the contracting entities have different requirements. In the scenario in which the contract is awarded to the affiliated undertaking, the stability of link refers to the 'principal activity' of providing goods, services or works to the group of which it is part, rather than offering the goods, services or works on the market. In comparison, In the scenario in which the contracts are awarded between the joint venture and the contracting entity, the stability of the link refers to the 'establishment period of the joint venture and the participation period of the contracting entity in the joint venture'.

Moreover, in this exemption, once the composition required of the joint venture and the stability of the link between the joint venture and the contracting entities are fulfilled, all awarding of contracts between the joint venture and the contracting entity under the coverage of the public utilities directive should be exempted from the regulation.

3.2.2 Chinese rules in a similar scenario

3.2.2.1 Background: No general exemption on in-house arrangement

(1) Under the framework of the CGPL

In China, if a public entity that falls within the scope of the CGPL awards a procurement contract to a controlled SOE, then this procurement activity should also conform to the CGPL. Firstly, all procurement contracts are generally awarded by the procurement entities[836] using fiscal funds, and falling within the scope of a centralised procurement catalogue or over the threshold, should be regulated by the CGPL. The main criteria for deciding the applicable scope of public procurement law are the characteristics of the entities and the source of fund. The characteristics of the entities which have been awarded the procurement contract have not been considered by the CGPL.

Secondly, the reasons for exclusion do not include the scenario involving in-house provision.[837] Emergency procurements and the procurements involving national securities or secrets have been ruled out, and the procurement which uses international funds could also apply other procurement rules if the parties reach an agreement and do not harm national and social interests. However, the in-house provision has not been considered by the government procurement law in China as a reason for exemption.

In summary, an 'in-house' arrangement is not considered a reason for exemption by the CGPL although generally, the SOEs are not regulated by the CGPL.

(2) Under the framework of the CBL

From the perspective of the CBL, as mentioned in Chapter 2, an 'in-house' arrangement is also not a consideration for exempting the application of CBL. In the energy sector, the electricity state-owned companies under the process of reform are used to establish affiliated companies to construct the electricity network. In accordance with the CBL through a competitive procedure, awarding this contract is mandatory as the construction of an electrical network is relevant to public interest and public service. The affiliated companies cannot obtain the contract without competition. [838]

3.2.2.2 Treatment of similar situations in practice

Although the Chinese procurement laws have not mentioned the in-house provision, several public entities directly awarded the contract to their affiliated undertakings. In 2004, the competent authority on providing gas in Beijing Municipality awarded a contract for a gas pipeline network step-up renovation project (燃气管网升压改造工程) valued at 296 million RMB to an affiliated undertaking of Beijing Municipality Gas Group without going through a

[836] 各级国家机关、事业单位和团体组织。《政府采购法》第二条第二款
[837] 第八十四条、第八十五条
[838] Furthermore, the policy of central government encourages separating the main activities of the transferring electricity company from affiliated activities, such as construction activities.

public tender procedure.[839] The affiliated undertaking is an SOE attached to Beijing Municipality.

The direct awarding by some municipality departments of the contract to its affiliated undertakings has been identified by some audit authorities as one of the five problems in the public procurement area.[840] Contract awarding should conform to public tender procedures and should not be directly awarded without competition.

Although the contract was awarded from a procuring entity to its affiliated undertaking through a competitive procedure, questions were still raised. For instance, the Confucius Institute Headquarters (Hanban) issued a contract notice on January 21, 2010 regarding the awarding of a service contract to operate the Hanban website to a company named '五洲汉风网络科技（北京）有限公司'.[841] The shares of '五洲汉风网络科技 (北京) 有限公司' were held by Confucius Institute Headquarters and '五洲汉风教育科技（北京）有限公司', another company held by Confucius Institute Headquarters. The value of this contract was 35.2 million RMB, which was 'the highest price for establishing a website in the history' according to critics. Whether fair competition was observed in the procurement procedure was questioned, and this awarding resulted in the transfer of funds from the left pocket to the right pocket of a person.

3.2.3 Comparative analysis

3.2.3.1 Under the background of traditional public procurement

On the basis of previous research, the EU and China have chosen different approaches to solving the issue of whether the in-house provision should be exempt from procurement rules. In the EU, the freedom of Member States and public authorities to perform works or provide services directly are respected. Member States and public authorities who decide to provide services directly are free to organise their internal sources. Since the development of a case law in the past years, in-house provision and outsourcing have been clearly delineated.

In China, the efficiency of public funds has been considered the most important; therefore, the discretion of public authorities has been limited. The public authorities cannot directly award the contract to their affiliated undertakings, which also conforms to the reform of SOEs since the 1990s that prompted the affiliated SOEs to join the market competition. Generally, procurement contracts may only be executed by the affiliated SOEs if they win the tender in a competition against private sector companies or other market players.

This approach is similar to 'Compulsory Competitive Tendering (CCT)' which was employed in the UK in the 1980s and 1990s[842] before the major reform of the European Community public procurement law. It can improve the cost-effectiveness of the projects and affiliated SOEs, as well

[839] http://business.sohu.com/20050722/n240178756.shtml
[840] For instance, the audit authority of Beijing, SEE: http://zhengwu.beijing.gov.cn/jhhzx/qtbmgzbg/t1122834.htm
[841] http://www.chinadaily.com.cn/dfpd/2010-01/22/content_9360662.htm
[842] Sue Arrowsmith (1994), Developments in Compulsory Competitive Tendering, 3 PPLR, CS153-172; Martin Trybus(2010). From the indivisible Crown to Teckal: the in-house provision of works and services in the United Kingdom, in Mario Comba and Steen Treumer (eds.) The in house providing in European Law, Denmark: DJOF Publishing.

as encourage them to be responsive and increase their productivity and quality. However, the CCT also has certain disadvantages. For instance, in the UK, the CCT has been abolished as it created a separation between the client and the provider (so-called 'client/contractor')[843], which led to antagonism and discouraged many providers from bidding for such a contract. The CCT has been criticised because the process of competition has often become an end in itself, distracting attention from the services actually provided to local people, and lacking practical flexibility.

Similar criticisms have been received by similar arrangements in China. On the one hand, encouraging affiliated undertakings to join the competition with external providers can be useful for market testing. Through the competition between the internal providers and the external providers, the entity exhibiting the greatest and with the most comparative advantages can be identified. From an economic perspective, it will improve the efficiency of source allocation and allow the most efficient entity to provide the goods, services or construction, regardless of the entity being public or private and belonging to the procurer or not. On the other hand, this arrangement has aroused scepticism in the following aspects: (a) fair competition between internal and external providers is difficult to ensure because the internal provider is controlled by the procurer and could be treated as 'the same person'; (b) if the internal providers win the contract, the parties to the contract would have no effective constraint mechanism owing to the lack of a punishment mechanism. If the internal provider fails to comply with the contract, the punishment would be weak because the transfer of funds could be considered to be from the left pocket to the right pocket.

The CCT has been abolished by the UK government because of the limited effectiveness of this mechanism. Under the influence of the EU public procurement regime, the in-house arrangement has also been considered acceptable in the UK. Therefore, contract awarding is not required to comply with the public procurement rules. Comprehensive competition-oriented arrangements are still effectively applied in China despite the scepticism. It lacks the systemic comparative analysis between in-house exemption and comprehensive competition arrangements. To determine whether in-house exemption is also necessary in China, benchmarking based on comparing the advantage and disadvantage between in-house exemption and comprehensive competition arrangements has to be conducted; however, the result depends on the databases collected. Given the limitation of this research, this aspect will not be explored in this dissertation.

3.2.3.2 Under the background of developing a public–private partnership

Under the background of developing a PPP, several situations are similar to the circumstances mentioned in in-house exemptions. For instance, establishing a joint venture between public and private partnership to implement the PPP contract is rather common in the practice. In the following case, comparative analysis between the EU experience and the Chinese experience will

[843] While many local councils made it as difficult as possible for a private provider to win the contract, if a private sector provider had actually won the contract, an adversarial relationship developed between the two sides of the split: many local governments saw the private sectors as the enemy. See: Badcoe (2004): "The national procurement strategy for local government", 12 PPLR, NA182.

be discussed.

A. Cases under the EU procurement regime

Assuming that SOEs participate in a PPP model as 'private partner', interesting issues arise under the EU public procurement regime. Firstly, if the SOE is the BGBPL kind of contracting authority, without the participation of private capital, then the contract awarded from the contracting authorities to the joint venture established exclusively between the contracting authorities with the SOE could be considered an in-house arrangement, as the result of forming the 'joint control'. Secondly, if the PPP contract is intended to pursue certain utility activities, then the contract awarded from the contracting authority or the SOE to the joint venture could be considered outside the scope of the procurement rules. When established for more than 3 years, the joint venture is exclusively formatted between the contracting authority and the SOE. This case is specifically relevant to the awarding of additional contract to the joint venture during the operation of the PPP project.

An ECJ case called *Mehiainen Oy v Oulun Kaupunki* is relevant to in-house exemption under the PPP model. In April 2008, the Oulu City Council in Finland established a joint venture with a private partner. The joint venture capital was divided equally between the two partners, and its management was shared. The joint venture was expected to actively provide occupational health care and welfare services. The two partners intended that the activities of the joint venture be mainly and increasingly focused on private clients. However, for a transitional period of four years, the partners agreed to purchase from the joint venture the health service they, as employers, are required to provide to their staff under the national law.[844] Such health services were previously provided to it by a municipal entity which is a component of its organisation.[845] The agreements indicate that this municipal entity, which is valued between 2.5 and 3.4 million euro, was transferred to the joint venture as a capital contribution.[846]

The Court in this case recalled that a public authority may perform the public interest tasks conferred on it by using its own resources without being obliged to call on out side entities not forming part of its own departments. The public authority may do so in cooperation with other public authorities. The Court also recalled the conditions for in-house exemption. However, this case involved the participation of private capital; thus, that contracting authority could not possibly exercise over that company control similar to that which it exercised over its own departments.

In addition to the condition of non-participation of private capital, the founding of the joint venture resulted from the intention of the contracting authority to contract out the provision of occupational health care and welfare services. Before the joint venture was established,

[844] See: paragraph 17-18 of the judgment. Adrian Brown, The award of a public services contract to a public-private joint venture upon its creation: Mehiainen Oy v Oulun Kaupunki (C-215/09), P.P.L.R. 2011, 3, NA70-73.
[845] Paragraph 28 of the judgment.
[846] Paragraph 20 of the judgment.

occupational health care to the Council employees was provided by the municipal entity, through in-house arrangement. However, during the establishment of the joint venture, the municipal entity was transferred into the joint venture as a capital contribution; alternatively, through the introduction of private capital, the municipal entity was transformed into a joint venture between the contracting authority and a private partner. With the involvement of private capital, this arrangement should not be considered as an in-house arrangement, and the contracting authority could not directly award the contract to the joint venture on the basis of an in-house arrangement. The contracting authority should comply with the procurement rules to award the contract for the occupational health care service even though the contracting authority still held half of the shares and could manage the joint venture.

Changing certain conditions in the *Mehiainen Oy v Oulun Kaupunki* cases will help understand the similarities and difference in the issues faced by EU Member States and China under the background of developing a PPP. Therefore, we assume the following: (1) The municipal entity is a company owned 100% by the municipality; (2) The 'private partner' is also a company owned 100% by the state and municipalities, without the involvement of private capital; (3) The purpose of this cooperation is to provide better water service to the citizens and final consumers plus government pay; the 'joint venture' does not undertake the demand risk; and (4) The cooperation will last for about 30 years.

However, under these assumptions the awarding of contract from the contracting authority to the joint venture for its employees as an in-house arrangement still requires justification. The key issue is relevant to the essential part of the activities of the joint venture. According to the conditions of in-house exemption, more than 80% of the activities of the controlled legal person are conducted in the performance of tasks entrusted to it by the controlling contracting authority. In this case, whether more than 80% of the joint venture activities are intended to carry out the task entrusted under the cooperation agreement is a factor to consider; if more than 80%, then this arrangement should be theoretically considered an in-house arrangement rather than a government-paid type of PPP, which kind is an approach to outsourcing the task of providing the public service. In this case, the contract falls outside the scope of public procurement rules. Additionally, if the public authority awards an additional contract on the basis of the original contract to the joint venture, it also falls outside the scope of the procurement rules.

Furthermore, if the third assumption is changed into 'the purpose of this cooperation is providing better occupational health care service to the employees; the employer will pay the service and the joint venture undertakes the demand risk' and has no limitation for the cooperation period, then the situation only refers to the establishment of a joint venture without entrusting the public service to it. In this case, if the contracting authority decides to award a specific contract to this joint venture without competition, it needs to justify that more than 80% of the activities of the joint venture are intended for the contracting authority. In the *Mehiainen Oy v Oulun Kaupunki* case, this condition was not met because only about 38% of the joint venture turnover was derived from the provision of such services to the Council employees.

Additionally, if the third assumption is changed into 'the purpose of this cooperation is providing better transport service to the citizens; the end-users will pay the price of using high way' and the cooperation will last around 30 years, then the key issue is relevant to the essential activities of the joint venture. In this case, a controversy arises as to whether the contract which authorised the exploration right to the 'private partner' could be considered as the contract awarded from the contracting authorities. Another controversy is whether the 'joint venture' which implements the contract should be considered part of the activities for contracting authorities. If so, then this kind of arrangement will theoretically not be considered as a concession contract under the 2014 Concession Directive but rather, as an in-house arrangement.

B. Cases under the Chinese procurement regime

In the development of public–private partnership in China, around 60% PPP projects involved SOEs as 'private partner'. In certain cases, if the SOEs have no participation of private capital, this 'PPP contract' could possibly be considered as an 'in-house' arrangement under the EU public procurement regime. However, in China, the same approach which has been used in traditional public procurement also applies in the procurement of the PPP model (See section 2.3). SOEs have been treated equally as private companies when they apply to join the PPP project as 'private partners'. Under this approach, the public partner could choose the most economically advantageous provider that participates in the PPP contract through a competition between several public and private companies.

Meanwhile, the approach adopted by China currently faces more challenges than do the traditional public procurement model, as observed in the typical PPP model mentioned previously. Under the typical Chinese PPP model, the government usually authorises the affiliated SOEs to become the public partner in SPVs. This authority is not a general relationship between the principal and the agency, given that the affiliated SOEs hold partial ownership, as well as control power of the joint venture and obtain benefits from the activities of the joint venture. If the affiliated SOEs are considered part of the government, then the SOEs are can be perceived to play such a role in the joint venture. However, separating the SOEs from the government has been advocated at the public policy level in China. Thus, the nature of this authority could also be considered as a warding a contract without competition. In strict accordance with the current Chinese public procurement law, such direct awarding is not legal. However, it meets the requirements of the Municipality to perform its responsibility in practice. Therefore, clarifying the rules about the in-house provision is necessary in China, particularly in the context of developing PPP and the new cycle reform of SOEs[847], to determine whether the freedom to allocate its resources is left with local governments. Specifically, a clarification is necessary to clarify whether governments could authorise the kind of SOEs to join as a public partner in a joint venture.

[847] In 2015, the government of China has started a new cycle of reform on SOEs for improving internal governance, external monitor, the efficiency of allocating national capital, the structure of national economy. See: 《中共中央、国务院关于深化国有企业改革的指导意见》，新华网，2015 年 9 月 13 日。

To understand the rules regarding in-house provision, the role of SOEs under the public sector need to be recognised, and the purpose for establishing SOEs and the type of SOEs need to be clarified. Under the new cycle of reform on SOEs, to strike a balance between the process of market-led development and the strategic role of SOEs in China, SOEs have been divided into two types: commercial type (商业类) and public-interest-type (公益类). The public interest type of SOEs is mainly aimed at safeguarding the quality of life of the people, serving society and providing public products and goods. Furthermore, public-interest-type SOEs are encouraged to use the methods of purchasing public service and concession for inviting non-SOEs participating in the operation. Public-interest-type SOEs are expected to undertake more functions, such as providing public service, and will be closer to the State or considered as a part of the State.

In the future the governments may award public contracts (including PPP contracts) to public-interest type SOEs, involving or without involving private capital. As the classification of SOEs undergoes reform, the establishment of the in-house exemption to regulate the awarding of these contracts will be an important issue for Chinese legislatures. They need to balance the fiscal efficiency from competition as well as the flexibility and healthy partnership or trust from direct in-house awarding.

3.3 SOEs under the public procurement as seller: Neutral competition issues

As both SOEs and private companies are economic actors, the neutral competition between SOEs and private companies needs to be ensured to protect the functioning of the market and ensure efficiency allocation throughout the economy[848]. From a political viewpoint, governments play a role as universal regulators to ensure that economic actors are 'playing fair' while they also ensure that public service obligations are being met.[849]

The public procurement market is one in which SOEs and private companies compete with each other; however, given the association between public authorities and SOEs, SOEs may have certain unreasonable advantages, and ensuring neutral competition is one of the goals for regulating public procurement.

3.3.1 The general public procurement regulation framework to ensure neutral competition

3.3.1.1 General procurement rules and principles on equal treatment and non-discrimination

General public procurement rules supporting principles that ensure equal treatment, non-discrimination and transparency can help achieve neutral competition. These rules include the following: rules on transparency for solving information asymmetry between different bidders, rules against discriminatory qualifications for ensuring equal chance to all providers and rules for ensuring neutral evaluation criteria and assessment in the procurement procedures.

[848] OECD (2012). P.9.
[849] OECD (2012). P.9.

As the convergence of public procurement rules worldwide,[850] those basic rules are widespread in many public procurement systems to provide a considerably fair competition framework for SOEs and private companies. The EU public procurement regulation has provided a good example, given the main objective of its procurement system, which is to open the procurement market in its Member States, and its neutral position on the ownership of the company. In China, transparency has also been an important tool used by the CGPL and the CBL. The regulation of CGPL[851], which has recently been enacted, has provided for the obligation of procurers in the publishing of public procurement contracts.[852] Additionally, the CGPL has stated the requirements of equal competition on qualifications, evaluation criteria and avoiding conflicts of interest.

3.3.1.2 Special requirements on PPP procurement

Regarding the PPP model, which is more complex, entails time and combines several legal relationships, some aspects should be emphasised to ensure competitive neutrality. For instance, the following aspects, which have been mentioned in the interpretative communication of the EU Commission on IPPP[853], could help solve information asymmetry problems between SOEs and other competitors: (1) In view of the Commission, the procurer should include in the contract notice or the contract documents basic information on the following: the public contracts and/or concessions awarded to the future public–private entity; the statutes and articles of association; and the shareholder agreement and all other elements governing the contractual relationship between the contracting entity and the private partner and the relationship between the contracting entity and the future public-private entity.[854] (2) Additionally, disclosure in the tender documents of optional renewals or modifications of the initial contract and disclosure of optional assignments of additional tasks is necessary. The tender documents should cover at least the number and conditions of these options.[855] The information thus provided should be sufficiently detailed. (3) The contract should determine from the outset of what happens if the public-private entity does not receive public contracts in the future and/or public contracts which have already been awarded are not extended. (4) The statutes and articles of association should be formulated such that changing the private partner in the future is possible.

In China, as SOEs play the role of the 'private partner' in most PPP projects, several rules have

[850] A convergence of procurement norms, standards and procedures has been considered one aspect of the internationalization of public procurement. More details, see the following researches: Aris C. Georgopulos, Bernard Hoekman, and Petros C. Mavroidis (eds.) The Internationalization of Government Procurement Regulation, Oxford University Press, March 2017.

[851] The Regulation on the Implementation of the Government Procurement Law of the People's Republic of China, as adopted at the 75th executive meeting of the State Council on December 31, 2014, is hereby issued, and shall come into force on March 1, 2015.

[852] However, the level of implementing this obligation needs to be improved. For instance, there are few PPP contracts which have been published online.

[853] Based on general public procurement rules and the characteristic of IPPP, EU commission has clarified whether and which the public procurement rules applicable to IPPP. See: Commission interpretative communication on the application of Community law on Public Procurement and Concessions to institutionalized PPP(IPPP), Official Journal of the European Union, 12.4.2008.

[854] See: section 2.3.5 of the interpretative communication of EU commission on IPPP.

[855] Ibid.

been provided under the current specific PPP procurement rules to create a circumstance of fair competition to attract private companies to join the PPP projects. (1) The pre-qualification notice should be published on the media for public procurement information, designated by the financial departments above the provincial level. (2) Certain issues in the context of the procurement document have to be specified. Compared with the traditional procurement document, the PPP procurement document should specify the following: 'negotiable details of the PPP contract', 'whether the 'private partner' which does not attend the pre-qualification procedure is allowed to join the competition' and 'whether after-qualification applies'[856]. If a concession model is chosen, special requirements on the proposal of concession project have to be met. These requirements include the return of investment, tariffs, feasibility analysis, commitment and guarantee of the government and disposal of asset after the expiration of the concession.[857] Therefore, SOEs and private companies have generally been treated equally under the PPP procurement procedures, and no procurement rules have been set against private companies or that put them in a disadvantageous position.

3.3.1.3. Treatment of unsolicited proposals for PPP

The EU and China have treated differently the unsolicited proposals for PPP, which provide an alternative to government-initiated projects. Unsolicited proposals are generally based on innovative project ideas, through which governments can benefit from the knowledge and ideas of the private sector and can promote innovation. Therefore, both the EU and China procurement rules allow the unsolicited proposals. However, as the unsolicited proposals will provide certain advantages to private sector entities which submit the proposals, relative to other private sector entities, as they are more familiar with the project and hold more information than others. The legislature is faced with challenges to strike a balance between encouraging private companies to submit innovative project ideas without losing transparency and efficiency gains of a competitive tender process.

In the EU procurement regime, the Public Sector Directive and the Public Utilities Directive have provided rules for scenarios with prior involvement of candidates or tenderers.[858] The contracting authority has been required to take appropriate measures to ensure that competition is not distorted by the participation of that candidate or tenderer. Such measures shall include the communication to the other candidates and tenderers of relevant information exchanged in the context of or resulting from the involvement of the candidate or tenderer in the preparation of the procurement procedure and the fixing of adequate time limits for the receipt of tenders. The candidate or tenderer concerned shall only be excluded from the procedure in the absence of other means to ensure compliance with the duty to observe the principle of equal treatment. Prior to any such exclusion, candidates or tenderers shall be given the opportunity to prove that their

[856]财政部关于印发《政府和社会资本合作项目政府采购管理办法》的通知，财库[2014]215 号，2014 年 12 月 31 日。第九条。
[857] 《基础设施和公用事业特许经营管理办法》第十条
[858] Article 41 of Directive 2014/24/EU

involvement in preparing the procurement procedure is not capable of distorting competition.

Under the current Chinese procurement rules for PPP, the unsolicited proposal for PPP has been clearly specified in the guideline for implementing the PPP model[859]. Private sector entities are allowed to recommend potential PPP projects as project proposals to the PPP centre in the financial department. The proponents, including private sector entities, of those proposals which have been selected by the PPP centre to become annual development projects should provide feasibility reports and relevant information.[860] However, no procurement rule has considered the issue arising from unsolicited proposal on the equal treatment of all private sector entities. This situation implies that in China, the private sector entities which submit the unsolicited proposal should obtain certain obligations, such as providing feasibility report. Meanwhile, such a situation also provides certain comparative advantages because the procurement procedure has no specific rule to protect the interest of other private sector entities on this issue. Additionally, SOEs have better financial, technical and management capability in public service sectors, compared with the development status of the private sector entities. Therefore, SOEs are more likely to submit unsolicited proposals, and will thus have comparative advantages in the procurement procedures.

3.3.1.4. Discussion

The aforementioned description indicates that the general procurement rules and principles have provided a framework for the neutral competition between SOEs with private enterprises. Furthermore, as the PPP model is more complex, both the EU Commission and the competent authorities in China have cited several measures for solving information asymmetry problems between SOEs and other competitors.

Providing unsolicited proposal is a common situation under the PPP model; on the one hand, these proposals help encourage the private sector to provide a new one based on their professional knowledge; on the other hand, these proposals could bring unreasonable advantage to the proponents compared with other competitors. Under the EU public procurement regime, the balance is between allowing the provision of unsolicited proposal and not bringing unreasonable advantage to the proponents. In China, providing unsolicited proposal is allowed but the underlying issue of competitive neutrality has not been given sufficient attention by competent authorities.

[859] 《政府和社会资本合作模式操作指南》第六条，第二款。关于印发《政府和社会资本合作模式操作指南（试行）》的通知，财金[2014]113 号，2014 年 11 月 29 日。
[860] 《政府和社会资本合作模式操作指南》第七条

3.3.2 Special issue on neutral competition: State aid and neutral competition under public procurement rules

3.3.2.1 Coherence between State Aid Law and Public Procurement Law in the EU regime

3.3.2.1.1 Definition of State Aid in EU

The notion of state aid is an objective and legal concept defined directly by the treaty. Article 107(1) of the TFEU defines 'State aid' as 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods [……], in so far as affects trade between Member States'.

Generally, 'State' is very widely construed and includes at least all public authorities. 'A transfer of State resources' does not necessarily entail a subsidy; the concept of aid is wider because it embraces not only positive benefits, such as subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without being subsidies in the strict meaning of the word, are similar in character and have the same effect.[861]

In the context of the State Aid modernisation, the Commission wished to further clarify the key concepts relating to the notion of State Aid to contribute to an easier, more transparent and more consistent application of this notion across the Union. On July 19, 2016, the Commission issued a Commission Notice on the notion of State aid as referred to in Article 107(1) of the TFEU.[862] This Notice clarified the different constituent elements of the notion of State aid: the existence of an undertaking, the imputability of the measure and its effect on competition and trade between Member States. In subsequent text, the core aspects of the notion of State aid will be discussed.

Firstly, the EU State aid rules only apply when the beneficiary of a measure is an 'undertaking'. (i) The notion of undertaking. The Court of Justice has consistently defined the undertaking as entities engaged in an economic activity regardless of their legal status and the way in which they are financed.[863] Thus, the classification of a particular entity as an undertaking depends entirely on the nature of its activities. Consequently, the status of the entity under national law is not decisive; whether the entity is set up to generate profits is not relevant; and the classification of an entity as an undertaking is always relative to a specific activity. If an entity carries out both economic and non-economic activities, such entity is to be regarded as an undertaking only with regard to the former.[864] (ii) The distinction between economic activities and non-economic

[861] See: Grith Skovgaard Ølykke and Cecilie Fanøe Andersen, A state aid perspective on certain elements of Article 12 of the new Public Sector Directive on in-house provision, P.P.L.R. 2015, 1, 1-15.
[862] 2016/C 262/01
[863] Judgment of the Court of Justice of 12 September 2000, *Pavlov and Others*, Joined Cases C-180/98 to C-184/98, ECLI:EU:C:2000:428, paragraph 74; Judgment of the Court of Justice of 10 January 2006, *Cassa di Risparmio di Firenze SpA and Others*, C-222/04, ECLI:EU: C:2006:8, paragraph 107.
[864] Para.7-10 of the Commision Notice. Furthermore, several separate legal entities may be considered to form one economic unit for the purposes of the application of State aid rules. That economic unit is then considered to be the relevant undertaking. In this respect, the Court of Justice considers the existence of a controlling share and other functional, economic and organic links to be relevant.

activities. The Court of Justice has consistently held that any activity consisting of offering goods and services on a market is an economic activity. The distinction between economic and non-economic activities depends to a certain extent on political choices and economic development in a given Member State. The decision of a public authority not to allow third parties to provide a certain service (for example, because it wishes to provide the service in-house) does not rule out the existence of an economic activity. In spite of such a market closure, an economic activity can exist when operators are willing and able to provide the service in the market concerned. More generally, the provision of a particular service in-house has no relevance to the economic nature of the activity.[865] [866]

Secondly, only advantages granted directly or indirectly through State resources can constitute State aid.[867](i) Scope of ' State'. State resources include all resources of the public sector, including resources of intra-state entities and under certain circumstances, resources of private bodies. Whether an institution within the public sector is autonomous is irrelevant. Resources of public undertakings also constitute State sources because the State can direct the use of these resources. For the purpose of the State aid law, transfers within a public group may also constitute State aid if, for example, resources are transferred from the parent company to its subsidiary even if they constitute a single undertaking from an economic point of view. The fact that a public undertaking is a beneficiary of an aid measure does not prohibit the undertaking from granting aid to another beneficiary through a different aid measure. (ii) The transfer of State sources may take many forms, such as direct grants, loans, guarantees, direct investment in the capital of companies and benefits in kind. [868] (iii) The origin of the resources is not relevant provided that before they are directly or indirectly transferred to the beneficiaries, the resources come under public control and are therefore available to national authorities even if the resources do not become the property of the public authority.[869] (iv) An advantage is any economic benefit which an undertaking could not have obtained under normal market conditions, that is, in the absence of State intervention.

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[865] See Opinion of Advocate General Geelhoed of 28 September 2006, *Asociación Nacional de Empresas Forestales (Asemfo)*, C-295/05, ECLI: EU:C:2006:619, paragraphs 110 to 116; Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ L 315, 3.12.2007, p. 1), Articles 5(2) and 6(1); Commission Decision 2011/501/EU of 23 February 2011 on State aid C-58/06 (ex NN 98/05) implemented by Germany for Bahnen der Stadt Monheim (BSM) and Rheinische Bahngesellschaft (RBG) in the Verkehrsverbund Rhein-Ruhr (OJ L 210, 17.8.2011, p. 1) recitals 208 and 209.

[866] Moreover, Commission has clarified that whether schemes in the area of social security are to be classified as involving an economic activity depends on the way they are set up and structured; the health care services which independent doctors and other private practitioners provide for remuneration at their own risk are to be regard as an economic activity.

[867] Para.47 of the Commission Notice.

[868] A firm and concrete commitment to make State resources available at a later point in time is also considered a transfer of State resources. A positive transfer of funds does not have to occur; foregoing State revenue is sufficient. Waiving revenue which would otherwise have been paid to the State constitutes a transfer of State resources. (77) For example, a ' shortfall' in tax and social security revenue due to exemptions or reductions in taxes or social security contributions granted by the Member State, or exemptions from the obligation to pay fines or other pecuniary penalties, fulfils the State resources requirement of Article 107(1) of the Treaty. (78) The creation of a concrete risk of imposing an additional burden on the State in the future, by a guarantee or by a contractual offer, is sufficient for the purposes of Article 107(1). (79)

[869] subsidies financed through parafiscal charges or compulsory contributions imposed by the State and managed and apportioned in accordance with the provisions of public rules imply a transfer of State resources, even if not administered by the public authorities. (89)

Thirdly, to fall within the scope of State Aid, a State measure must favour 'certain undertakings or the production of certain goods'. Therefore, not all measures which favour economic operators and only those which selectively grant an advantage to certain undertakings or categories of undertakings or to certain economic sectors fall under the notion of aid.[870] The Commission indicated that to clarify the notion of selectivity under the State aid law, material selectivity should be distinguished from regional selectivity.[871] The material selectivity of a measure[872] implies that the measure applies only to certain (groups of) undertakings or certain sectors of the economy in a given Member State. Material selectivity can be established de jure or de facto. De jure selectivity results directly from legal criteria for granting a measure that is formally reserved for certain undertakings only; companies incorporated or newly listed on a regulated market during a particular period; companies belonging to a group having certain characteristics or entrusted with certain functions within a group; ailing companies; or export undertakings or undertakings performing export-related activities. De facto selectivity may be the result of the conditions or barriers imposed by Member States preventing certain undertakings from benefiting from the measure.[873] In principle, only measures that apply within the entire territory of the Member States are excused from the regional selectivity criterion established in the notion of State aid. However, as established by the case law[874], not all measures that apply only to certain parts of the territory of a Member State are automatically selective. Measures with a regional or local scope of application may not be selective if certain requirements are fulfilled.[875]

Fourthly, public support to undertakings only constitutes State aid if it 'distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods' and only to the extent that it 'affects trade between Member States.' (i) Distortion of competition. A measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of a recipient relative to other competing undertakings.[876] Essentially, a distortion of competition generally exists when the State grants a financial advantage to an undertaking in a liberalised sector where competition exists or could exist. Public support is liable to distort competition even if it does not help the recipient undertaking to expand and gain market share. The aid sufficiently allows it to maintain a stronger

[870] para.117 of the Commission Notice.
[871] Para.119 of the Commission Notice.
[872] For details of material selectivity, please see para.120-142 of the Commission Notice.
[873] For example, applying a tax measure only to investments exceeding a certain threshold, other than a minor threshold for reasons of administrative expediency, may mean that the measure is de facto reserved for undertakings with significant financial resources. A measure granting certain advantages for a brief period only may also be de facto selective.
[874] Judgment of the Court of Justice of 6 September 2006, *Portugal* v *Commission*, C-88/03, ECLI:EU:C:2006:511, paragraphs 57 et seq.; Judgment of the Court of Justice of 11 September 2008, *Unión General de Trabajadores de La Rioja*, Joined Cases C-428/06 to C-434/06, ECLI:EU:C:2008:488, paragraphs 47 et seq.
[875] For the discussion and clarification of regional selectivity, please see para. 142—184 of the Commission Notice.
[876] Judgment of the Court of Justice of 17 September 1980, *Philip Morris*, 730/79, ECLI:EU:C:1980:209, paragraph 11; Judgment of the General Court of 15 June 2000, *Alzetta*, Joined Cases T-298/97, T-312/97 etc., ECLI:EU:T:2000:151, paragraph 80.

competitive position than it would have had without the aid.[877] (ii) Effect on trade. Public support to undertakings only constitutes State aid to the extent that it 'affects trade between Member States'. Whether the aid exerts an actual effect on trade between Member States need not be established but only whether the aid is liable to affect such trade.

According to the classification of aids in article 107 of the treaty, the notion of the aforementioned State aid has been considered incompatible with the internal market. Additionally, under the Treaty, the aids which shall be considered compatible with the internal market, as well as the aids which may be considered compatible with the internal market, have been mentioned.

The following shall be considered compatible with the internal market: (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; (b) aid to make good the damage caused by a natural disaster or exceptional occurrences; (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany to the extent that such aid is required to compensate for the economic disadvantage caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may repeal this point.

The aids may be considered compatible with the internal market in the following circumstances: (a) aid to promote the economic development of areas where the standard of living is abnormally low or where serious underemployment is observed, and of the regions referred to in Article 349, in view of their structural, economic and social situation; (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State; (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest; (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest; (e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.

The Commission has specific competence under Article 108 of TFEU to decide on the compatibility of State aid with the internal market when reviewing existing aid, when taking decisions on new or altered aid and when taking action regarding non-compliance with its decisions or with the requirement as to notification.[878] In accordance with Article 108(3) TFEU, any plan to grant new aid is to be notified to the Commission and should not be implemented before the Commission has authorised it.[879] In accordance with Article 4(3) of the Treaty on European Union, Member States are obliged to cooperate with the Commission and to provide it

[877] Para.189 of the Commision Notice.
[878] Recital (2) of Council Regulation (EU) 2015/1589 of 13 July 2015, laying down detailed rules for application of Article 108 of the Treaty on the Functioning of the European Union.
[879] Recital (5) of Council Regulation (EU) 2015/1589

with all information required to allow the Commission to conduct its relevant duties. [880]

3.3.2.1.2 Conducting public procurement procedures and eliminating the risk of granting State aid

a. General coherence between public procurement law and State aid Law

In EU, the rules on public procurement and State aid have the common objective of promoting the internal market by preventing favouring of national undertakings (protectionism).[881] Both regulate the economic transactions of public authorities. Specifically, the Public Procurement rules are relevant to the procurement activities of the public authorities. State aid Rules are relevant to both buying and selling activities of the public authorities. Therefore, when public authorities procure, the two sets of rules apply simultaneously. Specifically, several kinds of interfaces between public procurement rules and State aid rules.[882] They will be discussed in the subsequent section in the context of the role of SOEs as sellers.

b. ***Awarding of a contract which falls outside the scope of the public procurement directives could result in granting of State aid***

This interface concerns contracts excluded from the scope of the public procurement directives or transactions which are not public contracts in the context of the directives, such as sale of public assets. To prevent the granting of State aid when such transactions are entered into, public authorities could establish market conditions/the market price, amongst others, by conducting an open/competitive, transparent, non-discriminatory and unconditional tender. Thus, a procedure similar to public procurement is recommended.[883]

Furthermore, one kind of transaction falls outside the scope of the public procurement directive; however, the public procurement rules are not suitable to the awarding of these contracts. This arrangement is an in-house provision, as has been previously discussed. In the Commission Notice, two aspects of clarifications regarding the scope of State aid rules are provided with respect to in-house situations. Firstly, the Commission has indicated that the decision of a public authority not to allow third parties to provide a certain service (such as when it wishes to provide the service in-house) does not rule out the existence of an economic activity. In spite of such market closure, an economic activity can exist where other operators would be willing and able to provide the service in the market concerned. More generally, that a particular service is provided in-house has

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[880] Recital (6) of Council Regulation (EU) 2015/1589

[881] For discussion on the objectives of State aid rules, see e.g. *A. Oldale and H. Piffaut, "Introduction to State aid law and policy" in K. Bacon (ed), European Community Law of State Aid (Oxford: Oxford University Press, 2009), pp. 3–22, at p.9.* EU Commission Communication on EU State Aid Modernisation (SAM), COM (2012) 209 final. For discussion on the relationship between public procurement rules and State aid rules, see: A. Doern (2004), the interaction between EC rules on public procurement and State aid,2004,13, P.P.L.R. 97-129.

[882] Grith Skovgaard Ølykke (2016). Commission Notice on the notion of State aid as referred to in article 107(1) TFEU—is the conduct of a public procurement procedure sufficient to eliminate the risk of granting state aid? P.P.L.R. 2016, 5, 197-212.

[883] Altmark Trans (C-280/00) EU:C:2003:415; [2003] 3 C.M.L.R. 12; Commission v France (C-214/07) EU:C:2008:619; [2009] 1 C.M.L.R. 27, at [59]; Konsum Nord v Commission (T-244/08) EU:T:2011:732; Land Burgenland and others v Commission (C-214-215 and 223/12 P)EU:C:2013:682.

no relevance to the economic nature of the activity.[884] Therefore, the Commission has confirmed that the in-house entities could also provide economic activities and that the conditions of State aid can be satisfied.

Secondly, the Commission has noted that in-house arrangement could distort competition. The Commission Notice has stated that the fact that the assignment by the authorities of a public service to an in-house provider, even if they were free to entrust that service to third parties, does not as such exclude a possible distortion of competition.[885] The competition could be distorted by in-house provision as it may prevent entry by competitors or the expansion of activities by the in-house provider to other markets may be facilitated.[886]

Specifically, combined with the in-house exemption rules in the EU public procurement regime, at least two kinds of risks for granting State aid exist.[887] Firstly, allowing non-controlling and non-blocking private capital in entities engaged in pure and quasi in-house transaction/provision, if required by national law and in conformity with the Treaties, could benefit the private capital provider because the choice of capital provider and the terms of the capital provision are not regulated. Secondly, allowing 20% of the activities of the quasi in-house entity to be performed on the market in competition with a private undertaking, without requiring measures to prevent cross-subsidisation, also induces a State aid risk.

However, the Commission also provides a safe harbour from State aid rules for certain in-house provision. The Commission has indicated that a possible distortion of competition is excluded if the following cumulative conditions are met[888]: (a) a service is subject to a legal monopoly[889] established in compliance with EU law; (b) the legal monopoly not only excludes competition on the market, but also for the market, in that it excludes any possible competition to become the exclusive provider of the service in question[890]; (c) the service is not in competition with other services; and (d) if the service provider is active in another (geographical or product) market that is open to competition, cross-subsidisation has to be excluded. This requires that separate accounts are used, costs and revenues are allocated appropriately and public funding provided for the service subject to the legal monopoly cannot benefit other activities.

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[884] para.14 of the Commission Notice.
[885] Para.188 of the Commission Notice.
[886] para.37 of the communication on State aid and SGEIs.
[887] Grith Skovgaard Ølykke (2016). Commission Notice on the notion of State aid as referred to in article 107(1) TFEU—is the conduct of a public procurement procedure sufficient to eliminate the risk of granting state aid? P.P.L.R. 2016, 5, 197-212.
[888] Para.188. for discussion the details of this exemption, see: Grith Skovgaard Ølykke (2016). Commission Notice on the notion of State aid as referred to in article 107(1) TFEU—is the conduct of a public procurement procedure sufficient to eliminate the risk of granting state aid? P.P.L.R. 2016, 5, 197-212.
[889] A legal monopoly exists where a given service is reserved by law or regulatory measures to an exclusive provider, with a clear prohibition for any other operator to provide such service (not even to satisfy a possible residual demand from certain customer groups). However, the mere fact that the provision of a public service is entrusted to a specific undertaking does not mean that such undertaking enjoys a legal monopoly.
[890] Judgment of the General Court of 16 July 2014, *Germany* v *Commission*, T-295/12, ECLI:EU:T:2014:675, paragraph 158; Commission Decision of 7 July 2002 on State aid No N 356/2002 — United Kingdom — Network Rail (OJ C 232, 28.9.2002, p. 2), recitals 75, 76 and 77. For example, if a concession is awarded through a competitive procedure there is competition for the market.

Apart from the legal monopoly exemption clearly indicated by the Commission, the in-house provision could also be considered as falling outside the State aid rules if the in-house provision is conducted on normal market conditions. As in-house provision falls outside the scope of EU public procurement rules, other methodologies mentioned by the Commission in its Notice could be employed, such as benchmarking. To establish whether an in-house transaction complies with market conditions, this transaction can be assessed in the light of the terms under which comparable transactions conducted by comparable private operators have occurred in comparable situations.[891] Other assessment methods could also be used, including a generally accepted standard assessment methodology, which must be based on the available objective, verifiable and reliable data. The data should be sufficiently detailed and should reflect the economic situation at the time the transaction was decided, with the level of risk and future expectations considered.[892] However, the implementation of these measures is limited because it relies on the amounts of databases. Thus, the method of assessing the distortion of competition by in-house transactions remains uncertain.

In the context of pursuing the neutral competition between SOEs and private undertakings, as SOEs could gain the advantages of in-house provisions, they could also use this advantage in competing with private undertakings in the market. If this market is a public procurement market, the abnormal low price rules under the EU public procurement regime, as discussed below, will apply. If the market is a normal commercial market, the State aid rules will apply if the State aid has been constituted.

c. Awarding of a contract which falls within the scope of public procurement directives could result in granting of State aid

As previously described, to constitute State aid, the granting of 'advantage' should be necessary. If an economic benefit which an undertaking is obtained under normal market conditions, this economic benefit will not be considered an 'advantage'. In the Altmark judgment[893], the Court clarified that the granting of an advantage can be excluded if four cumulative conditions[894] are met regarding compensation for costs incurred to provide a service of general economic interest. The fourth Altmark criterion[895] provides two ways to establish the market conditions/the market price, thereby avoid the granting of State aid: a public procurement procedure and benchmarking

[891] Paragraph 98-100 of the Commission Notice.
[892] Para.101-105 of the Commission Notice.
[893] Judgment of Case C-280/00 Altmark Trans and Regierungsprasidum Magdeburg, 24.07.2003.
[894] The first three criterions are flowing: First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner. Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit.
[895] Paragraph 93 of the judgment stated the fourth criterion that 'where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tender capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the cost which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.'

with an efficient operator.[896]

Before the Commission Notice on State aid, the Commission has further elaborated on its understanding of these conditions in a package of legal measure concerning the application and interpretation of the judgment.[897] In these documents, the Commission reasoned along the lines of the Altmark judgment and stated that the market price could be obtained in two ways: (a) creation of competition by conducting an open, transparent, non-discriminatory and unconditional tender or (b) by benchmarking. The Commission also stated that the easiest way to ensure that the services were provided at the least cost to the taxpayer would be to conduct a public procurement procedure.[898]

However, the assumption of the Commission at the time was that following the public procurement rules cannot eliminate the State aid; the State aid may remain in the flexible procedures. On the one hand, the Commission stated that concerning the characteristics of the tender, an open procedure in line with the requirement of the public procurement rules is certainly acceptable, but a restricted procedure can also satisfy the fourth Altmark criterion unless interested operators are prevented to tender without valid reasons. On the other hand, it also stated that a competitive dialogue or a negotiated procedure with prior publication confers a wide discretion on the adjudicating authority and may restrict the participation of interested operators. Therefore, they can only be deemed sufficient to satisfy the fourth Altmark criterion in exceptional cases. The negotiated procedure without publication of a contract notice cannot ensure that the procedure leads to the selection of the tenderer capable of providing those services at the least cost to the community. Hence, according to the Commission, any public procurement procedures under the public procurement directives that involved negotiation could not be assumed to comply with State aid law.[899] Another view is that the awarding of a contract which falls within the scope of the public procurement directives could result in the granting of State aid.

A development on the relationship between public procurement rules and State aid rules since the Commission Notice on State aid has recently been observed. In the Commission Notice on

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[896] Grith Skovgaard Ølykke (2016). Commission Notice on the notion of State aid as referred to in article 107(1) TFEU—is the conduct of a public procurement procedure sufficient to eliminate the risk of granting state aid? P.P.L.R. 2016, 5, 197-212.

[897] Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest [2005] OJ L312/67; Community framework for State aid in the form of public service compensation [2005] OJ C297/4. Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest [2012] OJ C8/4. Commission Regulation on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest [2012]OJ L114/8; Commission Decision of 20 December on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest
[2012] OJ L7/3; Communication from the Commission, European Union framework for State aid in the form of public service compensation [2012] OJ C8/15.

[898] Communication on State aid and SGEIs, para.66.

[899] See also the academic research on this topic, for instance: P. Nicolaides and I.E. Rusu, "Competitive selection of undertakings and State aid: Why and when does it not eliminate advantage?" (2012) 7(1) European Procurement & Public Private Partnership Law Review 5–29.

State aid, the assumption is that where (almost any) procedure in the public procurement directives has been followed, no exists of State aid.[900] It states that 'if the sale and purchase of assets, goods and services (or other comparable transactions) are carried out following a competitive, transparent, non-discriminatory and unconditional tender procedure in line with the principles of the TFEU on public procurement, those transactions can be presumed to be consistent with the market conditions, provided that the appropriate criteria for selecting the buyer or seller as stated in Paragraphs 95[901] and 96[902] have been used.' The Commission insists that the use of a procedure from public procurement directives will satisfy the requirements of a competitive, transparent, non-discriminatory and unconditional procedure; thus, economic benefits are granted under the market condition.

However, exceptions arise when a market price is impossible to establish. One such instance is when the negotiated procedure is used without publication of a contract notice, which is not required to publish a call for competition. The EU public procurement directives have identified scenarios in which the procedure is applicable[903]: (1) 'lack' of tenders; (2) the contract may be awarded only to a particular economic operator; (3) 'extreme urgency'; (4) the products involved are manufactured purely for the purpose of research, experiment, study or development; (5) additional deliveries by the original suppler; (6) supplies quoted and purchased on a commodity market; (7) supplies being purchased on particularly advantageous terms; (8) contracts that follow a design contest; (9) additional works or services not included in the original contract; (10) new works and services consisting of the repetition of similar works or services of the original contract. The majority of the circumstances are relevant to only one available tenderer. The Commission has indicated that if only one bid is submitted, the procedure would not normally be sufficient to ensure a market price unless either (i) there are particularly strong safeguards in the design of the procedure ensuring genuine and effective competition and it is not apparent that only one operator is realistically able to submit a credible bid or (ii) the public authorities verify through additional means that the outcome corresponds to the market price.

Therefore, even though contract awarding from the public authority to the SOEs falls within the scope of public procurement rules, competitive neutrality could still not be guaranteed. [904]Particularly when using the negotiated procedure without the publication of a

[900] Grith Skovgaard Ølykke (2016). Commission Notice on the notion of State aid as referred to in article 107(1) TFEU—is the conduct of a public procurement procedure sufficient to eliminate the risk of granting state aid? P.P.L.R. 2016, 5, 197-212.

[901] Paragraph 95 of the Commission Notice pointed out that, for public bodies sell assets, goods and services, the only relevant criterion for selecting the buyer should be the highest price, also taking into account the requested contractual arrangements, for example the vendor's sales guarantee or other post-sale commitments.

[902] Paragraph 96 of the Commission Notice pointed out that, when public bodies buy asset, goods and services, any specific conditions attached to the tender should be non-discriminatory and closely and objectively related to the subject matter and to the specific economic objective of the contract. they should allow for the most economically advantageous offer to match the value of the market. the criteria therefore should be defined in such a way as allow for an effectively competitive tendering procedure which leaves the successful bidder with a normal return, not more. In practice this implies the use of tenders which put significant weight on the 'price' component of the bid or which are otherwise likely to achieve a competitive outcome.

[903] Article 32 of the directive 2014/24/EU

[904] As the increased flexibility and negotiations in the EU 2014 public procurement directives, it has been argued

contract notice, as the competition is limited or eliminated, the distortion of neutral competition may still exist in special circumstances. Thus, the existence of granting State aid will be considered in these specific circumstances.

d. Procurement of contract objects not needed by the contracting authority constitutes State aid

In certain cases, the contracting authorities award a public contract but do not require the objects of the procurement contract. For instance, in Case T-14/96, *BAI* v *Commission*[905] the General Court held that in light of the specific circumstances of the case, the purchase of travel vouchers by national authorities from P&O Ferries did not meet an actual need; thus, the national authorities did not act in a manner similar to that of a private operator acting under normal market conditions. Accordingly, the purchase conferred an advantage on P&O Ferries, which it would not have obtained under normal market conditions, and all the sums paid in the fulfilment of the purchase agreement constituted State aid.[906] The Commission further indicated that to ascertain whether certain transactions are in line with the market conditions all the relevant circumstances of the particular case should be considered. In the aforementioned cases, even if the purchase was made at market prices, it may not be in line with market conditions.

However, in this case, the contract was awarded indirectly. The issue was whether the element that the procurement of the contract objects that were not needed by the contracting authority was sufficient to constitute State aid. The Court and Commission have not provided clarification whether a contract awarded through a competitive procedure still constitutes State aid. An interesting issue to discuss would be whether the contract awarded through competitive procedures could still be considered as granting State aid despite the absence of an actual demand of the contract objects. To reiterate, the issue is whether the contract awarded through a competitive procedure still constitutes State aid even though the contract object is not the actual demand of the contracting authorities. The answer remains inconclusive. However, in legal practice, it is difficult to prove that the contract object is not demanded by the contracting authority. Additionally, if the awarding occurs through a competitive procedure, the undertaking which the contracting authority intends to grant State aid may not win the contract. Even though the undertaking wins the contract through a competitive procedure, the undertaking could not obtain the 'advantage' which is allowed for granting 'State aid'. Therefore, just based on the element that the contract object is not the actual demand of contracting authorities, the conditions of 'State aid' are not fulfilled.

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by researchers that the new public procurement package poses significant threats to State aid rules, which could amount to competition distortions in the internal market. For the details, see: Pernille Edh Hasselgard, The Use of Tender Procedures to Exclude State Aid: the Situation under the EU 2014 Public Procurement Directives, EPPPL, 2017(1), p.16-28.

[905] Judgment of the General Court of 28 January 1999, *BAI* v *Commission*, T-14/96, ECLI:EU:T:1999:12, paragraphs 74 to 79.

[906] Para.82 of the Commission Notice.

e. Abnormally low tenders from SOEs obtaining illegal State aid

The first interface is the use of State aid to win public contracts. SOEs obtaining illegal State aid usually intend to submit abnormally low tenders to win the public procurement contract. This interface is regulated by the provision on abnormally low tenders in the public procurement directives which allows rejection of tenders tainted by illegal/incompatible State aid. When the contracting authorities determine that the tenders of SOEs appear to be abnormally low relative to the works, supplies or services, the contracting authorities generally require SOEs to explain the price or costs proposed in the tender. One of the explanation may be the possibility of the SOEs obtaining State aid.[907] Notably, the abnormally low price may result from several factors and should not cause the rejection of the tender from SOEs only because it receives subsidies from the State. When a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender may be rejected solely on that ground only after consultation with the SOEs when the SOEs are unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was compatible with the internal market within the meaning of Article 107 TFEU. If the contracting authority rejects a tender in those circumstances, it shall inform the Commission thereof.

However, the competency of the contracting authorities to determine whether the State aid concerned is compatible with the internal market is questionable. The amount of information and time required for the Commission to complete its investigation impede the possibility for the contracting authority to make the decision. According to the ECJ case law, the Commission has stated that as the public entity concerned has separate accounts for its activities on the market and for its other activities, it may be possible to establish whether a tender is abnormally low because of an element of State aid. However, the contracting authority may not conclude from the absence of such separate accounts that such a tender was made possible by the grant of a subsidy or State aid which is incompatible with the Treaty.[908]

f. Modification of a public contract after its awarding may lead to granting of State aid.

In several circumstances, the original contract awarded by the contracting authorities to the SOEs (as a provider) need to be modified. The modification of the contract may affect the neutrality between SOEs and private companies. For instance, contracting authorities directly award an additional contract to SOEs without competition, which may lead to the granting of State aid.

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[907] Other explanations which may also be mentioned include: (1) the economics of the manufacturing process, of the services provided or of the construction method; (b) the technical solutions chosen or any exceptionally favorable conditions available to the tenderer for the supply of the products or services or for the execution of the work; (c) the originality of the work, supplies or services proposed by the tender; (d) compliance with obligations referred to in Article 18(2) of directive 2014/24/EU, referring to the environmental or social, labor law obligations which should be undertook by the entities; (e) compliance with obligations referred to in article 71 on subcontracting. See, article 69(2) of the directive 2014/24/EU.

[908] Paragraph 45 of the Judgment of Case C-568/13 Data Medical Service, Judgment of 18.12.2014. For the discussion of this issue also can see: *Ølykke, Abnormally Low Tenders — With an Emphasis on Public Tenderers (2010)* and Ølykke, "Public undertakings and imputability — the case of DSBFirst" (2013) 2 European State Aid Law Quarterly 341–361.

For the modification of the contracts during their term, the 2014 EU directives have provided several rules. Generally, a new procurement procedure in accordance with EU public procurement directives shall be required.[909] However, the EU public procurement regime also leaves room for modifying the contract without a new procurement procedure, provided the conditions are fulfilled.[910] These modification rules could guarantee the neutral competition between SOEs and private companies.

Whether those modifications without a new procurement procedure will lead to the granting of State aid is uncertain. However, these conditions for modification without a new procurement procedure are applicable to all public contracts, including both SOEs and private companies as provider. Thus, it should not be regarded as an influencing factor affecting the neutral competition between SOEs and private companies.

3.3.2.2 Chinese subsidies to SOEs and neutral competition

3.3.2.2.1 General competition between SOEs and private companies in China

A. Efforts to provide an environment of equal competition in the recent decades

As introduced in Chapter One of the dissertation, the role of SOEs in China has been and is still under reform. Complaints on unfair competition between SOEs and private companies in the past mostly focused on certain issues, including market access, taxation, obtaining commercial finance and local protectionism. Most of these issues have been addressed in recent years.

Market access. SOEs play an important role in Chinese economy and social development. In 2006 the *State-owned Assets Supervision and Administration Commission of State Council (SASAC)* indicated that the State should keep absolute control in seven strategic industries: military, power grid, petroleum and petrochemical industry, telecommunications, coal, civil aviation and shipping. The State should also maintain relative control in nine basic and pillar industries: equipment manufacturing, automotive, electronic information, construction, steel, nonferrous metals, chemicals, survey and design and science and technology.[911] This document has been described as restraining the development of private companies.

However, after the importance of the private capital and companies has been recognised by the government, market access significantly changed. In 2014, the State Council issued Opinions of the State Council on Promoting Fair market Competition and Maintaining the Normal Market Order[912], which indicated the reduction of restrictions on market access. For all investments and operations and civil and commercial acts of market participants out of their free will, the government may not impose any restrictions on their access to fields where their access is not prohibited by laws and regulations. This provision is on the condition that their access is not detrimental to the interests of third parties, public interest, and national security. The ruling

[909] Article 72 (5) of the Directive 2014/24/EU
[910] Article 72 (1)-(4) of the Directive 2014/24/EU
[911] http://www.gov.cn/jrzg/2006-12/18/content_472256.htm
[912] No.20 [2014] of the State Council, 16-04-2014.

implies that if allowed by law, all market participants, including SOEs, internal private companies and foreign companies, have the right to access the market.

Specifically, the market access system has been reformed.[913] Negative lists for market access have been employed. The State Council has clearly established in the form of lists the sectors, fields and business, among others, where investments and operations are prohibited or restricted.[914] All market participants are not allowed to access the prohibited industries. However, they may access the restricted industries once they submit their applications and then obtain the approval of the administrative agencies; if the market participants fulfil the conditions for participation, approval is not necessary.

The details show that the negative lists are more inclined to open equal opportunities for all market participants, compared with the circumstances in 2006. In that year, the steel industry was regarded as a basic and pillar industry which should be under the absolute control or conditionally relative control of the national capital. However, as private companies have been encouraged to enter this market, the market shares of private companies continue to increase. From 2004 to 2011, the market share of ShaGang Group (沙钢集团) in the production of original steel was increased from 7.8% to 11.1%.[915] As for companies in the steel industry which are on the negative list, only the prohibited behaviours have been provided, such as the establishment of non-environmental projects and investment in outdated equipment and products in the steel industry. Market access in the steel industry has recently been equal for all market participants, including SOEs and private companies.

Taxation. In the Provisional Regulations of China on Enterprise Income Tax[916], which was issued in December 1993, the same income tax rate was applied for SOEs and (domestic) private enterprises, 33%. The income tax rate applied for foreign enterprises at the time was 30%.[917] Foreign enterprises enjoyed super-national treatment. However, this circumstance has changed since the issuance of Enterprise Income Tax Law of the People's Republic of China on March 16, 2007. According to this law, all enterprises which are established within China, or which are established under the law of a foreign country (region) but whose actual office of management is within China, referred to as 'residence enterprises'[918], have been applied the same income tax rate, which is 25%.[919] Therefore, foreign enterprises and domestic enterprises have been treated equally in the aspect of income tax.

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[913] 国务院关于实行市场准入负面清单制度的意见，国发[2015]55 号，
[914] http://www.sdpc.gov.cn/gzdt/201604/W020160412311161765167.pdf
[915] FanGang and Nicolas Hope, the role of State-Owned Enterprises in the Chinese economy, P.8, see: http://www.chinausfocus.com/2022/china/wp-content/uploads/Part-02-Chapter-16_SC.pdf
[916] Article 3 of Provisional Regulations of the People's Republic of China on Enterprises Income Tax, issued by State Council, issued on 13 December of 1993. It has been invalidated by Enterprise Income Tax Law of People's Republic of China.
[917] Article 5 of Income tax law of the People's Republic of China for Enterprises with Foreign Investment and Foreign Enterprises, which was issued on 04-09-1991 by National People's Congress and has been invalidated by Enterprise Income Tax Law of the People's Republic of China.
[918] Article 2 of the Enterprise Income Tax Law of the People's Republic of China.
[919] Article 4(1) of the Enterprise Income Tax Law of the People's Republic of China.

Obtaining commercial financial support from banks. There were notions that SOEs easily obtained commercial loans from banks because the bank industry in China is headed by national banks. These notions of SOEs being prioritised and being charged lower rates on bank loans have now become uncertain.[920] However, bank decisions in China are certainly based on commercial considerations. SOEs generally have better asset and good credit records; thus, the risks of lending to SOEs are smaller than those of private enterprises, prompting commercial banks to provide loans to SOEs.

Local protectionism. Local governments generally intend to protect and favour local enterprises, including local SOEs and local private enterprises. For instance, some municipal government may support local enterprises with lower land costs, preferential licensing and approvals, as well as better access to bank loans. Such behaviour impedes the competition from all non-local companies.

If these activities of the administrative agencies constitute 'abuse of administrative power to eliminate or restrict Competition', also called 'administrative monopoly', then such should be regulated by Anti-Monopoly Law of the People's Republic of China (hereinafter referred to as 'Chinese Anti-Monopoly Law').[921] Specifically, the following activities have been prohibited by the Chinese Anti-Monopoly Law: (1) abuse of administrative power to force or use a disguised form to force any entities or individuals to deal, purchase or use the commodities provided by business operators designated by such an administrative agencies; (2) abuse of administrative power to block the inter-region free trading of commodity; (3) abuse of administrative power to **reject or restrict the participation of non-local business operators in local tendering and bidding activities by imposing discriminatory qualification requirements or assessment standards or failing to publicise the binding information according to law**; (4) abuse of administrative power to reject or restrict either investment in its jurisdiction or the establishment of local branches by non-local business operators by imposing unequal treatments on them compared with those on the local business operators; (5) abuse of administrative power to compel business operators to engage in monopolistic activities prohibited by the Chinese Anti-Monopoly law.

Although the provisions in the Anti-Monopoly law is not specifically relevant to the neutral competition between SOEs and private enterprises, the implementation of these provisions have improved competitive neutrality for the following reasons: the local government cannot impose any entities or individuals to purchase or use the commodities provided by local SOEs; the local government cannot impose the qualifications which favour local SOEs in bidding activities; and the local government cannot compel local SOEs to engage in illegal monopolistic activities.

However, local protectionism prevails in China. Given the size of China and the wide disparities in the level of development of different regions, apart from the inadequacies of its institutions and

[920] FanGang and Nicolas Hope, the role of State-Owned Enterprises in the Chinese economy, P.8.
[921] Chapter 5 of Anti-monopoly law of the People's Republic of China, No.68 Order of the President of the People's Republic of China, issued by Standing Committee of the National People's Congress, on 08-30-2007.

capabilities, such problems are complex and difficult to resolve completely.

In summary, with the reforms in the recent decades, SOEs and private enterprises have been given equal treatment. The ongoing reform still aims to provide an environment for equal competition one of which is the creation of more fair and transparency rules for granting subsidies.

B. Issues on granting subsidies

There is a notion that SOEs can more easily obtain subsidies than can private enterprises, resulting in unfair competition between SOEs and private enterprises.[922] Another observation is that SOEs generally obtain more subsidies than can private enterprises.[923]

Providing subsidies for SOEs used to be reasonable as they SOEs undertake certain public service functions. However, after the increased participation of SOEs in commercial activities, transparency rules of granting subsidies for different kinds of SOEs under the background of new reform on SOEs have to be provided. Moreover, an increasing number of subsidies should be granted to enterprises which meet the conditions, regardless of the enterprise being SOEs or private enterprises. Additionally, granting subsidies by the local authorities should not be used as a method for local protectionism.

3.3.2.2.2 Relationship between the special advantages obtained by SOEs and the public procurement law

a. Whether the special advantages obtained by SOEs could influence the procurement activities

Both in Chinese Government Procurement Law and Chinese Bidding Law, the 'lowest price' has been employed as one criterion of awarding. Procuring with the 'lowest price' has been considered as an approach to saving public funds. Centralizing procurement has also been regarded as a way to procure goods and services at prices below the market price.[924] The Chinese public procurement regime encourages the providers to submit a low tender price.

However, maliciously using low bids is prohibited. A maliciously low bid usually refers to two circumstances. Firstly, in bid rigging, some tenderers submit a low price to win the contract. Secondly, the tenderers submit the tender with a price which is abnormally lower than the cost to win the contract. Both circumstances are against the provisions of the Anti-unfair Competition Law of the People's Republic of China (Chinese Anti-unfair Competition Law)[925]. According to the Chinese Anti-unfair Competition Law, the bidder shall not act in collusion with one another to raise or reduce the price for bidding[926], and the bidder shall not sell the commodity at a price lower than the cost of the commodity to put the other competitors out of the competition. For the

[922] 补贴"最赚钱"国企不公平,http://pinglun.eastday.com/p/n911830/u1ai8454476.html
政策补贴偏爱国企，涉农民企日子难熬，经济参考报，2015-01-22，
http://dz.jjckb.cn/www/pages/webpage2009/html/2015-01/22/content_1221.htm
[923] 孔东民，刘莎莎，王亚男：市场竞争、产权与政府补贴，经济研究，2013 年第 2 期。
[924] Article 17 of the CGPL.
[925] The Chinese Anti-unfair competition Law was issued by the Standing Committee of the National People's Congress, on 09-02-1993.
[926] Article 15 of the Chinese anti-unfair competition Law.

first circumstance, the CGPL, CBL and Chinese Anti-unfair Competition Law have provided the sanction rules for those activities but not the coordination rules between the inconsistent rules.[927] For the second circumstance, the CGPL and CBL are silent on the provisions. An increase in price during the performance phase is a risk. The Chinese Anti-unfair Competition Law has provided the sanction[928] for the circumstance that the provider sells the service or products at a price below the cost. However, whether the provider can submit the tenderer with a price below the cost and method to verify the cost presented by the provider remain unclear.[929]

The special advantage obtained by the provider is not related to the price which the provider submits in the tenders in Chinese Law. In the Chinese Anti-unfair Competition Law, the provider generally shall not sell the goods or services under the cost; regardless, no further condition on the cost is required. If the SOEs gain special advantages from local authorities, the cost of SOEs is lower than that of private enterprises to the extent that the price at which the SOEs sell is not less than their cost, which is allowed by Chinese Laws. The same circumstance applies to the public procurement market. Therefore, even though the Chinese public procurement regime has provided the general fair rules to both SOEs and private enterprises, the substantial competition policy is still not neutral if the SOEs could obtain special advantages not offered to private enterprises. In the typical Chinese PPP model described earlier, the affiliated SOE directly has the opportunities to become a shareholder of the joint venture and earn income from the PPP contract. This affiliated SOE also participates in the competition with other SOEs or private enterprises on the private market and the public procurement market to provide either similar or different services. The role of the affiliated SOE as a shareholder in the joint venture could bring unreasonable advantage to the affiliated SOE relative to other competitors in the market. In China, no special rule exists that the accounts be separate for those two different activities in one SOE.

b. Whether the procurement should be considered as authorizing special advantages for SOEs

[927] According to article 77 of CGPL, the provider shall be fined not less than 5‰ but not more than 10‰ of the procurement value, be included in the list of vicious providers, and shall be prohibited from participating in any government procurement activities within one to three years. The illegal proceeds, if any, shall be confiscated; if the business license thereof shall be cancelled by the competent administration for industry and commerce. If any crime has been constituted, the offenders shall be subject to criminal liabilities. According to article 53 of CBL, if the tenderer wins the bid by conspiring with the tenderers or with the tenderee or paying bribes to the tenderee or members of the bid evaluation committee, the bid shall be invalid, and the bid winner shall be subject to a fine of not less than 1/2% but not more than 1% of the total value of the bidding project. The person-in-charge directly responsible for the entity or any other person who are held directly responsible shall be subject to a fine of not less than 5% but not more than 10% of the total amount of fine imposed upon the entity. Where any illegal gains have resulted, such gains shall be confiscated; where the circumstance are serious, the tenderer shall be disqualified from participation in bidding for a term of 1 to 2 years for and shall be published in public notices, or be revoked of his business license by the administration for industry and commerce. If any violation of law constitutes a crime, the tenderer shall be criminally prosecuted. If losses have been caused to other persons, the tenderer shall be responsible for making compensations. According to the article 27 of Chinese anti-unfair competition law, the winning tenderer is invalid. And also the competent authorities could apply punishment on fine.

[928] According to the article 23 of Chinese anti-unfair competition law, the competent authorities shall in order to stop the illegal activities and may punish with fine.

[929] This issue has been reflected by the recent cases: 腾讯 1 分钱中标厦门政务云：
http://companies.caixin.com/2017-03-17/101067400.html

According to the relevant Anti-unfair Competition Law of China and the Anti-monopoly Law of China, whether the procurement activities that comply with the Chinese public procurement regime could constitute authorizing special advantages for SOEs has not been considered a controversial question because all procurement activities of the governments should generally fall into the public procurement regime and no in-house provision arrangements exist.

However, if the local governments fail to comply with the procurement rules, several circumstances are considered in violation of the Anti-unfair Competition Law and the Anti-monopoly Law of China. Firstly, the local government requires the public procurer to purchase certain goods or services, such as those produced by the local SOEs. Secondly, the local government rejects or restricts the participation of non-local business operators in local tendering and bidding activities by imposing discriminatory qualification requirements or assessment standards or failing to publicise the binding information in accordance with the law. Thirdly, the public procurer colludes with the SOE which offers a bid to put the other bidders out of the competition. For instance, if the local government has already decided to award the contract to its local SOE before the procurement procedure begins, then the implementation of the procurement procedure becomes a mere act. For the three aforementioned circumstances, the four relevant laws have provided sanction rules but are not consistent with one another.

3.3.2.4 Discussion

As previously mentioned, EU holds the neutral position on the use of public entities or private entities to provide public services; therefore, the Member States have the freedom to choose the method of providing public services. Governments of the Member States are used to granting aids to their internal undertakings, particularly public undertakings for developing internal economies. However, such granting of aid could distort or threaten to distort the competition between the Member States. For this kind of 'State Aid', the EU has established a set of rules.

The coverage of 'State Aid' has been limited under the following conditions: (a) the beneficiary of a measure is an 'undertaking'; (b) the advantages should be granted directly or indirectly through State resources; (c) the State measure must favour 'certain undertakings or the production of certain goods'; (d) the State measure 'distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods' and only to the extent that it 'affects trade between Member States'. The rule means that not all aids from the State are forbidden; some aids shall be or may be considered compatible with the internal markets.

As both the State Aid law and public procurement law are relevant to the economic behaviour of the public authorities, these two laws have certain coherence. (a) Awarding a contract which falls outside the scope of the public procurement directives could result in the granting of State aid. The contracts awarded on the basis of an in-house arrangement prompt controversy. According to the EU Commission, the in-house contracts could also be exempt from the State aid law, provided that they meet the cumulative conditions of legal monopoly exemption or are awarded under normal market conditions. Under the EU regime, if one contract which is awarded from one public

authority to one SOE is exempted from the public procurement regime; it will be governed by the State aid law if the contract is not awarded under normal market conditions. (b) The awarding of a contract which falls within the scope of the public procurement directives may result in the granting of State aid. Although most public procurement procedures are open, transparent and non-discriminatory, some procurement procedures are not, such as 'the negotiated procedure without publication of a contract notice'. Therefore, some contracts awarded from public authorities which comply with the public procurement regime may still be considered as granting State aid. (c) If the objects of the procurement contracts are not needed by the contracting authorities, and these contracts are directly awarded to undertakings, it constitutes State aid. However, the procurement contracts not being the actual needs of the contracting authorities is not enough for determining the existence of 'State aid'. (d) Modification of a public contract after its award may lead to the granting of State aid. The EU public procurement regime provides a certain degree of freedom to modify the contract without a new procurement procedure under certain conditions. Whether this kind of modification could constitute State aid remains undetermined.

Comparatively, in China, SOEs could also benefit from the central or local governments, which could influence the neutral competition between SOEs and private enterprises in public procurement. For instance, advantages in terms of market access, taxation and obtaining subsidies have been considered necessary or reasonable in China as SOEs burden certain public functions of the government in many significant sectors. With economic reform, these advantages for the SOEs have been reduced by providing a fair competition environment for SOEs and private enterprises. However, the reform needs to go further, such as providing transparency rules of granting subsidies.

The reason for reducing the advantages for SOEs mostly originates from the requirement of the internal reform of China instead of from the pressure of international trade. However, this reduction does not imply that the considerations under the EU rules on the coherence between State aid law and public procurement law are meaningless to Chinese law reform on public procurement.

In China, in addition to the central SOEs, each local government has its own SOEs and the discretion to confer advantages to them. Competitions exist between central SOEs and SOEs from different local governments, between SOEs from different local governments, between the SOEs and private enterprises and between provinces or in the provinces. Under this situation, the competition between the enterprises from different province is similar to the competition between the different Member States in EU. This similarity suggests that the granting of advantages to the SOEs could influence the competition between SOEs and private enterprises with respect to the public procurement contracts. However, the previous discussion indicates that this issue has not been addressed under the current Chinese public procurement law. When the proper regulation of granting advantages to the enterprises, including SOEs and private enterprises, is considered by the Chinese legislator, a factor to consider is the sufficiency of conducting public procurement procedures in eliminating illegal advantage. Another factor is whether obtaining the illegal

advantage could lead to the rejection of the tender.

3.4 Conclusion

Both in EU and China, SOEs may join the public procurement procedures as seller. However, under the background of developing PPPs, whether the SOEs could become the 'private partner' is controversial. Although from the political perspective the PPP model should generally encourage the pure private companies to join the PPP projects, from the legal perspective, all economic operators are allowed to join the PPP projects if they meet the qualification set by the procurers. If the SOEs have the considerable financial and technical capacities, they should have the qualification to join the competition. However, in China, the MOF limited the participation of certain kinds of SOEs to join the PPP projects as private partners to control the debt crisis of local governments.

Meanwhile, the Chinese public procurement law and the EU public procurement regime hold different positions on whether the contracts awarded to SOEs by public entities should be awarded by public procurement rules. In the EU, the contracts awarded by contracting authorities to SOEs may be ruled out of the procurement regime if they meet the conditions for in-house provision or public–public cooperation. However, in China, all contracts awarded by procurers to SOEs should comply with the public procurement regime. Comparatively, in EU, certain SOEs which are controlled by the State are established specifically to meet the needs in the general interest and not having an industrial or commercial character, also have been regulated under the procurement regime. If this kind of SOEs meet the further conditions and have been awarded the contract by contracting authorities without competition, the procurement activities of those SOEs still need to comply with the full provisions of public procurement regime. Therefore, the EU procurement regime leaves space for contracting authorities to treat certain SOEs as their internal organisations for performing the public function. In China, no such space is provided. For implementing the strategic functions of public interest type SOEs, the current approach overemphasises the competition for all SOEs to obtain the public procurement contracts because they could be considered as the internal department of the specific public entities. The idea of 'in-house' exemption from the EU regime could be one of the models for the formulation of Chinese legislations.

Both the procurement regimes of the EU and China have provided a general framework for ensuring considerable neutral competition between SOEs and private companies. Requirements such as transparency, equal treatment and non-discrimination contribute to competitive neutrality. The EU Commission also cited several aspects which could help resolve the information asymmetry problem between private companies and SOEs under the IPPP model. In China, SOEs should generally obtain the procurement contract through competition, and the affiliated SOEs compete with private companies in the commercial market. The subsidy by affiliated SOEs of their commercial activities through benefits directly obtained from providing service to local

governments has been questioned. Under this circumstance, competitive neutrality may be impaired. In the EU, through the cooperation between State aid rules and public procurement rules have already regulated this kind of illegal state aids has already been regulated. This kind of cooperation between rules could be learnt by China.

However, some issues have not yet been addressed in this paper. In future, the need to establish in-house provision rules in China should be discussed. If an affirmative conclusion is reached, the appropriate rules for China and how the neutral competition could be more efficiently achieved under the IPPP model in China should be explored as well.

Chapter Four Role of SOEs under the WTO Agreement on Government Procurement

4.1 Background: Development of the WTO Agreement on Government Procurement

Sets of rules have firstly been enacted under the framework of WTO to improve the liberalisation of the global trade market[930]. However, in the past, agreements on public procurement took a long time to process because numerous parties commonly used public procurement as an approach to implement 'buy-national preferences', and tariffs and quotas played more important roles as international trade barriers.[931] For the same reason, GATT and GATS as multilateral trade rules have explicitly excluded government procurement from their applicable scopes[932]. However, over the years, under the framework of WTO, three main approaches have been employed to address the issue of government procurement in the multilateral trading system[933]: (a) negotiation on the plurilateral Agreement on Government Procurement; (b) negotiations on government procurement in services pursuant to Article XIII:2 of GATS[934]; and (3) the work on transparency in government procurement in the Working Group established by the Singapore Ministerial Conference in 1996[935].

The WTO Agreement on Government Procurement (GPA) is a milestone in the liberalisation of public procurement markets. The first agreement on government procurement (the so-called 'Tokyo Round Code on Government Procurement') was signed in 1979 and entered into force in 1981.[936] Its scope and coverage have been extended in parallel with the Uruguay Round. A new Agreement on Government Procurement (GPA 1994) was signed in Marrakesh on April 15, 1994[937], which came into force on January1, 1996. GPA 1994 provided an international legal

[930] World Trade Organization (2015), Understanding the WTO, fifth edition, https://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf.

[931] The negotiation on government procurement has been continued since 1945. The details see: Gabrielle Marceau (1996), History of Government Procurement Negotiations since 1945, Public Procurement Law Review.

[932] See: article III: 8a of GATT and Article XIII:1 of GATS.

[933] https://www.wto.org/english/tratop_e/gproc_e/overview_e.htm

[934] The General Agreement on Trade in Services (GATS) states in Article XIII:1 that government procurement is exempt from the main market access provisions of the GATS. Nevertheless, Article XIII:2 of the GATS establishes a multilateral negotiating mandate on the procurement of services. Discussions are on-going in the Council for Trade in Services. However, WTO members hold different views with respect to the scope of the mandate for negotiations contained in Article XIII. Some members take the view that negotiations under this mandate can involve market access and non-discrimination as well as transparency and other procedural issues. Other members do not share this interpretation, considering that Article XIII excludes most-favoured nation (MFN) treatment, market access and national treatment from the scope of the mandated negotiations. See: https://www.wto.org/english/tratop_e/gproc_e/gpserv_e.htm

[935] The Singapore Ministerial Conference of 1996 set up the multilateral Working Group on Transparency in Government Procurement to conduct a study on transparency in government procurement practices, taking into account national policies and, on that basis, to develop elements suitable for inclusion in an appropriate agreement. See: https://www.wto.org/english/tratop_e/gproc_e/gptran_e.htm

[936] It was amended in 1987 and the amended entered into force in 1988.

[937] It was at the same time as the Agreements Establishing the WTO.

framework for the liberalisation and governance of public procurement markets.[938] It comprised the following main elements: (1) guarantees of national treatment and non-discrimination for the goods, services and suppliers of parties to the Agreement with respect to procurement of covered goods, services and construction services as established in the schedules of each party and subject to various exceptions and exclusions noted in the agreement; (2) minimum standards regarding national procurement processes, which are intended to ensure that the covered procurements of the parties are conducted in a transparent and competitive manner without discrimination against the suppliers of other parties;[939] (3) requirements regarding the availability and nature of domestic review procedures which must be put in place by all parties to the Agreement; (4) provisions regarding the application of the WTO Dispute Settlement Understanding in this area; (5) procedures dealing with modification and rectification of the coverage commitments of the parties; and (6) 'built-in agenda' for the improvement of the Agreement, extension of coverage and elimination of remaining discriminatory measures applied by parties.

However, the text of GPA 1994 is far from complete. A large part has yet to be completed, including the expansion of the coverage of GPA 1994 or addressing issues relating to the use of information technology in procurement.[940] Within two years of the implementation of GPA 1994, the parties to GPA initiated the renegotiation of the Agreement in accordance with a built-in provision of the 1994 Agreement. The negotiation was concluded in December 2011, and the outcome of the negotiations was formally adopted in March 2012. The revised GPA was entered into force on April 6, 2014.[941]

The revised GPA incorporated significant enhancements. Firstly, in the aspect of procedure rules, it updates the Agreement to consider the enhancements in the current electronic procurement practice. For instance, the revised GPA considers the use of electronic tools in procurement, as well as the availability and interoperability of information technology systems. It incorporates additional flexibility; when the electronic tools are used, shorter notice periods are required.[942]

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[938] Roberto Anderson (2008). China's accession to the WTO Agreement on Government Procurement: Procedural Considerations, Potential Benefits and Challenges, and Implementation of the Ongoing Re-negotiation of the Agreement, P.P.L.R., 2008, 4, 161-174.

[939] The aspects of the procurement process addressed include: (1) the use of technical specifications; (2) allowable tendering procedures; (3) qualification of suppliers; (4) invitations to participate in intended procurements; (5) selection procedures; (6) timelimits for tendering and delivery; (7) tender documentation; (8) submission, receipt and opening of tenders, and the awarding of contracts; (9) negotiations by entities with suppliers; and (10) the use of limited tendering.

[940] See: Roberto D. Anderson and Sue Arrowsmith (2011), The WTO regime on government procurement: past, present and future, in Sue Arrowsmith and Robert D. Anderson (eds.). *The WTO regime on government procurement: challenge and reform*, Cambridge University Press, chapter 1, p.20-21.

[941] Until November 1 of 2016, the Agreement has 19 parties comprising 47 WTO members. Another 29 WTO members participate in the GPA Committee as observers. Out of these, 9 members are in the process of acceding to the Agreement.

[942] For the detailed analysis on the procedure rules of revised 2012 GPA, see the following papers: Arie Reich(2009). The New text of the Agreement on Government Procurement: an analysis and assessment, Journal of International Economic Law 12(4), 989-1022; Sue Arrowsmith (2011), The revised Agreement on Government Procurement: Changes to the Procedural Rules and Other Transparency Provisions, in Sue Arrowsmith and Robert D. Anderson (eds.). *The WTO regime on government procurement: challenge and reform*, Cambridge University Press, chapter 10, p.285-336; Robert D Anderson (2012). The conclusion of the renegotiation of the World Trade Organization Agreement on Government Procurement: what it means for the Agreement and for the world economy, P.P.L.R., 2012,3, 83-94.

Secondly, it has clarified and improved transitional measures (or 'special and differential treatment'). In the 1994 GPA, the parties 'shall duly take into account the development, financial and trade needs of developing countries, in particular least-developed countries'[943]; in the revised GPA, the parties 'shall give special consideration to the development, financial and trade needs and circumstances of developing countries and least-developed countries….'[944]. Therefore, the transitional measures become the available 'as of right' under the revised 2012 GPA.[945] Additionally, the transitional measures which may be awarded are clearly intended to be time-bound. Thirdly, the revised GPA text consists of the new specific requirements for participating governments and their relevant procuring entities to avoid conflicts of interest and prevent corrupt practices.[946]

Moreover, several issues have been cited in the revised GPA for further negotiations between Parties.[947] These issues include the (a) treatment of small and medium-sized enterprises; (b) collection and dissemination of statistical data; (c) treatment of sustainable procurement; (d) exclusions and restrictions in the Annexes of the Parties; and (e) safety standards in international procurement.

4.2 General scope and coverage of the WTO agreement on government procurement

4.2.1 'Government procurement exclusion' under the General Agreement on Tariffs and Trade (GATT) and General Agreement on Trade in Services (GATS)

GPA as a plurilateral agreement was designed to fill the gap left by the government procurement exclusion contained in GATT and GATS. Therefore, in the discussion of the scope and coverage of GPA, the government procurement exclusion under the GATT and GATS require an introduction.

4.2.1.1 Government procurement exclusion under the GATT

Article III: 8(a) of GATT states that '*the provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.*' However, certain issues in this paragraph have yet to be clarified, including the following: the relation of this paragraph to other paragraphs in Article III of GATT, the meaning of the term 'governmental purpose', 'without commercial resale', 'governmental agency' and so on. For the interpretation of the paragraph, Article III:8(a) of GATT 1994 had been firstly called upon until the reports of the Appellate Body on *Canada—Certain measures affecting the renewable energy generation sector* and *Canada—Measures relating to the feed-in tariff program*[948]. In the reports, the following aspects

[943] Article V (1) of 1994 GPA
[944] Article V (1) of 2012 GPA
[945] Robert D Anderson (2012). The conclusion of the renegotiation of the World Trade Organization Agreement on Government Procurement: what it means for the Agreement and for the world economy, P.P.L.R., 2012,3, 83-94.
[946] It has been provided in the preamble of the revised 2012 GPA.
[947] Article XXII (8) of 2012 GPA
[948] WT/DS412/AB/R·WT/DS426/AB/R, World Trade Organization, 19 December 2012.

have been considered:

A. Nature of Article III:8(a) of GATT 1994

The Appellate Body in the reports indicated that '*Article III:8(a) therefore establishes a derogation from the national treatment obligation of Article III for government procurement activities falling within its scope. Measures satisfying the requirements of Article III:8(a) are not subject to the national treatment obligations set out in other paragraphs of Article III. Article III:8(a) is a derogation limiting the scope of the national treatment obligation and it is not a justification for measures that would otherwise be inconsistent with that obligation.*'[949] The conclusion was based on the observation that: firstly, the introductory clause of Article III:8(a) establishes linkage with the remainder of Article III; secondly, Article III has enshrined the principle of national treatment which is a cornerstone of the multilateral trading system since its inception; thirdly, the opening clause of Article III:8(a) uses the term 'apply' in the negative, thus precluding the application of the other provisions of Article III to measures that meet the requirements of that paragraph.

B. Approach to interpreting Article III:8(a) of GATT 1994

The Appellate Body in the reports considered that Article III:8(a) should be interpreted holistically[950], as some of the terms qualify other terms used in the same provision, or provide guidance for the interpretation of those terms. Therefore, to interpret the terms in Article III:8(a) of GATT 1994, the Appellate Body considered the linkages between the different terms used in the provision and the contextual relation to other parts of Article III, as well as to other provisions of GATT 1994, such as Article XVII of GATT 1994. The details of the linkages will be presented in the subsequent discussion.

C. Meaning of 'governing'

Article III:8(a) describes the types of measures falling within its ambit as 'laws, regulations or requirements governing the procurement by governmental agencies of products purchased.' The Appellate Body considered that the word 'governing', along with the word 'procurement' and other parts of the paragraph, defines the subject matter of the 'laws, regulations or requirements'[951]. After referring to the definition of 'governing' in the Oxford English Dictionary Online which is 'constitut[ing] a law or rule for', the Appellate Body insisted that **'Article III:8(a) requires an articulated connection between the laws, regulations, or requirements and the procurement, in the sense that the act of the procurement is undertaken within a binding structure of laws, regulations, or requirements.**'[952]

In the case concerned, under the Feed-In Tariff (FIT) Programme[953] and Contracts[954], the

[949] WT/DS412/AB/R·WT/DS426/AB/R, World Trade Organization, 19 December 2012, para. 5.56.
[950] WT/DS412/AB/R·WT/DS426/AB/R, World Trade Organization, 19 December 2012, para. 5.57.
[951] WT/DS412/AB/R·WT/DS426/AB/R, World Trade Organization, 19 December 2012, para. 5.58.
[952] Ibid.
[953] The feed-in tariff programme (FIT programme) is a scheme implemented by the Government of Ontario in

Government of Ontario[955] procured electricity from the generators[956]. Generators that entered into a FIT or micro FIT contract were required to build, operate and maintain the approved generation facility in accordance with all relevant laws and regulations and deliver the electricity produced into the Ontario electricity system.[957] In addition to these obligations, the FIT Programme imposes 'Minimum Required Domestic Content Levels'. This condition must be satisfied in the development and construction of solar PV electricity generation facilities participating in both streams of the FIT Programme[958] and of windpower electricity generation facilities that take part in the FIT stream. Both Japan and EU emphasised before the Panel that the focus of complaints is the domestic content requirements that form part of the FIT Programme as well as the FIT and microFIT contracts.[959] **The Appellate Body acknowledged that under the challenged measures, a connection is articulated between the procurement of electricity and the Minimum Required Domestic Content levels regarding generation equipment.** However, in the view of the Appellate Body, this connection under municipal law is not dispositive of the issue because Article III:8(a) imposes other conditions as well.[960]

D. Meaning of 'procurement'

Firstly, the Appellate Body found the general meaning of 'procurement' as referring to '[t]he action of obtaining something; acquisition', or the term may refer more specifically to 'the action or process of obtaining equipment and supplies'. **Secondly**, the Appellate Body considered in a more technical sense that procurement usually refers to formal procedures used by governments to acquire goods or services, for instance, in the 2011 Model Law on Public Procurement prepared by the United Nations Commission on International Trade Law (UNCITRAL). **Thirdly,** the Appellate Body held the view that the concepts of 'procurement' and 'purchase' are not to be equated. In Article III:8(a), the word 'procurement' is related to the words 'products purchased'. In the cases concerned, the Panel found that the term 'procurement' in Article III:8(a) should be given the 'same essential meaning' as the word 'purchased' and *vice versa*.[961] However, in the view of Appellate Body, 'procurement' is the operative word in Article III:8(a) describing the

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2009 to increase the supply of electricity generated from certain renewable sources of energy into the Ontario electricity system. Participation in the FIT Programme is open to facilities located in Ontario that produce electricity from following energy sources: wind, solar PV, renewable biomass, biogas, landfill gas, and waterpower. See Panel Reports, para.7.65 and 7.66.

[954] The OPA implements the FIT programme through the application of a standard set of rules, standard contracts (i.e. FIT and mircoFIT Contracts) and for each class of generation technology, standard pricing.

[955] Ontario Electricity Restructuring Act of 2004 created the Ontario Power Authority(OPA) as 'an' agency of the Government of Ontario responsible for managing Ontario's electricity supply and resources in order to meet its medium and long-term needs. The FIT programme was formally launched by the OPA in 2009 pursuant to the Direction of the Ontario Minister of Energy and Infrastructure acting under the authority of the Electricity Act of 1998. See, Panel Reports, para.7.37.

[956] Generators participating in the FIT Programme are paid a guaranteed price per kWh of electricity delivered into the Ontario electricity system under 20 year or 40 year contracts with the Ontario Power Authority (OPA).

[957] Panel reports, 7.68.

[958] The FIT Programme is divided into two streams, the FIT stream and the microFIT stream. The participants under the microFIT stream are typically small household, farm, or business generation projects. See Panel reports, para.7.66.

[959] Panel reports, 7.6, 7.7, and 7.70.

[960] WT/DS412/AB/R·WT/DS426/AB/R, World Trade Organization, 19 December 2012, para. 5.78.

[961] Panel Report, para. 7.131.

process and conduct of the governmental agency. The word 'purchased' is part of a process of government procurement. The Appellate Body considered that 'the use of the word 'purchase' in the same provision suggests reading the word 'procurement' as referring to the process of obtaining products, rather than as referring to an acquisition itself because if procurement was understood to refer simply to any acquisition, it would not add any meaning to Article III:8(a) apart from what is already expressed by the word 'purchased''.[962] **Therefore, the Appellate Body explained the word 'procurement' to refer to the process pursuant to which a government acquires products.**[963]

E. Meaning of 'governmental agency'

In Article III:8 (a), the term 'governmental agency' refers to 'by whom'. **First**, the Appellate Body accepted the definition of 'agency' in Oxford English Dictionary as '[a] business, body, or organization providing a particular service, or negotiating transactions on behalf of a person or group'. **Second**, combining the fact that the word 'agency' is used in connection with the word 'governmental', the Appellate Body considered that 'Article III:8(a) refers to entities acting for or on behalf of government'. **Third**, the Appellate Body employed the meaning of 'government', which has been held by the Appellate Body in previous cases[964], which 'is derived, in part, from the functions that it performs and, in part, from the authority under which it performs those functions.' **Therefore, the Appellate Body considered that in the sense of Article III:8 (a), the question of whether an entity is a 'governmental agency' is determined by the competences conferred on the entity concerned and by whether that entity acts for or on behalf of the government.**

Furthermore, the Appellate Body considered that Articles XVII:1 and Article XVII:2 of the GATT 1994 provide relevant context for the interpretation of the term 'governmental agency' in Article III:8 (a). Article XVII:1 stipulates obligations for state trading enterprises (STE) and Article XVII:2 sets out a derogation from those obligations for certain government procurement transactions. 'State trading enterprises' includes state enterprises and enterprises that are conferred exclusive or special privileges from the state. **The Appellate Body noted that 'the GATT 1994 recognizes that there is a public and private realm, and that government entities may act in one, the other, or both. Governments may limit the actions of entities to the public realm or give entities competences to act in private realm.'**[965] From the view of the Appellate Body, the term 'governmental agencies' refers to those entities acting for or on behalf of the government in the public realm with the competences conferred on them to discharge governmental functions. This perspective confirms the understanding of the Appellate Body that a 'governmental agency' is an entity acting for or on behalf of government and performing governmental functions within the competence conferred on it.

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[962] WT/DS412/AB/R·WT/DS426/AB/R, World Trade Organization, 19 December 2012, para. 5.59.
[963] Ibid.
[964] Appellate Body reports, Canada-Dairy, para.97; and US-Anti-Dumping and Countervailing Duties (China), para.20.
[965] WT/DS412/AB/R·WT/DS426/AB/R, World Trade Organization, 19 December 2012, para. 5.61.

The observation of the aforementioned Appellate Body has close relevance to the discussion in this chapter on the role of SOEs under the WTO government procurement rules. However, some issues remain unclear, such as the logic and rationale of the discussion, and the meanings of the terms 'governmental entities' and 'public realm' mentioned by the Appellate Body in this discussion. A further discussion is included in the following section 4.2.2.2 and section 4.3.1.1.2.

F. Meaning of 'products purchased'

Firstly, the Appellate Body indicated that a 'product' in the sense of this provision is something that is capable of being traded. **Secondly**, the Appellate Body mentioned that the term 'product' is also found in other provisions of Article III of the GATT 1994, which provide relevant context. Article III:4 prohibits discrimination against imported products; that is, it prohibits a Party from treating imported products less favourable than similar products of national origin. In the context of Article III:2, the national treatment obligation applies also to the treatment of imported products that are directly competitive to or substitutable with domestic products. **Thirdly,** as both the obligations in Article III and derogation in Article III:8 (a) refer to the discriminatory treatment of products, and Article III:8(a) is a derogation from the obligations contained in other paragraphs of Article III, the Appellate Body determined that the same discriminatory treatment must be considered with respect to both the obligations of Article III and the derogation of Article III:8(a). Accordingly, the scope of the terms 'products purchased' in Article III:8(a) is provided by the scope of 'products' referred to in the obligation set out in other paragraphs of Article III. Thus, Article III:8(a) concerns the product that is subject to the discrimination. The coverage of Article III:8(a) extends not only to products that are identical to the product that is purchased but to 'similar' products as well. In accordance with the Note Ad to Article III:2, it also extends to products that are directly competitive to or substitutable with the product purchased under the challenged measure. For convenience, the Appellate Body described this range of products as products that are in a competitive relationship.[966] This description means that the product of foreign origin allegedly being discriminated against must be in a competitive relationship with the product purchased.[967]

In its rebuttal of Canada's claim under Article III:8 the EU (a) acknowledges that the coverage of Article III:8 (a) may also extend to discrimination relating to inputs and process of production used with respect to products purchased by procurement.[968] The Appellate Body stated that what constitutes a competitive relationship between products may require consideration of inputs and process of production used to produce the product. However, it considered that whether the derogation in Article III:8(a) can extend also to discrimination of the kind referred to by the

[966] WT/DS412/AB/R·WT/DS426/AB/R, World Trade Organization, 19 December 2012, para. 5.63.
[967] WT/DS412/AB/R·WT/DS426/AB/R, World Trade Organization, 19 December 2012, para. 5.79.
[968] The European Union explains that, when it refers to product 'characteristics', it does not as necessarily referring to physically detectable characteristics, but as referring to elements that define the nature of the product more broadly. The European Union submits that the environmental profile or the environmental attributes that a particular product may incorporate, even if they do not materialize into any particular physical related to the subject matter of the contract. see, European Union's other appellant's submission (DS426), fn 43 to para.51.

European Union is a matter which they should decide in the case concerned.[969] **Therefore, it is not certain that the coverage of Article III:8(a) may also extend to discrimination relating to inputs and processes of production used with respect to products purchased by way of procurement.**

In the case concerned, the product purchased by the Government of Ontario under the FIT Programme and Contracts, is electricity and not generation equipment.[970] The generation equipment is purchased by the generators themselves, whereas the product discriminated against for reason of its origin is generation equipment. These two products are not in a competitive relationship, which for the Appellate Body is the dispositive of the issue.[971] Accordingly, the discrimination relating to generation equipment contained in the FIT Programme and Contracts is not covered by the derogation of Article III:8(a) of the GATT 1994.[972] Consequently, the Appellate Body found that the Minimum Required Domestic Content Levels cannot be characterised as 'laws, regulations or requirements governing the procurement by governmental agencies' of electricity within the meaning of Article III: 8(a) of the GATT 1994.[973]

G. Meaning of 'for governmental purposes'

'For governmental purpose' has brought divergent views from the participants in the cases. In the **Canada case**, the appellee's submission advocated a broad interpretation that may encompass any purchase for a stated aim of the government.[974] In response to questioning at the oral hearing, it clarified that the inquiry under 'governmental purpose' needs to go beyond the stated aim of the government. In addition, the inquiry must include an assessment of whether a government has traditionally supplied a certain product and whether it has constitutional mandate to do so. It must also consider the role of the government in a particular country, focusing on the history, constitution and legislation of a particular government. The EU regarded the Canada interpretation to be overly broad. For the EU, the key issue was whether the 'products purchased' were needed to sustain the work and functions of the government and therefore would genuinely be used by the government in the exercise of its public functions, including the provision of public services.[975] The EU accepts that 'products purchased for governmental purposes' need not be confined to those purchased for the consumption or physical use by the government.[976] **Japan** emphasises the word 'for', which requires an inquiry into whether a true and genuine connection exists between

[969] WT/DS412/AB/R·WT/DS426/AB/R, World Trade Organization, 19 December 2012, para. 5.63.
[970] Panel reports, 7.64.
[971] None of the participants has suggested otherwise, much less offered evidence to substantiate such proposition.
[972] The Appellate Body recalled that they didn't address in this case rules for determining the origin of products purchased. It also has not been alleged in this case that the Minimum Required Domestic Content Levels are rules of origin.
[973] WT/DS412/AB/R·WT/DS426/AB/R, World Trade Organization, 19 December 2012, para. 5.79.
[974] Canada's appellee's submission, para.59.
[975] European Union's opening statement at the oral hearing. Referred by the Appellate Body in the reports, para.5.64.
[976] European Union's opening statement at the oral hearing. Referred by the Appellate Body in the reports, para.5.64.

the 'purchase' and the 'governmental purpose' at issue.[977]

The Panel suggested that the 'ordinary meaning' of the term 'governmental purposes' is relatively broad, and could encompass all three meanings proposed by the parties.[978] The Panel indicated that it had to 'interpret this expression within its context'.[979] However, ultimately the Panel did not define 'governmental purposes' and instead proceeded with the question of whether those purchases were intended for commercial resale on the assumption that if found to be the case the purchases could be implied to be not intended for 'governmental purposes'.[980]

The analysis of **the Appellate Body** could be divided into the following aspects: **firstly,** the Appellate Body searched the general definition of 'purpose', which may refer to 'an object in view; a determined intention or aim', or to 'the end to which an object or action is directed'. Accordingly, the term 'governmental purposes' may refer either to the intentions or aims of a government or government as the end to which the product purchased is directed. **Secondly,** the Appellate Body noted that in Article III:8(a) the word 'governmental' is used once in connection with 'purposes' and again in connection with the word 'agencies'. The reference to 'governmental agencies' defines the identity of the entity conducting the procurement. The Appellate Body considered that because the governmental agencies by their very nature pursue governmental aims to objectives, the additional reference to 'governmental' in relation to 'purposes' must be further than requiring some governmental aim or objective with respect to purchase by governmental agencies. **Thirdly,** the Appellate Body noted that in the French and Spanish versions of Article III:8(a), the term 'purposes' corresponds to the term 'besoins' and 'necesidades', respectively, both of which correspond closely to the English term 'needs'. As such, the French and Spanish text can be read harmoniously with an interpretation of the word 'purposes' in English as referring to purchases of products directed at the government or purchased for the needs of the government in the discharge of its functions.[981] **Fourthly**, the Appellate Body considered that Article XVII:2 of the GATT 1994 provides relevant context for the interpretation of the words 'governmental purposes' in Article III:8(a). By referring to 'immediate and ultimate consumption in governmental use', Article XVII:2 identifies instances in which a product may be said to be purchased for governmental purposes.[982] A clear example is when a governmental agency purchases a good and uses it to discharge its governmental functions, and the good is totally consumed in the process. None of the participants disputes that this scenario would constitute an example of a good purchased for governmental purposes. **Therefore, the Appellate Body held the view that the phrase 'products purchased for governmental purposes' in Article III:8(a) refers to what is consumed by government or what is provided by government to recipients in the discharge**

[977] Japan's other appellant's submission (DS412), para.171.
[978] Panel Reports, para.7.139.
[979] Panel Reports, para.7.139.
[980] Panel Reports, para.7.145.
[981] WT/DS412/AB/R·WT/DS426/AB/R, World Trade Organization, 19 December 2012, para. 5.67.
[982] The Appellate Body also noted that Article XVII:2 is phrased more narrowly than Article III:8(a), as the former provision refers to 'immediate' or ultimate consumption in governmental use'. This in turn suggests that, where the products purchased are consumed in governmental use, Article III:8(a) does not require that this be 'immediate or ultimate'.

of its public functions. The scope of these functions is determined on a case by case basis.[983]

The word 'for' relates the term 'products purchased' to 'governmental purpose' and thus indicates that the products purchased must be intended to be directed at the government or be used for governmental purposes. **Thus, the Appellate Body considered that Article III:8(a) requires that there be a rational relationship between the product and the governmental function being discharged.**[984]

H: Relationship between 'for governmental purposes' and 'not with a view to commercial resale'

The relationship between 'for governmental purposes' and 'not with a view to commercial resale' is also a controversial issue in the cases. **The Panel** stated that 'the term 'governmental purposes' should be interpreted in juxtaposition to the expression 'not with a view to commercial resale or with a view to use in the production of goods for commercial sale' that appears in Article III:8(a).' In the view of the Panel, a purchase 'for governmental purposes' cannot simultaneously be regarded as a government purchase of goods 'with a view to commercial resale'.

The analysis of the **Appellate Body** is that both 'for governmental purposes' and 'not with a view to commercial resale' further qualify and limit the scope of 'products purchased'. These two requirements are linked by the words 'and not', which **suggests that the requirement of purchase not being made with a view to commercial resale must be met, in addition to the requirement of purchases being made for governmental purposes.** Therefore, the Appellate Body disagreed with the proposition of the Panel and considered that these are cumulative requirements.[985]

I: Meaning of 'commercial resale'

Firstly, according to the general definition of 'resale', which is 'sale of something previously bought', the Appellate Body indicated that 'commercial resale' is the resale of a product at arm's length between a willing seller and a willing buyer.

Secondly, the Appellate Body analysed the debate between the participants on 'whether procurement 'with a view to commercial resale' must involve profit'. Canada argued that procurement 'with a view to commercial resale' is procurement 'with the aim to resell for profit'.[986] Japan and the EU reject the proposition that profit, or intent to profit, is a required element.[987] In this regard, the Panel observed that 'it is a fact that loss-making sales can be, and often are, a part of ordinary commercial activity.'[988]

Thirdly, whether a transaction constitutes a 'commercial resale', **the Appellate Body held the**

[983] WT/DS412/AB/R·WT/DS426/AB/R, World Trade Organization, 19 December 2012, para. 5.68.
[984] Ibid.
[985] WT/DS412/AB/R·WT/DS426/AB/R, World Trade Organization, 19 December 2012, para. 5.69.
[986] Panel Reports, para. 7.146.
[987] Panel Reports, para. 7.146.
[988] Panel Reports, para. 7.151.

view that it must be assessed with regard to the entire transaction.[989] In the view of the Appellate Body, the assessment must look at the transaction both from the seller's perspective and from the perspective of the buyer.[990] From the seller's perspective, the assessment must examine whether the transaction is oriented at generating a profit for the seller. According to the Appellate Body, the **profit-orientation is an indication that a resale is at arm's length.** Profit-orientation indicates that the seller is acting in a self-interested manner. The Appellate Body agreed with the observation of the Panel that under some circumstances, a seller enters into a transaction out of his or her own interest without making a profit. However, for the Appellate Body, the circumstances vary under which a seller may offer a product at a price that does not allow him or her to make a profit or sometimes even fully recoup cost. In such scenarios, the Appellate Body considered examining the long-term strategy of the seller as loss-making sales could not be sustained indefinitely; in addition, a rational seller would be expected to be profit-oriented in the long term. Viewed from the buyer's perspective, a **commercial resale would be one in which the buyer seeks to maximise his or her own interest. Thus, the Appellate Body emphasised that the assessment of the relationship between the seller and the buyer in the transaction in question determines whether a transaction is made at arm's length.**

In this regard, the Appellate Body regards 'commercial resale' as a transaction at arm's length. The profit orientation of the seller is indicative of a transaction being 'at arm's length'. The lack of profit from a transaction does not imply that it is not at arm's length. In this case, the long-term strategy of the seller should be evaluated. Comparatively, the Appellate Body did not accept the arguments of Japan that 'with a view to commercial resale' means 'with a view to being sold into the stream of commerce or trade'.[991]

J: Meaning of the clause 'not… with a view to use in the production of goods for goods for commercial sale'

The Appellate Body considered that when the provision uses the same words as in the phrase 'not with a view to commercial resale', these words have the same meaning in both clauses. The difference between 'resale' and 'sale' then becomes the key word that requires clarification. **To the Appellate Body**, both clauses refer essentially to the same type of sale.[992] The use of different words results from the fact that the penultimate clause addresses the sale of the product previously bought by the governmental agency, whereas the last clause addresses the sale of the product that is different from the product previously bought by the government.[993]

In the phrase 'use in the production of goods', the word 'use' refer to '[t]he act of putting

[989] WT/DS412/AB/R·WT/DS426/AB/R, World Trade Organization, 19 December 2012, para. 5.71.
[990] Ibid.
[991] Japan's other appellant's submission (DS412), para.188. Based on this view, Japan submitted that, to the extent the FIT programme and contracts involve purchases of electricity by the Government of Ontario, such purchases are 'with a view to commercial resale', because the electricity is purchased with a view to being sold or introduced into the stream of commerce, trade or market, without regard to whether the government makes a profit from the resale.
[992] WT/DS412/AB/R·WT/DS426/AB/R, World Trade Organization, 19 December 2012, para. 5.72.
[993] Ibid.

something to work, or employing or applying a thing, for any (esp. a beneficial or productive) purpose' as defined in the Oxford English Dictionary. **The Appellate Body** considered that the relevant purpose in the sense of the provision is specified by the words 'in the production of goods'.[994] The preposition 'in' expresses a relation of inclusion and thus suggests that the product has a role in the production of goods. Finally, the Appellate Body noted that the provision covers only products that are neither purchased for commercial resale nor purchased with the intention of being used in the production of goods for commercial sale[995] because the word 'or' is used to connect the two phrases.

In summary, the Appellate Body considered that Article III:8(a) sets out a derogation from the national treatment obligation contained in Article III of the GATT 1994. The provision exempts from the national treatment obligation certain measures containing rules for the process by which government purchases products. Under Article III:8(a), the entity procuring products for the government is a 'governmental agency'. 'Governmental agency' is an entity performing functions of government and acting for or on behalf of government. Furthermore, the product that is of foreign origin must be in a competitive relationship with the product purchased. Additionally, Article III:8(a) is limited to products purchased for the use of government, consumed by government, or provided by government to recipients in the discharge of its public functions. On the contrary, Article III:8(a) does not cover purchases made by governmental agencies with the intention of reselling the purchased products in an arm's length sale and does not cover purchases made with the intention of using the product previously purchased in the production of goods for sale at arm's length.[996]

4.2.1.2 Government procurement exclusion under GATS

Article XIII:1 GATS provides that '*Article II, XVI and XVII shall not apply to laws, regulations and requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not for commercial resale or for use in supplying service for commercial sale.*' To a certain extent, Article XIII:1 of the GATS copies Article III:8(a) of the GATT, except that one refers to the government procurement of goods, whereas the other refers to the government procurement of services. The interpretation given to similar provisions under Article III:8(a) of the GATT might also provide guidance on Article XIII:1 of the GATS.[997] Therefore, the interpretation of the Appellate Body discussed earlier regarding several elements could also apply to the same terms in Article XIII:1 of the GATS.

However, there is one exception on one type of service—the government procurement exclusion

[994] WT/DS412/AB/R·WT/DS426/AB/R, World Trade Organization, 19 December 2012, para. 5.73.
[995] Ibid
[996] WT/DS412/AB/R·WT/DS426/AB/R, World Trade Organization, 19 December 2012, para. 5.74.
[997] WTO Working Party on GATS Rules, Interpretation of Procurement-related Provisions in GATT—Possible Application to Article XIII of GATS, Background Note by the Secretariat, S/WPGR/W/29, 31 March 1999, at para.2.

in the GATS differs from that in the GATT with regard to the procurement of financial services.[998] Section B.2 of the Understanding on Commitments in Financial Services states that 'each Member shall ensure that financial service suppliers of any other Member established in its territory are accorded most-favoured-nation treatment and national treatment as regards the purchase or acquisition of financial services by public entities of the Member in its territory'[999]. The statement indicates that under the GATS, if 'public entities' intend to procure financial services, they should comply with the most-favoured nation (MFN) treatment and the national treatment under the GATS.

In this provision, the term 'public entities', instead of 'governmental agencies', is used and is defined in the GATS Annex on Financial Services as follows: '(i) a government, a central bank or monetary authority of a Member, or an entity or controlled by a Member, that is principally engaged in carrying out governmental functions or activities for governmental purpose, not including an entity principally engaged in supplying financial services on commercial terms; or (ii) a private entity, performing functions normally performed by a central bank or monetary authority, when exercising those functions.'[1000] As could be observed, 'performing governmental functions' is also the core element for defining 'public entities' as it also includes the private entities which perform governmental functions.

4.2.2 Normative analysis: Scope and coverage of GPA

4.2.2.1 *Scope and coverage of 1994 GPA*

The scope and coverage of the 1994 GPA are provided in Article I, which states the following:'*(1) This Agreement applies to any law, regulation, procedure or practice regarding any procurement by entities covered by this Agreement, as specified in Appendix I. (2) This Agreement applies to procurement by any contractual means, including such methods as purchase or as lease, rental or hire purchase, with or without an option to buy, including any combination of products and services. (3) Where entities, in the context of procurement covered under this Agreement, require enterprises not included in Appendix I to award contracts in accordance with particular requirements, Article III shall apply mutatis mutandis to such requirements. (4) This Agreement applies to any procurement contract of a value of not less than the relevant threshold specified in Appendix I.*' This provision essentially indicates that to define the scope and coverage of the GPA, the following factors have been employed: (1) the entities; (2) the forms of the 'procurement' activities; (3) the object of the 'procurement' activities; and (4) the value of the procurement contract. In the revised GPA, the main factors have not been changed; however, it integrates the various aspects of the coverage, exceptions and methods of calculating the value thresholds into

[998] Wang Ping, p.237.
[999] The Understanding has been accepted as a basis for making commitments by twenty-seven countries. P.R. of China has not subscribed to it. The benefits of the Undertaking are also extended to Members who have not subscribed to it, through benefiting to the entities established in the territory of the Member which undertakes the commitment.
[1000] Article 5 (c) (i) of the Annex on Financial Services.

one article.[1001] In the following subsection, the discussion will be based on the revised GPA.

4.2.2.2. Covered procurement under the revised 2012 GPA

The GPA indicates that '*this Agreement applies to any measure regarding* ***covered procurement****, whether or not it is conducted exclusively or partially by electronic means.*'[1002] For the purpose of the Agreement, 'covered procurement' has been interpreted by the following factors:

(1) '*Procurement* ***for governmental purposes***'. The term 'for governmental purposes' is not new and is largely taken from Article III:8(a) of the GATT 1994 (formulated in 1947), which has been discussed. Thus, the expression 'for governmental purposes' should also be interpreted similarly by the Appellate Body as that under the *Canada-Certain Measures Affecting the Renewable Energy Generation Sector & Canada-Measures relating to the Feed-in Tariff Program* case. According to the Appellate Body, the phrase 'products purchased for governmental purposes' refers to what is consumed by government or what is provided by government to recipients in the discharge of its public functions.[1003]

However, under Article II of the GPA 2012, the phrase 'for governmental purposes' comes after the word 'procurement', instead of the words 'products purchased'. The word 'procurement' has been interpreted by the Appellate Body as 'the process pursuant to which a government acquires products'[1004]. However, under Article II:2 of the GPA 2012, the meaning of 'procurement' is closer to a kind of 'behaviour' or 'activities' because the objects of the behaviour, the subjects of the behaviour, the forms of the behaviour and the estimated value of the behaviour have been explained in the subsequent items of the paragraph. Accordingly, the term 'procurement' in this discussion should be understood to refer to an activity exercised by procuring entities for obtaining goods, services or any combination thereof through any contractual means. Briefly, it could be described as 'procurement activities'.

In the Reports of the Appellate Body, two basic meanings of the world 'purpose' have been provided: (i) 'an object in view; a determined intention or aim'; or (ii) 'the end to which an object or action is directed'. Accordingly, the term 'governmental purposes' may refer either to the intentions or aims of government. It may also refer to government as the end to which the product purchased is directed. The Appellate Body ultimately chose the second basic meaning. One of the reasons is that the term 'governmental agencies' has been used in the same provision to define the identity of the entity conducting the procurement, and governmental agencies by their very nature pursue governmental aims or objectives; therefore, the additional reference to 'governmental' in relation to 'purposes' must proceed further than merely requiring some governmental aim or objective with respect to purchases by governmental agencies. Another reason is that in the French and Spanish contexts of the GATT 1994, the terms closely correspond to the English term 'needs'.

[1001] Arie Reich(2009). The New text of the Agreement on Government Procurement: an analysis and assessment, Journal of International Economic Law 12(4), p. 1005.
[1002] Article II (1) of the revised 2012 GPA.
[1003] The Appellate Body Reports, p.5.68.
[1004] The Appellate Body Reports, p.5.59.

Therefore, the French and Spanish contexts can be read harmoniously, with the word 'purposes' in English referring to purchases of products directed at the government or purchased for the needs of the government in the discharge of its functions.

However, in Article II:2 of the GPA 2012, the term 'governmental agencies' has not been referred to, or the word 'governmental' has not been associated with other words. The expression 'a procuring entity' has been used to identify the entity which conducts the procurement and has been covered by the Agreement. Whether the entity pursues governmental aims or objectives could not be determined from the phrase 'a procuring entity'. Additionally, in the French version of Article II:2 of the GPA 2012, the term 'les besoins des pouviors' is used, whereas in the Spanish version, the expression used is 'efectos gubernamentales' instead of 'las necesidades de los poderes públicos'. One meaning of 'efectos' is the English word 'purpose' or 'objective'.[1005] Therefore, the logic used by the Appellate Body in the previous case does not apply in the interpretation of Article II:2 of the GPA 2012.

The original meaning of 'purpose' referred to by the Appellate Body could possibly be interpreted as 'for governmental purposes'. Analysis of these two expressions suggests that the first refers to the aims or objective of one subject or entity, and the second refers to the end to which one action or object is directed. **These two meanings could harmoniously correspond to the phrase 'procurement for governmental purposes'. On the one hand, the term 'purposes' refers to the end to which procurement activities are directed; On the other hand, the term 'purposes' refers to the aims or objectives of government. Therefore, coupled with the interpretation from the Appellate Body, the term 'procurement for governmental purpose' under the GPA 2012 could be understood to refer to procurement activities which are conducted for the consummation by government or for providing goods and services (including construction services) by government to recipients in the discharge of its public functions.**

(2) *Object of the 'procurement' activities.* However, the Agreement does not apply to all procurement activities of goods, services or any combination thereof. It only applies to the goods and services specified in the annexes of each Party to Appendix I[1006]. The notion of 'services' under GPA includes construction service[1007] and non-construction service. Moreover, the goods and services should not be procured for commercial sale or resale, or for use in the production or supply of goods or services for commercial sale or resale.

[1005] https://es.oxforddictionaries.com/definition/efecto

[1006] Each Party shall specify the following information in its annexes to Appendix I: (a) in Annex 1, the central government entities whose procurement is covered by this Agreement; (b) in Annex 2, the sub-central government entities whose procurement is covered by this Agreement; (c) in Annex 3, all other entities whose procurement is covered by this Agreement; (d)in Annex 4, the goods covered by this Agreement; (e) in Annex 5, the services, other than construction services, covered by this Agreement; (f) in Annex 6, the construction services covered by this Agreement; and (g) in Annex 7, any General Notes.

[1007] According to Article I (c) of revised 2012 GPA, construction service means a service that has as its objective the realization by whatever means of civil or building works, based on Division 51 of the United Nations Provisional Central Product Classification (CPC).

As discussed earlier, for the Appellate Body, 'commercial resale' is a transaction at arm's length. In Article III:8(a) of the GATT, the terms 'commercial sale' and 'commercial resale' are used in different circumstances. However, according to the Appellate Body, both clauses essentially refer to the same type of sales transactions.[1008] This interpretation can also apply to the context of Article II:2 of the GPA; the clause 'commercial sale or resale' has particularly been used in both circumstances. **Therefore, the goods and services procured under the GPA should be the goods and services which have been procured under a transaction at arm's length.**

(3) *Forms of 'procurement' activities.* The procurement activities could be conducted through any contractual means, including purchase, lease and rental or hire purchase, with or without an option to buy.

(4) *Value of the procurement contract.* The Agreement applies to procurement the value of which equals or exceeds the relevant threshold specified in a Party's annexes to Appendix I at the time of the publication of a notice in accordance with Article VII. No common rule on the threshold is provided. Developing countries may adopt a threshold that is higher than its permanent threshold[1009]as a transitional measure during transition. The specific thresholds of each Party depend on the result of negotiation between Parties.

(5) *'A **procuring entity**'.* The revised GPA does not provide a substantive definition of a procuring entity but provides a formal definition——a procuring entity means an entity covered under a Party's Annex 1, 2 or 3 to Appendix I. Therefore, a procurement entity could be generally classified into three kinds: central government entities, sub-central government entities and other entities.

In Article III:8(a) of the GATT, the term 'governmental agencies' is used to represent the subject of 'government procurement'. In the view of the Appellate Body, the term 'governmental agencies' refers to entities acting for or on behalf of government in the public realm and performing governmental functions within the competence conferred on it. This interpretation is also is useful in understanding the general subject of 'government procurement' under the GPA, and the substantive definition of 'procurement entities'. However, the scope of 'governmental agencies' differs from the scope of 'procurement entities' as the former is general, whereas the latter is for a specific coverage of entities under the GPA.

(6) *Exclusions.* Firstly, 'covered procurement' does not include the procurement which has been excluded from the coverage under the common exclusion rules. Generally, the Agreement does not apply to the following[1010]: (a) the acquisition or rental of land, existing buildings or other immovable property or the rights thereon; (b) **non-contractual agreements or any form of assistance that a Party provides, including cooperative agreements, grants, loans, equity infusions, guarantees and fiscal incentives;** (c) the procurement or acquisition of fiscal agency

[1008] WT/DS412/AB/R·WT/DS426/AB/R, World Trade Organization, 19 December 2012, para. 5.72.
[1009] Article V:III (d) of the revised 2012 GPA.
[1010] Article II (3) of the revised 2012 GPA

or depository services, liquidation and management services for regulated financial institutions or services related to the sale, redemption and distribution of public debt, including loans and government bonds, notes and other securities; (d) public employment contracts; (e) procurement conducted (i) for the specific purpose of providing international assistance, including development aid; (ii) under the particular procedure or condition of an international agreement relating to the stationing of troops or relating to the joint implementation by the signatory countries of a project; or (iii) under the particular procedure or condition of an international organisation, or funded by international grants, loans or other assistance where the applicable procedure or condition would be inconsistence with this Agreement.

Second, 'covered procurement' does not include the procurement which has been individually excluded from a Party's annexes to Appendix I. In the annexes to Appendix I, the Parties have the right to provide specific exclusions. For instance, the Agreement does not apply to certain procurement entities or certain goods or services. The result of this kind of exclusions depends on the negotiations between the Parties.

4.2.2.3. Security and general exceptions under the revised 2012 GPA

However, although the procurement falls within the scope of 'covered procurement', the GPA provides security and general exceptions.[1011] Firstly, nothing in the Agreement shall be construed to prevent any Party from taking any action or not disclosing any information that it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or procurement indispensable for national security or for national defence purposes.[1012] Secondly, subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where some conditions prevail or a disguised restriction on international trade, nothing in the Agreement shall be construed to prevent any Party from imposing or enforcing measures (a) necessary to protect morals, order or safety; (b) necessary to protect human, animal or plant life or health; (c) necessary to protect intellectual property; or (d) relating to goods or services of persons with disabilities, philanthropic institutions or prison labour.

4.2.2.4 Modification of the coverage under the revised 2012 GPA

Additionally, although the procurement has been covered by the GPA, the Parties have the chance to modify the coverage. For instance, the Parties could propose any rectification, transfer of an entity from one annex to another, withdrawal of an entity or other modification of its annexes to Appendix I. However, the modifying Party shall notify the Committee of any proposed modification. In the notification, the Party shall include the following information[1013]: (a) **for any proposed withdrawal of an entity from its annexes to Appendix I in exercise of its rights on the grounds that government control or influence over the entity's covered procurement has**

[1011] Article III of the revised 2012 GPA
[1012] Article III:1 of the revised 2012 GPA
[1013] Article XIX: 1 of the revised 2012 GPA

been effectively eliminated, evidence of such elimination; or (b) for any other proposed modification, information as to the likely consequences of the change for the mutually agreed coverage provided for in this Agreement. Any Party whose rights under this Agreement may be affected by a proposed modification may notify the Committee of any objection to the proposed modification[1014] and shall set out reasons for the objection. After making the objection, the Modifying Party and the objecting Party shall make every attempt to resolve the objection through consultations. However, the proposed modification could become effective without resolving the objection through the consultations.[1015] Under this case, any objecting Party may withdraw substantially equivalent coverage. This withdrawal may be implemented solely with respect to the modifying Party.

Under the revised 2012 GPA, the Committee has been authorised to adopt an arbitration procedure to facilitate resolution of objections. After the arbitration procedure has been implemented, the modification procedure will be changed, whether the Party invokes or not the arbitration procedure.[1016] Mostly, where the arbitration procedure has been invoked, the proposed modification shall not become effective before the completion of the arbitration procedures. A modifying Party should comply with the results of the arbitration procedures in making any modification effective pursuant to paragraph 5(c) of the Agreement.

Therefore, the coverage may be modified for the following types of reasons: (1) as government control or influence over the entity's covered procurement has been effectively eliminated, the Party withdraws the entity from its annexes and (2) government control or influence still exists but is willing to reduce the covered procurement activities of the entity, such as transferring the entity from a lower-threshold annex to a higher-threshold annex, or adding exceptions for certain kinds of procurement.

For the first type, no criteria have been set for demonstrating the effective elimination of government control or influence over an entity's covered procurement until now. **The Committee has been authorised by the Agreement to adopt relevant indicative criteria but no development on this matter has this far been reported.** In the future, if the entity meets the indicative criteria, the entity could be removed from the coverage after the modification procedures have been executed.

Notably, the revised 2012 GPA has not defined the term 'public entity' and has not established the conditions for the entity, which is mandatory under the coverage. The provisions for the modification of the coverage seemingly insists that the 'public entity' should be the entity whose **procurement activities** are under the control or influence of the government. As the characteristic

[1014] The Agreement provides the time limitation for making the objection, which is within 45 days from the date of the circulation to the Parties of the notification.
[1015] According to Article XIX:5(c) of the revised 2012 GPA, Where 150 days from the date of circulation of the notification of the proposed modification under paragraph 1 have elapsed, and the modifying Party has informed the Committee in writing of its intention to implement the modification, a proposed modification shall become effective.
[1016] Article XIX: 7 of the revised 2012 GPA.

of the GPA, not all 'public entity' should be mandatorily listed under the GPA by the Parties; but all the entities covered under the GPA should be the entity, the procurement activities of which are under that control or influence of the government.

The second type of reason requires no objective reason and focuses on the consequence of the modification for the mutually agreed coverage. Thus, the Agreement did not authorise the Committee to adopt the standards as to the conditions the Party could make from this kind of modification. The Party can instead make this kind of modification but shall just offer the compensatory adjustments for the modification, with the intent of maintaining a balance of rights and obligations and a comparable level of mutually agreed coverage provided in the Agreement. Otherwise, the objecting Party may withdraw substantially equivalent coverage. The Committee has been authorised to adopt a set of criteria for determining the level of compensatory adjustment to be offered for modification and of substantially equivalent coverage.

4.2.3 Functional analysis: Coverage of the current parties

The coverage schedules of Parties are an integral part of the GPA and are included in Appendix I of the GPA. As indicated by the WTO, only procurement entities carried out by a covered entity purchasing the covered goods, services or construction services of a contract whose value exceeds the relevant threshold, and not specifically exempt from the notes to the schedules, are subject to the GPA rules.[1017] The covered entities and the relevant thresholds are generally listed from Annex 1 to Annex 3, the covered goods are listed in Annex 4, the covered services are listed in Annex 5, the covered construction services are listed in Annex 6, and the general notes are listed in Annex 7. The exceptions established by the Parties could be provided in each annex; however, the applicable coverage of the exceptions depends on the annex where they have been stated.

To modify the text of the revised 2012 GPA, Parties have negotiated the coverage schedules under the revised GPA.[1018] On the basis of the revised coverage schedules of the Parties, the following characteristics could be observed: (a) the principle of reciprocal access has been reflected completely in the coverage schedules; (b) an agreement between the Parties has been reached to include all central government entities in the coverage schedules, but sub-central government entities and other entities remain controversial; (c) several goods or services could be excluded from the coverage, based on the consideration of industrial policies in the domestic market.

4.3 Role of SOEs as a buyer under the WTO Agreement on Government Procurement

4.3.1 Role of SOEs as a buyer under the WTO multilateral agreements

Given the relationship between the GATT and GATS with the GPA on the coverage, it is necessary to describe the situation of SOEs under the WTO multilateral agreements although the term 'SOEs' is not explicitly used in the GATT and GATS. The GATT includes a special rule for

[1017] https://www.wto.org/english/tratop_e/gproc_e/gp_app_agree_e.htm
[1018] https://www.wto.org/english/tratop_e/gproc_e/gp_app_agree_e.htm

'State Trading Enterprises', which is similar to 'SOEs'. This special rule and its impact on the procurement activities of SOEs will be discussed. Although the GATS provides no specific rule for STEs or SOEs, whether the general rules apply to SOEs will be discussed in this section. The exceptions on government procurement in the GATT and GATS have been discussed in an earlier section. As these exceptions are closely related to the GPA, the effects of these exceptions on the procurement activities of SOEs will be discussed in conjunction with the GPA.

4.3.1.1 Regulation of State Trading Enterprises under the Article XVII of the GATT and its impact on the procurement activities of SOEs

4.3.1.1.1 General context of Article XVII of the GATT

Article XVII provides for the obligations of Members with respect to the activities of STEs referred to in paragraph 1 of Article XVII, which should be consistent with the general principles of non-discriminatory treatment prescribed in the GATT 1994 for government measures affecting imports or exports by private traders. Thus, Members are subject to their obligations as provided in GATT 1994 with respect of those governmental measures affecting STs. This article is characterised by the Appellate Body as an 'anti-circumvention' provision seeking 'to ensure that a Member cannot, through the creation or maintenance of a state enterprise or the grant of exclusive or special privileges to any enterprise, engage in or facilitate conduct that would be condemned as discriminatory under the GATT 1994 if such conduct were undertaken directly by the Member itself.'[1019]

This article requires STEs to make any such purchases or sales solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale. STEs shall also afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.[1020]

However, the aforementioned requirements shall not apply to imports of products for immediate or ultimate consumption in governmental use and not otherwise for resale or use in the production of 'goods' for sale. With respect to such imports, each contracting party shall accord to the trade of the other contracting parties fair and equitable treatment.[1021]

4.3.1.1.2 the ambiguous issues in the Article XVII of GATT

However, the Article XVII of GATT has been considered as ambiguities surrounding key issues.

First, the scope of entities which are covered by the term 'state trading enterprises (STE)'.

[1019] Appellate Body report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*,WT/DS276/AB/R, adopted 30 August 2004, para. 85, footnote omitted.
[1020] Article XVII: 1 (b) of GATT 1994. Article XVII:2(c) of GATT 1994 also provides that "no contracting party shall prevent any enterprises (whether or not an enterprise described in subparagraph (a) of this paragraph) under its jurisdiction from acting in accordance with the principles of subparagraphs (a) and (b) of this paragraph."
[1021] Article XVII: 2 of GATT 1994.

There is no precise definition of this term, only main categories of entities are mentioned: (i) 'state enterprises', wherever located; (ii) enterprises formally or in effect granted exclusive or special privileges by the state.

No further definition has been given to the term 'state enterprise' and 'exclusive or special privileges'. The United States contained a more precise definition of 'state enterprise' for this Article, as 'any enterprise over whose operations a Member government exercises, directly or indirectly, a substantial measure of control.'[1022] However, this definition was considered as not necessary. It was general understanding that the term 'state enterprise' includes, inter alia, any agency of government that engages in purchasing and selling.[1023] The term 'enterprise' was used to refer only to an instrumentality of government which has the power to buy or sell, but not to any instrumentality of government.[1024] As regards to 'exclusive or special privileges', the Paragraph 1(a) of the Interpretative Note Ad Article XVII provides that 'privileges granted for the exploitation of national natural resources but which do not empower the government in question to exercise control over the trading activities of the enterprise in question do not constitute exclusive or special privilege.' Therefore, it was argued that 'exclusive or special privileges' seemed to imply the power of the government to exercise control over the trading activities of the enterprise.[1025] However, it is not clear that whether this test of control could be applied more generally or only to the privilege granted for the exploration of national resources.[1026]

However, the 'WTO understanding on the Interpretation of Article XVII GATT'[1027] provides the following working definition of 'state trading enterprises': 'governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports.' Thus, some scholars regard the working definition as the WTO definition of STEs and maintain that **exclusivity, instead of state ownership,** is the key rationale for the GATT to define and regulate state trading practice.[1028] Nevertheless, the working definition is applicable for notification purposes and is without prejudice to the substantive disciplines prescribed in Article XVII.

In the case *Canada-Certain Measures Affecting the Renewable Energy Generation Sector &*

[1022] GATT, Analytical Index, note 5 above, at p.439.
[1023] Havana Report, p.114, para.10. Quoted from GATT, Analytical Index, note 5 above, at p.439.
[1024] Panel report on the Notification of State-Trading Enterprises, adopted on 24 May 1960, BISD 9S/179, 183-4, paras. 21-3.
[1025] D. Luff, 'Multilateral Trade Issues and Liberalization: Current and Future Perspectives', in D. Geradin (ed.), *The Liberalization of State Monopolies in the European Union and Beyond* (The Hague: Kluwer Law International, 2000), at pp. 339–40.
[1026] Ping Wang, in book, p.204.
[1027] It was signed in the Uruguay Round as a part of the effort to improve the effectiveness of Article XVII GATT with special respect to the notification procedure. See: https://www.wto.org/english/docs_e/legal_e/08-17.pdf
[1028] B. M. Hoekman and M. M. Kostecki, *The Political Economy of the World Trading System: From GATT toWTO* (Oxford University Press, 1995), at p. 110;W.Martin, 'State Trading and China's Agricultural Import Policies', *Canadian Journal of Agricultural Economics*, 49 (2001), 441, at 442; S. McCorriston and D. MacLaren, 'State Trading Enterprises: Some Legal and Conceptual Issues', *Canadian Journal of Agricultural Economics*, 49 (2001), 415; S.McCorriston andD.MacLaren, 'State Trading, theWTOandGATT Article XVII', *World Economy*, 25 (2002), 110.

Canada-Measures relating to the Feed-in Tariff Program, the Appellate Body referred to the term 'state trading enterprises' and contexts of Articles XVII:1 and XVII:2 of the GATT for the interpretation of the term 'governmental agency' in Article III:8(a) of the GATT.[1029] The Appellate Body determined through the context of Article XVII:1 and XVII:2 of the GATT that '*the GATT 1994 recognizes that there is a public and a private realm, and that government entities may act in one, the other, or both. Governments may limit the actions of entities to the public realm or give entities competences to act in the private realm.*' The term 'state trading enterprises' could be understood to include the (government) entities which act in the public realm and the (government) entities which act in the private realm. However, the substantive definition of 'state trading enterprise' remains unclear.

In practice, as the requirement of Article XVII:4 of the GATT, which has been implemented through the 'WTO understanding on the Interpretation of Article XVII GATT', Members shall notify the enterprises to the Council for Trade in Goods to ensure the transparency of the activities of STEs. As indicated in the latest notifications from the Members[1030], (a) not all Members have STEs, and the number of STEs is limited. Most of the Members from EU, such as Italy, Germany, Spain, UK, Romania, Bulgaria and Czech Republic, have no STEs. Members in other areas, such as Brazil and Argentina, also claimed that they do not maintain any STEs which fall within the working definition. Most Members have a limited number of STEs, such as Switzerland (1), Japan (4), United States (4), Australia (1), Canada (4) and Vietnam (2). Amongst the Members with STEs, China is one exception. (b) Most of the listed STEs come from the agriculture and energy sectors, and the affected goods include grains, tobacco, sugar, cotton, oil, chemical products and others. (c) Even though ownership is not an factor for determining whether an organisation is an STE, the lists of Members show that some STEs are wholly owned by the government.[1031] (d) The forms of STEs are diverse, including corporation, the board[1032], the Department or Ministry of the government[1033] and others.

Second, the nature and content of non-discrimination obligation conferred by this Article. This is sue includes two aspects[1034]: (i) whether the general principles of non-discriminatory treatment in Article XVII:1(a) refer to the MFN obligation only or to both MFN and the national treatment rules and (ii) whether Article XVII:1(b) establishes a separate set of rules requiring STEs to make their purchases and sales 'solely in accordance with commercial considerations' and 'afford the enterprise of other contracting parties adequate opportunities… to compete for participation in' their purchases and sales.

[1029] Para.5.61 of the Appellate Body reports.
[1030] https://www.wto.org/english/tratop_e/statra_e/statra_e.htm
[1031] For instance, XUNHASABA is a 100% state owned enterprise authorized to import and export international newspapers, journals and periodicals in Vietnam.
[1032] For instance, the Rice Marketing Board for the State of New South Wales in Australia.
[1033] For instance, the Ministry of Agriculture, Forestry & Fisheries (MAFF) of Japan, as which is authorized to take measures to stabilize supply and demand situations as well as prices for such staple foods as rice, wheat and barley, for promoting stability of national life and economy, according to the Law of Stabilization of Supply-Demand and Price of Staple Food.
[1034] Wang Ping, in book, page 202.

For the first aspect, the legal text of Article XVII:1(a), which refers only to the general principles of non-discriminatory treatment, is ambiguous. Thus, the drafting history and GATT/WTO jurisprudence have been examined in the literature. The argument from the drafting history perspective is that the non-discrimination treatment prescribed in Article XVII:1 refers to MFN only.[1035] This issue has yet to be addressed from the jurisprudence perspective despite a number of cases relevant to this.[1036]

The second aspect is relevant to the procurement activities of STEs. If indeed Article XVII:2(b) establishes a separate set of rules, then the requirement to purchase and sell solely in accordance with commercial considerations could potentially be used as an alternative to or a substitute for the national treatment obligation to prevent STEs from discriminating against foreign products in their procurement.[1037]

The scope of the obligation imposed by Article XVII.1 (b) is unclear. The Interpretative Note Ad Article XVII lists two scenarios that could be regarded as 'commercial considerations', namely, using a 'tied loan' to purchase abroad and charging by a state enterprise of different prices for its sale of a product in different markets for commercial reasons.

The meaning of 'commercial consideration' has been considered by the Panel in *Canada-Wheat Exports and Grain Imports*. The Panel found that the term 'commercial consideration' should be understood to mean 'considerations pertaining to commerce and trade, or considerations which involve regarding purchases or sales 'as mere matters of business'[1038]. This interpretation is supported by the ordinary meaning of the word 'commercial' and by its context.[1039] In view of the Panel, the requirement that STEs make purchases or sales solely in accordance with commercial consideration 'must imply that they should seek to purchase or sell on terms which are economically advantageous for themselves and/or their owners, members, beneficiaries, etc.'[1040] The Panel also noted that 'if an STE is directed to make, or does make purchases or sales on the basis of such considerations as the nationality of potential buyers or sellers, the policies pursued by their governments, or the national (economic or political) interest of the Member maintaining the STE, it would not be acting solely in accordance with commercial considerations.'[1041]

The approach of the Panel has been upheld by the Appellate Body[1042]. The Appellate Body deems it important to observe that the Panel's interpretation of the term 'commercial

[1035] Wang Ping, in book, page 206.
[1036] Even though the panel of Belgian Family Allowances case (1952), US and Canada in Canada-FIRA case(1984), the EC and Canada in Canadian Marketing Agencies Case (1988), the Panel in Korea-various measures on beef case, WTO relevant Members in the Canada-Wheat Exports and Grain Imports cases, have debated their view on the question of whether the general principals of non-discrimination treatment prescribed in Article XVII:1 refer to both MFN and national treatment, the Appellate Body didn't give an answer on it. For details of these cases study see: Wang Ping, in book, page 207-211.
[1037] Wang Ping, in book, page 211.
[1038] Panel report, WT/DS276/R, circulated to Members 6 April 2004, paragraph 6.85
[1039] Appellate Body report, WT/DS276/AB/R, adopted on 30 August 2004, para. 45.
[1040] Panel report, WT/DS276/R, circulated to Members 6 April 2004, para.6.87.
[1041] Panel report, WT/DS276/R, circulated to Members 6 April 2004, para.6.87.
[1042] Appellate Body report, WT/DS276/AB/R, adopted on 30 August 2004, para.144.

considerations' necessarily implies that the consistency of the conduct of a particular STE is with the requirements of the first clause of subparagraph (b) of Article XVII:1 must be determined on a case-by-case basis and involve a careful analysis of the relevant market(s).[1043] Furthermore, the Appellate Body indicated that 'such an analysis will reveal the type and range of considerations properly considered 'commercial' as regards purchases and sales made in those markets, as well as how those considerations influence the actions of participants in the market(s).'

The Appellate Body also mentioned that their interpretation of the relationship between subparagraphs (a) and (b) of Article XVII:1 necessarily implies that 'the scope of the inquiry to be undertaken under subparagraph (b) must be governed by the principle of subparagraph (a).'[1044] This statement indicates that a panel inquiring whether an STE has acted solely in accordance with commercial considerations must undertake this inquiry with respect to the market(s) in which the STE is alleged to be engaging in discriminatory conduct. The Appellate Body holds the view that subparagraph (b) does not give panels a mandate to engage in a broader inquiry into whether, in the abstract, STEs are acting 'commercially'. The disciplines of Article XVII:1 are aimed at preventing certain types of discriminatory behaviour, and no basis is found for interpreting that provision as imposing comprehensive competition-law-type obligations on STEs.

Third, the extent to which such obligation may be exempted by virtue of the government procurement exclusion. Article XVII:2 of the GATT provides an exception to Article XVII:1 of the GATT. In the following scopes of activities of STEs, discriminatory behaviour is allowed: (1) the imports of the products of STEs; (2) for immediate or ultimate consumption in governmental use; (3) and not otherwise for resale or use in the production of goods for sale.

The context of the exclusion is similar to the exclusion of Article III:8 of the GATT, which has been discussed in an earlier section. The slight differences between these two contexts have been disputed as insubstantial. These differences include 'for governmental purposes' being replaced by 'for immediate or ultimate consumption in governmental use' and 'not for commercial resale' being replaced by 'not otherwise for resale'.[1045] However, several differences still need to be noted: (a) *The entities covered.* Article XVII:2 of the GATT pertains to STEs, whereas Article III:8(a) pertains to governmental agencies. According to the report of the Appellate Body in the case *Canada-Certain Measures Affecting the Renewable Energy Generation Sector & Canada-Measures relating to the Feed-in Tariff Program*, they overlap in coverage. For instance, STEs which play in the public realm and have been authorised the competence to….. are not covered under the term 'governmental agencies'.

(b) *Products covered.* Article XVII:2 of the GATT only covers imported products. While the Article III:8(a) covers the products purchased, including the products purchased in the domestic market and also the imported products.

[1043] Ibid.
[1044] Appellate Body report, WT/DS276/AB/R, adopted on 30 August 2004, para.145.
[1045] Wang Ping, in book, page.217.

(c) *Positive purposes mentioned.* In Article XVII:2 of the GATT, the exclusion only applies to importing products for immediate or ultimate consumption in governmental use. The rule implies that the import of products by STEs may be purchased for governmental purposes. For instance, when a governmental agency-type STE purchases a good, such use it to discharge its governmental functions, and the good is totally consumed in the process.[1046] However, Article III:8(a) is phrased more broadly than Article XVII:2, as the former does not limit to 'immediate or ultimate' consumption in governmental use.[1047] However, as to what 'immediate or ultimate consumption in governmental purpose' refers to is not clear. The Appellate Body indicated that 'products purchased for governmental purposes' or 'products purchased for consumption in governmental use' include what is consumed by government or what is provided by government to recipients in the discharge of its public functions.[1048] However, whether 'immediate or ultimate consumption in governmental use' also includes these two circumstances is not clear, particularly when the products purchased by STEs are consumed by other governmental agencies or by recipients in discharge of their public functions.

(d) *Negative purposes mentioned.* Article XVII:2 of the GATT requires that to fall under the exclusions, the import of products should be 'not otherwise for resale or use in the production of goods for sale'. Meanwhile, Article III:8 states that the products purchased should not be 'with a view to commercial resale or with a view to use in the production of goods for commercial sale'. The difference between these two phrases is 'commercial resale/sale' vs 'resale/sale'. Sue Arrowsmith suggested that the main significance of the word 'commercial' in Article III.8 of the GATT is to clarify that purchase for sale to government rather than in open commercial market is intended to be covered by the exclusion, and the word 'otherwise' in Article XVII:2 suggests that the purchase for the explicit purpose of resale to government is covered by the exclusion.[1049] Arrowsmith argued that in these two provisions, with or without mentioning 'commercial', the same type of resale and sale is referred to. The term 'commercial resale' has been interpreted by the Appellate Body as an arm's length transaction.[1050] Regarding the positive condition 'for immediate or ultimate consumption in governmental use', it could be implemented through certain methods. For instance, an STE could directly use the condition to fulfil its governmental function, provide to the government, and resell to the government. If the form of resale is used, 'the resale of products for governmental use' should be distinguished from other resale activities, such as 'resale to government not for governmental use' and 'resale to other entities except government'. Therefore, the 'resale' and 'sale' mentioned in Article XVII:2 should be assigned special definitions as opposed to normal definitions. Additionally, as the positive conditions mentioned in Article XVII:2 and Article III:8(a) are similar, the negative conditions are also similar. Thus, the terms 'resale' and 'sale' in Article XVII:2 could also be understood as

[1046] The Appellate Body Report, para.5.68.
[1047] Ibid.
[1048] Ibid.
[1049] See footnote 71 of Wang Ping, in book, page. 217. It was quoted from the unpublished lecture note 'State Trading and State Enterprises' of Sue Arrowsmith.
[1050] The Appellate Body Report, para.5.70 and para.5.71.

'commercial resale/sale', referring to an arm's length transaction.

Fourth, **the interpretation of 'fair and equitable' requirement.** Different from Article III:8(a), Article XVII:2 provides 'an exception to the exception'. For the import of the products which have been exempted from obligations consistent with the general principles of non-discriminatory treatment, each contracting party shall accord fair and equitable treatment to the trade of the other contracting parties. The purpose of drafting this phrase is for governmental purchases through the state enterprises, the rule of 'commercial consideration' for such purchases might be difficult to observe. Thus, the rule of 'fair and equitable treatment' had to be applied, with full regard of all relevant circumstances.[1051] The rule of 'fair and equitable treatment' was also intended to apply to both government procurement and procurement of STEs, which was excluded from MFN and national treatment but was included in Article XVII.2 because of a misunderstanding.[1052] Therefore, only the import of products under Article XVII.2 should apply the rule of 'fair and equitable treatment', whereas at least, government procurement under Article III:8(a) will not apply. However, as previously mentioned, the scope of STEs overlaps with that of governmental agencies. Thus, it is irreconcilable to apply two different obligations for these same entities.

The rule of 'fair and equitable treatment' is ambiguous and has never been clearly defined in the GATT or by the jurisprudence.[1053] Different views on its nature are presented, as[1054]: (1) 'fair and equitable treatment is just another expression of MFN'[1055]; (2) the requirement of 'fair and equitable treatment' might impose a 'weak' form of MFN obligation which allows certain derogations, compared with the 'full' MFN[1056]; (3) 'fair and equitable treatment' requires reciprocal treatment to be afforded.[1057] The practical significance of MFN in Article XVII:1 is largely limited; thus, any real impact of this vague rule of 'fair and equitable treatment' is difficult

[1051] London Report, p.17, para. 1(a)(v). quoted from GATT, Analytical Index: Guide to GATT law and practice, 6th rev. edn (Geneva:WTO, 1995), footnote 45, at pp.446. Quoted also from Wang ping, in book, footnote 72, page.217.

[1052] A. Blank and G.Marceau, 'the history of Government Procurement Negotiations since 1945', Public Procurement Law Review, 5 (1996), 86.

[1053] Wang Ping, in book, page.218.

[1054] Ibid.

[1055] Since the clause 'fair and equitable treatment' first appeared in the US Draft ITO Charter as an alternative expression of MFN in the context of government procurement. See Quoted from GATT, Analytical Index, footnote 49, at p.447. Also, In Canada-FIRA and Canadian Marketing Agencies I, the US and the EC simply equated 'fair and equitable treatment' with MFN treatment in their arguments. See Panel report on Canda-Administration of Foreign Investment Review Act, adopted on 7 February 1984, BISD 30S/140; Panel report on Canada-Import, Distribution and Sale of Alcoholic drinks by Canadian Provincial Marketing Agencies (Canadian Marketing Agencies I), adopted on 22 March 1988, BISD 35S/37, paras. 3.37-3.44.

[1056] For instance, the Obligations and benefits of Government Procurement Agreement would not be required to be extended to non-parties by the rule of 'fair and equitable treatment'. See: P.Low, A, Mattoo and A. Subramaniam, 'Government Procurement in Services', World Economy, 20 (1996), 8, note7. W.J.Davey, 'Article XVII GATT: An Overview,' in T. Cottier and P. C. Mavroidis (eds.), State Trading in the Twenty-First Century, Ann Arbor: University of Michigan Press, 1998, at p.29. they suggests that it involves a 'form of' MFN treatment but doesn't elaborate what this might be.

[1057] See: D.J. Walker, 'government Procurement: A Small Open Economy Perspective', in B.M. Hoekman and P.C.Mavoidis (eds.), Law and Policy in Public Purchasing: The WTO Agreement on Government Procurement (Ann Arbor: University of Michigan Press, 1997), Chapter 9 at p.179; J. Hird, 'Government Procurement', in K. Anderson (ed.) Strengthening the Global Trading System: from GATT to WTO (University of Adelaide, 1996), at p.125-126.

to recognise.[1058]

4.3.1.1.3 Impact of Article XVII of the GATT on the procurement activities of SOEs

On the basis of the previous discussion, Article XVII provides for the obligations of Members with respect to the activities of STEs. STEs are required to make any purchases or sales solely in accordance with commercial considerations. However, imports of products for immediate or ultimate consumption in governmental use and not otherwise for resale or use in the production of goods for sale shall not be subject to these requirements but shall accord fair and equitable treatment to the trade of the other contracting parties.

However, the scope of the term 'state trading enterprises' is not clear. According to the working definition given by WTO, the 'exclusivity' held by the enterprises, instead of 'state ownership', is the key rationale of the definition. Partial SOEs could suit the definition of STEs; thus, Article XVII of the GATT applies.

Article XVII:2 of the GATT also provides a similar exemption to the 'government procurement' of STEs. If the relevant conditions are met, the procurement products by STEs for their production will be exempt from the obligation as provided in Article XVI:1 but meet the requirement of 'fair and equitable treatment'. Meanwhile, as discussed earlier, the obligations covered, the exclusions on government procurement and the requirement on 'fair and equitable' require clarification.

4.3.1.2. Role of SOEs as a buyer under the GATS

In the context of negotiations under the GATS, neither the term 'State Trading Enterprises' and 'State Enterprises' nor the term 'State Owned Enterprises' has been mentioned. However, the procurement activities of SOEs would still be relevant to international trade in services and with the GATS.

4.3.1.2.1 Coverage of the GATS and the procurement activities of SOEs

The GATS applies to measures by Members affecting trade in services.[1059] Therefore, several issues have arisen with regard to the coverage of the GATS and the procurement activities of SOEs[1060]: (1) whether the measures undertaken by SOEs can be viewed as measures adopted by the relevant Member; (2) whether a procurement decision by SOEs can be viewed as a 'measure' for the purpose of Article I:1 of the GATS; (3) whether such a decision can be classified as 'affecting trade in services', which indicates whether a threshold is set for a trade-distorting effect to trigger the application of the GATS; (4) whether the exemption of government procurement also applies to the procurement activities of SOEs. The first issue requires analysis as to what extent SOEs are 'non-governmental bodies in the exercise of powers delegated by central, regional or

[1058] See: Wang Ping, in book, p.219.
[1059] Article I:1 of GATS
[1060] The similar issues have been discussed by Wang Ping on the research question of the coverage of GATS and the impact of government procurement exclusion. For the details, see Wang Ping, in book, page 231-236. However, as the scope of SOEs is different from STEs, so it is necessary to analyze the details.

local governments or authorities'[1061]. The GATS intends to include 'within its scope all measures resulting from the exercise of public authority, at whatever level of government, and whether this power has been delegated or not.'[1062] The statement implies that if the SOE is in the exercise of powers delegated by central, regional or local governments or authorities, then it should be regarded as 'government', thus the measures it undertakes could fall into the coverage of the GATS. Therefore, any power which belongs to the government but is delegated to the SOEs could be included in the scope of 'power' in the context of Article I:3(a) of the GATS. Whether an SOE authorized by the central or sub-central government to produce and provide certain public service to the citizens should be considered the 'government' has to be determined. If so, then the measure undertaken by this SOE may be covered by the GATS, provided that other conditions are fulfilled. However, when is an SOE considered authorised by the government? If the SOEs not only pursue activities authorised by the government but pursue other activities as well, such as commercial activities; would all measures undertaken by the SOEs still be covered by the GATS? How about SOEs that pursue purely commercial activities? All these questions have yet to be answered.

For the second question, the scope of 'measures' has to be analysed. The term 'measures' has been defined as any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action or any other form.[1063] According to Article XXVIII(c) of the GATS, 'measures by Member affecting the trade in services' include measures with respect to (i) the purchase, payment or use of a service; (ii) the access to and use of, in connection with the supply of a service, services which are required by those Members to be offered to the public generally; and (iii) the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another Member. Therefore, the measures include the purchase, payment or use of a service. As mentioned, if an SOE has been authorised the power by the government and enacts certain measure for its and its subsidiaries' guiding procurement service activities, this measure could be considered as covered by the GATS.

The third question is relevant to the meaning of 'affecting trade in services'. Not all measures issued by the Members fall within the scope of the GATS, which only apply to the measures affecting trade in services. The Appellate Body in the case of *Canada-Autos* explained that at least two key legal issues must be examined to determine whether a measure affects trade in services.[1064] First, whether 'trade in service' in the sense of Article I:2 exists, and second, whether the measure concerned 'affects' such trade in services within the meaning of Article I:1. The definition of the term 'affecting' has been discussed in the case of *EC—Bananas III*.[1065] The

[1061] Article I:3 (a) of GATS explains that 'measures by Members' means measures taken by: (i) central, regional or local governments and authorities; and (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities.
[1062] *Definitions in the Draft General Agreement on Trade in Services*, Note by the secretariat, MTN.GNS/W/139. 15 October 1991, at para.7.
[1063] Paragraph (a) of Article XXVIII GATS
[1064] The Appellate Body report on Canada—certain Measures affecting the Automotive Industry (Canada-Autos), WT/DS139/AB/R and WT/DS142/AB/R, adopted on 31 May 2000, para.155.
[1065] European Communities—Regime for the Importation, Sale and Distribution of Bananas (EC-Bananas III). the

Appellate Body maintained that the use of the term 'affecting' rather than narrower terms, such as 'regulating' or 'governing', reflects the intent of the drafters to provide a broad reach to the GATS.[1066] However, the Appellate Body in *Canada-Autos* also indicated that 'it is not enough to make assumptions', and all the relevant facts[1067] should have been examined to establish the effect for the purpose of Article I:1 of the GATS[1068]. Therefore, the measures enacted by the aforementioned SOE should also affect the trade of services. The measures relevant to the procurement service activities should also affect the trade of the service which it procures. As the GATS intends to provide MFN treatment and national treatment, the measures enacted by the SOEs, related to the procurement service activities and affecting trade in services, should comply with the general rules of the GATS. This kind of measures should be against the MFN treatment and national treatment principle.

The fourth question is relevant to the exception of government procurement from the GATS and has been discussed earlier. If the measures discussed in this section are covered by the exception in Article XIII:1 of the GATS, the measures should be *exempted from the national treatment obligation of GATS*. The key issue is whether and to what extent the measures issued by the SOE fall within the exception from government procurement in the GATS. The details will be discussed in the following section.

In summary, the measures adopted by certain SOEs which have been considered part of government, on the procurement service activities of these SOEs and the other companies in this company group, may fall within the scope of the GATS. However, this occurrence also depends on the extent of coverage by the exception from government procurement in the GATS. The measures adopted by the government (central or sub-central) on the procurement activities of SOEs may also fall within the scope of the GATS and depend on whether they fall within the scope of the exception from government procurement in the GATS.

4.3.2 Normative analysis: How do GPA rules treat SOEs?

The GPA treatment of SOEs requires the determination of whether and to what extent the procurement of SOEs falls within the scope of 'covered procurement'. According to the aforementioned decisive factors of 'covered procurement', the procurement of SOEs falls within the scope of 'covered procurement' provided the following cumulative conditions are fulfilled: (a) the procurement of SOEs should be for governmental purposes; (b) the object of the 'procurement' activities should be covered under the Party's annexes to Appendix I; (c) the goods and services should not be procured with a view to commercial sale or resale; (d) the value of the procurement contract should be equal to or higher than the relevant threshold; (e) the SOEs should be listed in

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Panel report was adopted on 22 May 1997, and the Appellate Report was adopted on 7 September 1997.

[1066] The Appellate report on European Communities—Regime for the Importation, Sale and Distribution of Bananas (EC-Bananas III), WT/DS/AB/R, adopted on 7 September 1997, at para.220.

[1067] In this case, the facts include who supplies wholesale trade services of motor vehicles through commercial presence in Canada, and how such services are supplied.

[1068] The Appellate Body report on Canada—Certain Measures affecting the Automotive Industry (Canada-Autos), WT/DS139/AB/R and WT/DS142/AB/R, adopted on 31 May 2000, para.165.

the Party's Appendix I as procuring entity; (f) the procurement of SOEs should not fall under the exclusions and exceptions.

However, whether the procurement of SOEs has been included in the 'covered procurement' is not clear.

Firstly, under the GPA, the coverage of 'procuring entity' is determined by lists, and substantive definition of 'procuring entity' is lacking. In the latest Dispute Settlement Procedures (referred as DSP) case, the Appellate Body has interpreted the term 'governmental agencies' in Article III:8(a) of the GATT as entities acting for or on behalf of government in the public realm and performing governmental functions within the competence conferred on it. This interpretation could provide certain insight to understand the term 'procuring entities'. However, whether the SOEs should be considered as 'procuring entities' still depends on the negotiations between Parties with the accessing Party. On the one hand, the Party may argue that the SOEs acting for or on behalf of government in the public realm and performing governmental functions within the competence conferred on them should be covered under GPA as 'procuring entity'. On the other hand, no standard or measurable condition is set to determine the kind of SOEs to consider as acting for or one behalf of government in the public realm and performing governmental functions within the competence conferred on it.

Secondly, how to determine which part of the activities of SOEs is for governmental purposes and which part of the activities of SOEs is not for governmental purposes. The GPA only applies to procurement for governmental purposes. Normally the classic government agencies only pursue activities to complete the public function; therefore, their procurement activities are conducted only for the consumption by the government or for providing goods and services (including construction services) by government to recipients in the discharge of its public functions. However, some SOEs not only pursue activities to complete public function but also to pursue activities for other purposes. The GPA provides that the goods and services should not be procured for commercial sale or resale or for use in the production or supply of goods or services for commercial sale or resale, which intends to distinguish procurement for governmental purposes from commercial purposes. However, this approach is not effective as lack of standards for determining 'commercial sale and resale', as discussed below.

Thirdly, under which conditions the goods and services procured by the SOEs could be determined as not for commercial sale and resale. According to the rules of the GPA, given the assumption that one SOE has been confirmed as the procuring entity under the GPA, if the goods and services procured by the SOE are for commercial sale and resale, then these procurement activities should not fall under 'covered procurement'. With the discussion on the impact of the WTO multilateral agreement on the procurement activities of SOEs, the exceptions to government procurement under the GATT and GATS are not applicable. The laws, regulations, or measures issued by the government on the procurement activities of SOEs for commercial sale and resale should fall within the scope of the GATT and GATS; the measures issued by the SOEs on the

procurement service activities for commercial sale and resale may fall within the scope of the GATS. As the GPA provides no effective criteria for distinguishing these two kinds of procurement activities, the regulation of SOE procurement activities under GPA becomes uncertain. Therefore, the accessing Party has no obligation to offer all SOEs under the GPA; furthermore, the current GPA does not provide clear and implementable criteria for determining what kinds of SOEs should be covered by the GPA and how to effectively distinguish procurement for governmental purposes from procurement for commercial purposes.

4.3.3 Functional analysis: SOEs under the coverage of Parties in GPA

According to Parties' annexes to Appendix I, Parties already put SOEs in their offers at different extents. Amongst them, the EU (including its Member States) is the Party which opens the largest number and markets of SOEs. The SOEs under the coverage of the EU and the United States will be discussed in the following subsection.

4.3.3.1 EU

4.3.3.1.1 Introduction of covered entities of the EU under the GPA

(a) Covered entities under Annex 1

In Annex 1[1069], the EU has stated that the EU Entities and the central government contracting authorities of EU Member States are in the list of central government entities. Interestingly, for certain Parties, such as Liechtenstein, Switzerland, Iceland and Norway, all central government contracting authorities of EU Member States have been listed, and under this circumstance, the list attached in Annex 1 is merely indicative. However, on the basis of the principle of reciprocity, the entities marked by an asterisk in the attached list of Annex 1 are not open to some Parties.

(b) Covered entities under Annex 2

Annex 2 of Appendix I of the EU covers two kinds of entities: 'all regional or local contracting authorities'[1070] and 'all contracting authorities which are bodies governed by public law as defined by the EU procurement directive'. The definition and the indicative lists of the 'bodies governed by the public law' have been mentioned in Annex 2, which is the same as that in the 2014 EU Public Sector Directive. However, in the General Note, the EU establishes a general exclusion to the entities covered by Annexes 1 and 2. The exclusion provides that 'procurement by procuring entities covered under Annexes 1 and 2 in connection with activities in the fields of

[1069] European Union, Annex 1—Central Government Entities, WT/Let/1084, 14 July 2016.

[1070] It has been explained that: "(a) All contracting authorities of the administrative units as defined by Regulation 1059/2003 – NUTS Regulation.(b) For the purposes of the Agreement, "Regional contracting authorities" shall be understood as contracting authorities of the administrative units falling under NUTS 1 and 2, as referred to by Regulation 1059/2003 – NUTS Regulation. (c)For the purposes of the Agreement, "Local contracting authorities" shall be understood as contracting authorities of the administrative units falling under NUTS 3 and smaller administrative units, as referred to by Regulation 1059/2003 – NUTS Regulation.". see: European Union, Annex 2—sub-central government entities of Appendix I, WT/Let/977, 7 July 2014.

drinking water, energy, transport and the postal sector are not covered by this Agreement, unless covered under Annex 3.'[1071] The statement implies that generally, the procurement activities of the contracting authorities which, in connection with the activities in the field of drinking water, energy, transport and postal sector, are not covered under the GPA, except if they have been covered under Annex 3 of the Appendix under the GPA. This arrangement reflects the coordination between the EU Public Sector Directive and the EU Public Utilities Directive on the coverage.

(c) Covered entities under annex 3

Annex 3 of Appendix I of EU[1072] provides the following:

'All contracting entities whose procurement is covered by the EU utilities directive which are contracting authorities (e.g. those covered under Annex 1and Annex 2) or public undertakings and which have as one of their activities any of those referred to below or any combination thereof:

a. the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water or the supply of drinking water to such networks;

b. the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of electricity or the supply of electricity to such networks;

c. the provision of airport or other terminal facilities to carriers by air;

d. the provision of maritime or inland port or other terminal facilities to carriers by sea or inland waterway;

e. the provision or operation of networks providing a service to the public in the field of transport by urban railway, automated systems, tramway, trolley bus, bus or cable.

f. *the provision or operation of networks providing a service to the public in the field of transport by railways*.'

In the footnote, the EU has provided the definition of public undertakings, which is the same definition provided in the 2014 EU Public Utilities Directive. Additionally, an indicative list of contracting authorities and public undertakings fulfilling the criteria has been included in Annex 3.

It means that if contracting authorities or public undertakings which pursue any one of the activities listed in Annex 3 of the Appendix or any combination thereof, then the procurement of those contracting authorities or public undertakings to pursue these activities, which are equal to or beyond the certain threshold, should be covered.

[1071] European Union, Annex 7—General Notes, WT/Let/977, 7 July 2014, note 2.
[1072] European Union, Annex 3—Other entities of Appendix I of GPA, WT/Let/977, 7 July 2014.

Different from Annexes 1 and 2, which only provides special exceptions based on the principle of reciprocal access, the EU has provided several general exceptions to the covered procurement in the notes to Annex 3.[1073]

First, ' procurement for the pursuit of an activity listed above when exposed to competitive forces in the market concerned are not covered by this Agreement.' The statement implies that if the pursued activities are exposed to competitive forces, the procurement activities exercised by the entities listed in Annex 3 for those activities should not be covered under the GPA. The exclusion is the same as the provision in the EU public utilities directive.[1074]

Second, certain procurement activities have been directly excluded from the coverage. Annex 3 provides that 'this Agreement does not cover procurement by procuring entities included in this Annex: a. for the purchase of water and for the supply of energy or of fuels for the production of energy; b. for purposes other than the pursuit of their activities as listed in this Annex or for the pursuit of such activities in a non-EEA country; c. for purposes of re-sale or hire to third parties, provided that the procuring entity enjoys no special or exclusive right to sell or hire and it is under the same conditions as the procuring entity.' Most of these exceptions are the ones specified under the EU public utilities directive.[1075]

Third, if fulfilling the following two conditions, the supply of drinking water or electricity to networks which provide a service to the public by a procuring entity other than a contracting authority shall not be considered as an activity within the meaning of paragraph (a) or (b) of the Annex 3: (a) the production of drinking water or electricity by the entity concerned takes place because its consumption is necessary for carrying out an activity other than that referred to in paragraphs (a) to (f) of this Annex; and (b) supply to the public network depends only on the entity's own consumption and has not exceeded 30% of the entity's total production of drinking water or energy, having regard to the average of the preceding three years, including the current year. This exception is also consistent with the provisions of Directive 2014/24/EU[1076].

Fourth, the exclusion is relevant to affiliated undertakings. Provided that at least 80% of the average turnover of the affiliated undertaking with respect to services or supplies for the preceding three years derives respectively from the provision of such services or suppliers to undertaking with which it is affiliated, the Agreement does not cover procurement by a procuring entity to an affiliated undertaking[1077] or by a joint venture[1078] to an undertaking which is affiliated with one

[1073] European Union, Annex 3—Other entities of Appendix I of GPA, WT/Let/977, 7 July 2014.
[1074] See the discussion in the section 2.2.2.2.4.
[1075] For the point (a), it includes the exceptions specified from Article 8 to Article 10 of the directive 2014/24/EU.
[1076] See the discussion in the section 2.2.2.2.4.
[1077] In the footnote it points out that "affiliated undertaking" means any undertaking the annual accounts of which are consolidated with those of the procuring entity in accordance with the requirements of Council Directive 83/349/EEC on consolidated accounts, or in case of entities not subject to that Directive, any undertaking over which the procuring entity may exercise, directly or indirectly, a dominant influence, or which may exercise a dominant influence over the procuring entity, or which, in common with the procuring entity, is subject to the dominant influence of another undertaking by virtue of ownership, financial participation, or the rules which govern it.
[1078] It provides that a joint venture means a entity formed exclusively by a number of procuring entities for the

of these procuring entities. This exception also originates from the provisions of EU Public Utilities Directive[1079].

Fifth, the exclusion of contracts between joint venture and the procuring entities which form it. The Agreement doesn't cover the procurement: (a) by a joint venture[1080] to one of these procuring entities; (b) by a procuring entity to such a joint venture of which it forms part, provided that the joint venture has been set up to carry up the activity concerned over a period of at least three years and the instrument setting up the joint venture stipulates that the procuring entities, which form it, will be part thereof for at least the same period. This exception can also be found in the EU Public Utilities Directive[1081]

4.3.3.1.2 Possible approaches through which SOEs have been brought under the coverage

(a) General analysis

As the term 'SOE' is not directly mentioned under the schedule coverage of the EU, to examine whether and how SOEs have been included under the offer of the EU, fulfilment of relevant conditions, case by case, by the SOEs needs to be assessed. Three possible approaches can be adopted through which the SOEs could be covered under the GPA.

Firstly, if the SOEs meet the definition of 'bodies governed by public law' in the EU Public Sector Directive, the SOEs should be included in Annex 2 of the GPA. For this kind of entity, no limitation is set on the activities of the SOEs unless the procurement is conducted in connection with activities in the fields of drinking water, energy and transport and the postal sector.

Secondly, if the SOEs meet the conditions of BGBPL and simultaneously conduct activities within the meaning of paragraphs (a) to (f) of Annex 3, then the relevant procurement of SOEs should be considered covered by the GPA. As the term 'contracting authorities' also includes 'bodies governed by public law', the SOEs could also be covered under Annex 3 as 'contracting authorities'. Furthermore, as Annex 3 only covers the entities which conduct certain public utility activities, then the GPA only applies to procurement to pursue these utility activities.

Thirdly, if the SOEs meet the definition of 'public undertaking', and those SOEs pursue the public utility activities listed, those SOEs should be covered under Annex 3 of Appendix I.

Therefore, if SOEs fulfil the criteria of BGBPL, these SOEs should within the scope of the GPA, either as the entities listed in Annex 2 or as the entities listed in Annex 3. For SOEs fulfilling the criteria of 'public undertakings', only SOEs of the 'public undertakings' type which pursue the listed public utility activities are covered by the GPA. If the awarding contracts of these SOEs fulfil one of the aforementioned exceptions, these contracts are also exempt from the GPA.

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purpose of carrying out activities within the meaning of paragraphs (a) to (f) of the Annex 3.

[1079] See the discussion in the section 3.2.1.3.

[1080] It provides that a joint venture means a entity formed exclusively by a number of procuring entities for the purpose of carrying out activities within the meaning of paragraphs (a) to (f) of the Annex 3.

[1081] See the discussion in the section 3.2.1.4.

(b) Analysis of indicative lists

In Annex 2, EU Member States have listed the contracting authorities which meet the conditions of BGBPL as defined by the EU procurement directive. In Annex 3, the EU Member States have listed the contracting authorities and public undertakings fulfilling the criteria established under Annex 3. Although the lists are indicative, analysis of the entities listed indicates that a large number of SOEs have been included. The SOEs under Annexes 2 and 3 of the GPA by the EU are listed in Appendix X of this dissertation. However, the list does not include all SOEs that fall under the annexes, as some Member States have provided several characteristics, instead of the specific names, of the entities. Even though relying on this incomplete list, one could still analyse the coverage schedule of the EU Member States on SOEs.

(i) SOEs under Annex 2

The BGBPL listed under Annex 2 also provides information on other listed public agencies, offices, institutes, foundations, hospitals, universities, museums, theatres and companies. The list mainly covers the public entities which operate in the fields of culture and art, healthcare, education, scientific research, environmental protection, public safety and order.

At least 16 Member States have clearly listed their SOEs under the annexes, although the number of SEOs and the activities they are involved in vary. Belgium, Bulgaria and Romania have listed more than 10 SOEs. These SOEs mainly perform activities or roles as the national bank, general health insurance, investment company for developing countries or land development, housing corporation for public policies, transport construction and communication construction. Other SOEs handle the safety of navigation, news or broadcasting corporations, employment and training corporations and national research development corporations.

The nature and structure of these companies or corporations have also been examined. They include the following: companies wholly owned by the State or jointly owned by several local governments in one State; companies in which the majority or half of the shares are owned by one or several governments; companies listed under the stock exchange market but partial of the majority of the shares are owned by government (s).

Furthermore, the criteria employed by the Member States which do not list the specific names of the entities under Annex 2 are notable. Greece has mentioned three categories of the entities: (1) 'public enterprises' and 'public entities'; (2) legal persons governed by private law which are State-owned or which regularly receive at least 50% of their annual budget in the form of State subsidies, pursuant to the applicable rules, or in which the State has a capital holding of at least 51 per cent; (3) legal persons governed by private law which are owned by legal persons governed by public law, by local authorities of any level or which regularly receive at least 50% of their annual budget in the form of subsidies from such legal persons, pursuant to the applicable rules or to their own articles of association, or legal persons as previously referred which have a capital holding of at least 51% in such legal persons governed by public law. However, in the first type of entities,

the meaning and coverage of the terms 'public enterprise' and 'public entities' are not clear. In the second and third types, the criteria of ownership and finance are emphasised. Compared with the definition of 'bodies governed by public law' under the EU public procurement directives, the criteria of 'established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character' and the alternative criteria of 'management supervision' and 'right of appointing the members' have not been specified. Finland has specified 'public or publicly controlled bodies and undertakings except those of an industrial or commercial nature'. The extent to which the term 'public or publicly controlled bodies and undertakings' matches the term 'bodies governed by public law' has yet to be clarified. The criteria of 'controlled' and 'non industrial and commercial nature' have been emphasised by Finland. Although in the EU public procurement directives the term 'bodies governed by public law' is legally defined, the Member States have not completely followed the criteria mentioned in the legal definition to list the coverage of BGBPL. The definition of the BGBPL is the substantive standard for determining the coverage; regardless, this approach could lead to the coverage of BGBPL complying with the rules of the GPA to be narrower than the entities which should be covered under the GPA, as the result of weak implementation mechanism of the GPA. Additionally, even though the criterion of 'ownership' has not been mentioned in the definition of BGBPL, it has been employed by the Member States in describing the coverage of BGBPL.

(ii) SOEs under Annex 3

In Annex 3, the entities have been listed according to various activities. Almost all EU Member States have contracting entities which pursue the public utility activities concerned.[1082] Essentially, the EU has only put the contracting authorities and public undertakings in Annex 3, without the private entities which enjoy exclusive and specific rights. However, this kind of entities also has been included in the indicative lists. Therefore, not all entities listed under Annex 3 are covered by the GPA.

At least 18 Member States[1083] have clearly listed the SOEs pursuing the production, transport or distribution of drinking water; at least 20 Member States have clearly listed the SOEs pursuing the production, transport or distribution of electricity; at least 22 Member States have clearly listed the SOEs pursuing airport installation; at least 21 Member States have clearly listed the SOEs pursuing activities of Maritime or inland port or other terminal facilities; at least 23 Member States have clearly listed the SOEs pursuing activities in the field of urban railway, tramway, trolleybus or bus services; at least 24 Member States have clearly listed the SOEs pursuing activities in the field of rail services. Except for those Member States who have clarified no entities involving certain activities, other Member States may also include SOEs in Annex 3 if the SOEs fulfil the conditions established by the Member States. For instance, for Hungary, 'entities

[1082] Except Croatia, Cyprus and Malta have clearly stated that there is no contracting entity in the field of rail services; Cyprus has stated that there is no contracting entities in the field of airport installations, and no contracting entities in the field of urban railway, tramway, trolleybus or bus services.
[1083] See: Annex 1 of the Chapter 4: the indicative lists of SOEs covered under the GPA of EU

producing, transporting or distributing electricity pursuant to Articles 162-163 of 2003. évi CXXIX. törvény a közbeszerzésekről (Law on public procurement) and 2007. évi LXXXVI. törvény a villamos energiáról (Law on Electricity)' have been listed under Annex 3. If the SOEs pursuant to these two laws pursue activities in the production, transport or distribution of electricity, they should be covered by the GPA.

All Member States, including those with a high degree of privatisation, have SOEs which operate in the field of public utilities. The United Kingdom has SOEs operating in all six fields of public utilities. With regard to the number of SOEs listed under Annex 3Bulgaria, Poland, Romania and Slovenia generally have more SOEs than other Member States in the field of public utilities. Furthermore, in some activities, the number of SOEs covered is related to the characteristics of the Member States. For instance, as Spain has a long coastline, it has listed 27 SOEs in the field of maritime or inland ports.

With regard to the nature and structure of these SOEs, both wholly state-owned and partially state–owned companies, both limited liability companies and joint-stock companies and both listed companies and non-listed companies have been included.

Notably, some of the Member States which do not specify the entities have mentioned the characteristics of the entities through the criteria of 'ownership': for instance, Germany, 'publicly-owned companies'[1084] and 'seaports owned totally or partially by territorial authorities (Länder, Kreise Gemeinden)'; Portugal, 'undertakings involving the State or other public entities, with a majority shareholding'[1085] and 'undertaking in which all or majority of the capital is publicly owned'[1086]; France, 'airports operated by State-owned companies'[1087] and 'State-owned civilian airports'[1088]; Sweden, 'publicly-owned and operated airports in accordance with luftfartslagen (1957:297)'; and Austria, 'inland ports owned totally or partially by the Länder and/or Gemeinden'. **In practice, the whole or the majority ownership of the enterprise or corporation or companies held by the public entities is a criterion commonly used by Member States to determine the SOEs which should be covered under the GPA.**

4.3.3.1.3 Relationship between the offers of the EU under the GPA with the EU regulation of the SOE procurement activities

As indicated by the GPA coverage schedule of the EU, the coverage schedule relating to SOEs

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[1084] Publicly-owned companies producing or distributing water pursuant to the Kommunalgesetze (the municipal laws), in particular the Gemeindeverordnungen of the Länder.

[1085] 22.1 Intermunicipal Systems – Undertakings involving the State or other public entities, with a majority shareholding, and private undertakings, pursuant to Decreto-Lei No 379/93 do 5 de Novembro 1993, alterado pelo Decreto-Lei Nº 176/99 do 25 de Outubro 1999, Decreto-Lei Nº 439-A/99 do 29 de Outubro 1999 and Decreto-Lei Nº 103/2003 do 23 de Maio 2003. Direct administration by the State is permissible;

[1086] 22.2 Municipal Systems – Local authorities, associations of local authorities, local authority services, undertakings in which all or a majority of the capital is publicly owned or private undertakings pursuant to Lei 53-F/2006, do 29 de Dezembro 2006, and to Decreto-Lei No 379/93 do 5 de Novembro 1993 amended by Decreto-Lei Nº 176/99 of 25 October 1999, Decreto-Lei Nº 439-A/99 do 29 de Outubro 1999 e Decreto-Lei Nº 103/2003 do 23 de Maio 2003.

[1087] Airports operated by State-owned companies pursuant to Articles L.251-1, L.260-1 and L.270-1 of the code de l'aviation civile.

[1088] State-owned civilian airports whose management has been conceded to a chambre de commerce et d'industrie (Article 7 of Loi n°2005-357 of 21 April 2005 relative aux aéroports and Décret n°2007-444 of 23 February 2007 relatif aux aérodromes appartenant à l'État). Other State-owned civilian airports excluded from the transfer to regional and local authorities pursuant to Décret n°2005-1070 of 24 August 2005, as amended:10.7.1. Aérodrome de Saint-Pierre Pointe Blanche; 10.7.2. Aérodrome de Nantes Atlantique et Saint-Nazaire-Montoir.

is closely related to the EU regulation of the SOE procurement activities.

Firstly, the coverage of the entities almost reflects the EU public procurement regime, although they are not completely identical, as reflected in the following aspects: (a) The entities covered in Annexes 1 and 2 have been covered under the EU public sector directive. (b) The entities covered in Annex 3 has also been covered in the EU public utilities directive. The circumstances for general exceptions to the entities covered under Annex 3 are the same as those under the EU public utilities directive. (c) The terms and definitions employed under the annexes of EU Appendix 1 are quoted from the EU public procurement rules, such as 'bodies governed by public law' and 'public undertakings', as well as the definitions and indicative lists thereof.

Secondly, the schedule coverage of the EU under the GPA is based on the EU rules and the domestic rules of its Member States. *On the one hand, the schedule coverage of the EU under the GPA is marginally narrower than the opened public procurement market between EU member states at the EU level.* For procurement in the public utilities sector, the entities which are not included by public authorities and public undertakings but hold special or exclusive rights have been regulated under the EU public procurement regime; however, they have not been covered under the offers of the EU in the GPA. *One the other hand, the schedule coverage under the GPA does not cover the procurement activities which have not yet been regulated by the EU public procurement regime.* For instance, the entities and the activities listed under the GPA are already covered by the EU or the domestic procurement regime. No entity can be found which is only covered under the GPA and not under the EU public procurement regime. Those procurement activities which have been excluded from the EU public procurement regime have also been excluded under the GPA.

Specifically, to determine the coverage of the SOEs under the GPA, the definitions of 'bodies governed by public law' and 'public undertakings' are the key issues. While the definitions point to the EU rules, the interpretation of the terms in ECJ cases is expected to influence the scope of SOEs which will be covered under the GPA. The criteria for determining which SOEs should be covered under the GPA are based on the EU rules. The GPA rules on 'covered procurement' can also be deduced to be considerably broad and can include diverse approaches, including different interpretations of 'procuring entities', to determine the coverage.

However, the approach used by the EU, employing specific terms from the EU public procurement regime to determine the coverage of the procuring entities under the GPA, lacks transparency and certainty. Firstly, as the indicative lists of the entities do not include all entities fulfilling the definitions, the suppliers or service providers from other Parties of the GPA would have difficulty determining the exact coverage of the entities. Secondly, although one entity has been listed in the indicative list, it is no longer covered under the GPA as certain reforms or changes have occurred and it does not fulfil the definitions anymore. Without implementing the modification procedure under the GPA, the schedule coverage of the EU could be changed automatically. Additionally, in the absence of a general definition and implementable conditions

under the GPA, the interpretation of the terms only depends on the EU rules and ECJ cases instead of the GPA rules. The EU accords to its own rules to interpret the coverage of procuring entities under the GPA, and no implementable GPA rule binds the interpretation of the EU.

4.3.3.2 United States

4.3.3.2.1 SOEs covered under Annex 1

In Annex 1 of Appendix I[1089], the United States has employed the positive list approach to present the entities covered by the GPA. A total of 85 entities have been included. As to which entities are SOEs is difficult to distinguish from the name of the entities.

However, combined with the situation of SOEs at the Federal government level, it is helpful to analyse which of the entities included are SOEs. Generally, two kinds of SEOs exist at the Federal government level: Federal government corporation and government-sponsored enterprises (GSEs).

The definition of federal government corporation is contested. The United States code does not provide a single definition of the term 'government corporation'. Title 5 of the United States Code provides a definition of 'government corporation', for the purpose of this Title, as 'corporation owned or controlled by the Government of United States'.[1090] Meanwhile, the Government Corporation Control Act provides that 'government corporation' means 'a mixed-ownership government corporation and wholly-owned government corporation'[1091]. Another definition which is 'a federal government corporation is an agency of the federal government, established by Congress to perform a public purpose, which provides a market-oriented product or service and is intended to produce revenue that meets or approximates its expenditures' has also been employed in several reports.[1092] According to this definition, 17 entities are considered federal government corporations.[1093] Compared with the list of federal government corporations, Annex 1 includes 6 Federal government corporations.[1094]

Additionally, Annex 1 mentions 3 other entities titled 'corporation'.[1095] Amongst the 3 entities, the Federal Home Loan Mortgage Corporation has been classified as 'government-sponsored enterprises'[1096], which is a quasi-governmental entity. The Corporation for National and Community Service, which is also included in the Government Corporation Control Act, is

[1089] United States—Annex 1 central government entities, WT/Let/950, 7 June 2014.
[1090] 5 U.S.C. 103.
[1091] Government Corporation Control Act, 31 U.S.C. 9101-10.
[1092] See: Kevin R. Kosar: Federal Government Corporations: an overview, June 8, 2011, p.2.
[1093] Kevin R. Kosar: Federal Government Corporations: an overview, June 8, 2011, p.15. See: https://fas.org/sgp/crs/misc/RL30365.pdf
[1094] These 6 federal government corporations are: export-import bank; federal crop insurance corporation, federal deposit insurance corporation, federal prison industries, Inc., (UNICOR), Overseas Private Investment Corporation, government national mortgage corporation. There are other 2 federal government corporations which have been listed in annex 3: St. Lawrence Seaway Development Corporation, Tennessee Valley Authority.
[1095] There are the Corporation for National and Community Service, Millennium Challenge Corporation, Federal Home Loan Mortgage Corporation and Uranium Enrichment Corporation.
[1096] For a discussion of GSEs, see CRS Report RS21663, *Government-Sponsored Enterprises (GSEs): An Institutional Overview*, by Kevin R. Kosar; and Thomas H. Stanton, *Government-Sponsored Enterprises: Mercantilist Companies in the Modern World* (Washington: AEI Press, 2002).

arguably non-corporate in function and authority; the Millennium Challenge Corporation created by the U.S. Congress in January 2004 and is an innovative and independent U.S. foreign aid agency helping lead the fight against global poverty; however, that this agency directly involves economic activities is inconclusive.[1097] Amongst these three entities, only the Federal Home Loan Mortgage Corporation could be considered as an SOE.

Notably, 'the Uranium Enrichment Corporation' of United States, established as a wholly owned government corporation according to the Energy Policy Act of 1992, has been removed from the current version of Annex 1 and other annexes. However, this entity has been privatised through an initial public offering in 1998 and is still involved in public policy implementation. It was also listed in the previous Annex 1 of Appendix I of the GPA. The reason for the removal is vague. Other widely known federal government corporations have not been included, such as the United States Postal Service.

Therefore, although government corporations have been considered part of government agencies, the United States chose to list the specific names of the entities in Annex 1 as no general provision states the precise definition of government corporations and government-sponsored corporation. The aforementioned analysis also shows that the positive list does not cover all government corporations. The criteria or reasons for inclusion are not clear.

4.3.3.2.2 SOEs covered under Annex 2

In Annex 2 of Appendix I of the United States, 37 states have opened their public procurement market under the GPA to a certain extent. Amongst these states, 13 states have included all or almost all 'executive branch agencies' in Annex 2 of Appendix I, and 24 states have only listed several specific entities.

The states which have listed 'executive branch agencies' under Annex 2 have no clear criteria for the inclusion of SEOs. The answer depends on the rules and lists in the states for the term 'executive branch agencies'. The majority of the states which have chosen the positive list approach to describe the coverage under Annex 2 have not included any SOEs in Annex 2.

An exception is the New York state, which clearly includes 'public authorities and public benefit corporations' in Annex 2 and provides that the GPA does not cover 'procurement by public authorities and public benefit corporations with multi-state mandates'.[1098]

The New York State interprets the term 'public authorities' as follows: *'Public authorities are corporate instruments of the State created by the Legislature to further public interests. Public authorities have various levels of autonomy from the State based on the powers, as well as the constraints, built into their legislative mandate. Some public authorities are completely self-supporting and operate entirely outside the budget process, while others rely on State appropriations to fund operations. In addition, most authorities are authorized to issue*

[1097] See the relevant initiatives involved by MCC: https://www.mcc.gov/initiatives/initiative/power-africa
[1098] United States, Annex 2—Sub-central government entities, WT/Let/950, 7 June 2014, 25.2(1).

bonds—without voter approval—to develop and maintain infrastructure, such as roads and schools, or to fund projects for third parties, including hospitals and nursing homes. The debt service for these bonds is usually supported by revenues of the project, such as tolls that are levied by the authority, fees paid by the third party or appropriated payments from the State to repay outstanding debt. The State has also assigned specific revenue streams to an authority as a way for the authority to pay debt service.'[1099] As observed, the term 'public authorities' has a narrow meaning relative to the same term under the EU public procurement regime. The term does not refer to typical governmental agencies but only refers to the entities which can operate activities in the infrastructure and public service fields.

The term 'public benefit corporation' has the same meaning as 'public authorities', and no distinction is made between the two. The New York General Construction Law defines 'public benefit corporation'[1100] as 'a corporation organised to construct or operate a public improvement wholly or partly within the state, the profits from which inure to the benefit of this or other states, or to the people thereof.'[1101] According to the New York Public Authorities Law, 'public benefit corporation' seems highly similar to 'public authority'. Both could be divided into 'state authority' and 'local authority' and are created by or existing under the New York Public Authorities Law or other laws of the state of New York.

Under the New York Public Authorities Law, several specific public authorities or public corporations have been listed and regulated on the basis of the field of activities. These fields include the following: (1) park, parkway and highway[1102]; (2) bridge and tunnel[1103]; (3) market[1104]; (4) public utility[1105]; (5) port; (6) parking; (7) New York State municipal assistance, such as health care; and (8) others[1106]. Each public authority and public benefit corporation has a specific

[1099] http://www.osc.state.ny.us/pubauth/whatisauthority.htm

[1100] It is worthy to notice that in New York State, the term 'public benefit corporation' is different from the term 'benefit corporation' and 'not-for-profit corporation'. Benefit corporations have been allowed to form in New York State after a new Article 17 has been added to the New York Business Corporation Law in the December of 2011[1100] that lays out the rules relating specifically to New York benefit corporations. the benefit corporations not only pursue profits for the shareholders, but also pursue profits for the general public. For them, the public interest is even more important than the financial interest for the shareholders. The directors and officers of a benefit corporation must act in the best interest of a broad group of people that includes customers, suppliers and employees of the corporation, in addition to the shareholders. Any existing New York corporation can choose to become a benefit corporation through amending its certificate of incorporation to state that it is a benefit corporation. It means that the any private corporation could become a benefit corporation. A "not-for-profit corporation", if a domestic corporation, is a corporation as defined in subparagraph five of paragraph (a) of section one hundred two of the not-for-profit corporation law. A "not-for-profit corporation", if formed under laws other than the statutes of this state, is a foreign not-for-profit corporation as defined in subparagraph seven of paragraph (a) of such section.

[1101] Section 66.4 of New York General Construction Law.

[1102] In this field, Jones Beach State Parkway Authority, Bethpage Park Authority, New York State Thruway Authority have been included.

[1103] In this field, New York State Bridge Authority, Triborough Bridge Authority, Nassau County Bridge Authority, Ogdensburg Bridge and Port Authority have been included.

[1104] In this field, the Central New York Regional Market Authority, Genesee Valley Regional Market Authority, Long Island Market Authority have been included.

[1105] In this field, the authorities in power, light, heat, water, sewer, transit, transportation, environmental facilities authorities and corporations have been included.

[1106] It includes the authorities and corporations in the field of small business concerns, job development, energy research and development, green-jobs, sport centers, industrial development, etc.

definition and purpose and is subject to specific rules.

Additionally, Oklahoma State has included 'corporation commission' as an entity in Annex 2; however, 'corporation commission' only involves activities for regulating and enforcing laws and supervising activities associated with the exploration and production of oil and gas, the storage and dispensing of petroleum-based fuels, the establishment of rates and services of public utilities and the operation of intrastate transportation to best serve the economic needs of the public.[1107] A 'corporation commission' is only a regulatory agency instead of a corporation which directly involves economic activities; as such, it could not be considered as an SOE.

Therefore, under Annex 2 of Appendix I of the United States, the coverage of SOEs is unclear, and whether the term 'executive branch agencies' includes entities such as SOEs is uncertain. The New York State, which clearly includes 'public authorities' and 'public benefit corporations', is an exception. 'Public authorities' and 'public benefit corporations' are similar, and both involve providing infrastructures and public services to citizens. However, the substantive definitions and the differences between 'public authorities' and 'public benefit corporations' are not provided in New York State law, which only lists public authorities and public corporations. Furthermore, in the United States, at the State, municipal and county levels, public authorities and public benefit corporations are commonly employed to pursue public interest; however, whether and to what extent these entities have been included under the GPA has yet to be determined.

4.3.3.2.3 SOEs covered under Annex 3

In Annex 3 of Appendix I of the GPA[1108], the United States has listed several specific entities which could be considered as SOEs: (1) two federal government corporations—Tennessee Valley Authority and St. Lawrence Seaway Development Corporation; (2) four regional power marketing administrations of the United States Department of Energy—the Bonneville Power Administration, Southeastern Power Administration, Sourthwestern Power Administration and the Western Area Power Administration. All of these agencies operate on the principle of selling wholesale electric power with preference given to publicly or cooperatively owned utilities 'at the lowest possible rates to consumers consistent with sound business practices' under the Flood Control Act of 1944 (16 U.S.C. §825s).[1109] These agencies are similar to independent, wholly-owned corporations of the Department of Energy; (3) Port Authority of New York and New Jersey[1110], which is a joint venture between the New York State and New Jersey through an interstate compact authorised by the United States Congress; (4) Port of Baltimore, which is a shipping port in Baltimore, Maryland. (5) New York Power Authority, officially the Power Authority of State of New York, which is in the list of public authorities and public corporations in New York State Public Authorities Law. The New York Power Authority is the largest state power organisation in the United States, with

[1107] http://www.occeweb.com/FY13%20Annual%20Report%20FOR%20PRINTING.pdf
[1108] United States, Annex 3—other entities, WT/Let/950, 7 June 2014.
[1109] Nic Lane， Power Marketing Administrations: Background and Current Issues, CRS Report for Congress, January 3, 2007.
[1110] http://www.panynj.gov/

16 generating facilities and more than 1,400 circuit miles of transmission lines.[1111]

In Annex 3, the United States has chosen the positive list approach and specified the name of the entities. Both Federal entities and sub-central entities have been listed in Annex 3. With further information on these entities, several SOEs could be found listed in Annex 3; however, from the name of the entities, they cannot be easily found .

4.3.3.2.4 Relationship between the offers of the United States under the GPA and the regulation on the procurement activities of SOEs in United States

Analysis of the offers of the United States under the GPA on SOEs indicates the following: (a) Only those entities covered under the national procurement rules could be opened under the GPA, implying that only the SOEs regulated under the national law have been brought under the GPA. There is no one SOE which is not regulated by the national law but it has been brought under the coverage of the GPA. (b) Only part of the SOEs have been brought under the GPA. The coverage of the national law on SOEs is broader than the coverage of SOEs under the GPA. (c) No rule exists on choosing which SOEs to put under the coverage of the GPA and which approach to employ—i.e., specifying the names of the entities or putting the general terms. At the state government level, each state is free to decide which kind of SOEs should be listed under the offer; no mandatory rule exists.

4.3.3.3 China (as an accessing Party)

On its WTO accession, China made several commitments regarding government procurement, amongst which is its understanding to observe the GPA upon accession to the WTO Agreement and to 'initiate negotiations for membership in the GPA by tabling an Appendix 1 offer as soon as possible.'[1112] China became an observer of the GPA in 2002, and on 28 December 2007, it submitted a formal application (an application for accession into the GPA and Appendix I offer) to become a party to the GPA,[1113] implying the initiation of China's GPA accession process. China later revised its offer in July 2010,[1114] November 2011,[1115] November 2012,[1116] and December 2013[1117]. The most recent offer is the sixth revised offer and was submitted to the WTO on

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[1111] http://www.nypa.gov/about/whoweare.htm

[1112] Para. 341, WT/MIN(01)/3, 10 November 2001, Report of the Working Party in the Accession of China. Other commitments include: (1)before China becomes a party to the GPA "all government entities at the central and sub-national level, as well as any of its public entities other than those engaged in exclusively commercial activities, would conduct their procurement in a transparent manner, and provide all foreign suppliers with equal opportunity to participate in that procurement pursuant to the principle of MFN treatment." See Para. 339, WT/MIN(01)/3, 10 November 2001, Report of the Working Party in the Accession of China.

[1113] See GPA/ACC/CHN/1 of 7 January 2008, available at www.wto.org. The text in Chinese is available at http://www.gov.cn/gzdt/2008-05/13/content_971032.htm

[1114] "Accession of the People's Republic of China to the Agreement on Government Procurement," Communication from the People's Republic of China, Revised Offer, GPA/ACC/CHN/16,9 July 2010 (available at http://cwto.mofcom.gov.cn/accessory/201007/1279697635138.txt[2011/11/26 0: 09:45). The text in Chinese is available at http://www.caigou2003.com/perspective/gpa/20110706/gpa_186783.html

[1115] GPA/ACC/CHN/30,30 November 2011. An English version is available atwww.caigou2003.com/lib/text/GPA2011.doc. *(visited 12* November 2016).

[1116] See: http://finance.sina.com.cn/roll/20121217/213214029908.shtml(last visited 15 November 2016).

[1117] See: http://www.cgpnews.cn/articles/18948(last visited 15 November 2016).

December 22, 2014. The new offer covers three state-owned enterprises for the first time.[1118]

However, as discussed in Chapter Two, the procurement activities of SOEs in China have not fell within the scope of CGPL. By contrast, the EU and the United States offer no procurement activities which are not regulated by the domestic procurement rules under the GPA. The main reason for adding several SOEs under the sixth offer could be explained by the intense pressure from the main negotiating Parties of the GPA, such as the EU and United States. Additionally, as indicated by the recent high-level conversation between China and the EU, the claimed purpose behind this is 'padding the road' for the 'going out' strategy of SOEs. Joining the GPA may solve issues of 'identities' and qualifications of enterprises as well as reduce the unfair treatment of enterprises attempting to enter the foreign public procurement market.[1119]

4.3.4 Issues under the current GPA rules on treating SOEs as a buyer

On the basis of the preceding discussion, the most critical issue raised under the current GPA rules on treating SOEs as a buyer is the lack of a substantive definition of 'procuring entity'. The coverage of the 'procuring entity' is determined by the lists of the Parties. However, the lists of the Parties have been influenced by the principle of reciprocity and are based on domestic rules. Thus, offers from the Parties on SOEs under the GPA vary, and no common rule could be identified in accordance with the current offers. Analysis of the EU and United States lists suggests that both have certain SOEs which have been brought under the GPA; however, the extent of the coverage depends on the results of the negotiations and the willing of Parties on open public procurement market under the GPA. In addition to the criteria for determining which kinds of SOEs would be covered by the GPA, the set of criteria for determining which kinds of SOE procurement should be covered by the GPA is another issue. SOEs may not only participate in the activities for performing public function but could also join in the commercial activities. Therefore, not all SOE procurement activities covered by the GPA should be regulated under the GPA. The GPA covers procurement for governmental purposes but not procurement for commercial sale or resale. However, the GPA does not provide an effective approach for distinguishing between these two kinds of procurement activities.

4.4 Role of SOEs as a seller under the GPA

4.4.1 In-house arrangement

4.4.1.1 General analysis of in-house arrangement under the GPA

Neither the 1994 GPA nor the revised 2012 GPA has clearly used the term 'in-house' arrangement. To determine whether in-house arrangement has been excluded from the GPA rules, the general rule on the coverage of the GPA (which has been discussed above) and the individual offer provided by the Parties need to be examined.

[1118] 我国向世界贸易组织提交加入《政府采购协定》第 6 份出价清单，
http://www.mof.gov.cn/zhengwuxinxi/caizhengxinwen/201412/t20141224_1171570.html
[1119] http://guoji.caigou2003.com/jujiaoCPA/2531592.html

With regard to the general rule on the coverage of the GPA, the GPA does not seem to include certain procurements or arrangements which are similar to 'in-house' provision. Firstly, on the basis of the clause that the covered procurement should be 'not with a view to commercial sale or resale, or for use in the production or supply of goods or services for commercial sale or resale', and the interpretations of the Appellate Body of the terms 'commercial resale' and 'covered procurement' under the GPA could be deduced to refer to an arm's length transaction. In effect, 'covered procurement' does not include transactions such as in-house arrangements. Secondly, from the circumstance of exclusion that the GPA does not apply to 'non-contractual agreements or any form of assistance that a Party provides, including cooperative agreements, grants, loans, equity infusions, guarantees and fiscal incentives', the cooperative agreements concluded between the public entities covered under the GPA for providing goods or services, or non-contractual agreement concluded between any public entities could be excluded from the GPA.

With the offers provided by the Parties considered, several Parties have provided similar exclusions in their coverages chedules. As previously discussed, the **EU** has provided the exclusion relevant to affiliated undertakings[1120] and the exclusion of contracts between a joint venture and the procuring entities which form it[1121] in Annex 3. Essentially, these exclusions are relevant to the specific in-house arrangements in the public utilities sector. However, typical in-house arrangements are not clearly excluded from all annexes. The EU possibly considers that this kind of in-house arrangement has been excluded from general GPA rules. **Canada** has interpreted procurement as follows: 'procurement in terms of Canadian coverage is defined as contractual transactions to acquire goods or services for the direct benefit or use of the government.'[1122] On the basis of this interpretation, Canada has stated that 'it does not include procurements between one government entity or government enterprise and another government entity or government enterprise.'[1123] **New Zealand** has clarified that the GPA does not cover 'procurement by an entity covered under this Appendix from another entity covered under this Appendix, except where tenders are called, in which case, this Agreement shall apply'.[1124]

However, the coverage of in-house arrangements between Parties is different. Under the GPA, **the EU** emphasizes the exclusion of special in-house arrangements in public utilities. **Canada** seems to treat the whole State as one 'house', thus excluding all procurements between one government entity or government enterprise and another government entity or government enterprise regardless of control or close relationship exists between these government entities and government enterprises. **New Zealand** emphasizes that the procurement between the entities under the GPA' coverage schedules should not be covered by the GPA. This ruling implies that the

[1120] Note 4 to Annex 3 of EU
[1121] Note 5 to Annex 3 of EU
[1122] Canada, Annex 7—General Notes, Note 4, WT/Let/954, 23 June 2014. It provides that 'Procurement in terms of Canadian coverage is defined as contractual transactions to acquire goods or services for the direct benefit or use of the government. The procurement process is the process that begins after an entity has decided on its requirement and continues through to and including contract award. It does not include procurements between one government entity or government enterprise and another government entity or government enterprise.'
[1123] Canada, Annex 7—General Notes, Note 4, WT/Let/954, 23 June 2014.
[1124] New Zealand, Annex 7---General Notes, Note 1(f), WT/Let/1085, 26 September 2015.

entities covered under the GPA award procurement contracts to other public entities not covered by the GPA should be regulated under the GPA, even though the awarded public entities are controlled or are the awarding entities are closely related.

4.4.1.2 Whether SOEs as a seller provide goods and services to public entities should be regulated under the GPA

On the basis of the previous discussion regarding the general GPA rules, if the transaction between SOEs and public entities could not be regarded as an arm's length transaction, the transaction is not covered by the GPA. If the procurement between the SOEs and public entities is not in the form of a contractual agreement or is in the form of assistance, then it should not also be covered by the GPA. 'A transaction at arm's length' and 'contractual agreement' are two criteria for determining whether the SOEs as a seller provide the goods and services to the public entities should be regulated under the GPA. However, the conditions under which the transaction should be considered as an arm's length transaction have yet to be determined.

With regard to the schedule coverage, the Parties which have shown increased certainty on this issue have provided inconsistent views. The EU has merely mentioned the special in-house arrangement in public utilities sectors but certainly intends to apply the conditions for excluding in-house arrangements between contracting authorities under the GPA, similar to the conditions under the EU public procurement regime. Therefore, the answer to whether the SOEs from the EU as a seller providing the goods and services to the public entities should be regulated by the GPA is consistent with the discussion in Section 3.2.1 of Chapter Three in this dissertation. If the SOEs from Canada suit the definition of 'government enterprise', the procurement contract awarded from a 'government entity' or a 'government enterprise' to those SOEs should not be covered by the GPA. If the SOEs from New Zealand are the entities covered under the GPA, the procurement contract awarded from the entities which are also covered under the GPA should not be regulated under the GPA. Meanwhile, if the awarding entities are not covered under the GPA, they will not be regulated under the GPA; under this circumstance, whether these procurement contracts should be regulated by the national public procurement rules of New Zealand is another issue.

Comparison of the schedule coverage of the three aforementioned Parties indicates that the EU has applied stricter conditions for in-house arrangements other than the Parties. Procuring entities in the EU are less likely to employ the exclusion of in-house arrangements to prevent the application of the GPA.

4.4.2 Neutral competition issue

4.4.2.1 General GPA rules on neutral competition

Ensuring equal competition between domestic suppliers and foreign suppliers is one of the objectives of the GPA.[1125] To achieve this goal, the GPA includes a set of rules in the procurement

[1125] In the preamble of the GPA, it has been provided that 'recognizing that measures regarding government procurement should not be prepared, adopted or applied so as to afford protection to domestic suppliers, goods or

process, from issuing the procurement notice to the awarding of the procurement contract. Specific circumstances of each Party vary. To accommodate the diversity, the procedure commitments under the Agreement are minimal and sufficiently flexible.

The following rules have generally contributed to ensuring neutral competition between suppliers. (1) **Principle of non-discrimination.** Each Party to the GPA and its procuring entities shall accord to the goods, services and suppliers of any other Party, treatment no less favourable than the treatment the Party and its procuring entities accord to the goods, services and suppliers of domestic good of any other Party.[1126] Additionally, with respect to any measure regarding covered procurement, a Party, including its procuring entities, shall not: (a) treat a locally established supplier less favourably than another locally established supplier on the basis of the degree of foreign affiliation or ownership; or (b) discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of any other Party.[1127] **(2) Emphasis on publishing relevant government procurement system information and contract chance to improve the chance to compete with foreign potential suppliers.[1128] (3) Setting of certain requirements on establishing and assessing the conditions for participation to avoid unreasonable and unfair conditions and assessment.[1129]** For instance, when assessing whether a supplier satisfies the conditions for participation, a procuring entity shall evaluate the financial capacity as well as the commercial and technical abilities of a supplier on the basis of the business activities of that supplier both inside and outside the territory of the Party of the procuring entity. (4) **Discouraging limited tendering and limiting its use to certain circumstances.**[1130] (5) Minimum requirements on the treatment of tenders and awarding of contracts; for instance, a procuring entity shall receive, open and treat all tenders under procedures that guarantee the fairness and impartiality of the procurement process and the confidentiality of tenders.[1131] (6) Requirements on providing information to suppliers and publishing the award information to the public to provide opportunities of supervision between suppliers and from the public.[1132] (7) Minimum requirements on domestic review procedures to ensure fair remedies to suppliers.[1133]

4.4.2.2 Neutral competition of foreign suppliers with domestic SOEs

If foreign suppliers join the domestic open public procurement market, how is neutral competition between foreign suppliers and domestic SOEs guaranteed? On one hand, this issue is similar to the neutral competition between domestic non-SOEs and SOEs; on the other hand, as the reality that in certain Parties, the foreign suppliers are generally preferred by the domestic

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services, or to discriminate among foreign suppliers, goods or services.'

[1126] Article IV (1) of 2012 revised GPA.
[1127] Article IV (2) of 2012 revised GPA.
[1128] Article VI and VII of 2012 revised GPA.
[1129] Article VIII and IX of 2012 revised GPA.
[1130] Article XIII of the 2012 Revised GPA.
[1131] Article XV of the 2012 revised GPA.
[1132] Article XVI of the 2012 revised GPA.
[1133] Article XVIII of the 2012 revised GPA.

contracting authority. How is neutral competition between foreign suppliers and domestic suppliers, including SOEs, guaranteed in this situation?

The GPA rules are based on the assumption that the State or its procuring entities prefer domestic suppliers to foreign suppliers. This assumption could be observed from the preamble and specific rules of the GPA. Therefore, the aforementioned GPA rules also help resolve the issue of preferring domestic SOEs.

However, in certain circumstances, the domestic suppliers, including SOEs, could be given preferential measures. These measures rely on the special and differential treatment obtained by the Parties whose role is taken by the least developed countries or developing countries against foreign suppliers. Generally, the least developed countries and developing countries may adopt or maintain one or more of the following transitional measures: (a) a price preference programme; (b) an offset[1134]; (c) phased-in addition of specific entities or sectors; and (d) a threshold higher than its permanent threshold. Therefore, in the government procurement market of the Parties which have the right to maintain these transitional measures, the foreign suppliers may be treated less favourably than domestic suppliers, including SOEs. For instance, Israel may operate provisions which require the limited incorporation of domestic content, offset procurement or transfer technology in the form of objective and clearly defined conditions for participating in the awarding of procurement, which do not discriminate between Parties.[1135]

The issue of preferring foreign suppliers is not a GPA concern, although the GPA rules are objectively helpful in solving this issue. When the design or descriptive characteristics are used in the technical specifications, a procuring entity should indicate, where appropriate, that it will consider tenders of equivalent goods or services that demonstrably fulfill the requirements of the procurements by including words such as ‘or equivalent’ in the tender documentation.[1136] Essentially, the issue of preferring foreign suppliers or goods or services it is the concern of domestic public procurement rules, which should balance the rules on forbidding preferences for the procurement covered under the GPA.

4.4.2.3 Neutral competition between foreign SOEs and domestic suppliers

If the SOEs from one Party of the GPA join the public procurement market opened under the GPA in another Party of the GPA, whether neutral competition between these SOEs and domestic suppliers could be ensured is an issue. Moreover, whether these SOEs could be distinguished from private enterprise of the same country is another concern. Assuming that China has become a Party to the GPA, could Chinese SOEs join the public procurement market of the EU as Chinese private enterprises, and could neutral competition be guaranteed under the GPA?

[1134] See the following paper for discovering more about the offset in GPA: David Collins (2016). Government Procurement with Strings attached: the Uneven Untrol of Offsets by the World Trade Organization and regional Trade Agreements, Asian Journal of International Law, March 14, 2016. See: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2747284

[1135] Israel, Note—Offset, Appendix I, WT/let 947/Corr.1, 30 March 2015.

[1136] Article X(3) of the 2012 revised GPA.

On one hand, this issue is relevant to the principle of non-discrimination between domestic suppliers and foreign suppliers, as well as between foreign suppliers from one Party and foreign suppliers from another Party. Therefore, any measure regarding the covered procurement should not harm the neutral competition between the domestic suppliers and the foreign-SOE type of suppliers. Specifically, the principle of non-discrimination in the GPA provides that if any Party of the GPA has established an SOE in another Party of the GPA as a potential supplier in the government procurement market, the other Party of the GPA and its procuring entities should not treat these SOEs less favourably than another local established supplier on the basis of the degree of foreign affiliation or ownership. Under the assumption that China has accessed the GPA, and one SOE of China has established one subsidiary in Italy for supplying goods and services, the procuring entities in Italy should not be treated less favourably than other suppliers locally established in Italy, including the companies established by Italian or other foreigners, only on the that the Chinese government holds directly or indirectly ownership of this enterprise.

On the other hand, this issue is related to the fact that the SOEs usually receive subsidies from the government of the home country; therefore, the subsidies could lead to a substantially unfair competition between the SOEs and the domestic suppliers in the country of the procuring entities. However, the GPA has not provided the rule for dealing with the relation of obtaining subsidies to submitting the tenders as suppliers in a government procurement market under the GPA. Even though the GPA also has a rule on abnormally lower tenders submitted by the suppliers, the concerns are focused on verifying with the suppliers that it satisfies the conditions for participation and can fulfil the terms of the contract.[1137] Therefore, after China has joined the GPA, if one Chinese SOE submits to an Italian procuring entity a tender much lower than that submitted by other suppliers, the Italian procuring entity should not reject this tender on the suspicion that subsidies exist if the Chinese SOE can prove that it satisfies the conditions for participation and can fulfil the terms of the contract. The provision on subsidies in the EU public procurement directive is not applicable to this circumstance; moreover, the EU Commission has no right to determine whether the subsidies given by the Chinese government is legal. However, this issue may be related to the anti-subsidy rules under the WTO. If the EU wins the anti-subsidy case on Chinese goods, the EU has right to impose a higher import tax rate on Chinese goods, thereby increasing the cost of submitting tenders in the EU for Chinese enterprises, including SOEs.

4.5 Discussion and conclusion

From the perspective of the buyer, the role of SOEs under the GPA is relevant to two important issues: (a) whether the SOEs should be covered under the GPA as 'procuring entities' and (b) whether all procurement activities of the SOEs covered under the GPA should be regulated.

With regard to the first issue, the GPA does not provide a general definition for the term 'procuring entity'. The coverage of 'procuring entity' is determined by the annexes of Appendix I of the GPA resulting from the negotiation between the Parties to the GPA. Therefore, no general

[1137] Article XV (7) of the revised 2012 GPA

rule is set for determining what kinds of SOEs should be covered under the GPA.

However, relevant provisions are found in the revised GPA and WTO multilateral agreements which could provide insights into it. Firstly, the revised 2012 GPA has provided a chance for Parties to withdraw the entities from their offer on the ground that 'government control or influence over the entity's covered procurement has been effectively eliminated'. The existence of 'government control or influence' would be the reason for coverage under the GPA. In theory, the SOEs under governmental control or influence over their 'covered procurement' should be listed in the annexes of the GPA. However, the GPA Committee has not enacted the relevant criteria for determining the elimination of government control or influence over the entity's covered procurement. Secondly, the term 'governmental agency' in Article III:8(a) of the GATT 1994 could provide the direction to understand the procuring entities under the GPA as it provides justification for establishing the GPA apart from the WTO multilateral agreements. The term 'governmental agency' has not been interpreted by the Appellate Body of the WTO until the cases *Canada-Certain measures affecting the renewable energy generation sector* and *Canada-measures relating to the feed-in tariff program.* In the view of the Appellate Body, the term 'governmental agencies' refers to those entities acting for or on behalf of government in the public realm with the competences that have been conferred on them to discharge governmental functions. As observed, the core elements emphasised include 'performing governmental functions' by 'the entities acting for or on behalf of government' and not only government itself. The SOEs which have been conferred the competences to perform governmental functions could be regarded as a 'governmental agency'. To reiterate, no implementable criteria have been provided for this interpretation.

Comparison of these two approaches suggests that the approach of 'governmental control or influence' is stricter than the approach of 'performing governmental functions' as 'governmental control or influence' should be specifically reflected in the procurement behaviour of the procuring entity. It should also refer to 'covered procurement'.

Additionally, analysis of the annexes of the EU and the United States shows the following: (a) Some Parties have clearly listed certain SOEs under the GPA, some Parties have not listed any SOEs under the GPA and whether some Parties have listed SOEs or not is uncertain; (b) The Parties which have listed SOEs under the GPA have not listed all SOEs or not all SOEs which have been regulated by the domestic public procurement law under the GPA. The second finding implies that listing SOEs under the GPA is a selective behaviour and results from negotiations between Parties and the consideration of the domestic situations. (c) Among the Parties which have clearly listed SOEs, both wholly state-owned and partially state-owned companies, both limited liability companies and joint-stock companies and both listed companies and non-listed companies have been included; (d) Among the Parties which do not directly list the name of the entities, 'ownership' is the criterion most commonly mentioned. (e) The schedule coverage of the Parties under the GPA is based on the domestic rules of the Parties. The EU has directly used the expressions and definitions of 'bodies governed by public law' and 'public undertakings' from EU

directives to describe the entities brought under the GPA. (f) If the SOEs have not been regulated by the domestic public procurement law, they will not be listed under the GPA. In summary, the regulatory approach to procuring entities under the GPA allows a comprehensive method of interpreting whether one entity should be listed under the GPA.

With respect to the second issue, the GPA has recognized that not all procurement activities of the procuring entities should be covered. Firstly, as one of the justifiable reasons for modifying the entities under the aforementioned annexes, 'governmental control or influence' should be eliminated from the 'covered procurements'. If the 'governmental control or influence' eliminated is over other procurement activities, the entities should still be covered under the GPA. Secondly, 'covered procurements' should be determined on the basis of the general coverage rules of the GPA and the specific offers of the Parties. On the one hand, the GPA provides positive conditions for determining the 'covered procurement', including procurement for governmental purposes, the object of the procurement activities, the forms of the 'procurement' activities, the value of the procurement contract and the covered procuring entities. On the other hand, the GPA also provides negative conditions for determining the 'covered procurement', referring to exclusions, such as general and individual exclusions. Thirdly, from 'procurement for governmental purposes' and 'not with a view to commercial sale or resale, or for use in the production or supply of goods or services for commercial sale or resale', if one SOE participates in the fields of providing public service and commercial activities and has been listed under the GPA, the GPA does not regulate the part of the procurement activities for pursuing commercial activities, but rather, only for the part of the procurement activities to provide public services. The ruling implies that the GPA has distinguished two kinds of procurement activities: one for governmental purposes and the other for commercial purposes.

From the perspective of the seller, the role of SOEs under the GPA is relevant to the following two issues: (a) whether the SOEs as a seller provide the goods and services to the public entities should be regulated under the GPA and (b) how the GPA would guarantee neutral competition between foreign suppliers and domestic SOEs and between foreign SOEs and domestic suppliers.

With regard to the first issue, the GPA does not provide general rules which are similar to 'in-house' exemption in the EU public procurement regime; however, several Parties have provided similar exclusions in their coverage schedules, such as the EU, Canada and New Zealand. Each in-house arrangement between these Parties varies in coverage, and the EU has applied stricter conditions for in-house arrangements compared with other Parties. The procuring entities in the EU are less likely to employ the exclusion of in-house arrangements to prevent the application of the GPA. Stated differently, SOEs in Canada and New Zealand are more likely to sell goods or services to the procuring entities covered under the GPA without competition as the reason for the in-house arrangement.

With regard to the second issue, as the GPA rules are based on the assumption that the State or its procuring entities prefer domestic suppliers, the general GPA rules could also help address the

issue concerning the preference for domestic SOEs. However, the preference for foreign suppliers in certain countries has not been noticed by the GPA. This issue should be addressed through domestic public procurement rules, which should balance the rules on forbidding these two kinds of preference for the procurement covered under the GPA.

Additionally, the issue of maintaining neutral competition between foreign SOEs and domestic suppliers under the GPA has not been discussed further; however, this issue will be given emphasis once countries with large SOE sectors join the GPA, such as China. This issue is not only relevant to the non-discrimination rules of the GPA but also on how to treat suppliers obtaining subsidies or advantages from the government. Under the current GPA rules, the procuring entity could not discriminate a supplier from other Parties to the GPA on the basis of public ownership; in addition, the procuring entity could not discriminate a locally established supplier on the basis of the country of production, and according to its domestic law, on the basis of having the background of other countries' public ownership. This issue is also related to the anti-subsidy rules under the WTO.

Chapter Five Conclusion

State and market have been regarded as two resource allocation mechanisms since the development of the capitalism. The market mechanism has been advocated by classical economics as the 'invisible hand' which could generally regulate economic activities. The economic crisis in the 1930s led to market failure. Thus, the state mechanism, which emphasizes the plan, guide, order, regulation or even operation by itself of economic activities, has been advocated worldwide. Meanwhile, under the impact of Marxism, public ownership has been established in Communist or Socialist countries. Since then, numerous SOEs were created in both developing and developed countries. However, as the development of the economy, it also shows that the State also could fail as the result of captured or influenced by the interest groups and the existence of moral hazard. Moreover, the absence of absolute advantage between the State mechanism and the market mechanism has been recognised. Even in the socialist countries, the importance of the market mechanism has also been advocated. One government can choose any one of them for allocating the resources. Even for the same industry, one government could prefer the market mechanism, and another government could prefer the state mechanism. The underlying reason is given by the economic theory on the basis of various transaction costs. Thus, the number of SOEs and the fields in which SOEs are involved are different between countries.

Generally, except for special limitations by the law, an SOE could play one or more of the following roles: (1) being used by the State to provide public service; (2) producing and/or providing private goods (services) to the State; (3) participating in the market to provide private goods (services) and join the competition as do private companies. SOEs have been observed participate as seller not only in the public sector but in the private sector as well. SOEs provide not only public goods and services but private public goods and services as well; SOEs join not only the monopolistic market but the oligopolistic, monopolistic and free markets as well. Therefore, SOEs are positioned in the middle of these two types—the public sector and the private sector. In some cases, SOEs are closer to the public sector, such as when SOEs undertake some government functions to provide public service. However, in other cases, SEOs are closer to the private sector, such as when SOEs participate in commercial activities and compete with private entities.

Public procurement law regulates the procurement activities of the entities in the public sector. From the perspective of the buyer, whether the public procurement law should also regulate the SOEs is a concern. What are the reasons for regulating or not regulating them? What kinds of SOEs should be regulated under the public procurement rules? What kind of SOE procurement activities should be regulated? From the perspective of the seller, whether SOEs as the seller could join public procurement is an issue. Whether the contracts awarded from the procuring entities to the SOEs should be regulated by the public procurement law raises another question. Whether and

how the public procurement law guarantees the neutral competition between the SOEs and private enterprises is another issue. All these concerns have been examined through a comparative study on the EU public procurement regime, Chinese public procurement regime and the GPA under the WTO. On the basis of the analyses in previous chapters, several conclusions could be drawn on the aforementioned issues.

SOEs are typically regulated in the public procurement regime. The term 'SOEs' has not been directly mentioned in the EU public procurement regime; yet, research on their rules shows that some SOEs have been regulated. As the EU public procurement directives must be transposed into the domestic law of Member States, all Member States should regulate the procurement activities of their SOEs, which fulfil the conditions provided in the EU directives in their domestic public procurement rules. The GPA rules also comprehensively to include SOEs under the regulation. Several Parties to the GPA have already listed the SOEs under their annexes. An exception to this is China; SOEs have not been regulated under the CGPL, and only part of the procurement activities of the SOEs have been regulated by the Chinese Bidding Law (CBL).

The following could be the reasons for regulating the procurement activities of SOEs: firstly, for the public procurement law at the international and supranational levels, the main purpose is to eliminate the barriers of the open public procurement market. As SOEs usually implement public policies enacted from the governments in the process of procurement, such as buying national products, this is against the main regulatory objective of the GPA and the EU public procurement regime. Therefore, the SOEs have been regulated under these procurement rules. Secondly, for the public procurement law at the domestic level, the main purpose is to save and improve the efficiency of public funds. As SOEs are involved in public ownerships or even use public funds for ordinary operating activities, regulating the procurement activities of the SOEs could reduce the cost of the SOEs, thus saving public funds. Thirdly, at the domestic level, leveraging the effects of the public procurement behaviour for implementing public policies could also be the reason for the regulation, such as the improvement of green government procurement.

The main reason for not regulating the procurement activities of SOEs in China is the consideration of creating a fair environment for SOEs to compete with private enterprise. Regulating the procurement activities of SOEs could reduce the efficiency of the procurement and lead to additional cost for the SOEs. However, analysis of the procurement situation of Chinese SOEs indicates that lack of regulation leads to problems, such as the procurement of luxury or excessive goods and service through a fictitious procurement contract for lending funds to other corporations or for other purposes. Particularly, the procurement activities of SOEs are associated with serious corruption challenges. Therefore, given the issues related to SOE procurement activities and the direction of new reform on SOEs, China needs to regulate the procurement activities of partial SOEs, such as public interest-type SOEs.

The issue as to which kinds of SOEs should be regulated under the public procurement rules has prompted controversy. SOEs are theoretically entities between pure 'government' and pure

'private entities'. Some SOEs are relatively closer to the 'pole' of the government, whereas other SOEs are closer to the 'pole' of the private entities. This research shows that not all kinds of SOEs need to be regulated, and only the SOEs relatively closer to the 'government' should be regulated. For instance, both the EU public procurement regime and the GPA intend to regulate the SOEs which perform public functions. Generally, SOEs which only pursue commercial activities have not been regulated by the public procurement rules. From the perspective of both domestic law and international law, such selective regulation is sensible. SOEs pursuing commercial activities rather than performing public functions use less public funds. For instance, the government may only hold minor shares of the SOEs, face a higher degree of competition in the relevant market and freely decide on procurement activities.

Two kinds of SOEs which are relatively closer to 'government' have been regulated under the EU public procurement regime: (a) the entities for meeting needs in the general interest, not having an industrial or commercial character and (b) the entities for meeting the general needs and having an industrial or commercial character. According to the EU public procurement regime, the possession of an industrial or a commercial character should be analysed case by case. The competition situation, bearing the economic risk and pursuing the profits are relevant but not decisive factors. When regulating the SOEs in domestic law, the need to regulate these two kinds of SOEs has to be considered; for instance, whether SOEs pursuing activities in the utilities sector and possessing an industrial or commercial character needs to be regulated. Furthermore, the EU Public Utilities Directive generally provides lighter rules compared with the EU public sector directive; thus, the SOEs governed under the Public Utilities Directive also apply lighter rules.

The core issue of regulating the SOEs which are relatively closer to the 'pole' of the government is the provision of implementable and effective criteria for determining the scope of these SOEs. This dissertation shows that although not clearly noted in the GPA, through the relevant provision, it could be observed that 'governmental control or influence' over the procurement activities is one of the reasons for listing the entities under the coverage of the GPA. Additionally, in the EU public procurement regime, whether government could directly or indirectly exercise dominant influence on the procurement decision of SOEs is the main approach for determining the close relationship between SOEs and government. However, the GPA rules has not provided such criterion as a general standard for listing the entities. The coverage of SOEs depends on the negotiation between Parties and the willingness of the Parties to open their procurement market to foreign suppliers. Comparatively, combining the provisions in the EU public procurement directive and the ECJ cases, the EU public procurement regime provides more implementable criteria. Notably, the capability of government to influence is sufficient; no requirement is set on executing the influence. Ownership, financial participation or financial structure; the situation of the management supervision; the constitution of the administrative, managerial or supervisory board; and the rules which govern it are relevant factors which have been considered under the EU public procurement regime for determining the presence of 'government dominant influence'.

As one SOE could participate in the activities for pursuing both public purposes and commercial activities, whether the procurement activities for pursuing both kinds of activities should be regulated by public procurement rules remains a question. Different arguments are presented regarding this question. One argument is that extending the application of the public procurement rules to activities of a purely industrial or commercial nature is an onerous constraint and may seem unjustified. The reason is that the rule does not apply to bodies established to conduct identical activities. The GPA rules seem to support this as the GPA rules only cover the procurement for governmental purpose and not the procurement for commercial sale or resale. Another argument is that all procurement activities of the same SOE should be regulated under the public procurement rules for considerations of legal certainty because requiring the SOEs to establish one independent financial structure for two activities is impractical. The EU public sector directive sets an example for supporting this argument. Furthermore, another argument insists that whether public procurement rules apply depends on the proportion of these two kinds of activities in the SOE. However, no legal regime has been found to support this argument. Additionally, the EU Public Utilities Directive holds a different position from the EU public sector directives; the former only applies to the procurement activities of SOEs for pursing certain utilities activities.

Even though the procurement activities of SOEs have been regulated under the Public procurement rules, they may be deregulated if certain conditions are met. Under the EU public procurement regime, the characteristic of the service, the characteristic of the procurers, the coverage cooperation between rules and the characteristic of the relevant market structure would be the reasons for the deregulation.

SOEs are not only the buyers in the public procurement market but also the sellers of goods, services and works. This dissertation shows that both in the EU and China, SOEs are free to join the public procurement procedures as sellers if they meet the requirements set by the procuring entities. Under the GPA, SOEs from one Party could also participate as suppliers in the public procurement market of other Parties.

However, given the close relationship between SOEs and government, should the sale of SOEs of the goods, services and works to the procuring entities still be regulated by public procurement rules? The EU public procurement regime provides 'in-house' exemption, in recognition of the freedom of the public entities to organize their internal sources. Public entities can freely decide on whether to provide public services by themselves or contract out. The EU public procurement regime intends to build the boundary of the 'public house' by establishing conditions for applying in-house exemption. 'Single control', 'joint control' and 'horizontal cooperation between contracting authorities' are the three types of 'in-house' exemption allowed in the EU public sector directive. As can be observed, the boundary of 'public house' is gradually greater in these three types of 'in-house' arrangements. Notably, the existence of an 'in-house' arrangement between the awarding entities and the awarded entities could not provide justification to also exempt the procurement activities of the 'awarded entities' from the application of public procurement rules. In the EU, certain SOEs controlled by the State which are established specifically to meet general

interest needs, with no industrial or commercial character, have also been regulated under the procurement regime. If this kind of SOEs meet further conditions and are awarded the contract by contracting authorities without competition, the procurement activities of those SOEs still need to comply with the full provisions of the public procurement regime. Therefore, the EU procurement regime leaves an opportunity for contracting authorities to treat certain SOEs as their internal organisations for performing the public function. The GPA does not provide general rules similar to 'in-house' exemptions, but several Parties have provided similar but relatively lenient exclusions in their coverage schedules. This situation proves that an in-house exemption is not a unique arrangement under the EU regime.

However, in China all contracts awarded by procurers to SOEs should comply with the public procurement regime. To implement the strategic functions of public interest-type SOEs, the current approach is overemphasis on competition for all SOEs to obtain the public procurement contracts. The reason is that they could be regarded as the internal department of the specific public entities. The idea of 'in-house' exemption from the EU regime could be one of the models for study by Chinese legislators.

Neutral competition between SOEs and private enterprises is another concern. Generally, either the EU public procurement regime, the GPA rules or Chinese government procurement rules could provide a good framework for guaranteeing neutral competition between SOEs and private enterprises. However, SOEs could obtain advantages from the governments, which could impact the substantive competition between SOEs and private enterprises. The rules for granting the advantages should be incorporated with the public procurement rules. The relevant key concerns under the EU rules also could be referred by the reform of Chinese law and the GPA in the future.

Under the background of developing PPP, such as the situation in China, SOEs play important roles under the PPP model, and PPP procurement is more complex than traditional government procurement. The relevant issues have also been examined under the background of PPP.

The analysis of the EU public procurement regime and practice indicates that SOEs could also join the PPP as a public partner, and when SOEs award the PPP contracts, the applicable procurement rules mainly depend on the character of the SOEs and the activities involved. However, in China the current CGPL cannot include the situation where the SOEs join the PPP as public partners, and the current normative documents have not clarified whether the SOEs could join the PPP as public partners. In practice, municipal SOEs usually join the PPP projects as among the 'agents' of the municipal government and represent the public shareholders. The difference between these two public procurement regimes could be explained by the different relationships between the public procurement rules and the PPP rules. The EU public procurement regime has been adopted to include the complex procurement processes, such as the awarding of the PPP contract,. The same coverage rules for traditional public procurement and PPP are applied. However, the CGPL has not been adopted to cover the awarding of the PPP contract, and the SOEs are not covered by the CGPL. Under the new tendency of SOE reform and the application

of the PPP model to provide better public service by certain SOEs, it is necessary to provide the possibilities of SOEs participating as pubic partner in the PPP.

With regard to the procurement activities of the IPPP kinds of SOEs, in the EU public procurement regime, whether SEOs should be regulated by the procurement rules and to what extent they should be regulated depends on the characteristics of the SOEs. Specifically, the answer depends on the type of SOEs, which have been classified according to the public procurement rules. The current EU public procurement regime has no intention to regulate the procurement activities of the concessionaires or other 'private partners' of PPP, except that these entities are originally covered by the procurement regime. The character of the mixed entities under the IPPP projects, instead of the holding of exclusive or special rights, is the regulatory reason. In China, the regulatory framework for the procurement activities of the mixed entities under the IPPP projects is similar to the regulatory framework of the ordinary SOEs. Only when the procurement activities of SOEs fall within the compulsory coverage of the CBL should the CBL apply . From the perspective of national legislation, if the mixed entities under the IPPP projects could bear the operational risk by themselves, such as when the government does not guarantee the return on an investment, the procurement activities of the mixed entities concerned need not be regulated. By contrast, if the mixed entities rely on the support of public finance, such as an offset, regulation of their procurement activities is a reasonable move.

From the perspective of seller, whether the SOEs could become the 'private partner' of the PPP model has prompted controversy. Generally even though from the political perspective the PPP model should encourage the pure private companies to join the PPP projects, from the legal point of view, all economic operators that meet the qualification set by the procurers may join the PPP . This statement implies that generally, if the SOEs exhibit considerable financial and technical capacities, they should be qualified to join the competition. However, in China to control the debt crisis of local governments, the MOF limited the participation of certain SOEs as private partners in the PPP projects.

From the perspective of the seller, the in-house exemption could also apply to the PPP model in the EU, particularly when SOEs become the private partners under the PPP model. The EU Commission also noted several aspects which could help solve the information asymmetry issue between private companies and SOEs under the IPPP model. Granting advantages to SOEs could also affect the neutral competition between SOEs and private enterprises under the PPP model.

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Annex 1 of the Chapter 4: the indicative lists of SOEs covered under the GPA of EU Member States

Part A

Under the Annex 2 of GPA—an indicative list of contracting authorities which are governed by public law

BELGIUM

Bodies :

1.10. Banque nationale de Belgique – Nationale Bank van België; (National Bank of Belgium)
1.49. Entreprise publique des Technologies nouvelles de l'Information et de la Communication de la Communauté française; (Public enterprise of the new information and communication technologies of the French Community)
1.147. Société belge d'Investissement pour les pays en développement – Belgische Investeringsmaatschappij voor Ontwinkkelingslanden;
1.148. Société d'Assainissement et de Rénovation des Sites industriels dans l'Ouest du Brabant wallon;
1.149. Société de Garantie régionale;
1.150. Sociaal economische Raad voor Vlaanderen;
1.151. Société du Logement de la Région bruxelloise et sociétés agréées –Brusselse Gewestelijke Huisvestingsmaatschappij en erkende maatschappijen;
1.152. Société publique d'Aide à la Qualité de l'Environnement;
1.153. Société publique d'Administration des Bâtiments scolaires bruxellois;
1.154. Société publique d'Administration des Bâtiments scolaires du Brabant wallon;
1.155. Société publique d'Administration des Bâtiments scolaires du Hainaut;
1.156. Société publique d'Administration des Bâtiments scolaires de Namur;
1.157. Société publique d'Administration des Bâtiments scolaires de Liège;
1.158. Société publique d'Administration des Bâtiments scolaires du Luxembourg;
1.159. Société publique de Gestion de l'Eau;
1.160. Société wallonne du Logement et sociétés agréées;
1.161. Sofibail;
1.162. Sofibru;
1.163. Sofico;
1.173. Vlaamse Huisvestingsmaatschappij en erkende maatschappijen;
1.176. Vlaamse Landmaatschappij;
1.177. Vlaamse Milieuholding;

BULGARIA

2.10 State undertakings within the meaning of Article 62(3) of the Търговския закон (обн., ДВ, бр.48/18.6.1991):
2.10.1. Национална компания "Железопътна инфраструктура";

2.10.2. ДП "Пристанищна инфраструктура";

2.10.3. ДП "Ръководство на въздушното движение";

2.10.4. ДП "Строителство и възстановяване";

2.10.5. ДП "Транспортно строителство и възстановяване";

2.10.6. ДП "Съобщително строителство и възстановяване";

2.10.7. ДП "Радиоактивни отпадъци";

2.10.8. ДП "Предприятие за управление на дейностите по опазване на околната среда";

2.10.9. ДП "Български спортен тотализатор";

2.10.10. ДП "Държавна парично-предметна лотария";

2.10.11. ДП "Кабиюк", Шумен;

2.10.12. ДП "Фонд затворно дело";

2.10.13. Държавни дивечовъдни станции (State game breeding stations).

CZECH REPUBLIC

3.2 Česká národní banka; (Czech National Bank;)

3.6. Všeobecná zdravotní pojišťovna České republiky; (General Health Insurance Company of the Czech Republic;)

3.7. Zdravotní pojišťovna ministerstva vnitra ČR; (The Health Insurance Company of the Ministry of the Interior;)

DENMARK

Bodies:

4.3. Danmarks Nationalbank; (Denmark's national bank;)

4.4. Sund og Bælt Holding A/S;

4.5. A/S Storebælt;

4.6. A/S Øresund;

4.8. M etroselskabet I/S;

4.9. Arealudviklingsselskabet I/S; (City Development Corporation I / S;)

GREECE
Categories:

8.1. Public enterprises and public entities;

8.2. Legal persons governed by private law which are State-owned or which regularly receive at least 50 per cent of their annual budget in the form of State subsidies, pursuant to the applicable rules, or in which the State has a capital holding of at least 51 per cent;

8.3. Legal persons governed by private law which are owned by legal persons governed by public law, by local authorities of any level, including the Greek Central Association of Local Authorities (Κ.Ε.Δ.Κ.Ε.), by local associations of "communes", (local administrative areas) or by public enterprises or entities, or by legal persons as referred to in 2) or which regularly receive at least 50 per cent of their annual budget in the form of subsidies from such legal persons, pursuant to the applicable rules or to their own articles of association, or legal persons as referred to above which have a capital holding of at least 51 per cent in such legal persons governed by public law.

FRANCE
Bodies:

10.1. Compagnies et établissements consulaires, Chambres de Commerce et d'Industrie - CCI, chambres des métiers et chambres d'agriculture. (Consular Companies and Institutions, Chambers of Commerce and Industry - CCI, chambers of trade and chambers of agriculture.)

10.2. National public bodies:

10.2.6. Banque de France (Bank of France)

CROATIA
11.47. Jadrolinija (shipping company)

11.75. Plovput d.o.o. (State-owned company in charge of safety of navigation)

ITALY
Bodies:

12.1. Società Stretto di Messina S.p.A.;

12.2. Mostra d'oltremare S.p.A.;

12.4. Società nazionale per l'assistenza al volo S.p.A. – ENAV;

12.5. ANAS S.p.A.

CYPRUS
13.21. Κεντρική Τράπεζα της Κύπρου; (Central Bank of Cyprus)

13.22. Χρηματιστήριο Αξιών Κύπρου; (Cyprus Stock Exchange)

13.23. Οργανισμός Χρηματοδοτήσεως Στέγης; (Housing Finance Corporation)

13.43. Κυπριακός Οργανισμός Αναπτύξεως Γης; (Cyprus Land Development Corporation)

HUNGARY

Bodies:

17.4. A Magyar Nemzeti Bank; (The National Bank of Hungary;)

17.6. A Magyar Fejlesztési Bank Részvénytársaság; (The Hungarian Development Bank;)

17.7. A Magyar Távirati Iroda Részvénytársaság; (The Hungarian News Agency Corporation)

17.9. Azok a közműsor-szolgáltatók, amelyek működését többségi részben állami, illetve önkormányzati költségvetésből finanszírozzák (public broadcasters financed, for the most part, from public budget); (Those public broadcasting service, the performance of which are financed by state or municipal budgets for the most part (public finance Broadcasters, now for the part, from public budget);)

MALTA

18.4.7. 'Employment and Training Corporation' which is one part of Ministry of Education, Youth and Employment.

NETHERLAND

19.2 Ministerie van Economische Zaken (Ministry of Economic Affairs)

19.2.8. LIOF (Limburg Investment Development Company LIOF);

ROMANIA

23.12. Romania Radio-Broadcasting Company

23.13. Romania Television Company

23.14. National Radio Communication Company

23.88. National Company for Investments

23.89. Romanian National Company of Motorways and National Roads

23.107. National Company 'Romanian Lottery'

23.108. National Company 'ROMTECHNICA'

23.109. National Company 'ROMARM'

23.59 Autonomous Public Service Undertaking - Romanian Auto Register (Regia Autonomă Registrul Auto Român)

23.101 Autonomous Public Service Undertaking "State Mint of Romania" (Regia Autonomă "Monetăria Statului")

23.102 Autonomous Public Service Undertaking "Printing House of the National Bank" (Regia Autonomă "Imprimeria Băncii Naţionale")

23.103 Autonomous P ublic Service Undertaking "Official G azette" (Regia Autonomă "Monitorul Oficial")

23.112 Autonomous P ublic Service Undertaking "Administration of S tate P atrimony a nd Protocol" (Regia Autonomă "Administraţia Patrimoniului Protocolului de Stat")

SLOVENIA
24.14 Motorway Company in the Republic of Slovenia

FINLAND
26.1 Public or pu blicly c ontrolled bodi es and und ertakings e xcept t hose of a n i ndustrial or commercial nature

UNITED KINGDOM
Bodes:

28.3 National Research Development Corporation

Categories:

29.19 New Town Development Corporations; Urban Development Corporations

Part B

Under the Annex 3 of GPA: indicative lists of contracting authorities and public undertakings fulfilling the criteria set out above follow

A. Production, transport or distribution of drinking water

BELGIUM
1.2. S ociété Wallonne des Eaux; (Walloon Waters Company)

1.3. Vlaams Maatschappij voor Watervoorziening. (Flemish Water Supply Company)

BULGARIA
2.1. "Тузлушка гора" – ЕООД, Антоново; ("Tuzlushki forest" - Ltd. Antonovo)

2.2. "В И К – Батак" – ЕООД, Батак; ("PLUMBING - Batak" - Ltd. Batak)

2.3. "В и К – Белово" – ЕООД, Белово;

2.4. "Водоснабдяване и канализация Берковица" – ЕООД, Берковица;

2.5. "Водоснабдяване и канализация" – ЕООД, Благоевград;

2.6. "В и К – Бебреш" – ЕООД, Ботевград;

2.7. "Инфрастрой" – ЕООД, Брацигово;

2.8. "Водоснабдяване" – ЕООД, Брезник;

2.9. "Водоснабдяване и канализация" – ЕАД, Бургас;

2.10. "Лукойл Нефтохим Бургас" АД, Бургас;

2.11. "Бързийска вода" – ЕООД, Бързия;

2.12. "Водоснабдяване и канализация" – ООД, Варна;

2.13. "ВиК" ООД, к.к. Златни пясъци;

2.14. "Водоснабдяване и канализация Йовковци" – ООД, Велико Търново;

2.15. "Водоснабдяване, канализация и териториален водоинженеринг" – ЕООД, Велинград;

2.16. "ВИК" – ЕООД, Видин;

2.17. "Водоснабдяване и канализация" – ООД, Враца;

2.18. "В И К" – ООД, Габрово;

2.19. "В И К" – ООД, Димитровград;

2.20. "Водоснабдяване и канализация" – ЕООД, Добрич;

2.21. "Водоснабдяване и канализация – Дупница" – ЕООД, Дупница;

2.22. ЧПСОВ, в.с. Елени;

2.23. "Водоснабдяване и канализация" – ООД, Исперих;

2.24. "Аспарухов вал" ЕООД, Кнежа;

2.25. "В И К – Кресна" – ЕООД, Кресна;

2.26. "Меден кладенец" – ЕООД, Кубрат;

2.27. "ВИК" – ООД, Кърджали;

2.28. "Водоснабдяване и канализация" – ООД, Кюстендил;

2.29. "Водоснабдяване и канализация" – ООД, Ловеч;

2.30. "В и К – Стримон" – ЕООД, Микрево;

2.31. "Водоснабдяване и канализация" – ООД, Монтана;

2.32. "Водоснабдяване и канализация – П" – ЕООД, Панагюрище;

2.33. "Водоснабдяване и канализация" – ООД, Перник;

2.34. "В И К" – ЕООД, Петрич;

2.35. "Водоснабдяване, канализация и строителство" – ЕООД, Пещера;

2.36. "Водоснабдяване и канализация" – ЕООД, Плевен;

2.37. "Водоснабдяване и канализация" – ЕООД, Пловдив;

2.38. "Водоснабдяване–Дунав" – ЕООД, Разград;

2.39. "ВКТВ" – ЕООД, Ракитово;

2.40. ЕТ "Ердуван Чакър", Раковски;

2.41. "Водоснабдяване и канализация" – ООД, Русе;

2.42. "Екопроект-С" ООД, Русе;

2.43. "УВЕКС" – ЕООД, Сандански;

2.44. "ВиК-Паничище" ЕООД, Сапарева баня;

2.45. "Водоснабдяване и канализация" – ЕАД, Свищов;

2.46. "Бяла" – ЕООД, Севлиево;

2.47. "Водоснабдяване и канализация" – ООД, Силистра;

2.48. "В и К" – ООД, Сливен;

2.49. "Водоснабдяване и канализация" – ЕООД, Смолян;

2.50. "Софийска вода" – АД, София;

2.51. "Водоснабдяване и канализация" – ЕООД, София;

2.52. "Стамболово" – ЕООД, Стамболово;

2.53. "Водоснабдяване и канализация" – ЕООД, Стара Загора;

2.54. "Водоснабдяване и канализация-С" – ЕООД, Стрелча;

2.55. "Водоснабдяване и канализация – Тетевен" – ЕООД, Тетевен;

2.56. "В и К – Стенето" – ЕООД, Троян;

2.57. "Водоснабдяване и канализация" – ООД, Търговище;

2.58. "Водоснабдяване и канализация" – ЕООД, Хасково;

2.59. "Водоснабдяване и канализация" – ООД, Шумен;

2.60. "Водоснабдяване и канализация" – ЕООД, Ямбол.

CZECH REPUBLIC

3.1. All contracting entities in the sectors which supply services in the water management industry defined in section 4 paragraph 1 letters d), e) of Act. No 137/2006 Sb. on Public Contracts. Examples of contracting entities:

3.1.1. Veolia Voda Česká Republika, a.s.;

3.1.2. Pražské vodovody a kanalizace, a.s.;

3.1.3. Severočeská vodárenská společnost a.s.;

3.1.4. Severomoravské vodovody a kanalizace Ostrava a.s.;

3.1.5. Ostravské vodárny a kanalizace a.s.Severočeská vodárenská společnost a.s.

GERMANY

5.1Entities producing or distributing w ater pur suant t o t he E igenbetriebsverordnungen or 5.4Eigenbetriebsgesetze of the Länder (public utility companies);

Publicly-owned companies producing or distributing water pursuant to the Kommunalgesetze, in particular the Gemeindeverordnungen of the Länder;

5.5 Undertakings s et up pursuant t o t he Aktiengesetz of 6 S eptember 196 5, a s l ast amended on 5 January 2007, or the GmbH-Gesetz of 20 April 1892, as last amended on 10 November 2006, or having the legal status of a Kommanditgesellschaft (limited partnership), producing or distributing water on the basis of a special contract with regional or local authorities.

ESTONIA

6.1. Entities operating pursuant to Article 10(3) of the Public Procurement Act (RT I 21.02.2007, 15, 76) and Article 14 of the Competition Act (RT I 2001, 56 332):

6.1.1. AS Haapsalu Veevärk;

6.1.2. AS Kuressaare Veevärk;

6.1.3. AS Narva Vesi;

6.1.4. AS Paide Vesi;

6.1.5. AS Pärnu Vesi;

6.1.6. AS Tartu Veevärk;

6.1.7. AS Valga Vesi;

6.1.8. AS Võru Vesi.

GREECE

8.1 "Εταιρεία Υδρεύσεως και Αποχετεύσεως Πρωτευούσης Α.Ε." – "Ε.Υ.Δ.Α.Π." or "Ε.Υ.Δ.Α.Π. Α.Ε.". The legal status of the company is governed by the provisions of Consolidated Law No 2190/1920, Law No 2414/1996 and additionally by the provisions of Law No 1068/80 and Law No 2744/1999;

8.2 "Εταιρεία Ύδρευσης και Αποχέτευσης Θεσσαλονίκης Α.Ε." – "Ε.Υ.Α.Θ. Α.Ε." governed by the provisions of Law No 2937/2001 (Greek Official Gazette 169 Α΄) and of Law No 2651/1998 (Greek Official Gazette 248 Α΄);

8.3 "Δημοτική Επιχείρηση Ύδρευσης και Αποχέτευσης Μείζονος Περιοχής Βόλου" – "ΔΕΥΑΜΒ", which operates pursuant to Law No 890/1979;

8.4 "Δημοτικές Επιχειρήσεις Ύδρευσης — Αποχέτευσης", (Water Supply and Sewerage Municipal C ompanies) w hich pr oduce a nd di stribute water pur suant t o L aw N o 1069/ 80 of 23 August 1980;

SPAIN

9.2. Aigües de Barcelona S.A., y sociedades filiales;

9.3. Canal de Isabel II;

9.6. Other public entities which are part of or depend on the "Comunidades Autónomas" and on the "Corporaciones locales" and which are active in the field of drinking water distribution;

FRANCE

10.1 Regional or local authorities and public local bodies producing or distributing drinking water:

10.1.1. Régies des eaux, (examples: Régie des eaux de Grenoble, régie des eaux de Megève, régie municipale des eaux et de l'assainissement de Mont-de-Marsan, régie des eaux de Venelles);

10.1.2. Water transport, delivery and production bodies (examples: Syndicat des eaux d'Ile de France, syndicat départemental d'alimentation en eau potable de la Vendée, syndicat des eaux et

de l 'assainissement du Bas-Rhin, s yndicat i ntercommunal de s e aux de l a r égion gr enobloise, syndicat de l'eau du Var-est, syndicat des eaux et de l'assainissement du Bas-Rhin)

CROATIA

11.1 Contracting entities referred to in Article 6 of the Zakon o j avnoj nabavi (Narodne novine broj 90/11) (Public Procurement Act, Official Gazette No. 90/11) which are public undertakings or contracting authorities and which, in accordance with special regulations, engage in the activity of construction (providing) of fixed networks or managing fixed networks for public service delivery in relation to the production, transmission and distribution of drinking water and supplying fixed networks with drinking water; such as the entities established by the local self-government units acting as the public supplier of water supply services or drainage services in accordance with the Waters Act (Official Gazette 153/09 and 130/11).

ITALY

12.1. Bodies responsible for managing the various stages of the water distribution service under the consolidated text of the laws on the direct assumption of control of public services by local authorities and provinces, approved by Regio Decreto N°2578 of 15 October 1925, D.P.R. N°902 of 4 October 1986 and Legislative Decree N°267 of 18 August 2000 setting out the consolidated text of the laws on the structure of local authorities, with particular reference to Articles 112 and 116;

12.2. Acquedotto Pugliese S.p.A. (D.lgs. 11.5.1999 n. 141);

12.3. Ente acquedotti siciliani set up by Legge Regionale N°2/2 of 4 September 1979 and Lege Regionale N°81 of 9 August 1980, in liquidazione con Legge Regionale N°9 of 31 May 2004 (art. 1);

12.4. Ente sardo acquedotti e fognature set up by Law N°9 of 5 July 1963. Poi ESAF S.p.A. nel 2003 – confluita in ABBANOA S.p.A: ente soppresso il 29.7.2005 e posto in liquidazione con L.R. 21.4.2005 n°7 (art. 5, comma 1)- Legge finanziaria 2005.

MALTA

18.1 Korporazzjoni għas-Servizzi ta' l-Ilma (Water Services Corporation);
18.2 Korporazzjoni għas-Servizzi ta' Desalinazzjoni (Water Desalination Services).

POLAND

21.1 Water and sewerage companies within the meaning of ustawa z dnia 7 c zerwca 2001 r., o zbiorowym zaopatrzeniu w wodę i zbiorowym odprowadzaniu ścieków, carrying on economic activity in the provision of water to the general public or the provision of sewage disposal services to the general public, including among others:

21.1.1. AQUANET S.A., Poznań;

21.1.2. Górnośląskie Przedsiębiorstwo Wodociągów S.A. w Katowicach;

21.1.3. Miejskie Przedsiębiorstwo Wodociągów i Kanalizacji S.A. w Krakowie;

21.1.4. Miejskie Przedsiębiorstwo Wodociągów i Kanalizacji Sp. z o. o. Wrocław;

21.1.5. Miejskie Przedsiębiorstwo Wodociągów i Kanalizacji w Lublinie Sp. z o.o.;

21.1.6. Miejskie Przedsiębiorstwo Wodociągów i Kanalizacji w m. st. Warszawie S.A.;

21.1.7. Rejonowe Przedsiębiorstwo Wodociągów i Kanalizacji w Tychach S.A.;

21.1.8. Rejonowe Przedsiębiorstwo Wodociągów i Kanalizacji Sp. z o.o. w Zawierciu;

21.1.9. Rejonowe Przedsiębiorstwo Wodociągów i Kanalizacji w Katowicach S.A.;

21.1.10. Wodociągi Ustka Sp. z o.o.;

21.1.11. Zakład Wodociągów i Kanalizacji Sp. z o.o. Łódź;

21.1.12. Zakład Wodociągów i Kanalizacji Sp. z o.o., Szczecin.

PORTUGAL

22.1 Intermunicipal Systems – Undertakings involving the State or other public entities, with a majority shareholding, and private undertakings, pursuant to Decreto-Lei No 379/93 do 5 de Novembro 1993, alterado pelo Decreto-Lei Nº 176/99 do 25 de Outubro 1999, Decreto-Lei Nº 439-A/99 do 29 de Outubro 1999 and Decreto-Lei Nº 103/2003 do 23 de Maio 2003. Direct administration by the State is permissible;

22.2 Municipal Systems – Local authorities, associations of local authorities, local authority services, undertakings in which all or a majority of the capital is publicly owned or private undertakings pursuant to Lei 53-F/2006, do 29 de Dezembro 2006, and to Decreto-Lei No 379/93 do 5 de Novembro 1993 amended by Decreto-Lei Nº 176/99 of 25 October 1999, Decreto-Lei Nº 439-A/99 do 29 de Outubro 1999 e Decreto-Lei Nº 103/2003 do 23 de Maio 2003.

ROMANIA

23.1 Departamente ale Autorităţilor locale şi Companii care produc, transportă şi distribuie apă (departments of the local authorities and companies that produces, transport and distribute water). Examples:

23.1.1. S.C. APA –C.T.T.A. S.A. Alba Iulia, Alba;

23.1.2. S.C. APA –C.T.T.A. S.A. Filiala Alba Iulia SA., Alba Iulia, Alba;

23.1.3. S.C. APA –C.T.T.A. S.A Filiala Blaj, Blaj, Alba;

23.1.4. Compania de Apă Arad;

23.1.5. S.C. Aquaterm AG 98 S.A. Curtea de Argeş, Argeş;

23.1.6. S.C. APA Canal 2000 S.A. Piteşti, Argeş;

23.1.7. S.C. APA Canal S.A. Oneşti, Bacău;

23.1.8. Compania de Apă-Canal, Oradea, Bihor;

23.1.9. R.A.J.A. Aquabis Bistriţa, Bistriţa-Năsăud;

23.1.10. S.C. APA Grup SA Botoşani, Botoşani;

23.1.11. Compania de Apă, Braşov, Braşov;

23.1.12. R.A. APA, Brăila, Brăila;

23.1.13. S.C. Ecoaquasa Sucursala Călăraşi, Călăraşi, Călăraşi;

23.1.14. S.C. Compania de Apă Someş S.A., Cluj, Cluj-Napoca;

23.1.15. S.C. Aquasom S.A. Dej, Cluj;

23.1.16. Regia Autonomă Judeţeană de Apă, Constanţa, Constanţa;

23.1.17. R.A.G.C. Târgovişte, Dâmboviţa;

23.1.18. R.A. APA Craiova, Craiova, Dolj;

23.1.19. S.C. Apa-Canal S.A., Baileşti, Dolj;

23.1.20. S.C. Apa-Prod S.A. Deva, Hunedoara;

23.1.21. R.A.J.A.C. Iaşi, Iaşi;

23.1.22. Direcţia Apă-Canal, Paşcani, Iaşi;

23.1.23. Societatea Naţională a Apelor Minerale - SNAM.

SLOVENIA

24.1. Entities producing, transporting or distributing drinking water, in accordance with the concession act granted pursuant to the Zakon o varstvu okolja (Uradni list RS, 32/93, 1/96) and the decisions issued by the municipalities:

24.1.1. Javno Komunalno Podjetje Komunala Trbovlje D.O.O. - Mat. Št: 5015731 - 1420 – Kraj: Trbovlje;

24.1.2. Komunala D.O.O. Javno Podjetje Murska Sobota - 5067936 - Poštna Št.: 9000 - Kraj: Murska Sobota;

24.1.3. Javno Komunalno Podjetje Komunala Kočevje D.O.O. - Mat. Št 5067804 - Poštna Št.: 1330 - Kraj: Kočevje;

24.1.4. Loška Komunala, Oskrba Z Vodo In Plinom, D.D. Škofja Loka - Mat. Št 5075556 - Poštna Št.: 4220 - Kraj: Škofja Loka;

24.1.5. Komunalno Podjetje Velenje D.O.O. Izvajanje Komunalnih Dejavnosti D.O.O. – 5222109 - Poštna Št.: 3320 - Kraj: Velenje;

24.1.6 Javno Komunalno Podjetje Slovenj Gradec D.O.O. - Mat. Št 5072107 - Poštna Št.: 2380 - Kraj: Slovenj Gradec;

24.1.7. Komunala Javno Komunalno Podjetje D.O.O. Gornji Grad - Mat. Št 1122959 - Poštna Št.: 3342 - Kraj: Gornji Grad;

24.1.8. Režijski Obrat Občine Jezersko - Mat. Št 1332115 - Poštna Št.: 4206 - Kraj: Jezersko;

24.1.9. Režijski Obrat Občine Komenda - Mat. Št 1332155 - Poštna Št.: 1218 - Kraj: Komenda;

24.1.10. Režijski Obrat Občine Lovrenc Na Pohorju - Mat. Št 1357883 - Poštna Št.: 2344 - Kraj: Lovrenc Na Pohorju;

24.1.11. Komuna, Javno Komunalno Podjetje D.O.O. Beltinci - Mat. Št 1563068 - Poštna Št.: 9231 - Kraj: Beltinci;

24.1.12. Pindža Javno Komunalno Podjetje D.O.O. Petrovci - Mat. Št 1637177 - Poštna Št.: 9203 - Kraj: Petrovci;

24.1.13. Javno Podjetje Edš - Ekološka Družba, D.O.O. Šentjernej - Mat. Št 1683683 - Poštna Št.: 8310 - Kraj: Šentjernej;

24.1.14. Javno Podjetje Kovod Postojna, Vodovod, Kanalizacija, D.O.O., Postojna - Mat. Št 5015367 - Poštna Št.: 6230 - Kraj: Postojna;

24.1.15. Komunalno Podjetje Vrhnika Proizvodnja In Distribucija Vode, D.D. - Mat. Št 5015707 - Poštna Št.: 1360 - Kraj: Vrhnika;

24.1.16. Komunalno Podjetje Ilirska Bistrica - Mat. Št 5016100 - Poštna Št.: 6250 - Kraj: Ilirska Bistrica;

24.1.17. Javno Podjetje Vodovod – Kanalizacija, D.O.O. Ljubljana - Mat. Št 5046688 - Poštna Št.: 1000 - Kraj: Ljubljana;

24.1.18. Javno Podjetje Komunala Črnomelj D.O.O. - Mat. Št 5062403 - Poštna Št.: 8340 - Kraj: Črnomelj;

24.1.19. Komunala Radovljica, Javno Podjetje Za Komunalno Dejavnost, D.O.O. - Mat. Št 5063485 - Poštna Št.: 4240 - Kraj: Radovljica;

24.1.20. Komunala Kranj, Javno Podjetje, D.O.O. - Mat. Št 5067731 - Poštna Št.: 4000 - Kraj: Kranj;

24.1.21. Javno Podjetje Komunala Cerknica D.O.O. - Mat. Št 5067758 - Poštna Št.: 1380 - Kraj: Cerknica;

24.1.22. Javno Komunalno Podjetje Radlje D.O.O. Ob Dravi - Mat. Št 5068002 - Poštna Št.: 2360 - Kraj: Radlje Ob Dravi;

24.1.23. Jkp, Javno Komunalno Podjetje D.O.O. Slovenske Konjice - Mat. Št 5068126 - Poštna Št.: 3210 - Kraj: Slovenske Konjice;

24.1.24. Javno Komunalno Podjetje Žalec D.O.O. - Mat. Št 5068134 - Poštna Št.: 3310 - Kraj: Žalec;

24.1.25. Komunalno Podjetje Ormož D.O.O. - Mat. Št 50 73049 - Poštna Št.: 2270 - Kraj: Ormož;

24.1.26 Kop Javno Komunalno Podjetje Zagorje Ob Savi, D.O.O. - Mat. Št 5073103 - Poštna Št.: 1410 - Kraj: Zagorje Ob Savi;

24.1.27. Komunala Novo Mesto D.O.O., Javno Podjetje - Mat. Št 5073120 - Poštna Št.: 8000 - Kraj: Novo Mesto;

24.1.28. Javno Komunalno Podjetje Log D.O.O. - Mat. Št 5102103 - Poštna Št.: 2390 - Kraj: Ravne Na Koroškem;

24.1.29. Okp Javno Podjetje Za Komunalne Storitve Rogaška Slatina D.O.O. - Mat. Št 5111501 - Poštna Št.: 3250 - Kraj: Rogaška Slatina;

24.1.30. Javno Podjetje Komunalno Stanovanjsko Podjetje Litija, D.O.O. - Mat. Št 5112141 - Poštna Št.: 1270 - Kraj: Litija;

24.1.31. Komunalno Podjetje Kamnik D.D. - Mat. Št 51445 58 - Poštna Št.: 1241 - Kraj: Kamnik;

24.1.32. Javno Komunalno Podjetje Grosuplje D.O.O. - Mat. Št 5144574 - Poštna Št.: 1290 - Kraj: Grosuplje;

24.1.33. Ksp Hrastnik Komunalno - Stanovanjsko Podjetje D.D. - Mat. Št 5144728 - Poštna Št.: 1430 - Kraj: Hrastnik;

24.1.34. Komunalno Podjetje Tržič D.O.O. - Mat. Št 5145023 - Poštna Št.: 4290 - Kraj: Tržič;

24.1.35. Komunala Metlika Javno Podjetje D.O.O. - Mat. Št 5157064 - Poštna Št.: 8330 - Kraj: Metlika;

24.1.36. Komunalno Stanovanjska Družba D.O.O. Ajdovščina - Mat. Št 5210461 - Poštna Št.: 5270 - Kraj: Ajdovščina;

24.1.37. Javno Komunalno Podjetje Dravograd - Mat. Št 5213258 - Poštna Št.: 2370 - Kraj: Dravograd;

24.1.38. Javno Podjetje Komunala D.O.O. Mozirje - Mat. Št 5221897 - Poštna Št.: 3330 - Kraj: Mozirje;

24.1.39. Javno Komunalno Podjetje Prodnik D.O.O. - Mat. Št 5227739 - Poštna Št.: 1230 - Kraj: Domžale;

24.1.40. K omunala Trebnje D.O.O. - Mat. Št 5243858 - Poštna Št.: 8210 - Kraj: Trebnje;

24.1.41. K omunala, Komunalno Podjetje D.O.O.,Lendava - Mat. Št 5254965 - Poštna Št.: 9220 - Kraj: Lendava – Lendva;

24.1.42. Komunalno Podjetje Ptuj D.D. - Mat. Št 5321387 - Poštna Št.: 2250 - Kraj: Ptuj;

24.1.43. Javno Komunalno Podjetje Šentjur D.O.O. - Mat. Št 5466016 - Poštna Št.: 3230 - Kraj: Šentjur;

24.1.44. Javno Podjetje Komunala Radeče D.O.O. - Mat. Št 5475988 - Poštna Št.: 1433 - Kraj: Radeče;

24.1.45. R adenska-Ekoss, Podjetje Z a S tanovanjsko, K omunalno I n E kološko D ejavnost, Radenci D.O.O. - Mat. Št 5529522 - Poštna Št.: 9252 - Kraj: Radenci;

24.1.46. V it-Pro D.O.O. Vitanje; Komunala Vitanje, Javno Podjetje D.O.O. - Mat. Št 5777372 - Poštna Št.: 3205 - Kraj: Vitanje;

24.1.47. Komunalno Podjetje Logatec D .O.O. - Mat. Št 5827558 - Poštna Št.: 1370 - Kraj: Logatec;

24.1.48. Režijski Obrat Občine Osilnica - Mat. Št 5874220 - Poštna Št.: 1337 - Kraj: Osilnica;

24.1.49. Režijski Obrat Občine Turnišče - Mat. Št 5874700 - Poštna Št.: 9224 - Kraj: Turnišče;

24.1.50. Režijski O brat Občine Črenšovci - Mat. Št 58747 26 - Poštna Št.: 9232 - Kraj: Črenšovci;

24.1.51. Režijski Obrat Občine Kobilje - Mat. Št 5874734 - Poštna Št.: 9223 - Kraj: Dobrovnik;

24.1.52. Režijski Obrat Občina Kanal Ob Soči - Mat. Št 5881820 - Poštna Št.: 5213 - Kraj: Kanal;

24.1.53. Režijski Obrat Občina Tišina - Mat. Št 5883067 - Poštna Št.: 9251 - Kraj: Tišina;

24.1.54. Režijski Obrat Občina Železniki - Mat. Št 5883148 - Poštna Št.: 4228 - Kraj: Železniki;

24.1.55. Režijski Obrat Občine Zreče - Mat. Št 5883342 - Poštna Št.: 3214 - Kraj: Zreče;

24.1.56. Režijski Obrat Občina Bohinj - Mat. Št 5883415 - Poštna Št.: 4264 - Kraj: Bohinjska

Bistrica;

24.1.57. Režijski Obrat Občina Črna Na Koroškem - Mat. Št 5883679 - Poštna Št.: 2393 - Kraj: Črna Na Koroškem;

24.1.58. Vodovod - Kanalizacija Javno Podjetje D.O.O. Celje - Mat. Št 5914540 - Poštna Št.: 3000 - Kraj: Celje;

24.1.59. Jeko - In, Javno Komunalno Podjetje, D.O.O., Jesenice - Mat. Št 5926823 - Poštna Št.: 4270 - Kraj: Jesenice;

24.1.60. Javno Komunalno Podjetje Brezovica D.O.O. - Mat. Št 5945151 - Poštna Št.: 1352 - Kraj: Preserje;

24.1.61. Kostak, Komunalno In Stavbno Podjetje D.D. Krško - Mat. Št 5156572 - Poštna Št.: 8270 - Kraj: Krško;

24.1.62. Vodokomunalni Sistemi Izgradnja In Vzdrževanje Vodokomunalnih Sistemov D.O.O. Velike Lašče - Mat. Št 1162431 - Kraj: Velike Lašče;

24.1.63. Vodovodna Zadruga Golnik, Z.O.O. - Mat. Št 1314297 - Poštna Št.: 4204 - Kraj: Golnik;

24.1.64. Režijski Obrat Občine Dobrovnik - Mat. Št 1332198 - Poštna Št.: 9223 – Kraj: Dobrovnik – Dobronak;

24.1.65. Režijski Obrat Občine Dobje - Mat. Št 1357409 - Poštna Št.: 3224 - Kraj: Dobje Pri Planini;

24.1.66. Pungrad, Javno Komunalno Podjetje D.O.O. Bodonci - Mat. Št 1491083 - Poštna Št.: 9265 - Kraj: Bodonci;

24.1.67. Vodovodi In Kanalizacija Nova Gorica D.D. - Mat. Št 1550144 - Poštna Št.: 5000 - Kraj: Nova Gorica;

24.1.68. Vodovod Murska Sobota Javno Podjetje D.O.O. - Mat. Št 1672860 – Poštna Št.: 9000 - Kraj: Murska Sobota;

24.1.69. Komunalno Stanovanjsko Podjetje Brežice D.D. - Mat. Št 5067545 – Poštna Št.: 8250 - Kraj: Brežice;

24.1.70. Javno Podjetje - Azienda Publica Rižanski Vodovod Koper D.O.O. - S.R.L. - Mat. Št 5067782 - Poštna Št.: 6000 - Kraj: Koper – Capodistria;

24.1.71. Mariborski Vodovod Javno Podjetje D.D. - Mat. Št 5067880 - Poštna Št.: 2000 - Kraj: Maribor;

24.1.72. Javno Podjetje Komunala D.O.O. Sevnica - Mat. Št 5068088 - Poštna Št.: 8290 - Kraj: Sevnica;

24.1.73. Kraški Vodovod Sežana Javno Podjetje D.O.O. - Mat. Št 5072999 - Poštna Št.: 6210 - Kraj: Sežana;

24.1.74. Hydrovod D.O.O. Kočevje - Mat. Št 5073251 - Poštna Št.: 1330 - Kraj: Kočevje;

24.1.75. Komunalno-Stanovanjsko Podjetje Ljutomer D.O.O. - Mat. Št 5387647 - Poštna Št.: 9240 - Kraj: Ljutomer;

24.1.76. Vodovodna Zadruga Preddvor, Z.B.O. - Mat. Št 5817978 - Poštna Št.: 4205 - Kraj: Preddvor;

24.1.77. Režijski Obrat Občina Laško - Mat. Št 5874505 - Kraj: Laško;

24.1.78. Režijski Obrat Občine Cerkno - Mat. Št 5880076 - Poštna Št.: 5282 - Kraj: Cerkno;

24.1.79. Režijski Obrat Občine Rače Fram - Mat. Št 5883253 - Poštna Št.: 2327 - Kraj: Rače;

24.1.80. Vodovodna Zadruga Lom, Z.O.O. - Mat. Št 5884624 - Poštna Št.: 4290 - Kraj: Tržič;

24.1.81. Komunala, Javno Podjetje, Kranjska Gora, D.O.O. - Mat. Št 5918375 - Poštna Št.: 4280 - Kraj: Kranjska Gora;

24.1.82. Vodovodna Zadruga Senično, Z.O.O. - Mat. Št 5939208 - Poštna Št.: 4294 - Kraj: Križe;

24.1.83. Ekoviz D.O.O. - Mat. Št 1926764 - Poštna Št.: 9000 - Kraj: Murska Sobota;

24.1.84. Komunala Tolmin, Javno Podjetje D.O.O. - Mat. Št 5077532 - Poštna Št.: 5220 - Kraj: Tolmin;

24.1.85. Občina Gornja Radgona - Mat. Št 5880289 - Poštna Št.: 9250 - Kraj: Gornja Radgona;

24.1.86. Wte Wassertechnik Gmbh, Podružnica Kranjska Gora - Mat. Št 1274783 - Poštna Št.: 4280 - Kraj: Kranjska Gora;

24.1.87. Wte Bled D.O.O. - Mat. Št 1785966 - Poštna Št.: 4260 - Kraj: Bled;

24.1.88. Wte Essen - Mat. Št 1806599 - Poštna Št.: 3270 - Kraj: Laško;

24.1.89. Komunalno Stanovanjsko Podjetje D.D. Sežana - Mat. Št 5073260 - Poštna Št.: 6210 - Kraj: Sežana;

24.1.90. Javno Podjetje Centralna Čistilna Naprava Domžale - Kamnik D.O.O. - Mat. Št 5227747 - Poštna Št.: 1230 - Kraj: Domžale;

24.1.91. Aquasystems Gospodarjenje Z Vodami D.O.O. - Mat. Št 1215027 - Poštna Št.: 2000 - Kraj: Maribor;

24.1.92. Javno Komunalno Podjetje D.O.O. Mežica - Mat. Št 1534424 - Poštna Št.: 2392 - Kraj: Mežica;

24.1.93. Čistilna Naprava Lendava D.O.O. - Mat. Št 1639285 - Poštna Št.: 9220 - Kraj: Lendava – Lendva;

24.1.94. Nigrad Javno Komunalno Podjetje D.D. - Mat. Št 5066310 - Poštna Št.: 2000 - Kraj: Maribor;

24.1.95. Javno Podjetje-Azienda Pubblica Komunala Koper, D.O.O. - S.R.L. - Mat. Št 5072255 - Poštna Št.: 6000 - Kraj: Koper – Capodistria;

24.1.96. Javno Podjetje Komunala Izola, D.O.O. Azienda Pubblica Komunala Isola, S.R.L. - Mat. Št.: 5156858 - Poštna Št.: 6310 - Kraj: Izola – Isola;

24.1.97. Gop Gradbena, Organizacijska In Prodajna Dejavnost,D.O.O. - Mat. Št.: 5338271 - Poštna Št.: 8233 – Kraj: Mirna;

24.1.98. Stadij, D.O.O., Hruševje - Mat. Št 5708257 - Poštna Št.: 6225 - Kraj: Hruševje;

24.1.99. Komunala, Javno Komunalno Podjetje Idrija, D.O.O. - Mat. Št.: 5144647 - Poštna Št.: 5280 - Kraj: Idrija;

24.1.100. Javno Podjetje Okolje Piran - Mat. Št 5105633 - Poštna Št.: 6330 - Kraj: Piran –

Pirano;

24.1.101. Režijski Obrat Občina Kranjska Gora - Mat. Št 5874327 - Poštna Št.: 4280 - Kraj: Kranjska Gora;

24.1.102. Čista Narava, Javno Komunalno Podjetje D.O.O. Moravske Toplice - Mat. Št 1197380 - Poštna Št.: 9226 - Kraj: Moravske Toplice.

SLOVAKIA

25.1. Entities operating public water systems in connection with production or transport and distribution of drinking water to the public on basis of trade licence and certificate of professional competency for operation of public water systems granted pursuant to Act. No. 442/2002 Coll. in wording of Acts No. 525/2003 Coll., No. 364/2004 Coll., No. 587/2004 Coll. and No. 230/2005 Coll.;

25.2. Entities operating water management plant pursuant to conditions referred to in Act. No. 364/2004 Coll. in wording of Acts No. 587/2004 Coll. and No. 230/2005 Coll., on basis of the permission granted pursuant to Act. No. 135/1994 Coll. in wording of Acts No. 52/1982 Coll., No. 595/1990 Coll., No. 128/1991 Coll., No. 238/1993 Coll., No. 416/2001 Coll., No. 533/2001 Coll. and simultaneously provide for transport or distribution of drinking water to the public pursuant to Act. No. 442/2002 Coll. in wording of Acts No. 525/2003 Coll., No. 364/2004 Coll., No. 587/2004 Coll. and No. 230/2005 Coll. For example:

25.2.1. Bratislavská vodárenská spoločnos', a.s.;

25.2.2. Západoslovenská vodárenská spoločnos', a.s.;

25.2.3. Považská vodárenská spoločnos', a.s.;

25.2.4. Severoslovenské vodárne a kanalizácie, a.s.;

25.2.5. Stredoslovenská vodárenská spoločnos', a.s.;

25.2.6. Podtatranská vodárenská spoločnos', a.s.;

25.2.7. Východoslovenská vodárenská spoločnos', a.s.

SWEDEN

27.1 Local authorities and municipal companies producing, transporting or distributing drinking water pursuant to lagen (2006:412) om allmänna vattentjänster.

UNITED KINGDOM

28.1 A company holding an appointment as a water undertaker or a sewerage undertaker under the Water Industry Act. 1991;

B. Production, Transport or distribution of electricity

BELGIUM

1.2. Société de Production d'Electricité / Elektriciteitsproductie Maatschappij;

1.3. Electrabel / Electrabel;

1.4. E lia.

BULGARIA

2.1 Entities l icensed f or production, t ransport, di stribution, publ ic d elivery or s upply b y e nd supplier of electricity pursuant to Article 39(1) of the Закона за енергетиката (обн., ДВ, бр.107/09.12.2003):

2.1.1. АЕЦ Козлодуй – ЕАД;

2.1.2. Болкан Енерджи АД;

2.1.3. Брикел – ЕАД;

2.1.4. Българско акционерно дружество Гранитоид АД;

2.1.5. Девен АД;

2.1.6. ЕВН България Електроразпределение АД;

2.1.7. ЕВН България Електроснабдяване АД;

2.1.8. ЕЙ И ЕС – 3С Марица Изток 1;

2.1.9. Енергийна компания Марица Изток III – АД;

2.1.10. Енерго-про България – АД;

2.1.11. ЕОН България Мрежи АД;

2.1.12. ЕОН България Продажби АД;

2.1.13. ЕРП Златни пясъци АД;

2.1.14. ЕСО ЕАД;

2.1.15. ЕСП „Златни пясъци" АД;

2.1.16. Златни пясъци-сервиз АД;

2.1.17. Калиакра Уинд Пауър АД;

2.1.18. НЕК ЕАД;

2.1.19. Петрол АД;

2.1.20. Петрол Сторидж АД;

2.1.21. Пиринска Бистрица-Енергия АД;

2.1.22. Руно-Казанлък АД;

2.1.23. Сентрал хидроелектрик дьо Булгари ЕООД;

2.1.24. Слънчев бряг АД;

2.1.25. ТЕЦ - Бобов Дол ЕАД;

2.1.26. ТЕЦ - Варна ЕАД;

2.1.27. ТЕЦ "Марица 3" – АД;

2.1.28. ТЕЦ Марица Изток 2 – ЕАД;

2.1.29. Топлофикация Габрово – ЕАД;

2.1.30. Топлофикация Казанлък – ЕАД;

2.1.31. Топлофикация Перник – ЕАД;

2.1.32. Топлофикация Плевен – ЕАД;

2.1.33. ЕВН България Топлофикация – Пловдив – ЕАД;

2.1.34. Топлофикация Русе – ЕАД;

2.1.35. Топлофикация Сливен – ЕАД;

2.1.36. Топлофикация София – ЕАД;

2.1.37. Топлофикация Шумен – ЕАД;

2.1.38. Хидроенергострой ЕООД;

2.1.39. ЧЕЗ България Разпределение АД;

2.1.40. ЧЕЗ Електро България АД.

CZECH REPUBLIC

3.1. All contracting entities in the sectors which supply services in the electricity sector defined in the section 4 paragraph 1 letter c) of Act. No. 137/2006 Coll. on Public Contracts, as amended. Examples of contracting entities:

3.1.1. ČEPS, a.s.;

3.1.2. ČEZ, a. s.;

3.1.3. Dalkia Česká republika, a.s.;

3.1.4. P REdistribuce, a.s.;

3.1.5. Plzeňská energetika a.s.;

3.1.6. Sokolovská uhelná, právní nástupce, a.s.

DENMARK

4.3 Transport of electricity carried out by Energinet Danmark or subsidiary companies fully owned by Energinet Danmark according to lov om Energinet Danmark § 2, stk. 2 og 3, see Act. No. 1384 of 20 December 2004.

GERMANY

5.1 Local authorities, public law bodies or associations of public law bodies or State undertakings, supplying energy to other undertakings, operating an energy supply network or having power of disposal to an energy supply network by virtue of ownership pursuant to Article 3(18) of the Gesetz über die Elektrizitäts- und Gasversorgung (Energiewirtschaftsgesetz) of 24 April 1998, as last amended on 9 December 2006.

ESTONIA
Entities operating pursuant to Article 10(3) of the Public Procurement Act (RT I 21.02.2007, 15, 76) and Article 14 of the Competition Act (RT I 2001, 56 332):
6.1.1. AS Eesti Energia (Estonian Energy Ltd);

6.1.2. OÜ Jaotusvõrk (Jaotusvõrk LLC);

6.1.3. AS Narva Elektrijaamad (Narva Power Plants Ltd);

6.1.4. OÜ Põhivõrk (Põhivõrk LLC

IRELAND
7.1. The Electricity Supply Board;
7.2. ESB Independent Energy - ESBIE - electricity supply;
7.3. Synergen Ltd. - electricity generation;
7.4. Viridian Energy Supply Ltd. - electricity supply;
7.5. Huntstown Power Ltd. - electricity generation;
7.6. Bord Gáis Éireann - electricity supply;

SPAIN
9.1 Red Eléctrica de España, S.A.;
9.2 Endesa, S.A.;
9.3 Iberdrola, S.A.;
9.4 Unión Fenosa, S.A.;
9.5 Hidroeléctrica del Cantábrico, S.A.;
9.6 Electra del Viesgo, S.A.;
9.7 Other entities undertaking the production, transport and distribution of electricity, pursuant to "Ley 54/1997, de 27 de noviembre, del Sector eléctrico" and its implementing legislation.

FRANCE
10.1 Électricité de France, set up and operating pursuant to Loi n°46-628 sur la nationalisation de l'électricité et du gaz of 8 April 1946, as amended;
10.2 RTE, manager of the electricity transport network;
10.3 Entities distributing electricity, mentioned in Article 23 of Loi n°46-628 sur la nationalisation de l'électricité et du gaz of 8 April 1946, as amended (mixed economy distribution companies, régies or similar services composed of regional or local authorities). Ex: Gaz de Bordeaux, Gaz de Strasbourg;
10.4 Compagnie nationale du Rhône;
10.5 Electricité de Strasbourg.

CROATIA

11.1 Contracting entities referred to in Article 6 of the Zakon o javnoj nabavi (Narodne novine broj 90/11) (Public Procurement Act, Official Gazette No. 90/11) which are public undertakings or contracting authorities and which, in accordance with special regulations, engage in the activity of construction (providing) of fixed networks or managing fixed networks for public service delivery in relation to the production, transmission and distribution of electric energy and supplying fixed networks with electric energy; such as the entities engaging in the said activities based on the Licence for carrying out energy activities in accordance with the Energy Act (Official Gazette 68/01, 177/04, 76/07, 152/08, 127/10).

ITALY

12.1 Companies in the Gruppo Enel authorised to produce, transmit and distribute electricity within the meaning of Decreto Legislativo No. 79 of 16 March 1999, as subsequently amended and supplemented;

12.2 TERNA- Rete elettrica nazionale SpA;

12.3 Other undertakings operating on the basis of concessions under Decreto Legislativo No. 79 of 16 March 1999.

LATVIA

14.1 VAS "Latvenergo" and other enterprises which produce, transmit and distribute electricity, and which make purchases according to law "Sabiedrisko pakalpojumu sniedzēju iepirkumu likums".

LITHUANIA

15.1. State Enterprise Ignalina Nuclear Power Plant;

15.2. Akcinė bendrovė "Lietuvos energija"; (The joint-stock company "Lithuanian energy)

15.3. Akcinė bendrovė "Lietuvos elektrinė"; (The joint-stock company "Lithuanian Power Plant;)

15.4. Akcinė bendrovė Rytų skirstomieji tinklai; (The joint-stock company RST)

15.5. Akcinė bendrovė "VST";

15.6. Other entities in compliance with the requirements of Article 70 (1), (2) of the Law on Public Procurement of the Republic of Lithuania (Official Gazette, No. 84-2000, 1996; No. 4-102, 2006) and executing electricity production, transportation or distribution activity pursuant to the Law on Electricity of the Republic of Lithuania (Official Gazette, No. 66-1984, 2000; No. 107-3964, 2004) and the Law on Nuclear Energy of the Republic of Lithuania (Official Gazette, No. 119-2771, 1996).

LUXEMBOURG

16.1. Compagnie grand-ducale d' électricité de Luxembourg (CEGEDEL), producing or distributing electricity pursuant to the convention concernant l'établissement et l'exploitation des réseaux de distribution d'énergie électrique dans le Grand-Duché du Luxembourg of 11 November 1927, approved by the Law of 4 January 1928;

16.3. Société électrique de l'Our (SEO);

16.4. Syndicat de communes SIDOR.

MALTA

18.1 Korporazzjoni Enemalta (Enemalta Corporation)

Netherlands

19.1 Entities distributing electricity on the basis of a licence (vergunning) granted by the provincial authorities pursuant to the Provinciewet. For instance:

19.1.1. Essent;

19.1.2. Nuon.

POLAND

21.1 Energy companies w ithin t he meaning of ustawa z dnia 10 kwietnia 1997 r. Prawo energetyczne, including among others:

21.1.1. BOT Elektrownia "Opole" S.A., Brzezie;

21.1.2. BOT Elektrownia Bełchatów S.A.;

21.1.3. BOT Elektrownia Turów S.A., Bogatynia;

21.1.4. Elbląskie Zakłady Energetyczne S.A. w Elblągu;

21.1.5. Elektrociepłownia Chorzów "ELCHO" Sp. z o.o.;

21.1.6. Elektrociepłownia Lublin - Wrotków Sp. z o.o.;

21.1.7. Elektrociepłownia Nowa Sarzyna Sp. z o.o.;

21.1.8. Elektrociepłownia Rzeszów S.A.;

21.1.9. Elektrociepłownie Warszawskie S.A.;

21.1.10. Elektrownia "Kozienice" S.A.;

21.1.11. Elektrownia "Stalowa "Wola" S.A.;

21.1.12. Elektrownia Wiatrowa, Sp. z o.o., Kamieńsk;

21.1.13. Elektrownie Szczytowo-Pompowe S.A., Warszawa;

21.1.14. ENEA S.A., Poznań;

21.1.15. Energetyka Sp. z o.o., Lublin;

21.1.16. EnergiaPro Koncern Energetyczny S.A., Wrocław;

21.1.17. ENION S.A., Kraków;

21.1.18. Górnośląski Zakład Elektroenergetyczny S.A., Gliwice;

21.1.19. Koncern Energetyczny Energa S.A., Gdańsk;

21.1.20. Lubelskie Zakłady Energetyczne S.A.;

21.1.21. Łódzki Zakład Energetyczny S.A.;

21.1.22. PKP Energetyka Sp. z o.o., Warszawa;

21.1.23. Polskie Sieci Elektroenergetyczne S.A., Warszawa;

21.1.24. Południowy Koncern Energetyczny S.A., Katowice;

21.1.25. Przedsiębiorstwo Energetyczne w Siedlcach Sp. z o.o.;

21.1.26. PSE-Operator S.A., Warszawa;

21.1.27. Rzeszowski Zakład Energetyczny S.A.;

21.1.28. Zakład Elektroenergetyczny "Elsen" Sp. z o.o., Częstochowa;

21.1.29. Zakład Energetyczny Białystok S.A.;

21.1.30. Zakład Energetyczny Łódź-Teren S.A.;

21.1.31. Zakład Energetyczny Toruń S.A.;

21.1.32. Zakład Energetyczny Warszawa-Teren;

21.1.33. Zakłady Energetyczne Okręgu Radomsko-Kieleckiego S.A.;

21.1.34. Zespół Elektrociepłowni Bydgoszcz S.A.;

21.1.35. Zespół Elektrowni Dolna Odra S.A., Nowe Czarnowo;

21.1.36. Zespół Elektrowni Ostrołęka S.A.;

21.1.37. Zespół Elektrowni Pątnów-Adamów-Konin S.A.;

21.1.38. Polskie Sieci Elektroenergetyczne S.A.;

21.1.39. Przedsiębiorstwo Energetyczne MEGAWAT Sp. z o.o.;

21.1.40. Zespół Elektrowni Wodnych Niedzica S.A.;

21.1.41. Energetyka Południe S.A.

ROMANIA

23.1. Societatea Comercială de Producere a Energiei Electrice Hidroelectrica-SA Bucureşti (Commercial Company for Electrical Power Production Hidroelectrica – SA Bucharest);

23.2. Societatea Naţională "Nuclearelectrica" SA (Nuclearelectrica S.A. National Company);

23.3. Societatea Comercială de Producere a Energiei Electrice şi Termice Termoelectrica SA (Commercial Company for Electrical Power and Thermal Energy Production Termoelectrica SA);

23.4. S .C. Electrocentrale Deva S.A. (SC Power Stations Deva SA);

23.5. S.C. Electrocentrale Bucureşti S.A. (SC Power Stations Bucharest SA);

23.6. S.C. Electrocentrale Galaţi SA (SC Power Stations Galaţi SA);

23.7. S.C. Electrocentrale Termoelectrica SA (SC Power Stations Termoelectrica SA);

23.8. S.C. Complexul Energetic Craiova SA (Commercial Company Craiova Energy Complex);

23.9. S .C. Complexul E nergetic R ovinari S A (Commercial C ompany R ovinari E nergy Complex);

23.10. S.C. Complexul Energetic Turceni SA (Commercial Company Turceni Energy Complex);

23.11. Compania Naţională de Transport a Energiei Electrice Transelectrica SA Bucureşti ("Transelectrica" Romanian Power Grid Company);

23.12. Societatea Comercială Electrica SA, Bucureşti;

23.13. S.C. Filiala de Distribuţie a Energiei Electrice;

23.14. "Electrica Distribuţie Muntenia Nord" S.A;

23.15. S.C. Filiala de Furnizare a Energiei Electrice;

23.16. "Electrica Furnizare Muntenia Nord" S.A;

23.17. S.C. Filiala de Distribuţie şi Furnizare a Energiei Electrice Electrica M untenia S ud (Electrical Energy Distribution and Supply Branch Electrica Muntenia Sud);

23.18. S.C. Filiala de Distribuţie a Energiei Electrice (Commercial Company for Electrical Energy Distribution);

23.19. "Electrica Distribuţie Transilvania Sud" S.A;

23.20. S .C. Filiala de Furnizare a E nergiei E lectrice (Commercial C ompany for E lectrical Energy Supply);

23.21. "Electrica Furnizare Transilvania Sud" S.A;

23.22. S.C. Filiala de Distribuţie a Energiei Electrice (Commercial Company for Electrical Energy Distribution);

23.23. "Electrica Distribuţie Transilvania Nord" S.A;

23.24. S .C. Filiala de Furnizare a E nergiei E lectrice (Commercial C ompany for E lectrical Energy Supply);

23.25. "Electrica Furnizare Transilvania Nord" S.A;

23.26. Enel Energie;

23.27. Enel Distribuţie Banat;

23.28. Enel Distribuţie Dobrogea;

23.29. E.ON Moldova AS;

23.30. CEZ Distribuţie.

SLOVENIA

24.1 Entities producing, transporting or distributing electricity pursuant to the Energetski zakon (Uradni list RS, 79/99):

24.1.1. B orzen D.O.O. - Mat. Št. 1613383 - Poštna Št.: 1000 – Kraj: Ljubljana;
24.1.2. Elektro Gorenjska D.D. - Mat. Št. 5175348 - Poštna Št.: 4000 - Kraj: Kranj;
24.1.3. Elektro Celje D.D. - Mat. Št. 5223067 - Poštna Št.: 3000 - Kraj: Celje;
24.1.4. Elektro Ljubljana D.D. - Mat. Št. 5227992 - Poštna Št.: 1000 – Kraj: Ljubljana;
24.1.5. E lektro Primorska D.D. - Mat. Št. 5229839 - Poštna Št.: 5000 - Kraj: Nova Gorica;
24.1.6. Elektro Maribor D.D. - Mat. Št. 5231698 - Poštna Št.: 2000 - Kraj: Maribor;
24.1.7. Elektro - Slovenija D.O.O. - Mat. Št. 5427223 - Poštna Št.: 1000 – Kraj: Ljubljana;
24.1.8. Javno Podjetje Energetika Ljubljana, D.O.O. - Mat. Št. 5226406 - Poštna Št.: 1000 - Kraj: Ljubljana;
24.1.9. I nfra D.O.O. - Mat. Št. 1946510 - Poštna Št.: 8290 - Kraj: Sevnica;
24.1.10. Sodo Sistemski Operater Distribucijskega Omrežja Z Električno Energijo, D.O.O. - Mat. Št. 2294389 - Poštna Št.: 2000; Kraj: Maribor;
24.1.11. E gs-Ri D.O.O. - Mat. Št. 5045932 - Poštna Št.: 2000; Kraj: Maribor.

SLOVAKIA

25.1 Entities providing for, on basis of permission, production, transport through transmission network system, distribution and supply for the public of electricity through distribution network pursuant to Act No. 656/2004 Coll. For example:

25.1.1. Slovenské elektrárne, a.s.;

25.1.2. Slovenská elektrizačná prenosová sústava, a.s.;

25.1.3. Západoslovenská energetika, a.s.;

25.1.4. Stredoslovenská energetika, a.s.;

25.1.5. Východoslovenská energetika, a.s.

FINLAND

26.1 Municipal entities and public enterprises producing electricity and entities responsible for the maintenance of electricity transport or distribution networks and for transporting electricity or for the electricity system under a licence pursuant to Section 4 or 16 of sähkömarkkinalaki/elmarknadslagen (386/1995) and pursuant to laki vesi- ja energiahuollon, liikenteen ja posti palvelujen alalla toimivien yksiköiden hankinnoista (349/2007)/lag om upphandling inom sektorerna vatten, energi, transporter och posttjänster (349/2007).

UNITED KINGDOM

28.3 National Grid Electricity Transmission plc;
28.4 System Operation Northern Ireland Ltd;
28.5 Scottish & Southern Energy plc;
28.6 SPTransmission plc.

C. Airport Installations

BELGIUM

1.1 Brussels International Company

1.2. Belgocontrol;

1.3. Luchthaven Antwerpen;

1.4. Internationale Luchthaven Oostende-Brugge;

1.5. Société Wallonne des Aéroports;

1.6. Brussels South Charleroi Airport;

1.7. Liège Airport.

BULGARIA

2.2. ДП "Ръководство на въздушното движение"; (State Enterprise "Air Traffic Control")

2.3. Airport operators of civil airports for public use determined by the Council of Ministers pursuant to Article 43(3) of the Закона на гражданското въздухоплаване (обн., ДВ, бр.94/01.12.1972):

2.3.1. "Летище София" ЕАД;

2.3.2. "Фрапорт Туин Стар Еърпорт Мениджмънт" АД;

2.3.3. "Летище Пловдив" ЕАД;

2.3.4. "Летище Русе" ЕООД;

2.3.5. "Летище Горна Оряховица" ЕАД.

CZECH REPUBLIC

3.1. All contracting entities in the sectors which exploit specified geographical area for the purposes of the provision and operation of airports (ruled by the section 4 paragraph 1 letter i) of Act No. 137/2006 Coll. on Public Contracts, as amended). Examples of contracting entities:

3.1.1. Česká správa letišť, s.p.;

3.1.2. Letiště Karlovy Vary s.r.o.;

3.1.3. Letiště Ostrava, a.s.;

3.1.4. Správa Letiště Praha, s. p

ESTONIA

Entities operating pursuant to Article 10(3) of the Public Procurement Act (RT I 21.02.2007, 15, 76) and Article 14 of the Competition Act (RT I 2001, 56 332):

6.1.1. AS Tallinna Lennujaam (Tallinn Airport Ltd);

6.1.2. Tallinn Airport GH AS (Tallinn Airport GH Ltd).

IRELAND

7.1 Airports of Dublin, Cork and Shannon managed by Aer Rianta – Irish Airports;

GREECE

8.1 "Υπηρεσία Πολιτικής Αεροπορίας" ("ΥΠΑ") operating pursuant to Legislative Decree No 714/70, as amended by Law No 1340/ 83; the organisation of the company is laid down by Presidential Decree No. 56/89, as amended subsequently;

8.2 The company "Διεθνής Αερολιμένας Αθηνών" at Spata operating pursuant to Legislative Decree No 2338/95 Κύρωση Σύμβασης Ανάπτυξης του Νέου Διεθνούς Αεροδρομίου της Αθήνας στα Σπάτα, "ίδρυση της εταιρείας 'Διεθνής Αερολιμένας Αθηνών Α.Ε.' έγκριση περιβαλλοντικών όρων και άλλες διατάξεις");

SPAIN

9.1 Ente público Aeropuertos Españoles y Navegación Aérea - AENA.

FRANCE

10.1 Airports operated by State-owned companies pursuant to Articles L .251-1, L .260-1 and L.270-1 of the code de l'aviation civile;

10.6 State-owned civilian airports whose management has been conceded to a chambre de commerce et d'industrie (Article 7 of Loi n°2005-357 of 21 April 2005 relative aux aéroports and Décret n°2007-444 of 23 February 2007 relatif aux aérodromes appartenant à l'État):

10.6.1. Aérodrome de Marseille-Provence;

10.6.2. Aérodrome d'Aix-les-Milles et Marignane-Berre;

10.6.3. Aérodrome de Nice Côte-d'Azur et Cannes-Mandelieu;

10.6.4. Aérodrome de Strasbourg-Entzheim;

10.6.5. Aérodrome de Fort-de France-le Lamentin;

10.6.6. Aérodrome de Pointe-à-Pitre-le Raizet;

10.6.7. Aérodrome de Saint-Denis-Gillot.

10.7 Other State-owned civilian airports excluded from the transfer to regional and local authorities pursuant to Décret n°2005-1070 of 24 August 2005, as amended:
10.7.1. Aérodrome de Saint-Pierre Pointe Blanche;

10.7.2. Aérodrome de Nantes Atlantique et Saint-Nazaire-Montoir.

CROATIA
11.1 Contracting entities referred to in Article 6 of the Zakon o javnoj nabavi - Narodne novine broj 90/11 (Public Procurement Act, Official Gazette No. 90/11) which are public undertakings or contracting authorities and which, in accordance with special regulations, engage in the activity relating to the exploiting of a geographical area with the aim of making available airports and other terminal equipment to air transport operators; such as the entities engaging in the said activities based on the awarded concession in accordance with the Airports Act (Official Gazette 19/98 and 14/11)

ITALY
12.1 From 1 January 1996, the Decreto Legislativo N°497 of 25 November 1995, relativo alla trasformazione dell'Azienda autonoma di assistenza al volo per il traffico aereo generale in ente pubblico economico, denominato ENAV, Ente nazionale di assistenza al volo, reconducted several times and subsequently transformed into law, Legge N° 665 of 21 December 1996 has finally established the transformation of that entity into a share company (S.p.A) as from 1 January 2001;
12.4 Airport entities, including the managing companies SEA (Milan) and ADR (Fiumicino).

LATVIA
14.1 Valsts akciju sabiedrība "Latvijas gaisa satiksme" (State public limited liability company "Latvijas gaisa satiksme");
14.2 Valsts akciju sabiedrība "Starptautiskā lidosta 'Rīga'" (State public limited liability company "International airport 'Rīga'");

LITHUANIA
15.1 State Enterprise Vilnius International Airport;
15.2 State Enterprise Kaunas Airport;
15.3 State Enterprise Palanga International Airport;
15.4 State Enterprise "Oro navigacija";
15.5 Municipal Enterprise "Šiaulių oro uostas";

LUXEMBOURG
16.1. Aéroport du Findel

NETHERLANDS
19.1. Airports operating pursuant to Articles 18 and following of the Luchtvaartwet. For instance:
19.1.1. Luchthaven Schiphol

POLAND

21.1 Public undertaking "Porty Lotnicze" operating on the basis of ustawa z dnia 23 października 1987 r. o przedsiębiorstwie państwowym "Porty Lotnicze";
21.2 Port Lotniczy Bydgoszcz S.A.;
21.3 Port Lotniczy Gdańsk Sp. z o.o.;
21.4 Górnośląskie Towarzystwo Lotnicze S.A. Międzynarodowy Port Lotniczy Katowice;
21.5 Międzynarodowy Port Lotniczy im. Jana Pawła II Kraków - Balice Sp. z o.o.;
21.6 Lotnisko Łódź Lublinek Sp. z o.o.;
21.7 Port Lotniczy Poznań - Ławica Sp. z o.o.;
21.8 Port Lotniczy Szczecin - Goleniów Sp. z o.o.;
21.9 Port Lotniczy Wrocław S.A.;
21.10 Port Lotniczy im. Fryderyka Chopina w Warszawie;
21.11 Port Lotniczy Rzeszów – Jasionka;
21.12 Porty Lotnicze "Mazury-Szczytno" Sp. z o.o. w Szczytnie;
21.13 Port Lotniczy Zielona Góra – Babimost

PORTUGAL

22.1. A NA – Aeroportos de Portugal, S.A., set up pursuant to Decreto-Lei No 404/98 do 18 de Dezembro 1998;

22.2. N AV – Empresa Pública de N avegação Aérea de Portugal, E. P., s et up pur suant t o Decreto-Lei No 404/98 do 18 de Dezembro 1998;

22.3. A NAM – Aeroportos e Navegação Aérea da Madeira, S. A., set up pursuant to Decreto-Lei No 453/91 do 11 de Dezembro 1991.

ROMANIA

23.1 Compania Naţională "Aeroporturi Bucureşti" SA (National Company "Bucharest Airports S.A.");
23.2 Societatea Naţională "Aeroportul Internaţional Mihail Kogălniceanu-Constanţa" (National Company "International Airport Mihail Kogălniceanu-Constanţa" S.A.);
23.3 Societatea Naţională "Aeroportul Internaţional Timişoara-Traian Vuia"-SA (National Company International "International Airport Timişoara-Traian Vuia"-S.A.);
23.4 Regia Autonomă "Administraţia Română a Serviciilor de Trafic A erian ROMAT S A" (Autonomous Public Service Undertaking "Romanian Air Traffic Services Administration ROMAT S.A.");
23.5 Aeroporturile a flate î n s ubordinea Consiliilor Locale (Airports u nder L ocal C ouncils' subordination);
23.6 SC Aeroportul Arad SA (Arad Airport S.A. Commercial Company);
23.7 Regia Autonomă Aeroportul Bacău (Autonomous Public Service Undertaking Bacău Airport);
23.8 Regia Autonomă Aeroportul Baia Mare (Autonomous Public Service Undertaking Baia Mare Airport);
23.9 Regia Autonomă Aeroportul C luj Napoca (Autonomous P ublic S ervice U ndertaking C luj Napoca Airport);
23.10 Regia Autonomă Aeroportul Internaţional Craiova (Autonomous Public Service Undertaking International Craiova Airport);
23.11 Regia Autonomă Aeroportul Iaşi (Autonomous Public Service Undertaking Iaşi Airport);
23.12 Regia Autonomă Aeroportul Oradea (Autonomous Public Service Undertaking Oradea Airport);

23.13 Regia Autonomă Aeroportul Satu-Mare (Autonomous Public S ervice U ndertaking Satu-Mare Airport);
23.14 Regia Autonomă Aeroportul Sibiu (Autonomous Public Service Undertaking Sibiu Airport);
23.15 Regia Autonomă Aeroportul Suceava (Autonomous Public Service Undertaking Suceava Airport);
23.16 Regia Autonomă Aeroportul Târgu Mureş (Autonomous Public Service Undertaking Târgu Mureş Airport);
23.17 Regia Autonomă Aeroportul Tulcea (Autonomous Public Service Undertaking Tulcea Airport);
Regia Autonomă Aeroportul Caransebeş.

SLOVENIA
24.1. Public civil airports that operate pursuant to the Zakon o letalstvu (Uradni list RS, 18/01):
24.1.1. Letalski Center Cerklje Ob Krki – Mat. Št. 1589423 – Poštna Št.: 8263 – Kraj: Cerklje Ob Krki;
24.1.2. Kontrola Zračnega Prometa D.O.O. - Mat. Š t. 1913301 - Poštna Š t.: 1 000 - Kraj: Ljubljana;
24.1.3. Aerodrom Ljubljana D.D. - Mat. Št. 5142768 - Poštna Št.: 4210 - Kraj: Brnik-Aerodrom;
24.1.4. Aerodrom P ortorož, D .O.O. - Mat. Š t. 5500494 - Poštna Š t.: 6333 - Kraj: Sečovlje – Sicciole.

SLOVAKIA
25.1. Entities ope rating a irports on ba sis of c onsent gr anted by s tate a uthority a nd e ntities providing for aerial telecommunications services pursuant to Act No. 143/1998 Coll. in wording of Acts No. 57/ 2001 Coll., No. 37/2002 Coll., No. 136/2004 Coll. and No 544/2004 Coll. For example:
25.1.1. Letisko M.R.Štefánika, a.s., Bratislava;
25.1.2. Letisko Poprad – Tatry, a.s.;
25.1.3. L etisko Košice, a.s.

FINLAND
26.1 Airports managed by the 'Ilmailulaitos Finavia/Luftfartsverket Finavia', or by a municipal or public e nterprise p ursuant t o t he i lmailulaki/luftfartslagen (1242/2005) a nd l aki Ilmailulaitoksesta/lag om Luftfartsverket (1245/2005).

SWEDEN
27.1. P ublicly-owned and operated airports in accordance with luftfartslagen (1957:297);

UNITED KINGDOM
28.3 Highland and Islands Airports Limited;

D. Maritime or inland port or other terminal facilities

BELGIUM
1.1. Gemeentelijk Havenbedrijf van Antwerpen;

1.2. Havenbedrijf van Gent;

1.3. Maatschappij der Brugse Zeevaartinrichtigen;

1.4. Port autonome de Charleroi;

1.5. Port autonome de Namur;

1.6. Port autonome de Liège;

1.7. P ort autonome du Centre et de l'Ouest;

1.8. S ociété r égionale d u P ort de Bruxelles/Gewestelijk V ennootschap v an de H aven v an Brussel;

1.9. Waterwegen en Zeekanaal;

1.10. De Scheepvaart.

BULGARIA
2.1. ДП "Пристанищна инфраструктура"

CZECH REPUBLIC
3.1. A ll c ontracting e ntities i n t he s ectors w hich exploit s pecified ge ographical a rea f or t he purposes of the provision and operation of maritime or inland ports or other terminal facilities to carriers by air, sea or inland waterways (ruled by the section 4 paragraph 1 letter i) of Act No. 137/2006 Coll. on Public Contracts, as amended). Examples of contracting entities:

3.1.1. České přístavy, a.s.

GERMANY
5.1. Seaports owned totally or partially by territorial authorities (Länder, Kreise Gemeinden)

ESTONIA
6.1. Entities operating pursuant to Article 10 (3) of the Public Procurement Act (RT I 21.02.2007, 15, 76) and Article 14 of the Competition Act (RT I 2001, 56 332):

6.1.1. AS Saarte Liinid;

6.1.2. AS Tallinna Sadam.

IRELAND
7.2 P ort of Rosslare Harbour ope rating p ursuant t o t he F ishguard a nd R osslare Railways a nd Harbours Acts 1899.

GREECE
8.1. "Οργανισμός Λιμένος Βόλου Ανώνυμη Εταιρεία" ("Ο.Λ.Β. Α.Ε."), pursuant to Law No 2932/01;

8.2. "Οργανισμός Λιμένος Ελευσίνας Ανώνυμη Εταιρεία" ("Ο.Λ.Ε. Α.Ε."), pursuant to Law No 2932/01;

8.3. "Οργανισμός Λιμένος Ηγουμενίτσας Ανώνυμη Εταιρεία" ("Ο.Λ.ΗΓ. Α.Ε."), pursuant to Law No 2932/01;

8.4. "Οργανισμός Λιμένος Ηρακλείου Ανώνυμη Εταιρεία" ("Ο.Λ.Η. Α.Ε."), pursuant to Law No

2932/01;

8.5. "Οργανισμός Λιμένος Καβάλας Ανώνυμη Εταιρεία" ("Ο.Λ.Κ. Α.Ε."), pursuant to Law No 2932/01;

8.6. "Οργανισμός Λιμένος Κέρκυρας Ανώνυμη Εταιρεία" ("Ο.Λ.ΚΕ. Α.Ε."), pursuant to Law No 2932/01;

8.7. "Οργανισμός Λιμένος Πατρών Ανώνυμη Εταιρεία" ("Ο.Λ.ΠΑ. Α.Ε."), pursuant to Law No 2932/01;

8.8. "Οργανισμός Λιμένος Λαυρίου Ανώνυμη Εταιρεία" ("Ο.Λ.Λ. Α.Ε."), pursuant to Law No 2932/01;

8.9. "Οργανισμός Λιμένος Ραφήνας Ανώνυμη Εταιρεία" ("Ο.Λ.Ρ. Α.Ε"), pursuant to Law No 2932/01;

SPAIN

9.1. Ente público Puertos del Estado;

9.2. Autoridad Portuaria de Alicante;

9.3. Autoridad Portuaria de Almería – Motril;

9.4. Autoridad Portuaria de Avilés;

9.5. Autoridad Portuaria de la Bahía de Algeciras;

9.6. Autoridad Portuaria de la Bahía de Cádiz;

9.7. Autoridad Portuaria de Baleares;

9.8. Autoridad Portuaria de Barcelona;

9.9. Autoridad Portuaria de Bilbao;

9.10. Autoridad Portuaria de Cartagena;

9.11. Autoridad Portuaria de Castellón;

9.12. Autoridad Portuaria de Ceuta;

9.13. Autoridad Portuaria de Ferrol – San Cibrao;

9.14. Autoridad Portuaria de Gijón;

9.15. Autoridad Portuaria de Huelva;

9.16. Autoridad Portuaria de Las Palmas;

9.17. Autoridad Portuaria de Málaga;

9.18. Autoridad Portuaria de Marín y Ría de Pontevedra;

9.19. Autoridad Portuaria de Melilla;

9.20. Autoridad Portuaria de Pasajes;

9.21. Autoridad Portuaria de Santa Cruz de Tenerife;

9.22. Autoridad Portuaria de Santander;

9.23. Autoridad Portuaria de Sevilla;

9.24. Autoridad Portuaria de Tarragona;

9.25. Autoridad Portuaria de Valencia;

9.26. Autoridad Portuaria de Vigo;

9.27. Autoridad Portuaria de Villagarcía de Arousa;

FRANCE

10.1. Port autonome de Paris set up pursuant to Loi n°68-917 relative au port autonome de Paris of 24 October 1968;

10.2. Port autonome de Strasbourg set up pursuant to the convention entre l'Etat et la ville de Strasbourg relative à la construction du port rhénan de Strasbourg et à l'exécution de travaux d'extension de ce port of 20 May 1923, approved by the Law of 26 April 1924;

10.3. Ports autonomes operating pursuant to Articles L. 111-1 et seq. of the code des ports maritimes, having legal personality:

10.3.1. Port autonome de Bordeaux;

10.3.2. Port autonome de Dunkerque;

10.3.3. Port autonome de La Rochelle;

10.3.4. Port autonome du Havre;

10.3.5. Port autonome de Marseille;

10.3.6. Port autonome de Nantes-Saint-Nazaire;

10.3.7. Port autonome de Pointe-à-Pitre;

10.3.8. Port autonome de Rouen.

10.4. Ports without legal personality, property of the State - décret n°2006-330 of 20 march 2006 fixant la liste des ports des départements d'outre-mer exclus du transfert prévu à l'article 30 de la loi du 13 août 2004 relative aux libertés et responsabilités locales - whose management has been conceded to the local chambres de commerce et d'industrie:

10.4.1. Port de Fort de France - Martinique;

10.4.2. Port de Dégrad des Cannes - Guyane;

10.4.3. Port-Réunion - île de la Réunion;

10.4.4. Ports de Saint-Pierre et Miquelon.

10.5. Ports without legal personality whose property has been transferred to the regional or local authorities, and whose management has been committed to the local chambres de commerce et d'industrie - Article 30 of Loi n° 2004-809 of 13 August 2004 relative aux libertés et responsabilités locales, as amended by Loi n°2006-1771 of 30 December 2006:

10.5.1. Port de Calais;

10.5.2. Port de Boulogne-sur-Mer;

10.5.3. Port de Nice;

10.5.4. Port de Bastia;

10.5.5. Port de Sète;

10.5.6. Port de Lorient;

10.5.7. Port de Cannes;

10.5.8. Port de Villefranche-sur-Mer.

10.6. Voies navigables de France, public body subject to Article 124 of Loi n° 90-1168 of 29 December 1990, as amended.

CROATIA

11.1 Contracting entities referred to in Article 6 of the Zakon o javnoj nabavi - Narodne novine broj 90/11 (Public Procurement Act, Official Gazette No. 90/11) which are public undertakings or contracting authorities and which, in accordance with special regulations, engage in the activity relating to the exploiting of a geographical area with the aim of making available sea ports, river ports and other transport terminals to operators in sea or river transport; such as the entities engaging in the said activities based on the awarded concession in accordance with the Maritime Domain and Seaports Act (Official Gazette 158/03, 100/04, 141/06 and 38/09).

ITALY

12.1. State ports (Porti statali) and other ports managed by the Capitaneria di Porto pursuant to the Codice della navigazione, Regio Decreto N°327 of 30 March 1942;

12.2. Autonomous ports (enti portuali) set up by special laws pursuant to Article 19 of the Codice della navigazione, Regio Decreto N°327 of 30 March 1942.

CYPRUS

13.1. Η Αρχή Λιμένων Κύπρου established by the περί Αρχής Λιμένων Κύπρου Νόμο του 1973.

LITHUANIA

15.1. State Enterprise Klaipėda State Sea Port Administration acting in compliance with the Law on the Klaipėda State Sea Port Administration of the Republic of Lithuania (Official Gazette, No. 53-1245, 1996);

15.2. State Enterprise "Vidaus vandens kelių direkcija" acting in compliance with the Code on Inland Waterways Transport of the Republic of Lithuania (Official Gazette, No. 105-2393, 1996);

LUXEMBOURG

16.1 Port de Mertert, set up and operating pursuant to the loi relative à l'aménagement et à l'exploitation d'un port fluvial sur la Moselle of 22 July 1963, as amended.

NETHERLANDS

19.1. Contracting entities in the field of sea port or inland port or other terminal equipment. For instance:

19.1.1. Havenbedrijf Rotterdam.

AUSTRIA

20.1. Inland ports owned totally or partially by the Länder and/or Gemeinden.

POLAND

21.1. Entities established on the basis of ustawa z dnia 20 grudnia 1996 r. o portach i

przystaniach morskich, including among others:

21.1.1. Zarząd Morskiego Portu Gdańsk S.A.;

21.1.2. Zarząd Morskiego Portu Gdynia S.A.;

21.1.3. Zarząd Portów Morskich Szczecin i Świnoujście S.A.;

21.1.4. Zarząd Portu Morskiego Darłowo Sp. z o.o.;

21.1.5. Zarząd Portu Morskiego Elbląg Sp. z o.o.;

21.1.6. Zarząd Portu Morskiego Kołobrzeg Sp. z o.o.;

21.1.7. Przedsiębiorstwo Państwowe Polska Żegluga Morska.

PORTUGAL

22.1. A PDL – Administração dos Portos do Douro e Leixões, S.A., pursuant to Decreto-Lei No 335/98 do 3 de Novembro 1998;

22.2. A PL – Administração do Porto de Lisboa, S.A., pursuant to Decreto-Lei No 336/98 of do 3 de Novembro 1998;

22.3. A PS – Administração do Porto de Sines, S.A., pursuant to Decreto-Lei No 337/98 do 3 de Novembro 1998;

22.4. A PSS – Administração dos Portos de Setúbal e Sesimbra, S.A., pursuant to Decreto-Lei No 338/98 do 3 de Novembro 1998;

22.5. A PA – Administração do Porto de Aveiro, S.A., pursuant to Decreto-Lei No 339/98 do 3 de Novembro 1998;

22.6. Instituto Portuário dos Transportes Marítimos, I.P. (IPTM, I.P.), pursuant to Decreto-Lei No 146/2007, do 27 de Abril 2007.

ROMANIA

23.1. Compania Naţională "Administraţia Porturilor Maritime" SA Constanţa;

23.2. Compania Naţională "Administraţia Canalelor Navigabile SA";

23.3. Compania Naţională de Radiocomunicaţii Navale "RADIONAV" SA;

23.4. Regia Autonomă "Administraţia Fluvială a Dunării de Jos";

23.5. Compania Naţională "Administraţia Porturilor Dunării Maritime";

23.6. Compania Naţională "Administraţia Porturilor Dunării Fluviale" AS;

23.7. Porturile: Sulina, Brăila, Zimnicea şi Turnul-Măgurele.

SLOVENIA

24.1. Sea ports in full or partial state ownership performing economic public service pursuant to the Pomorski Zakonik (Uradni list RS, 56/99):

24.1.1 LUKA KOPER D.D. - Mat. Št. 5144353 - Poštna Št.: 6000 – Kraj: Koper – Capodistria;

24.1.2. S irio d.o.o. - Mat. Št. 5655170 - Poštna Št.: 6000 – Kraj: Koper.

UNITED KINGDOM
28.3 British Waterways Board

E. Contracting entities in the field of Urban Railway, Tramway, Trolleybus or Bus services

BELGIUM
1.1. Société des Transports intercommunaux de Bruxelles - Maatschappij voor intercommunaal Vervoer van Brussel;

1.2. Société régionale wallonne du Transport et ses sociétés d'exploitation (TEC Liège–Verviers, TEC N amur–Luxembourg, TEC B rabant wallon, T EC C harleroi, T EC H ainaut) - Société régionale w allonne du T ransport e n ha ar e xploitatiemaatschappijen (TEC L iège–Verviers, TEC Namur–Luxembourg, TEC Brabant wallon, TEC Charleroi, TEC Hainaut);

1.3. Vlaamse Vervoermaatschappij (De Lijn);

BULGARIA
2.1. " Метрополитен" ЕАД, София;

2.2. " Столичен електротранспорт" ЕАД, София;

2.3. " Столичен автотранспорт" ЕАД, София;

2.4. " Бургасбус" ЕООД, Бургас;

2.5. " Градски транспорт" ЕАД, Варна;

2.6. " Тролейбусен транспорт" ЕООД, Враца;

2.7. " Общински пътнически транспорт" ЕООД, Габрово;

2.8. " Автобусен транспорт" ЕООД, Добрич;

2.9. " Тролейбусен транспорт" ЕООД, Добрич;

2.10. " Тролейбусен транспорт" ЕООД, Пазарджик;

2.11. "Тролейбусен транспорт" ЕООД, Перник;

2.12. " Автобусни превози" ЕАД, Плевен;

2.13. " Тролейбусен транспорт" ЕООД, Плевен;

2.14. " Градски транспорт Пловдив" ЕАД, Пловдив;

2.15. " Градски транспорт" ЕООД, Русе;

2.16. " Пътнически превози" ЕАД, Сливен;

2.17. " Автобусни превози" ЕООД, Стара Загора;

2.18. " Тролейбусен транспорт" ЕООД, Хасково.

CZECH REPUBLIC

3.1. All contracting entities in the sectors which supply services in the field of urban railway, tramway, trolleybus or bus services defined in the section 4 paragraph 1 letter f) of Act No. 137/2006 Coll. on Public Contracts, as amended. Examples of contracting entities:

3.1.1. Dopravní podnik hl.m. Prahy ,akciová společnost;

3.1.2. Dopravní podnik města Brna, a.s.;

3.1.3. Dopravní podnik Ostrava a.s.;

3.1.4. Plzeňské městské dopravní podniky, a.s.;

3.1.5. Dopravní podnik města Olomouce, a.s.

DENMARK

4.1. DSB;

4.2. DSB S-tog A/S;

4.4. Metroselskabet I/S.

GERMANY

5.1 Undertakings providing, on the basis of an authorisation, short-distance transport services to the public pursuant to the Personenbeförderungsgesetz of 21 March 1961, as last amended on 31 October 2006.

ESTONIA

6.1. Entities operating pursuant to Article 10(3) of the Public Procurement Act (RT I 21.02.2007,15, 76) and Article 14 of the Competition Act (RT I 2001, 56 332):

6.1.1. AS Tallinna Autobussikoondis;

6.1.2. AS Tallinna Trammi- ja Trollibussikoondis;

6.1.3. Narva Bussiveod AS.

IRELAND

7.1. Iarnród Éireann (Irish Rail);

7.2. Railway Procurement Agency;

7.3. Luas (Dublin Light Rail);

7.4. Bus Éireann (Irish Bus);

7.5. Bus Átha Cliath (Dublin Bus);

GREECE

8.4 "Εταιρεία Θερμικών Λεωφορείων Α.Ε." ("Ε.Θ.Ε.Λ. Α.Ε."), (Company of Thermal Buses S.A.) established and operating pursuant to Laws Nos 2175/1993 (Α΄211) and 2669/1998 (Α΄283);

SPAIN

9.1. Entities that provide urban transport public services pursuant to "Ley 7/1985 Reguladora de las Bases de Régimen Local of 2 April 1985; Real Decreto legislativo 781/1986, de 18 de Abril, por el que se aprueba el texto refundido de las disposiciones legales vigentes en materia de régimen local" and corresponding regional legislation, if appropriate;

9.2. Entities providing bus services to the public pursuant to the transitory provision number three of "Ley 16/1987, de 30 de Julio, de Ordenación de los Transportes Terrestres".

Examples:

FRANCE

10.7 Réseau ferré de France, State-owned company set up by Law n°97-135 of 13 February 1997;

CROATIA

11.1 Contracting entities referred to in Article 6 of the Zakon o javnoj nabavi - Narodne novine broj 90/11 (Public Procurement Act, Official Gazette No. 90/11) which are public undertakings or contracting authorities and which, in accordance with special regulations, engage in the activity of making available the networks or managing the networks for public services of urban railway, automated systems, tramway, bus , trolleybus and cable car (cableway) transport; such as the entities engaging in the said activities as a public service in accordance with the Utilities Act (Official Gazette 36/95, 70/97, 128/99, 57/00, 129/00, 59/01, 26/03, 82/04, 110/04, 178/04, 38/09, 79/09, 153/09, 49/11, 84/11, 90/11)

ITALY

12.1 Entities, companies and undertakings providing public transport services by rail, automated system, tramway, trolleybus or bus or managing the relevant infrastructures at national, regional or local level. They include, for example:

12.1.1. Entities, companies and undertakings providing public transport services on the basis of an authorisation pursuant to Decreto of the Ministro dei Trasporti N°316 of 1 December 2006 "Regolamento recante riordino dei servizi automobilistici interregionali di competenza statale";

12.1.2. Entities, companies and undertakings providing transport services to the public pursuant to Article 1(4) or (15) of Regio Decreto N° 2578 of 15 October 1925 – Approvazione del testo unico della legge sull'assunzione diretta dei pubblici servizi da parte dei comuni e delle province;

12.1.3. Entities, companies and undertakings providing transport services to the public pursuant to Decreto Legislativo N°422 of 19 November 1997 – Conferimento alle regioni ed agli enti locali di funzioni e compiti in materia di trasporto pubblico locale, under the terms of Article 4(4) of Legge N °59 of 15 March 1997 – as amended by Decreto Legislativo N° 400 of 20 September 1999, and by Article 45 of Legge N°166 of 1 August 2002;

12.1.4. Entities, companies and undertakings providing public transport services pursuant to Article 113 of the consolidated text of the laws on the structure of local authorities, approved by Legge N°267 of 18 August 2000 as amended by Article 35 of Legge N°448 of 28 December 2001;

12.1.5. Entities, companies and undertakings operating on the basis of a concession pursuant to Article 242 or 256 of Regio Decreto N°1447 of 9 May 1912 approving the consolidated text of the laws on le ferrovie concesse all'industria privata, le tramvie a trazione meccanica e gli automobili;

12.1.6. Entities, companies and undertakings and local authorities operating on the basis of a

concession pursuant to Article 4 of Legge N°410 of 4 June 1949 – Concorso dello Stato per la riattivazione dei pubblici servizi di trasporto in concessione;

12.1.7. Entities, companies and undertakings operating on the basis of a concession pursuant to Article 14 of Legge N°1221 of 2 August 1952 – Provvedimenti per l'esercizio ed il potenziamento di ferrovie e di altre linee di trasporto in regime di concessione.

LATVIA

14.1. Subjects of public and private law which provide services of passenger convey on buses, trolleybuses a nd/or t rams a t l east i n s uch c ities: R iga, J urmala Liepaja, D augavpils, J elgava, Rezekne and Ventspils.

LITHUANIA

15.1. Akcinė bendrovė "Autrolis";

15.2. Uždaroji akcinė bendrovė "Vilniaus autobusai";

15.3. Uždaroji akcinė bendrovė "Kauno autobusai";

15.4. Uždaroji akcinė bendrovė "Vilniaus troleibusai"; (Joint Stock Company "Vilnius trolley)

LUXEMBOURG

16.1 Chemins de fer luxembourgeois - CFL;
16.2 Service communal des autobus municipaux de la Ville de Luxembourg;
16.3 Transports intercommunaux du canton d'Esch–sur–Alzette - TICE;
16.4 Bus s ervice unde rtakings ope rating pursuant t o t he r èglement gr and-ducal conc ernant l es conditions d'octroi des autorisations d'établissement et d'exploitation des services de transports routiers réguliers de personnes rémunérées of 3 February 1978

LUXEMBOURG

16.1. Chemins de fer luxembourgeois - CFL;

16.2. Service communal des autobus municipaux de la Ville de Luxembourg;

16.3. Transports intercommunaux du canton d'Esch–sur–Alzette - TICE;

NETHERLANDS

19.1 Entities providing transport services to the public pursuant to chapter II (Openbaar Vervoer) of the Wet Personenvervoer. For instance:

19.1.1. R ET (Rotterdam);

19.1.2. HTM (Den Haag);

19.1.3. GVB (Amsterdam)

POLAND

21.1. Entities providing urban railway services, operating on the basis of a concession issued in

accordance with ustawa z dnia 28 marca 2003 r. o transporcie kolejowym;

21.2. Entities providing urban bus transport services for the general public, operating on the basis of an authorisation according to ustawa z dnia 6 września 2001 r. o transporcie drogowym and entities providing urban transport services for the general public, including among others:

21.2.1. Komunalne Przedsiębiorstwo Komunikacyjne Sp. z o.o. Białystok; (Municipal Transport Company Sp. o.o. Bialystok)

21.2.2. Komunalny Zakład Komunikacyjny Sp. z o.o. Białystok;

21.2.3. Miejski Zakład Komunikacji Sp. z o.o. Grudziądz;

21.2.4. Miejski Zakład Komunikacji Sp. z o.o. w Zamościu;

21.2.5. Miejskie Przedsiębiorstwo Komunikacyjne - Łódź Sp. z o.o.;

21.2.6. Miejskie Przedsiębiorstwo Komunikacyjne Sp. z o.o. Lublin;

21.2.7. Miejskie Przedsiębiorstwo Komunikacyjne S.A., Kraków;

21.2.8. Miejskie Przedsiębiorstwo Komunikacyjne S.A., Wrocław;

21.2.9. Miejskie Przedsiębiorstwo Komunikacyjne Sp. z o.o., Częstochowa;

21.2.10. Miejskie Przedsiębiorstwo Komunikacyjne Sp. z o.o., Gniezno;

21.2.11. Miejskie Przedsiębiorstwo Komunikacyjne Sp. z o.o., Olsztyn;

21.2.12. Miejskie Przedsiębiorstwo Komunikacyjne Sp. z o.o., Radomsko;

21.2.13. Miejskie Przedsiębiorstwo Komunikacyjne Sp. z o.o., Wałbrzych;

21.2.14. Miejskie Przedsiębiorstwo Komunikacyjne w Poznaniu Sp. z o.o.;

21.2.15. Miejskie Przedsiębiorstwo Komunikacyjne Sp. z o.o. w Świdnicy;

21.2.16. Miejskie Zakłady Komunikacyjne Sp. z o.o., Bydgoszcz;

21.2.17. Miejskie Zakłady Autobusowe Sp. z o.o., Warszawa;

21.2.18. Opolskie Przedsiębiorstwo Komunikacji Samochodowej S.A. w Opolu;

21.2.19. Polbus - PKS Sp. z o.o., Wrocław;

21.2.20. Polskie Koleje Linowe Sp. z o.o Zakopane;

21.2.21. Przedsiębiorstwo Komunikacji Miejskiej Sp. z o.o., Gliwice;

21.2.22. Przedsiębiorstwo Komunikacji Miejskiej Sp. z o.o. w Sosnowcu;

21.2.23. Przedsiębiorstwo Komunikacji Samochodowej Leszno Sp. z o.o.;

21.2.24. Przedsiębiorstwo Komunikacji Samochodowej S.A., Kłodzko;

21.2.25. Przedsiębiorstwo Komunikacji Samochodowej S.A., Katowice;

21.2.26. Przedsiębiorstwo Komunikacji Samochodowej w Brodnicy S.A.;

21.2.27. Przedsiębiorstwo Komunikacji Samochodowej w Dzierżoniowie S.A.;

21.2.28. Przedsiębiorstwo Komunikacji Samochodowej w Kluczborku Sp. z o.o.;

21.2.29. Przedsiębiorstwo Komunikacji Samochodowej w Krośnie S.A.;

21.2.30. Przedsiębiorstwo Komunikacji Samochodowej w Raciborzu Sp. z o.o.;

21.2.31. Przedsiębiorstwo Komunikacji Samochodowej w Rzeszowie S.A.;

21.2.32. Przedsiębiorstwo Komunikacji Samochodowej w Strzelcach Opolskich S.A.;

21.2.33. Przedsiębiorstwo Komunikacji Samochodowej Wieluń Sp. z o.o.;

21.2.34. Przedsiębiorstwo Komunikacji Samochodowej w Kamiennej Górze Sp. zo.o.;

21.2.35. Przedsiębiorstwo Komunikacji Samochodowej w Białymstoku S.A.;

21.2.36. Przedsiębiorstwo Komunikacji Samochodowej w Bielsku Białej S.A.;

21.2.37. P rzedsiębiorstwo Komunikacji Samochodowej w Bolesławcu Sp. z o.o.;

21.2.38. Przedsiębiorstwo Komunikacji Samochodowej w Cieszynie Sp. zo.o.;

21.2.39. Przedsiębiorstwo Przewozu Towarów Powszechnej Komunikacji Samochodowej S.A.;

21.2.40. Przedsiębiorstwo Komunikacji Samochodowej w Bolesławcu Sp. z o.o.;

21.2.41. Przedsiębiorstwo Komunikacji Samochodowej w Mińsku Mazowieckim S.A.;

21.2.42. Przedsiębiorstwo Komunikacji Samochodowej w Siedlcach S.A.;

21.2.43. Przedsiębiorstwo Komunikacji Samochodowej "SOKOŁÓW" w Sokołowie Podlaskim S.A.;

21.2.44. Przedsiębiorstwo Komunikacji Samochodowej w Garwolinie S.A.;

21.2.45. Przedsiębiorstwo Komunikacji Samochodowej w Lubaniu Sp. z o.o.;

21.2.46. Przedsiębiorstwo Komunikacji Samochodowej w Łukowie S.A.;

21.2.47. Przedsiębiorstwo Komunikacji Samochodowej w Wadowicach S.A.;

21.2.48. Przedsiębiorstwo Komunikacji Samochodowej w Staszowie Sp. z o.o.;

21.2.49. Przedsiębiorstwo Komunikacji Samochodowej w Krakowie S.A.;

21.2.50. Przedsiębiorstwo Komunikacji Samochodowej w Dębicy S.A.;

21.2.51. Przedsiębiorstwo Komunikacji Samochodowej w Zawierciu S.A.;

21.2.52. Przedsiębiorstwo Komunikacji Samochodowej w Żyrardowie S.A.;

21.2.53. Przedsiębiorstwo Komunikacji Samochodowej w Pszczynie Sp. z o.o.;

21.2.54. P rzedsiębiorstwo Komunikacji Samochodowej w Płocku S.A.;

21.2.55. Przedsiębiorstwo Spedycyjno-Transportowe „Transgór" Sp. z o.o.;

21.2.56. Przedsiębiorstwo Komunikacji Samochodowej w Stalowej Woli S.A.;

21.2.57. Przedsiębiorstwo Komunikacji Samochodowej w Jarosławiu S.A.;

21.2.58. Przedsiębiorstwo Komunikacji Samochodowej w Ciechanowie S.A.;

21.2.59. Przedsiębiorstwo Komunikacji Samochodowej w Mławie S.A.;

21.2.60. Przedsiębiorstwo Komunikacji Samochodowej w Nysie Sp. z o.o.;

21.2.61. Przedsiębiorstwo Komunikacji Samochodowej w Ostrowcu Świętokrzyskim S.A.;

21.2.62. Przedsiębiorstwo Komunikacji Samochodowej w Kielcach S.A.;

21.2.63. Przedsiębiorstwo Komunikacji Samochodowej w Końskich S.A.;

21.2.64. Przedsiębiorstwo Komunikacji Samochodowej w Jędrzejowie Spółka Akcyjna;

21.2.65. Przedsiębiorstwo Komunikacji Samochodowej w Oławie Spółka Akcyjna;

21.2.66. Przedsiębiorstwo Komunikacji Samochodowej w Wałbrzychu Sp. z o.o.;

21.2.67. Przedsiębiorstwo Komunikacji Samochodowej w Busku Zdroju S.A.;

21.2.68. Przedsiębiorstwo Komunikacji Samochodowej w Ostrołęce S.A.;

21.2.69. Tramwaje Śląskie S.A.;

21.2.70. Przedsiębiorstwo Komunikacji Samochodowej w Olkuszu S.A.;

21.2.71. Przedsiębiorstwo Komunikacji Samochodowej w Przasnyszu S.A.;

21.2.72. Przedsiębiorstwo Komunikacji Samochodowej w Nowym Sączu S.A.;

21.2.73. Przedsiębiorstwo Komunikacji Samochodowej Radomsko Sp. z o.o.;

21.2.74. Przedsiębiorstwo Komunikacji Samochodowej w Myszkowie Sp. zo.o.;

21.2.75. Przedsiębiorstwo Komunikacji Samochodowej w Lublińcu Sp. z o.o.;

21.2.76. Przedsiębiorstwo Komunikacji Samochodowej w Głubczycach Sp. z o.o.;

21.2.77. PKS w Suwałkach S.A.;

21.2.78. Przedsiębiorstwo Komunikacji Samochodowej w Koninie S.A.;

21.2.79. Przedsiębiorstwo Komunikacji Samochodowej w Turku S.A.;

21.2.80. Przedsiębiorstwo Komunikacji Samochodowej w Zgorzelcu Sp. z o.o.;

21.2.81. PKS Nowa Sól Sp. z o.o.;

21.2.82. Przedsiębiorstwo Komunikacji Samochodowej Zielona Góra Sp. z o.o.;

21.2.83. Przedsiębiorstwo Komunikacji Samochodowej Sp. z o.o, w Przemyślu;

21.2.84. Przedsiębiorstwo Państwowej Komunikacji Samochodowej, Koło;

21.2.85. Przedsiębiorstwo Państwowej Komunikacji Samochodowej, Biłgoraj;

21.2.86. Przedsiębiorstwo Komunikacji Samochodowej Częstochowa S.A.;

21.2.87. Przedsiębiorstwo Państwowej Komunikacji Samochodowej, Gdańsk;

21.2.88. Przedsiębiorstwo Państwowej Komunikacji Samochodowej, Kalisz;

21.2.89. Przedsiębiorstwo Państwowej Komunikacji Samochodowej, Konin;

21.2.90. Przedsiębiorstwo Państwowej Komunikacji Samochodowej, Nowy Dwór Mazowiecki;

21.2.91. Przedsiębiorstwo Państwowej Komunikacji Samochodowej, Starogard Gdański;

21.2.92. Przedsiębiorstwo Państwowej Komunikacji Samochodowej, Toruń;

21.2.93. Przedsiębiorstwo Państwowej Komunikacji Samochodowej, Warszawa;

21.2.94. Przedsiębiorstwo Komunikacji Samochodowej w Białymstoku S.A.;

21.2.95. Przedsiębiorstwo Komunikacji Samochodowej w Cieszynie Sp. z o.o.;

21.2.96. Przedsiębiorstwo Państwowej Komunikacji Samochodowej w Gnieźnie;

21.2.97. Przedsiębiorstwo Państwowej Komunikacji Samochodowej w Krasnymstawie;

21.2.98. Przedsiębiorstwo Państwowej Komunikacji Samochodowej w Olsztynie;

21.2.99. Przedsiębiorstwo Państwowej Komunikacji Samochodowej w Ostrowie Wlkp.;

21.2.100. Przedsiębiorstwo Państwowej Komunikacji Samochodowej w Poznaniu;

21.2.101. Przedsiębiorstwo Państwowej Komunikacji Samochodowej w Zgorzelcu Sp. z o.o.;

21.2.102. Szczecińsko-Policki Przedsiębiorstwo Komunikacyjne Sp. z o.o.;

21.2.103. Tramwaje Śląskie S.A., Katowice;

21.2.104. T ramwaje Warszawskie Sp. z o.o.;

21.2.105. Zakład Komunikacji Miejskiej w Gdańsku Sp. z o.o.

PORTUGAL

22.2. Local authorities, local authority services and local authority undertakings under Law No 58/98 of 18 August 1998, which provide transport services pursuant to Lei No. 159/99 do 14 de Septembro 1999;

22.3. Public authorities and public undertakings providing railway services pursuant to Law No. 10/90 do 17 de Março 1990;

22.7. Metro do Porto, S.A., pursuant to Decreto-Lei No. 394-A/98 do 15 de Dezembro 1998, as amended by Decreto-Lei No. 261/2001 do 26 September 2001;

22.8. Normetro, S.A., pursuant to Decreto-Lei No. 394-A/98 of 15 December 1998, as amended by Decreto-Lei No. 261/2001 do 26 de Septembro 2001;

22.9. Metropolitano L igeiro de M irandela, S .A., pur suant t o Decreto-Lei N o. 24 /95 do 8 d e Fevereiro 1995;

22.10. Metro do Mondego, S.A., pursuant to Decreto-Lei No. 10/2002 do 24 de Janeiro2002;

22.11. Metro T ransportes do Sul, S .A., pursuant to D ecreto-Lei No 337/99 do 24 de Agosto 1999;

22.12. Local authorities and local authority undertakings providing transport services pursuant to Lei No. 159/99 do 14 de Septembro 1999.

ROMANIA

23.1 S.C. de Transport cu Metroul Bucureşti "Metrorex" SA (Bucharest Subway Transport Commercial Company "METROREX S.A.");
23.2 Regii Autonome Locale de Transport Urban de Călători (Local Autonomous Public Service Undertakings for Urban Passenger Transport).

SLOVENIA

24.1 Companies providing public urban bus transport pursuant to the Zakon o prevozih v cestnem prometu (Uradni list RS, 72/94, 54/96, 48/98 in 65/99):

24.1.1. AVTOBUSNI PREVOZI RIŽANA D.O.O. Dekani - Mat. Št. 1540564 - Poštna Št.: 6271 – Kraj: Dekani;

24.1.2. AVTOBUSNI PROMET Murska Sobota D.D. - Mat. Št. 5065011 - Poštna Št.: 9000 – Kraj: Murska Sobota;

24.1.3. Alpetour Potovalna Agencija - Mat. Št. 5097053 - Poštna Št.: 4000 - Kraj: Kranj;

24.1.4. ALPETOUR, Špedicija In Transport, D.D. Škofja Loka - Mat. Št. 5097061 - Poštna Št.: 4220 - Kraj: Škofja Loka;

24.1.5. INTEGRAL BREBUS Brežice D.O.O. - Mat. Št. 5107717 - Poštna Št.: 8250 - Kraj: Brežice;

24.1.6. IZLETNIK CELJE D.D. Prometno In Turistično Podjetje Celje - Mat. Št. 5143233 - Poštna Št.: 3000 - Kraj: Celje;

24.1.7. AVRIGO DRUŽBA ZA AVTOBUSNI PROMET IN TURIZEM D.D. NOVA GORICA - Mat. Št. 5143373 - Poštna Št.: 5000 - Kraj: Nova Gorica;

24.1.8. JAVNO PODJETJE LJUBLJANSKI POTNIŠKI PROMET D.O.O. - Mat. Št. 5222966 - Poštna Št.: 1000 - Kraj: Ljubljana;

24.1.9. CERTUS AVTOBUSNI PROMET MARIBOR D.D. - Mat. Št. 5263433 - Poštna Št.: 2000 - Kraj: Maribor;

24.1.10. I & I - Avtobusni Prevozi D.D. Koper - Mat. Št. 5352657 - Poštna Št.: 6000 - Kraj: Koper – Capodistria;

24.1.11. Meteor Cerklje - Mat. Št. 5357845 - Poštna Št.: 4207 - Kraj: Cerklje;

24.1.12. KORATUR Avtobusni Promet In Turizem D.D. Prevalje - Mat. Št. 5410711 - Poštna Št.: 2391 - Kraj: Prevalje;

24.1.13. INTEGRAL, Avto. Promet Tržič, D.D. - Mat. Št. 5465486 - Poštna Št.: 4290 - Kraj: Tržič;

24.1.14. KAM-BUS Družba Za Prevoz Potnikov, Turizem In Vzdrževanje Vozil, D.D. Kamnik - Mat. Št. 5544378 - Poštna Št.: 1241 - Kraj: Kamnik;

24.1.15. MPOV Storitve In Trgovina D.O.O. Vinica - Mat. Št. 5880190 - Poštna Št.: 8344 - Kraj: Vinica.

SLOVAKIA

25.2Carriers operating regular domestic bus transport for the public on the territory of the Slovak Republic, or on the part of the territory of the foreign state as well, or on determined part of the territory of the Slovak Republic on basis of the permission to operate the bus transport and on basis of the transport licence for specific route, which are granted pursuant to Act No. 168/1996 Coll. in wording of Acts No. 386/1996 Coll., No. 58/1997 Coll., No. 340/2000 Coll., No. 416/2001 Coll., No. 506/2002 Coll., No. 534/2003 Coll. and No. 114/2004 Coll. For example:

25.2.1. Dopravný podnik Bratislava, a.s.;

25.2.2. Dopravný podnik mesta Košice, a.s.;

25.2.3. Dopravný podnik mesta Prešov, a.s.;

25.2.4. Dopravný podnik mesta Žilina, a.s.

UNITED KINGDOM
28.2 London Underground Limited

28.11 Blackpool Transport Services Limited

28.14 Northern Ireland Transport Holding Company

F. Contracting entities in the field of rail services

BELGIUM
1.1. SNCB Holding/NMBS Holding;

1.2. Nationale Maatschappij der Belgische Spoorwegen (Société nationale des Chemins de fer belges);

1.3. Infrabel.

BULGARIA
2.1. Национална компания "Железопътна инфраструктура"; (2.1. National Company "Railway Infrastructure";)

2.2. "Български държавни железници" ЕАД; (2.2. "Bulgarian State Railways" EAD;)

2.3. "БДЖ – Пътнически превози" ЕООД; (2.3. "BDZ - Passenger Transport" EOOD;)

2.4. "БДЖ – Тягов подвижен състав (Локомотиви)" ЕООД; (2.4. "BDZ - Traction rolling stock (locomotives)" LTD;)

2.5. "БДЖ – Товарни превози" ЕООД; (2.5. "BDZ - Freight services";)

2.6. "Българска Железопътна Компания" АД; (2.6. "Bulgarian Railway Company";)

2.7. "Булмаркет – ДМ" ООД. (2.7. "Bulmarket - DM")

CZECH REPUBLIC
3.1. All contracting entities in the sectors which supply services in the field of rail services defined in the section 4 paragraph 1 letter f) of Act No. 137/2006 Coll. on Public Contracts, as amended. Examples of contracting entities:

3.1.1. ČD Cargo, a.s.;

3.1.2. České dráhy, a.s.;

3.1.3. Správa železniční dopravní cesty, státní organizace.

DENMARK
4.1. D SB;

4.2. DSB S-tog A/S;

4.3. M etroselskabet I/S.

GERMANY
5.1. Deutsche Bahn AG;

5.2. Other undertakings providing railway services to the public pursuant to Article 2(1) of the Allgemeines Eisenbahngesetz of 27 December 1993, as last amended on 26 February 2008.

ESTONIA
6.2. AS Eesti Raudtee;

6.3. A S Elektriraudtee.

IRELAND
7.1. Iarnród Éireann (Irish Rail);

GREECE
8.1. "Οργανισμός Σιδηροδρόμων Ελλάδος Α.Ε." ("Ο.Σ.Ε. Α.Ε."), pursuant to Law No 2671/98;("Hellenic Railways Organization SA" ("OSE SA"), pursuant to Law No 2671/98;)

8.2. "ΕΡΓΟΣΕ A.E." pur suant t o L aw N o 2366/95.(" ERGOSE S A" pur suant to L aw N o 2366/95.)

SPAIN
9.1. Ente público Administración de Infraestructuras Ferroviarias - ADIF;

9.2. Red Nacional de los Ferrocarriles Españoles - RENFE;

9.3. Ferrocarriles de Vía Estrecha - FEVE;

9.4. Ferrocarrils de la Generalitat de Catalunya - FGC;

9.5. Eusko Trenbideak - Bilbao;

9.6. Ferrocarrils de la Generalitat Valenciana - FGV;

9.7. Serveis Ferroviaris de Mallorca - Ferrocarriles de Mallorca;

9.8. Ferrocarril de Soller;

9.9. Funicular de Bulnes.

FRANCE
10.1 Société nationale des chemins de fer français and other rail networks open to the public, referred to in Loi d'orientation des transports intérieurs n° 82-1153 of 30 December 1982, Title II, Chapter 1;
10.2 Réseau ferré de France, State-owned company set up by Law n° 97-135 of 13 February 1997.

ITALY
12.1 Ferrovie dello Stato S. p. A. including le Società partecipate;
12.2 Entities, companies and undertakings providing railway services on the basis of a concession pursuant to Article 10 of Royal Decree No. 1447 of 9 May 1912, approving the consolidated text of the laws on le ferrovie concesse all'industria privata, le tramvie a trazione meccanica e gli automobili;
12.3 Entities, companies and undertakings providing railway services on the basis of a concession pursuant to Article 4 of Law N°410 of 4 June 1949 – Concorso dello Stato per la riattivazione dei pubblici servizi di trasporto in concessione;
12.4 Entities, companies and undertakings or local authorities providing railway services on the basis of a concession pursuant to Article 14 of Law 1221 of 2 August 1952 – Provvedimenti per l'esercizio ed il potenziamento di ferrovie e di altre linee di trasporto in regime di concessione;
12.5 Entities, companies and undertakings providing public transport services, pursuant to articles 8 and 9 of the decreto legislativo N°422 of 19 November 1997 – Conferimento alle regioni ed agli enti locali di funzioni e compiti in materia di trasporto pubblico locale, a norma dell'articolo 4, comma 4, della L. 15 marzo 1997, n. 9 – as modified by decreto legislativo N °400 of 20 September 1999, and by article 45 of the Legge N°166 of 1 August 2002.

LATVIA
14.1. Valsts akciju sabiedrība "Latvijas dzelzceļš";(State Joint Stock Company "Latvian Railway")
14.2. Valsts akciju sabiedrība "Pasažieru vilciens".(State joint stock company "Passenger Train")

LITHUANIA

15.1. Akcinė bendrovė "Lietuvos geležinkeliai";(

15.2. Other entities in compliance with the requirements of Article 70 (1, 2) of the Law on Public Procurement of the Republic of Lithuania (Official Gazette, No. 84-2000, 1996; No. 4-102, 2006) and operating in the field of railway services in accordance with the Code of Railway Transport of the Republic of Lithuania (Official Gazette, No. 72-2489, 2004).

LUXEMBOURG
16.1 Chemins de fer luxembourgeois - CFL.

HUNGARY
17.1 Entities providing rail transport services to the public pursuant to Articles 162-163 of 2003. évi CXXIX. törvény a közbeszerzésekről and 2005. évi CLXXXIII. törvény a vasúti közlekedésről and on the basis of an authorisation pursuant to 45/ 2006. (VII. 11.) GKM rendelet a vasúti társaságok működésének engedélyezéséről. For example:
17.1.1 Magyar Államvasutak (MÁV).

NETHERLANDS
19.1 Procuring entities in the field of railway services. For instance:
19.1.1. Nederlandse Spoorwegen;

19.1.2 ProRail

AUSTRIA
20.1 Österreichische Bundesbahn;
20.2 Schieneninfrastrukturfinanzierungs-Gesellschaft mbH sowie;
20.3 Entities authorised to provide transport services pursuant to Eisenbahngesetz, BGBl. No 60/1957, as amended.

POLAND
21.1 Entities providing rail transport services, operating on the basis of ustawa o komercjalizacji, restrukturyzacji i prywatyzacji przedsiębiorstwa państwowego "Polskie Koleje Państwowe" z dnia 8 września 2000 r.; including among others:
21.1.1. PKP Intercity Sp. z o.o.;

21.1.2. PKP Przewozy Regionalne Sp. z o.o.;

21.1.3. PKP Polskie Linie Kolejowe S.A.;

21.1.4. "Koleje Mazowieckie - KM" Sp. z o.o.;

21.1.5. PKP Szybka Kolej Miejska w Trójmieście Sp. z o.o.;

21.1.6. PKP Warszawska Kolej Dojazdowa Sp. z o.o.

PORTUGAL
22.1. CP – Caminhos de Ferro de Portugal, E.P., pursuant to Decreto-Lei No 109/77 do 23 de Março 1977;

22.2. REFER, E.P., pursuant to Decreto-Lei No 104/97 do29 de Abril 1997;

22.3. RAVE, S.A., pursuant to Decreto-Lei No 323-H/2000 of 19 de Dezembro 2000;

22.4. Fertagus, S.A., pursuant to Decreto-Lei 78/2005, of 13 de Abril;

22.5. Public authorities and public undertakings providing railway services pursuant to Lei No 10/90 do 17 de Março 1990;

22.6. Private undertakings providing railway services pursuant to Lei No 10/90 do 17 de Março 1990, where they hold special or exclusive rights.

ROMANIA
23.1. Compania Naţională Căi Ferate – CFR; (National Railway Company - CFR;)
23.2. Societatea Naţională de Transport Feroviar de Marfă "CFR – Marfă"; (National Society Rail Freight "CFR - Freight")
23.3. Societatea Naţională de Transport Feroviar de Călători "CFR – Călători". (National Society of Passenger Railway Transport "CFR - Passenger".)

SLOVENIA

24.1. Slovenske železnice, d. o. o. - Mat. Št. 5142733 - Poštna Št.: 1000 – Kraj: Ljubljana.

SLOVAKIA

25.1. Entities operating railways and cable ways and facilities related thereto pursuant to Act No. 258/1993 Coll. in wording of Acts No. 152/1997 Coll. and No. 259/2001 Coll.;

25.2. Entities, which are carriers providing for railway transport to the public under the Act No. 164/1996 Coll. in wording of Acts No. 58/1997 Coll., No. 260/2001 Coll., No. 416/2001 Coll. and No. 114/2004 Coll. and on basis of governmental decree No. 662 of 7. July 2004.

For example:

25.3. Železnice Slovenskej republiky, a.s.;

25.4. Železničná spoločnosť Slovensko, a.s.

FINLAND

26.1. VR Osakeyhtiö/ /VR Aktiebolag

UNITED KINGDOM

28.1 Network Rail plc;

28.2 Eurotunnel plc;

28.3 Northern Ireland Transport Holding Company;

28.4 Northern Ireland Railways Company Limited;

28.5 Providers of rail services which operate on the basis of special or exclusive rights granted by the Department of Transport or any other competent authority.

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