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Update

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Judgement of the Swiss Federal Supreme Court 145 II 252

Notion of public procurement: importance of the distinction between the State's administrative and financial assets

1. Introduction

In a landmark ruling handed down on August 29, 2019, in a case concerning the award of the management contract for the Hotel Metropole, owned by City of Geneva (hereinafter: the "City")[1], the Swiss Federal Supreme Court (hereinafter: the "FSC", confirmed the importance of the distinction between the State's administrative and financial assets. The underlying question in the case was if the hotel was part of the State's financial assets and whether the award of the contract relating to its operation, maintenance and management was subject to the rules governing public procurement and the internal market. The management contract was awarded by the City following a private tender, not subject to public procurement rules. An unsuccessful tenderer brought the case before the FSC, arguing that public procurement rules should have been applied. The FSC ruled in favour of the City.

2. Financial assets not subject to public procurement rules

Previously, the Administrative Chamber of the Geneva Court of Justice (hereinafter: the "Chamber") had found that the City did not have a monopoly on the economic activity involved in the operation of hotels. The Chamber's decision focused on the question of whether the operation of a hotel comprised in the City's financial assets had a public interest purpose, which would have resulted in the application of public procurement rules.

In accordance with the prevailing opinion of legal scholars and case law, the Chamber noted that administrative assets include assets belonging to public entities for the realisation of a public task, such as buildings housing schools, hospitals, railway stations, museums, etc.

Conversely, the State's financial assets consist of assets that aid indirectly in the accomplishment of public tasks, through income generated from their capital value and yield or from their sale.

Based on the above, the Chamber concluded that a management contract for a hotel that was part of the City's financial assets did not involve the carrying out of public tasks set forth in a law, was not a means of realising a public task and did not pursue a public interest purpose. Thus, in the absence of a public task or a public interest purpose, as in the present case, public procurement rules do not have to be applied.

[1] FSC Judgement 145 II 252.

This distinction introduces the accomplishment of a public task as a necessary condition for the application of public procurement rules. This same distinction is employed in the draft amended Article 8 of the Federal Act on Public Procurement, which includes the following definition of public procurement: "*a contract concluded between a contracting authority and a bidder for the execution of a public task*."

3. Absence of a concession under Article 7 par. 2 of the Federal Internal Market Act (IMA)

The FSC assessed whether hotel management can be qualified as a grant of monopoly privileges within the meaning of the Federal Internal Market Act (IMA).

Article 2 par. 7 IMA provides that the grant (also known as a concession) of the exploitation of a cantonal or municipal monopoly to private undertakers is subject to a public tender. This provision applies to both *de jure* and *de facto* monopolies.

The Federal Supreme Court held that a financial asset cannot be qualified as a *de jure* or *de facto* monopoly, insofar as it is not earmarked for a public interest purpose, it has a capital value and can produce a yield and it can be realised by the City at any moment. Thus, the management of financial assets is subject to private law.

4. Conclusion

The Federal Supreme Court held that since that the management contract concerned a hotel that is part of the City's financial assets, the City's call for applications (i) was not a public procurement and (ii) was not a grant of monopoly privileges to a private enterprise pursuant to Article 2 par. 7 IMA. Therefore, the call for applications did not give rise to a decision subject to appeal.

This FSC's decision is important for Swiss public entities, since it establishes that, in principle, the management of financial assets does not fall under public procurement rules.

It is interesting to note that, in 2C_569/2018 of May 27, 2019, a case concerning the call for applications for the management of two Geneva theatres, the FSC held that Article 2 par. 7 IMA was applicable; the FSC ruled that the theatres are part of the administrative assets of the City and that there is a *de facto* monopoly. The FSC's application of this provision meant that the public entity was required not only to organise a procedure through which private persons wishing to exploit the monopoly could submit tenders, but also to attribute the concession through a formal decision subject to appeal.

Please do not hesitate to contact us in case of any questions.

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