

Public Procurement – to be or not to be: what constitutes a body governed by public law under Directive 2014/24?

Last week, the Court of Justice of the European Union (the **Court**) rendered an interesting judgment clarifying the scope of application of public procurement legislation *ratione personae*. This case concerned the status of the Italian Football Federation, and specifically, whether it should be considered as a body governed by public law for the purpose of the application of public procurement rules under Directive 2014/24/EU of 26 February 2014 on public procurement and repealing

Directive 2004/18/EC (**Directive 2014/24/EU**). In doing so, the Court provided helpful guidance on applying the notion of a body governed by public law, especially in relation to what a “*specific purpose of meeting needs in the general interest, not having an industrial or commercial character*” within the realm of sports law entails, but left it to the referring court to verify whether the sports federation in question satisfied the criteria set out in the judgment.

1. Background

The case concerned a negotiated procedure run by the Italian Football Federation (the FIGC) for the award of a contract for portage services for accompanying the national football teams and for the purposes of the FIGC store, which it awarded to the enterprise, Consorzio Ge.Se.Av S.c.arl. An unsuccessful bidder challenged the tender procedure, claiming that the FIGC was a body governed by public law as defined in article 2(1)(4) of Directive 2014/24/EU and that it did not respect the publication rules laid down by the legislation on public procurement.

The Court of first instance upheld that action and annulled the award of the tender to Consorzio Ge.Se.Av S.c.arl. Consorzio Ge.Se.Av S.c.arl and the FIGC appealed the judgment to the Italian Council of State, questioning the assumption that the FIGC should be classified as a ‘body governed by public law’. The Council of State referred the case to the Court (joined cases C-155/19 FIGC et Consorzio Ge.Se.Av. & C-156/19 FIGC et Consorzio Ge.Se.Av. (the **FIGC Case**)) to establish whether the FIGC fulfilled the conditions laid down by Directive 2014/24/EU

on public procurement to be classified as a ‘body governed by public law’ and therefore, subject to the rules relating to the award of public contracts. In doing so it asked whether:

- the FIGC is to be qualified as a body governed by public law, insofar as it is established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and taking into account: (i) that it was established in the form of an association governed by private law; (ii) that it has the capacity to fund itself; (iii) that the concerned contract has a private-law nature;
- the Italian National Olympic Committee (the **CONI**) exercises dominant influence over the FIGC, in light of its legal powers of (i) recognition of the undertaking for sporting purposes; (ii) approval of annual budgets; (iii) management supervision; and (iv) placing the entity under administrative supervision, taking into account the significant participation of the presidents and representatives of the sports federations in the key bodies of the CONI.

2. Assessment by the Court

In its judgment, the Court confirmed its standing case law that the requirements of article 2(1)(4) of Directive 2014/24 are cumulative. Therefore, the FIGC qualifies as a public body if it:

- (i) is established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
- (ii) has legal personality; **and**

(iii) is financed, for the most part, by public bodies; **or** is subject to management supervision by those authorities or bodies; or has an administrative, managerial or supervisory board controlled by a public body.

As the legal personality of the FIGC was undisputed, the case depended on the first and third requirements, with the third requirement being limited to the question of management supervision by a public body (ie the CONI).

2.1 Is the FIGC established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character?

(a) Analysis of the Court

First, with regards to whether the FIGC is established “for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character”, the Court stated that, based on the information provided by the referring judge, it would appear that sport is considered an activity of public interest in Italy, and is pursued by each of the national sports federations within the framework of tasks of a public nature expressly assigned to those federations by Italian law.

In addition, the Court pointed out that the FIGC’s tasks, such as the supervision of the proper running of competitions and championships, the prevention and punishment of doping, and Olympic and high-level preparation, do not appear to be of an industrial or commercial nature. While this is a noteworthy observation, the Court left the ultimate assessment of this fact to the national court to verify.

According to the Court, the fact that the FIGC is an association governed by private law and also pursues other activities alongside the activities of general interest is irrelevant (even if the activities of general interest are not considerable) and does not call into question the above conclusion. Also, the fact that these non-public activities mean that a national sports federation is self-financing, does not alter the conclusion that the sports federation is established for the specific purpose of meeting needs in the general interest.

(b) Implications for sports federations (and others)

The above considerations may have important repercussions for sports federations in the EU. Firstly, while not all EU Member States expressly define the tasks of sports federations as tasks in the public interest and anchor these in a legal framework, as under Italian law, many sports federations may nevertheless benefit from Member State recognition and subsidy mechanisms, often on the basis of considerations that the promotion of sport has a certain social, cultural and/or educational value. Even the European Union recognises “*the specific nature of sport, its structures based on voluntary activity and its social and educational function*” in article 165(1) of the Treaty on the Functioning of the European Union. In addition, certain sports (such as football) are embedded within a wider framework (such as the UEFA or FIFA) for the promotion and advancement of that sport, but also to develop and enforce certain standards with regards to the sport’s integrity, which includes educational values such as cultivating a spirit of fairness and fair-play. These overarching federations may also imbue certain sports federations with a privileged status by according them official partner status or designating a certain national federation as the sole “true” representative of that sport within a certain country.

In addition, the FIGC’s tasks which the Court cited as being, *a priori*, not of an industrial or commercial nature (subject to the referring court’s verification), namely the supervision of the proper running of competitions and championships, the prevention and punishment of doping, and Olympic and high-level preparation, are tasks which are commonly found in the legal framework or founding statutes of sports federations.

In that context, it is no stretch to imagine that many sports federations (and other private associations with a for example socio-cultural character) may be considered to be “*established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character*” across the Member States.



2.2 Is the FIGC subject to management supervision by a public body (ie the CONI)?

Second, the Court specified that the third criterion requires active control over the management of the body concerned, amounting to a high level of dependency of that body on the public authority that **in practice**, called into question the management autonomy of the body itself, to such an extent as to allow the public authority to influence the body's decisions with regard to public contracts. This requires an overall analysis of the powers that a public authority has over the body to confirm that there is active management control. The Court highlighted that an 'ex post facto' review does not satisfy this condition, as this type of review does not allow the public authority to influence the relevant decisions of the body.

Subsequently the Court reviewed the CONI's role and powers vis-à-vis the FIGC in detail, and found that a public authority responsible in essence for laying down sporting rules, verifying that they are properly applied and intervening only as regards the organisation of competitions and Olympic preparation, without regulating the day-to-day organisation and practice of the different sporting disciplines cannot be regarded, *prima facie*, as a hierarchical body capable of controlling and directing the management of national sports federations. The Court concluded that the management autonomy conferred on the national sports federations in Italy seems, *a priori*, to mitigate against this active control on the part of the CONI so that it would be in a position to influence national sports federations such as the FIGC, particularly in relation to the award of public contracts.

2.3 What now?

In the FIGC case, the Court emphasised that in order to determine whether a certain entity qualifies as a body governed by public law, a detailed case-by-case analysis is required. In addition, it stressed the importance of a factual/practical analysis, as it is not only relevant what powers are (or are not) conferred on a specific body and/or public authority through legislation or other rules and regulations, but also how these are put into practice and how day-to-day decisions are made in practice.

That said, national courts may be reluctant to recognise that management supervision is exercised by the authorities or other bodies governed by public law over sports federations. Traditionally, sports federations have enjoyed relative autonomy. In a recent Belgian example, the State Council found that the relevant legislation "*enshrines the principle of autonomy and responsibility of sports associations*" and that "*sports federations are not directly placed under the administrative supervision*" of the relevant authorities, despite the system of recognition and subsidies for sports federations set out in this case in the relevant Walloon legislation¹. While this case did not concern public procurement (and instead related to the qualification of the Royal Belgian Football Association as a public authority whose decisions may be annulled by the Belgian State Council), it demonstrates that the national courts may be reluctant to recognise that Member States restrict autonomy or exercise control over sports.

However, while the Court examined the notion of "*management supervision*" over sports federations, such management supervision is but one of three alternative criteria set out in article 2(1)(4)(c) of Directive 2014/24/EU. The two other criteria – namely (i) whether a body is financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law, or (ii) whether a body has an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law – may nevertheless apply to a sports federation and may thus lead to its qualification as a body governed by public law, subject to public procurement obligations, even in the absence of any management supervision by the State.

As a result, it remains important to closely examine each sports federation (and other potential bodies governed by public law for that matter) on a case-by-case basis, in order to assess whether it qualifies as a body governed by public law. Sports federations that are unable to fully finance themselves may trigger public procurement obligations if they are financed for the most part by the State, regional or local authorities, or by other bodies governed by public law and their activities are considered to meet needs in the general interest, not having an industrial or commercial character, in the Member State(s) in which they operate.

1. Conseil d'Etat, arrêt no 248.214 du 4 septembre 2020, association sans but lucratif ROYAL WALLONIA WALHAIN CHAUMONT-GISTOUX, available [here](#).