HART STUDIES IN COMPETITION LAW

PUBLIC PROCUREMENT AND THE EU COMPETITION RULES

SECOND EDITION

Albert Sánchez Graells

BLOOMSBURY

PUBLIC PROCUREMENT AND THE EU COMPETITION RULES

Public procurement and competition law are both important fields of EU law and policy, intimately intertwined in the creation of the internal market. Hitherto their close connection has been noted, but not closely examined. This work is the most comprehensive attempt to date to explain the many ways in which these fields, often considered independent of one another, interact and overlap in the creation of the internal market. This process of convergence between competition and public procurement law is particularly apparent in the new 2014 Directives on public procurement that, in a novel way, consolidate the principle of competition in terms very close to those advanced by the author in the first edition. This second edition of the book builds upon this principled approach and continues to ask how competition law principles inform and condition public procurement rules, and whether the latter (in their revised form) are adequate to ensure that competition is not distorted in markets where public procurement is particularly significant. The second edition of the book also deepens the analysis of the market behaviour of the public buyer from a competition perspective. The analysis remains both legal and economic. Proceeding through a careful assessment of the general rules of competition and public procurement, the book constantly tests the efficacy of the rules in competition and public procurement against a standard of the proper functioning of undistorted competition in the market for public procurement. It also traces the increasing relevance of competition considerations in the case law of the Court of Justice of the European Union and sets out criteria and recommendations to continue influencing that line of development of EU Economic Law.

Shortlisted for the 2012 Prix Vogel in Economic Law.

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Foreword to the Second Edition

Public procurement regulation in Europe suffers from uncertainty over what is and what should be. What appears constant is not and even if the objectives of the directives can be reduced to a few key principles, as they were at the outset, that is not how they are used and interpreted by the regulator, the courts or in practice. There is confusion over the purposes of the directives and what they can be used to achieve. Indeed, if they could be used to achieve all of the goals claimed for them, they would be very fluid instruments indeed. This is not merely due to a lack of clarity in drafting, it also has to do with the place of the directives in the developing policies of the European adventure, the incrementalism of regulatory intervention and the very context of the legislation which applies in Member States alongside national goals.

The European judiciary has often been required to interpret the directives to make sense of them in practice. It has on several occasions, for example, been driven to state that the duty to observe the principle of equal treatment lies at the very heart of the public procurement directives even if this has only recently been recognised in the directives themselves. Equal treatment is not non-discrimination. The latter is key to achieving the goals of the European Union; the former is essential to the proper functioning of procurement in practice, notably in ensuring equal conditions of competition. There is no doubt that both are clearly principles that must now be respected in applying the directives. The directives have also developed as the Union has developed. Where once the objective may only have been to prevent non-discrimination, by the time of the single market exercise in 1992, the inclusion of the public procurement directives in the package of measures to be improved brought them within the remit of measures intended to complete the internal market. One of the goals or benefits to be expected of this further integration was to enhance competition in Europe, as explained in the 1986 Cecchini Report on the Cost of Non-Europe. These are complementary objectives to be sure but different ones.

The regulator has also continued to regulate and the way in which it has done so sometimes appears far removed from the original goals of the directives. This is true even where, as is also the case, it has changed tack, sometimes reluctantly, to pursue varying goals of the moment. The directives are arguably now used explicitly to further political goals which are not covered by the stated objectives and have little to do with the procurement function. The protection of socially deprived groups through the use of set asides is not a mechanism designed to prevent discrimination; it is an overtly political and socially inclusive objective. Promotion of SMEs may be positive discrimination but it is not a question of non-discrimination. The mandatory exclusion of tenderers found guilty of actions related to money laundering or corruption is similarly driven not by the need to guarantee non-discrimination but by the desire of the international community to face up to a number of challenges such as organised crime, terrorism and corruption. Final 'permission' to apply environmental concerns in procurement under the directives has been achieved not because of the principle of non-discrimination but in spite of it.

Similarly, the directives, though articulated at the European level, are transposed and applied at the national level. Despite appearing more like Regulations (than Directives) with each iteration, the Member States continue to retain discretion in the way in which they manage their own public purchasing, albeit within the expanding limits of the directives. Some Member States pursue this possibility with conviction; others less so. Member States pursue a variety of more strategic procurement policies aligned to national objectives such as greater promotion of SMEs, enhanced environmentally friendly procurement, greater integrity through targeted anti-corruption measures, improved technical efficiency and value for money. These are not mutually exclusive objectives; they are often complementary, sometimes contradictory. But they are national objectives rather than European ones even though the regulator introduces some confusion by referring to some of these in the directives. Value for money, a long-standing UK objective, now appears in the directives but is not one of their objectives and could even be inconsistent with some of them.

Many of the provisions of the directives, some of which may have been inspired by national objectives as is the way in the European legislative arena, are the result of decisions far removed from the stated goals of the directives and are political ones at that. That is not to say that this should not be the case. National governments have long used procurement as a policy tool and there is no reason why the European regulator as, apparently, an agent of national governments, should not also use the directives as a tool of policy. The pity is perhaps that the goals arguably made explicit in the directives themselves do not reflect the reality of the goals they are being used to achieve. This has been the history of the directives. The objectives have appeared constant but those are not the objectives that have been pursued. This perhaps partly explains the contortions of the European judiciary in seeking to align the directives with the reality of their application. The point is that policy goals need to be expressed clearly in the directives and not hidden in the detailed provisions where they cause confusion. It is a question of regulatory honesty.

At the same time, procurement sits within an economic reality and involves the purchase by public authorities of goods, works and services from the market. It is an activity of the market economy and is dependent on the laws of supply and demand. The regulation of procurement does not exist in a vacuum and will either affect or be affected by the participation of the public purchaser in the marketplace. An understanding of public procurement requires an understanding of how the procurement market works, especially when one of the parties to the transaction is a public buyer. This is not a normative exercise but one which consists in recognising the market effects of public procurement regulation. At a very basic level, distortions in the market affect the competitive structures in place and have the ability to distort the outcomes envisaged (or at least promoted) by the procurement directives.

The degree of distortion, if that is what it is, depends on the degree of regulatory intervention. The directives began life as relatively simple prohibitions of non-discrimination to be applied in public procurement. The original directives did not, as do the later directives, impose the use of certain procedures; they merely indicated the requirements that were to be imposed (in relation to advertising, for example) in the event that such procedures were used and provided examples of common procedures used at the time. Since then, the procedures required to be used, the conditions of use and the detailed steps to be followed in applying those procedures have been increasingly regulated, thus affecting

the conduct of the purchaser in the market to an ever greater extent. That conduct and its effect deserves attention.

In economic terms, the core procurement method of open tendering is dependent on 'contestability' (an expression of competition) meaning that neither buyer nor seller can exert control over the market prices and are thus price takers. In such circumstances, contestability, or competition through competitive tendering, serves to reflect the true cost of production and indicates, through the discovery process, those suppliers who are the most efficient producers. Contestability is also a key element in reaching a state of perfect competition, a construct which in reality is never achieved, since it is competition which acts as the primary discovery process through which market prices are identified.

Where conditions exist that detract from perfect competition and economic efficiency, there is a market failure. These market failures affect this efficiency and in turn the degree and effectiveness of contestability. At the most obvious level in this context, a market failure exists where suppliers are not price takers, eg where they are able to control the prices in the market. This could be either through bid-rigging and other forms of cartelisation or through the exercise of monopoly power.

But market failures do not occur only at the hands of suppliers, they also occur at the hands of buyers and are affected by their actions on the market. The fact that the buyer is a public body already presents challenges (because its preferences and hence what might be considered the value it places on its purchases are unlike those of a private purchaser, thus affecting the concept value for money) but the issue is broader than that. The way in which they manage their purchasing and the vehicles they choose to do so have implications for the market. Centralised purchasing is a case in point. The aggregation of demand by public purchasers to benefit from scale economies could have serious supply-side implications. Larger contracts may benefit larger suppliers and reduce opportunities for national suppliers or SMEs. Such arrangements may create supply-side monopolies or reduce prices to such an extent that some suppliers are forced to leave the market and new entrants are excluded. This is not a qualitative statement. These consequences may be either beneficial or disadvantageous depending on the market in question. The point is that the procurement decisions (guided or constrained as they might be by the directives) will have an effect on the market. It is an effect that cannot be ignored.

The original edition of this book was the first to provide a comprehensive analysis of the intersection between procurement law and competition law as an expression of how procurement affects the competitive structure of markets. It explained the concepts involved and carefully described the relevant provisions of both public procurement law and competition law at the European level. In drawing conclusions on the effect of the actions of the public purchaser in competitive markets, Dr Sánchez Graells was able to demonstrate in some detail the potential causes and effects of market distortions created by the participation of public buyers in the market, notably by concentrating on the demand side of the equation. In doing so, he raised much needed awareness of the issue and, in making some normative proposals based on his findings, precipitated some spirited debate along the way.

This second edition focuses even more on the demand side distortions and elevates that ongoing debate. With shrinking budgets, governments and their administrations are seeking ways of generating savings. In some cases, the mechanisms chosen will affect supply-side competition and the structure of the market. The concentration of purchasing

power in fewer and larger procuring entities which follows the internal centralisation of some procuring entities in the market and the removal of multiple purchasers within them (sometimes referred to as discrete operational units) may result in larger, longer contracts with fewer, bigger suppliers and could force the exit of other suppliers from the market. The increasing use made of the *Teckal* exemption for in-house contracting and of horizontal cooperation between public authorities (both of which devices are now codified in the new directives which provide for exemption from their provisions) may well remove a number of procurement opportunities from the market which previously supplied them with a similar effect. A reduction in contract opportunities may ultimately result in a reduction of suppliers. Whilst governments may benefit in the short term from cost savings brought about by apparently clever use of strategic procurement, the long-term effect on supply markets (and on future procurement) might be devastating.

Given the lack of constancy in the objectives sought to be pursued in the name of the directives and the confusion which results from the lack of regulatory honesty, it is little surprise that even the key principles have been subject to significant interpretation and re-articulation over the years. The concept of competition raises its head in the directives and the jurisprudence at many points but there is no consensus over its meaning and its implications for public procurement regulation in general. Even if such a consensus could be found, there is no reason to assume that this concept should remain static. It may well be subject to further interpretation or elucidation as has been the case with other key principles of the directives and who is to say that this will also not generate a need to respond through further instrumental regulation. This second edition provides a strong analytical basis for such a debate. And that debate is not over …

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Foreword to the First Edition

Pride and envy. Writing this Foreword arouses in me the contradictory feelings of pride and envy. I feel as proud of Albert Sánchez Graells for writing this book as I would if I had written it myself. On the other hand, I also feel envy as he has written a very well-conceived book that I would have liked to write myself. He has chosen an interesting and greatly complex topic and he has done a magnificent job of covering most of the background and issues that arise around it in a clear and convincing manner.

Public Procurement and the EU Competition Rules is a superb product of academic research and scholarship. It is the fruit of several years of study and reflection by Mr Sánchez Graells. I had the privilege of accompanying Mr Sánchez Graells during the course of much of his work, and I witnessed the perseverance, care and maturity he has poured into each of these pages.

Mr Sánchez Graells addresses in the book the seminal topic of the competition issues pervading public procurement. He follows a coherent and all-inclusive methodology, based on legal and economic grounds (inspired by a sensible functional approach), to build a strong and solid thesis on the limits and requirements that the free competition principle instils in public procurement.

The reader will find the book both good and original, mastering two different areas of law: competition policy and public procurement. It provides a well-balanced mix of theoretical construction (chapters three, four and five being the backbone of his thesis) with a detailed set of useful practical recommendations or guidelines also for the public buyer (chapter six) and for the European legislatures or governments that might endeavour to correct the shortcomings of current public procurement law (chapter seven).

In spite of the aridity and the difficulties of the topic, the book is clear and well written, using lucid and well-defined arguments. The reader will follow and discover the path, laboriously constructed by Mr Sánchez Graells, bridging two traditionally unrelated areas of public policy: competition and public procurement. It does so in an articulate and rigorous manner, erecting a persuading construction: that the competition principle/requirement is embedded in EU public procurement law. The work is especially valuable as it is not a mere description of the state of the law in these two areas. Mr Sánchez Graells portrays a novel view *of public procurement under the lens of competition* based on an extensive and exhaustive analysis of the case law of the European Union's Court of Justice. Of course, the reader may or may not be persuaded by Mr Sánchez Graells' clearheaded and convincing arguments. Understandably and despite the coherency of his arguments, if they are followed, they will profoundly overhaul the practice of EU public procurement and that will have economic and political implications. Therefore, that may condition how far competition is allowed to run in public procurement practice.

Finally, Mr Sánchez Graells does not cheat himself; neither does he try to mislead the reader, as he acknowledges from the start the risks of his pursuit. At the end, the topics dealt with by Mr Sánchez Graells in this book have a strong ideological scent—that is, the weakness of competition policy worldwide—and it may well happen that political

considerations lead to other public goals superseding competition as a principle in organising public tenders.

At this point, the only thing that remains for me to say, before leaving readers on their own, is that I am sure that they will find useful advice in the ideas and challenges Mr Sánchez Graells addresses in the book. *Public Procurement and the EU Competition Rules* is in itself an extensive intellectual puzzle that Mr Sánchez Graells has cleverly put together. I hope readers enjoy it as much as I have learned and enjoyed accompanying him during this, his first, major academic venture.

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Author's Note to the Second Edition

I have been blessed with a very good reception of the first edition of this book in academic circles, of which the short-listing for the 2012 Prix Vogel in Economic Law is one of the most prominent indicators. The book launched my international academic career and took me from the Pontifical University Comillas (ICADE) in Madrid, Spain to the Law School of the University of Hull, UK, and now to the Law School of the University of Leicester, UK. It has generally allowed me to participate in a significant number of international conferences, where I have met new friends and very relevant scholars and PhD students, all of which have helped me develop my thinking about these important areas of EU economic law. I am deeply indebted in gratitude to all of them.

I would like to mention in particular my peers at the European Procurement Law Group and, especially, Professor Steen Treumer and Professor Roberto Caranta; as well as the team of researchers at the University of Nottingham Law School Public Procurement Research Group, and in particular Professor Sue Arrowsmith and Dr Peter Trepte; the excellent American academics running the Government Contracts Program at the The George Washington University, DC, and in particular Associate Dean Daniel I Gordon, and Professors Steven Schooner and Chris Yukins; as well as the team of scholars in the Bangor Law School's Institute for Competition & Procurement Studies, and in particular Professor Dermott Cahill. I am also deeply indebted to my good friends and colleagues Carina Risvig Hammer, Pedro Telles and Grith Skovgaard Ølykke, all of whom are brilliant rising scholars in the fields of procurement and competition. Looking to the future, I feel very fortunate to have also met some energetic and innovative PhD candidates who keep pushing the boundaries of our knowledge in this area. I am particularly grateful to Ignacio Herrera Anchustegui, Member of BECCLE at the Faculty of Law of the University of Bergen, and Xavier Codina García-Andrade, at Universidad Complutense de Madrid. All of them have contributed in one or other way to this second edition, including the revision of rough drafts and the discussion of general ideas. I am deeply grateful for their help. The standard disclaimer applies.

The book was also the object of several book reviews, which were generally very positive and praise-worthy, but also pointed out areas of potential improvement that I have tried to take into account to the largest possible extent in the preparation of this second edition. In that regard, I would like to thank the following scholars for their pointed and useful ideas and suggestions: Grith Skovgaard Ølykke ((2011) 48(6) *Common Market Law Review* 2122), Kamala Dawar ((2011) 38(4) *Legal Issues of Economic Integration* 403), John Townsend ((2012) 75(4) *Modern Law Review* 693) and Stéphane Rodrigues ((2011) *Concurrences* no 36171). I would also like to thank Aris Georgopoulos for interesting discussions that did not, however, result in a book review in the *Public Procurement Law Review* as initially planned (maybe this second edition will provide a fresh opportunity for that). I am also thankful to Professor Chris Yukins for his promotion of the book amongst

US scholars and practitioners, including a kind mention at the US Congress (generally, see Yukins and Cora, 'Feature Comment: Considering the Effects of Public Procurement Regulations on Competitive Markets' (2013) 55(9) *Government Contractor* 64), as well as to Professor Steven Schooner and to Robert Anderson at the WTO for his always positive references to my work.

From an academic perspective, it has also been remarkable to see how the first edition of this book has sparked a rather intense, stimulating and fruitful debate between Professor Sue Arrowsmith, Professor Peter Kunzlik and myself about the ultimate goal of the EU public procurement rules. More specifically, we seem to hold very different views about the meaning of 'competition' and the ensuing economic efficiency, as well as their place in the EU procurement directives. I think that the readers of this second edition will benefit from a short summary of this academic debate, since it fundamentally underpins the work in this book.

Professor Sue Arrowsmith contends that the pro-competitive framework on which this book is based constitutes a stretched and distorted reading of the competition elements included in the EU public procurement directives and their interpreting case law.

Professor Sue Arrowsmith criticises my competition-oriented approach in a section of her article 'The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies' ((2011–12) 14 *Cambridge Yearbook of European Legal Studies* 1–47). She argues for her own interpretation of the goal of the EU rules and tries to limit their scope in search for some 'regulatory space' for Member States. This is part of a larger endeavour of hers, likely to carry on in the written proceedings of her conference on "Rethinking 'economic' derogations and justifications under the EU's free movement rules" within the Current Legal Problems 2014–15 series. In her 2012 paper, Professor Arrowsmith considered that my book espouses 'a broad notion of competition as a tool for replicating the private sector market' in the public procurement setting. She considers that such point of departure should be rejected, as it is a *misunderstanding* of the concept of competition embedded in the pre-2014 public procurement directives, which she considers limited to 'removing discrimination and barriers to entry into the competitive market, and implementation of the competitive procedures for transparency reasons'. She adopted a rather positivistic approach and stressed that '[i]t seems significant that while non-discrimination, transparency and equal treatment were written into the directives as general principles, [its] "competition" provisions are confined to specific areas'. She eventually concluded that 'a broad interpretation of the directives as being concerned with replicating market competition is incorrect. While apparently supported by some statements in the jurisprudence these are based on misunderstanding and such a broad interpretation, it is submitted, represents unwarranted judicial reorientation of the directives' rules' (all quotes from pp 25–34). My reaction to the line of criticism voiced by Professor Arrowsmith is as follows.

Firstly, I am not sure that my approach can be conceptualised as an attempt to make the directives 'replicate market competition'. I would submit that it is rather an attempt to *properly integrate them* within an environment of market competition. Or, put differently, this is an attempt to avoid public procurement rules from distorting or restricting the competition that already takes place in the market, or from preventing the competition that would emerge *but for* the constraints imposed by the procurement rules.

Secondly, as to the point that this approach is flawed and based on misunderstandings, taking exclusively into account the pre-2014 materials, I would suggest that Professor Arrowsmith's views do not lie on the strongest economic foundations. Professor Arrowsmith basically comes to the view that EU public procurement rules are concerned with preventing barriers to trade within the internal market (by means of transparency and non-discrimination), but that this has nothing to do with economic efficiency derived from undistorted competition because the ultimate objective of the rules (beyond internal market integration per se) belongs to the domestic regulatory space of the Member States. However, economic efficiency must, by necessity, derive from the completion of the internal market if that results in stronger competitive pressures for economic operators. Furthermore, as the Court of Justice of the EU has very recently stressed in an interpretation of the 2004 public procurement directives, *the ultimate objective of the internal market rules and the EU public procurement directives is to allow all the economic operators involved to achieve economic efficiency derived from competition strategies unaffected by restrictive procurement decisions*—in particular, even if that is attained by deriving a competitive advantage from the differences between the respective rates of pay applicable in different Member States (Judgment in *Bundesdruckerei*, C-549/13, EU:C:2014:2235, 34). It seems very clear that EU public procurement rules, just as everywhere else, are concerned with economic efficiency. Hence, limited doubt can seriously be cast on the fundamental proposition that the development of the internal market, including public procurement rules, and its supporting system of competition rules aim at generating economic efficiency by relying on (economic) market mechanisms.

Thirdly, and from a more legalistic perspective, the development of the EU public procurement rules in the revised 2014 directives also disprove the point that the general principle of competition does not exist and that competition considerations are limited or confined to specific areas. As discussed at length in chapter five of this second edition, article 18(1) of Directive 2014/24 now clearly *consolidates* the principle of competition amongst the general principles of the system. It is true that the wording of this provision could have been clearer and that there are significant interpretative questions that need being addressed, but it should be acknowledged that by clearly stating that '[t]he design of the procurement shall not be made with the intention … of artificially narrowing competition [and that c]ompetition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators'. Directive 2014/24 stresses the relevance of competition considerations *across the board* and provides an interpretative tool that is likely to further develop the pro-competitive orientation of the system of EU public procurement rules in the coming years. In my view, this is a truly welcome development, and not only because it clearly supports the ideas and approach developed in the first edition of this book and now further refined in this second edition. As has always been my conviction, a competition-oriented public procurement system is necessary for the public sector to properly carry out their missions with the minimum distortion of private sector activities and, ultimately, with the minimum loss of social welfare.

In the 2005 second edition of her magnificent treatise *The Law of Public and Utilities Procurement*, 2nd edn (London, Sweet & Maxwell, 2005) 432, she had indicated that '*competition might be developed as a general principle with the same status as transparency and equal treatment*. The very broad conception of competition endorsed by the Advocate

General [Stix-Hackl in Case C-247/02 *Sintesi*] was criticised … it was suggested that the directives are merely concerned with removing restrictions on participation in competitions held in public markets. However, *a general principle of competition could properly be developed to support this latter objective of removing restrictions on participation*.' Consequently, even if back in 2005 she already stressed the same points she later emphasised in the 2012 paper regarding transparency and non-discrimination, she seemed to be open to a development such as the 'creation' of a principle of competition like the one now included in article 18(1) of Directive 2014/24. However, when she now reads that article in 2014, she considers that it 'appears to be simply a manifestation of the more general equal treatment principle, as designing any aspect of the procurement for this reason [ie, 'unduly favouring or disadvantaging certain economic operators'] rather than based on the needs and preferences in the project would clearly infringe that principle' (*The Law of Public and Utilities Procurement. Regulation in the EU and the UK*, vol 1, 3rd edn (London, Sweet & Maxwell, 2014) 631). Professor Arrowsmith has overlooked the first part of the clause of article 18(1) of Directive 2014/24, where contrary to what she concluded regarding the 2004 rules, it is at least clear that competition is 'elevated' to the same altar of the general principles of the EU public procurement system as equality, non-discrimination, transparency and proportionality.

Overall, there is very little left to support Professor Arrowsmith's view that the pro-competitive approach advocated for in this book is based on *misunderstanding*. On the contrary, I would claim that the arguments presented in the first edition paved the way for a stronger recognition of the existence of the principle of competition embedded in the EU public procurement directives, which has now culminated in its explicit consolidation in article 18(1) of Directive 2014/24. That being said, this second edition will provide the reader with arguments why this is a development that still requires further fine-tuning and optimisation. And this is an endeavour to which I plan to continue dedicating my academic efforts.

Professor Peter Kunzlik argues that this book 'as well as being a scholarly analysis within the neoliberal normative frame, is a manifesto for the neoliberalisation of public procurement regulation in the EU' and is 'the most systematic statement' of the argument that 'the dominating aim of the EU procurement directives is to advance competition in the sense of a competition doctrine intended only to achieve efficiency'.

The further debate with Professor Peter Kunzlik was equally refreshing. Indeed, Professor Kunzlik thought that Arrowsmith had fallen short of exhausting the criticism of the first edition of this book and further expanded it in his article 'Neoliberalism and the European Public Procurement Regime' ((2012–13) 15 *Cambridge Yearbook of European Legal Studies* 283, 312–56). Interestingly, Kunzlik took a completely different approach and focused his criticism on the *ideology* that he imputes to the book (and myself, by extension). I must say that I am not completely dissatisfied by the label of 'neoliberal manifesto' and that, as Kunzlik recognises, this is something I disclose rather openly in the book when I warn the reader that this is a 'free-market type' study of competition in the public procurement environment. However, when it comes to the details of his criticism, I think that Kunzlik fails to provide a convincing argument for the following reasons.

Kunzlik starts off with a very lengthy discussion of neoliberalism to set the tone for his criticism, and then goes on to acknowledge Arrowsmith's position. Taking issue with

both positions, Kunzlik indicates that he aims to 'offer a third approach to the relevance of competition and value for money in EU public procurement regulation'. Indeed, Kunzlik considers that

> the concept of 'competition' to which the public procurement directives relate is not the 'efficiency' concept suggested by [Sánchez] Graells, but rather a 'structure of competition' concept that is concerned to protect the structure of the market and equality of competitive opportunity of traders in the interests of customers, competitors and ultimate consumers. It is a concept that in the public procurement context simply requires that the law must ensure equality of opportunity for potential tenderers and a structure of competition for public contracts that allows sufficient opportunities for EU-wide competition, thereby ensuring the integrity of the internal market—the very same objectives that are asserted by Arrowsmith. (327, 335)

Kunzlik was trying to square a circle between Arrowsmith's and my position. However, beyond the dismissive way in which he uses the terms 'efficiency' and 'neoliberalism', there are no such differences in the implications of his and my arguments. Indeed, I do not see any third view in his proposal.

I find it even harder to understand how his argument deviates from the ones presented in this book when he stresses that

> the public procurement directives do have a competition objective. However, … the objective in question is not to achieve 'efficiency' in the sense contended by [Sánchez] Graells, but to ensure a structure of competition for public contracts to be opened up to EU-wide competition on the basis of equality of competitive opportunity. (340)

Tertium non datur. I struggle to understand how equality of competitive opportunity on an EU-wide level does not amount to (facilitating) economic efficiency. Consequently, I hope the reader will agree with me in that there is no 'third view' and that, once it is accepted (as he does) that *the public procurement directives do have a competition objective*, the argument is over—regardless of the *ideological* content one tries to give to it.

Overall, then, I think that the academic debate (as I understand it) strongly supports the approach taken in this book, where these and other criticisms are addressed in further detail. There is nothing left for me to say. It is now for you, dear reader, to decide.

Albert Sánchez Graells
Leicester, 5 November 2014

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Part One

Introduction

1

Introduction and Framework for Analysis

I. Introduction

Both public procurement and competition law constitute particularly relevant fields of public policy and legislation in the European Union (EU). Their relevance throughout the process of construction of the internal market, and their key role in preserving the advances made so far and in pushing European economic integration forward can hardly be overstated. Indeed, both sets of economic regulation directly related to the internal market are instrumental in guaranteeing the principle of an *open market economy with free competition* as required by article 119 TFEU (ex art 4 TEC). Similarly, they are of the utmost relevance for organisations active in the EU, since they represent two of the basic building blocks of market regulation and are primarily entrusted with guaranteeing the existence of a 'level playing field' within the internal market and the effectiveness of the fundamental freedoms enshrined in the TFEU. They are, consequently, highly relevant for scholars and practitioners interested in EU law, economics and policy. Each of these bodies of economic regulation has given rise to a large volume of legislation and case law—both at the EU level and in each of the Member States. In turn, each of these legal corpuses has been the object of a significant amount of scholarly study and has generated a vast range of legal doctrine. However, they have largely remained as separate, watertight compartments in both regulation and practice. It is probably not an exaggeration to consider both competition and public procurement law as substantially independent branches within EU economic law.[1]

Indeed, the *traditional approach* to these branches of EU law identifies them with separate and parallel concerns related to the construction and development of the internal market. From this 'classical' perspective, public procurement was largely focused on eliminating public restrictions to the circulation of goods and services related to protectionist measures by Member States—and, consequently, was a body of regulation exclusively

[1] Terminological definitions should be made right at the outset. Given the change in terminology generated by the entry into force of the Treaty of Lisbon, the notation 'EU' will be used to refer to the European Union (EU) and all its legal instruments (broadly, EU law). However, quotes from previous materials will keep the reference to the Treaty of the European Communities (TEC) or to 'EC' law. Where relevant, the correspondence between old and new numbering of Treaty articles will be provided. Unless expressly indicated, all references are made to the consolidated version of the Treaty on European Union (TEU) [2010] OJ C83/13, the consolidated version of the Treaty on the Functioning of the European Union (TFEU) [2010] C83/47, and the Protocols to the consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2010] C83/201.

rooted in the four freedoms that define the core of the internal market provisions. For its part, competition law focused on private restraints of competition that damage consumers and on preventing the erection of private barriers to trade that substituted the public restrictions that internal market provisions aimed to eliminate. As such, it was considered to be a 'fifth freedom',[2] but it was not necessarily seen as closely related to public procurement rules or to other rules of internal market policy in particular. From that 'classical' perspective, very limited interaction between competition and public procurement law was envisaged, since both bodies of economic regulation seemed to have different objectives and, consequently, there seemed to be little reason for their joint study or for the development of consistent rules and remedies. However, this 'classical' view seemed to overlook important aspects of the rules regarding the four fundamental freedoms (particularly public procurement rules) and competition rules as parts of a system,[3] and has evolved towards a more 'integrative' understanding of the building blocks of internal market regulation.[4]

The developments attained so far under the traditional approach and in a largely independent way in public procurement and competition law have, indeed, generated increased possibilities for the further improvement of each of these bodies of regulation—and, what is most noteworthy, have created spaces for their rapprochement and joint development. Or, put differently, in their current state of development, both internal market rules (particularly those on public procurement) and competition law need each other if they are to continue contributing to the development of EU economic law, since the preservation of the 'classical' view (ie, of the relative insulation of both branches of EU economic law) can only restrict their development and limit their potentialities. Indeed, the evolution of these fields of EU law, their strong relationship as the two main building blocks of internal market regulation, and a progressive change in the conception (ie, the expansion) of competition law offer the support required to overcome that 'classical' approach to competition and public procurement law and to conduct research at their crossroads and with a more *'integrative' approach*—ultimately aiming at fostering developments in both areas.[5]

Firstly, the traditional division between public and private aspects of internal market law and competition rules has become increasingly blurry—just as in more general terms

[2] See: J Temple Lang, 'The Core of the Constitutional Law of the Community—Article 5 EC' in LW Gormley (ed), *Current and Future Perspectives on EC Competition Law. A Tribute to Professor MR Mok* (The Hague, Kluwer Law International, 1997) 44.

[3] See: LW Gormley, *Prohibiting Restrictions on Trade within the EEC. The Theory and Application of Articles 30–36 of the EEC Treaty* (The Hague, TMC Asser Institut, 1985) 232–33.

[4] For an interesting discussion along these lines of tying together internal market, public procurement and competition, see D Cahill 'The Ebb and Flow, the Doldrums and the Raging Tide: Single Market Law's Ebb and Flow over Services of General Economic Interest, the Legal Doldrums over Services of General Interest, and the Raging Tide of Article 106(2) (ex Art 86(2)) over State Aid and Public Procurement' (2010) 21(5) *European Business Law Review* 629–62. See also C Kennedy-Loest, C Thomas and M Farley, 'EU Public Procurement and Competition Law: The Yin and Yang of the Legal World' (2011) 7 *Competition Law International* 77; and CR Yukins and J Cora, 'Feature Comment: Considering the Effects of Public Procurement Regulations on Competitive Markets' (2013) 55(9) *Government Contractor* 64. This integration of public procurement and competition has to some extent been completed, or at least significantly further developed, in Dir 2014/24, particularly with the consolidation of the principle of competition in its art 18(1). For further discussion, see chapter five.

[5] Along the same lines, see CM Von Quitzow, *State Measures Distorting Free Competition in the EC. A Study of the Need for a New Community Policy towards Anti-Competitive State Measures in the EMU Perspective* (The Hague, Kluwer, 2002) 42. In a similar vein, see RA Feinstein et al, *Antitrust Analysis and Defense Industry Consolidation* (Chicago, ABA Section of Public Contract Law, 1994) 20.

the distinction between public and private is growing less and less clear-cut.[6] Core internal market provisions guaranteeing the four fundamental freedoms have been expanded and made more flexible by EU case law to capture private conduct that restricted free movement while, at the same time, competition law enforcement and its judicial interpretation has developed and broadened to tackle public interventions in the market not expressly covered by the provisions of the TFEU.[7] It should also be borne in mind that both fields of law and practice are in permanent evolution and both have been the object of substantial modernisation efforts in recent years in the EU and elsewhere. This evolution and modernisation has led to a clear trend of convergence between both sets of regulation.[8] Therefore, the evolution of each of these sets of EU economic law is bringing them closer and bridging the gap that used to exist between them. It is submitted that (at least in certain aspects) both sets of regulation might be seen as reaching out for each other. It seems clear that this converging trend will guide future developments in both areas, with the result that the interrelationships between them will become even more evident and grow stronger in the near future.

Secondly, it is submitted that a contextualised analysis of both sets of EU economic law, or the adoption of a systemic and all-encompassing view, shows even at first sight that they share common goals and principles, and that their basic foundations are strongly interwoven.[9] Both public procurement and competition law share basic economic objectives and were developed according to a common approach and in light of the same economic theories. To be sure, economics has always played a more significant role in the enforcement of competition law than in public procurement—and its importance has been growing significantly in recent years under the 'more economic approach' to EU

[6] See: M Kenny, *The Transformation of Public and Private in EC Competition Law* (Berne, Stämpfli Verlag, 2002); and, with a focus on public procurement, H Schepel, 'The Public/Private Divide in Secondary Community Law: a Footnote to the European Economic Constitution' (2008) 8 *Cambridge Yearbook of European Legal Studies* 259, 260–66; and W Sauter and H Schepel, *State and Market in European Union Law. The Public and Private Spheres of the Internal Market before the EU Courts* (Cambridge, Cambridge University Press, 2009) 19–21 and 49–57.

[7] Stressing these trends of evolution and convergence, see J Baquero Cruz, *Between Competition and Free Movement: The Economic Constitutional Law of the European Community* (Oxford, Hart Publishing, 2002) 85–104; and id, 'The State Action Doctrine' in G Amato and CD Ehlermann (eds), *Competition Law. A Critical Assessment* (Oxford, Hart Publishing, 2007) 551. Also J Stuyck, 'Libre circulation et concurrence: Les deux piliers du marché commun' in M Waelbroeck and M Doni (eds), *Études de Droit européen et international. Mélanges en hommage à Michel Waelbroeck* (Bruxelles, Bruylant, 1999) 1477; K Mortelmans, 'Towards Convergence in the Application of the Rules on Free Movement and on Competition?' (2001) 38 *Common Market Law Review* 613; E Szyszczak, 'State Intervention and the Internal Market' in T Tridimas and P Nebbia (eds), *European Union Law for the Twenty-First Century: Rethinking the New Legal Order* (Oxford, Hart Publishing, 2004) 217; and Sauter and Schepel (n 6) 89–90, 124–28, 154–55 and 211–21.

[8] See: E Szyszczak, *The Regulation of the State in Competitive Markets in the EU* (Oxford, Hart Publishing, 2007) 29–41; and id, 'Competition and the Liberalised Market' in NN Shuibhne (ed), *Regulating the Internal Market* (Cheltenham, Edward Elgar, 2006) 87. For an update on recent measures, see id, 'Services of General Economic Interest and State Measures Affecting Competition' (2013) 4(6) *Journal of European Competition Law and Practice* 514; and id, 'Services of General Economic Interest and State Measures Affecting Competition' (2014) 5(7) *Journal of European Competition Law & Practice* 508.

[9] PA Trepte, *Public Procurement in the EU: A Practitioner's Guide*, 2nd edn (Oxford, Oxford University Press, 2007) 40. See also SE Hjelmborg et al, *Public Procurement Law—The EU Directive on Public Contracts* (Copenhagen, Djøf Forlag, 2006) 19–23. *Contra*, see the criticism of S Arrowsmith, 'The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies' (2011–12) 14 *Cambridge Yearbook of European Legal Studies* 1–47. See also P Kunzlik, 'Neoliberalism and the European Public Procurement Regime' (2012–13) 15 *Cambridge Yearbook of European Legal Studies* 283–356.

competition law.[10] Nonetheless, public procurement regulations are strongly linked to free market economics and their final justification has always been primarily twofold: to guarantee the fundamental freedoms of the TFEU and to implement the economic policy of opening up public procurement to competition as a key tool for the development of the internal market in areas largely controlled by public demand.[11] Indeed, the European Court of Justice (ECJ) has repeatedly stressed that the purpose of the public procurement directives 'is to develop effective competition in the field of public contracts'.[12] Therefore, both sets of rules have always been the pillars for the construction, development and consolidation of the internal market as the primary objective of EU economic policy. It should hence come as no surprise that both sets of economic regulation[13] are strongly linked and that the consolidation of their prime objectives, coupled with further developments in economic theory (particularly in the field of competition) provide a sound basis for additional and common developments.

Finally, the conception and enforcement of competition law also seem to have been progressively expanding.[14] Even if 'antitrust' rules still constitute its core (ie articles 101 and 102 TFEU (ex arts 81 and 82 TEC) lie at the centre of EU competition law), the trends of development in this field have clearly broadened its scope, not only to exert increasing pressure on the mechanisms of merger control and state aid, and to develop common tests and principles applicable in all of these main areas of competition law, but also (and more interestingly for the purposes of this study) to reach towards public restrictions of competition in neighbouring or frontier fields,[15] such as the interplay between competition law and other types of economic regulation—eg, sectoral regulation in energy, telecommunications or other regulated markets[16]—or as regards intellectual property regulation.[17] Therefore, a modern conception of competition law can no longer be restricted to its 'antitrust' elements, or even limited to the rules contained in articles 101 to 109 TFEU and the rules on merger control, but should be conceived as *comprising all legal expressions of competition policy, broadly defined*.[18] In my view, under this broader approach to

[10] For discussion of the historical development, with interesting economic insights, see AD Chiriță, 'A Legal-Historical Review of the EU Competition Rules' (2014) 63(2) *International and Comparative Law Quarterly* 281–316.

[11] *Cf* Arrowsmith (n 9) 25–34; and Kunzlik (n 9) 312–56.

[12] Case C-138/08 *Hochtief and Linde-Kca-Dresden* [2009] ECR I-9889 47, with references to Case C-27/98 *Fracasso and Leitschutz* [1999] ECR I-5697 26; Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233 34; Case C-470/99 *Universale-Bau* [2002] ECR I-11617 89; and Case C-247/02 *Sintesi* [2004] ECR I-9215 35.

[13] For a clear discussion of the treatment of competition law as a body of regulatory rules, see P Ibañez Colomo, 'On the Application of Competition Law as Regulation: Elements for a Theory', in P Eeckhout and T Tridimas (eds), *Yearbook of European Law 2010*, vol 29 (Oxford, Clarendon Press, 2010) 261–306.

[14] DJ Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford, Oxford University Press, 1998) 334–436.

[15] OFT, *Public Bodies and Competition Law* (2011), available at www.gov.uk/government/publications/public-bodies-and-competition-law.

[16] See, eg: KJ Cseres, 'What Has Competition Done for Consumers in Liberalised Markets?' (2008) 4 *Competition Law Review* 77; and G Monti, 'Managing the Intersection of Utilities Regulation and EC Competition Law' (2008) 4 *Competition Law Review* 123.

[17] See, eg: V Korah, 'The Interface between Intellectual Property Rights and Competition in Developed Countries' (2005) 2 *SCRIPTed* 429.

[18] A clear example of such an expansion of the field of EU competition law is the inclusion of art 37 TFEU (ex art 31 TEC), or the inclusion under the concept of competition law of rules applicable to particular economic sectors, such as agriculture or transport; see A Jones and B Sufrin, *EC Competition Law: Text, Cases, and Materials*, 3rd edn (Oxford, Oxford University Press, 2008) 109–12. The adoption of a broad conception of competition law

competition law, public procurement cannot be left apart or excluded from its field of application.[19]

Legal research conducted at the crossroads of competition and public procurement law can help gain a better understanding of both fields of regulation and practice, and can contribute to the development of *a more consistent system of EU economic law*. Moreover, adopting a wider perspective on competition and public procurement might provide a different view and shed some light on certain of the issues that each of these sets of regulation is still struggling to resolve. However, the relationship between both sets of economic regulation has so far been relatively under-explored.[20] Therefore, *the time is ripe for a more detailed joint study of competition and public procurement*.

A. The Current Situation from a Competition Law Perspective

Given the strong political implications underlying public restrictions to competition—and, more generally, competition policy[21]—and the shortcomings that the basic rules and remedies of competition law present when trying to rein in the anti-competitive behaviour of the public sector, public restrictions to competition are amongst the sources of distortion of free market dynamics most pervasive, severe and difficult to combat.[22] Yet, the fight against public restrictions of competition should be the main target of competition policy,[23] as their suppression is a precondition for the development of effective and undistorted market competition.[24] However, an effective competition policy against public restraints is still under-developed,[25] and substantial improvement should not be expected unless strong political commitment is raised. Currently, competition policy is largely focused on the market behaviour of undertakings—and, these days, particularly on

based on a concept of 'competition law in a wider sense' was the basis for a substantial reform and development of this field of regulation in Australia, particularly as regarded government-imposed impediments to competition; see A Fels, 'Australia's Comprehensive Review of Anticompetitive Laws' in G Amato and LL Laudati (eds), *The Anticompetitive Impact of Regulation* (Cheltenham, Edward Elgar, 2001) 329, 332–33.

[19] Along the same lines, see RD Anderson and WE Kovacic, 'Competition Policy and International Trade Liberalisation: Essential Complements to Ensure Good Performance in Public Procurement Markets' (2009) 18 *Public Procurement Law Review* 67, 69. Indeed, in the US, public procurement has been considered amongst other 'regulated sectors' and included within the field of application of competition law; see ABA, *Antitrust Law Developments*, 3rd edn (Chicago, ABA Section of Antitrust Law, 1992) 1107–09; 4th edn (1997) 1251–56; 5th edn (2002) 1323–25; and 6th edn (2007) 1389–90.

[20] As stressed in clear terms by C Munro, 'Competition Law and Public Procurement: Two Sides of the Same Coin?' (2006) 15 *Public Procurement Law Review* 352; and, previously, by S Arrowsmith, *The Law of Public and Utilities Procurement*, 2nd edn (London, Sweet & Maxwell, 2005) 62–72, 431–32 and 955. See also id, *The Law of Public and Utilities Procurement. Regulation in the EU and the UK*, vol 1, 3rd edn (London, Sweet & Maxwell, 2014) 324–37.

[21] DI Baker, 'Antitrust and Politics at the Justice Department' (1992–93) 9 *Journal of Law and Politics* 291; and JB Baker, 'Competition Policy as a Political Bargain' (2006) 73 *Antitrust Law Journal* 483.

[22] For an interesting discussion on the reconceptualisation of the role of competition law to control certain sorts of state activity, see the contributions to TK Cheng, I Lianos and DD Sokol (eds), *Competition and the State* (New York, Stanford University Press, 2014).

[23] Indeed, its importance can hardly be overstated; see OECD, *Report on Regulatory Reform: Synthesis* (1997) 33; and id, *Economic Policy Reforms—Going for Growth* (2009) 19 and 179–92.

[24] H Demsetz, *The Organization of Economic Activity—Efficiency, Competition, and Policy* (New York, Basil Blackwell, 1989) 109, 206, 215 and 222–23.

[25] MS Gal and I Faibish, 'Six Principles for Limiting Government-Facilitated Restraints on Competition' (2007) 44 *Common Market Law Review* 69, 70.

collusion and the fight against cartels—and neglects (or at least pays secondary attention to) market and non-market behaviour of the public sector.[26]

From a different perspective, competition policy is an economic policy of 'offer', as its main focus is not on consumption, but on the production and offer of goods and services. Hence, competition policy is focused on the market behaviour of producers, or offerors—including intermediaries and economic agents other than consumers. This characteristic of competition policy conditions its scope in a way that passes unnoticed. The object of the present analysis lies only—or mainly—in the offer (ie, production and distribution) of products and services and the ensuing market power that colluding and dominant firms can exercise. Other aspects of market competition receive relatively less consideration. However, the main focus of competition law should not be termed as the exercise of 'market' power, but as the exercise of 'selling' power. Such rephrasing automatically sheds light on a relatively unexplored field of competition law: the exercise of 'buying' power.[27] This is an omission that is not justified in economic terms, since competition law should treat seller power and buyer power alike.[28] Arguably, then, development of the strands of competition policy focused on 'buying' power should be given high priority. However, competition policy is largely conceived of as a set of rules regulating sellers' competition, whereas demand-side (or buyers') competition policy remains largely under-developed.[29] The design and development of effective pro-competitive rules to discipline buying power are still incomplete.[30]

Public procurement is at the intersection of the two relatively unexplored fields of competition law, as it relates to the *demand-side* market behaviour of the *public* sector.[31]

[26] See: OECD, *Regulating Market Activities by the Public Sector* (2004) 7.

[27] See: JM Jacobson and GJ Dorman, 'Joint Purchasing, Monopsony and Antitrust' (1991) 36 *Antitrust Bulletin* 1. For a summary of recent trends in relation to the treatment of buyer power in competition law, and some insights into future developments, see BundesKartellamt, *Buyer Power in Competition Law—Status and Perspectives* (Working Group on Competition Law, Background Paper, 2008), available at www.bundeskartellamt.de/wEnglisch/download/pdf/2008_ProfTagung_E.pdf.

[28] See: M Schwartz, *Should Antitrust Assess Buyer Market Power Differently than Seller Market Power?* (remarks presented at the DOJ/FTC Workshop on Merger Enforcement, 2004) available at www.usdoj.gov/atr/public/workshops/docs/202607.pdf. See also ER Elhauge, 'Harvard, not Chicago: Which Antitrust School Drives US Supreme Court Decisions?' (2007) 2 *Competition Policy International* 59, 69; and N Rosenfelt, 'The Verdict on Monopsony' (2008) 20 *Loyola Consumer Law Review* 402, 412. *Contra*, see JT Rosch, 'Monopsony and the Meaning of "Consumer Welfare": A Closer Look at Weyerhaeuser' (2007) *Columbia Business Law Review* 353, 359–65. On these issues, see also E Pfister, 'Buying Power and Competition Policy' (2009) 1 *Concurrences* 34.

[29] In general, for a preliminary approximation to the potential benefits of demand-side competition policies focused on reducing the costs of consumer choice (such as information or switching costs), see SF Ennis and A Heimler, *Promotion of Competition on the Demand Side* (SSRN Working Paper, 2004), available at http://ssrn.com/abstract=622722.

[30] In similar terms, see I Kokkoris, 'Buyer Power Assessment in Competition Law: A Boon or a Menace?' (2006) 29 *World Competition* 139. However, significant developments in this area have recently taken place in the US and could spur further developments in other jurisdictions; see US SCt opinion in *Weyerhaeuser Co v Ross-Simmons Hardwood Lumber Co*, 549 US 312 (2007). *Cf* C Bovis, *EC Public Procurement: Case Law and Regulation* (Oxford, Oxford University Press, 2006) 42–49 and 600; and id, *EU Public Procurement Law* (Cheltenham, Edgar Elgar, 2007) 5–10, who considers that there is limited scope for the development of effective competition law mechanisms in the public procurement forum due to structural characteristics of 'public markets' (criticised below, chapter two).

[31] In fact, commentators that have focused on the interplay between public procurement and competition law have tended to stress such an 'offer–demand divide' between competition and public procurement law—see eg, PA Trepte, *Regulating Procurement. Understanding the Ends and Means of Public Procurement Regulation* (Oxford, Oxford University Press, 2004) 57; and, in more detail, id, *Public Procurement in the EU* (2007) 38–54. Similarly, C Bovis, 'The New Public Procurement Regime of the European Union: A Critical Analysis of Policy,

Therefore, it should not be surprising to note that the enforcement of competition law in the public procurement environment has received much less attention than it deserves and, consequently, still remains largely underdeveloped.[32] To be sure, restrictions of competition generated by private entities participating in public procurement processes—mainly related to collusion and bid-rigging—have so far attracted most of the attention as regards the intersection of competition law and the public procurement phenomenon.[33]

Similarly, some of the most remarkable issues at the juncture of EU state aid and public procurement law have already been addressed—such as whether the award of a public contract can constitute state aid, or under which conditions a recipient of state aid can participate in public tenders without this resulting in a breach of the principle of equality and non-discrimination.[34] A secondary focus has also centred on the impact of procurement markets in merger control cases, where the existence of a (public) power-buyer has usually been used by competition authorities as a blunt (but rather formal, and oftentimes unwarranted) argument to adopt a relatively lenient approach.[35] However, in my view, private restrictions to competition, the impact of state aid, and the analysis of mergers in the public procurement setting do not present markedly differentiated trends when compared with similar restrictions that take place in any other markets.[36] Moreover, the

Law and Jurisprudence' (2005) 5 *European Law Review* 607, 609; and id, *EC Public Procurement: Case Law and Regulation* (2006) 15–16 and 22–29. Whereas the separation between both sets of economic regulation is clear, this study attempts to go one step further and bridge some of the gaps generated by this 'offer–demand divide' by extending competition requirements to the demand side.

[32] To be sure, there are promising ways for the development of competition rules applicable to public sector activities that can have an impact on the markets; see eg: M Bazex, 'Le Droit public de la concurrence' (1998) 14 *Révue française de droit administratif* 781, 784; JY Chérot, 'Les méthodes du juge administratif dans le contentieux de la concurrence' (2000) 9 *Actualité juridique—Droit administratif* 687, 691–92; and S Nicinski, 'Les évolutions du droit administratif de la concurrence' (2004) 14 *Actualité juridique—Droit administratif* 751, 751–52.

[33] Indeed, this has been the main focus of international efforts, particularly by the OECD, which has recently published detailed guidelines to help design public procurement regulations to prevent collusion; see OECD, *Guidelines for Fighting Bid Rigging in Public Procurement. Helping Governments to Obtain Best Value for Money* (2009); later included in its more formal OECD, *Recommendation on Fighting Bid Rigging in Public Procurement* (2012). See also the results of the various previous roundtables published by the OECD, 'Procurement Markets' (1999) 1 *OECD Journal of Competition Law and Policy* 83; id, *Competition Policy and Procurement Markets* (1999); id, *Competition in Bidding Markets* (2006); and id, *Public Procurement: The Role of Competition Authorities in Promoting Competition* (2007). This is also the focus of recent scholarly studies in this field, eg: C Cabanes and B Neveu, *Droit de la concurrence dans les contrats publics. Pratiques anticoncurrentielles, abus de position dominante, controls et sanctions* (Paris, Le Moniteur, 2008); as well as some practitioners' guidance, see WE Kovacic, *The Antitrust Government Contracts Handbook* (Chicago, ABA Section of Antitrust Law, 1990). For additional discussion, see A Sánchez Graells, 'Prevention and Deterrence of Bid Rigging: A Look from the New EU Directive on Public Procurement', in GM Racca and CR Yukins (eds), *Integrity and Efficiency in Sustainable Public Contracts* (Brussels, Bruylant, 2014) 137.

[34] This issue is dealt with more extensively below chapter four, §II.A—where references are provided. For additional discussion, see A Sánchez Graells, 'Public Procurement and State Aid: Reopening the Debate?' (2012) 21(6) *Public Procurement Law Review* 205–12; and id, 'Bringing the "Market Economy Agent" Principle to Full Power' (2012) 33 *European Competition Law Review* 35–39.

[35] See: PD Klemperer, 'Bidding Markets' (2007) 3 *Journal of Competition Law and Economics* 1; id, 'Competition Policy in Auctions and Bidding Markets' in P Buccirossi (ed), *Handbook of Antitrust Economics* (Cambridge, MIT Press, 2008) 583, 583 and 608–09; K T'Syen, 'Market Power in Bidding Markets: An Economic Overview' (2008) 31 *World Competition* 37 (2008); P Szilágyi, 'Bidding Markets and Competition Law in the European Union and the United Kingdom' (pts 1 and 2) (2008) 29 *European Competition Law Review* 16 and 89; and C Doyle, *The Countervailing Buyer Power Merger Defence* (London School of Economics and Political Science (LSE)—Department of Economics Working Paper, 5 February 2009), available at http://ssrn.com/abstract=1338322.

[36] Along these lines, OECD, *Public Procurement: Role of Competition Authorities* (2007) 7; and ABA, *Antitrust Law Developments*, 5th edn (2002) 1322–23 and 6th edn (2007) 1389.

few differences that can be identified stem chiefly from the peculiarities of public procurement regulations and the distortions that they generate in the market (or its analysis by competition authorities) and, consequently, can be better explained and corrected (if need be) through the competition analysis of public procurement regulations and administrative practices *themselves*.

However, this significant area of overlap between competition and public procurement law (ie, the competition distortions that public procurement regulations and administrative practices can produce themselves) still remains unexplored. *Generally, publicly created distortions of competition in the field of public procurement have not yet been effectively tackled by either competition or public procurement law*—probably because of the major political and governance implications embedded in or surrounding public procurement activities, which make development and enforcement of competition law and policy in this area an even more complicated issue, and sometimes muddy the analysis and normative recommendations. Notwithstanding these relevant difficulties, in my view, this is a very relevant area of competition policy to which development could bring substantial improvements and, consequently, it merits more attention than it has traditionally received.

EU public procurement rules have been evolving and tilting towards a more flexible approach and towards conferring increased discretion to the public buyer,[37] and this increased flexibility is particularly relevant and visible in the 2014 new public procurement directives.[38] This evolution is freeing the public buyer from the straitjacket that stricter public procurement rules used to impose on its market behaviour. Somehow, a paradoxical development of EU public procurement can be identified. While the new EU directives try to increase competition in the public procurement setting by freeing the public buyer from some restrictions that were considered to limit its ability to exploit market-like mechanisms in the procurement process, they also increase the discretion of the public buyer in running the system and try to leave room for increased administrative efficiency in public procurement. The paradox is that some of the rules that provide for an increased flexibility can also generate anti-competitive results. Consequently, the aims pursued by the EU directives on public procurement can be relatively inconsistent or hard to reconcile and, as a result, the effect on the aggregate efficiency of the system is unclear. In my view, some of these effects and unintended consequences could be avoided if a better understanding of the relationship between competition and public procurement was gained and their cross-implications were made explicit.

B. The Current Situation from a Public Procurement Law Perspective

For its part, the relevance of exploring and reflecting on competition issues in the framework of public procurement derives from the strong (and, more than probably, increasing) reliance of the public purchaser on the market in order to discharge a significant number

[37] S Treumer, 'The Discretionary Powers of Contracting Entities—Towards a Flexible Approach in the Recent Case Law of the Court of Justice?' (2006) 15 *Public Procurement Law Review* 71. See also Bovis (n 30, 2006) 199 and 602.

[38] European Commission, *New Rules on Public Contracts and Concessions, Simpler and More Flexible* (2014), available at ec.europa.eu/internal_market/publications/docs/public-procurement-and-concessions_en.pdf.

of activities in the public interest.[39] The effectiveness of public procurement and its ability to contribute to the proper and most efficient carrying on of public interest obligations is conditional upon the existence of competition in two respects or separate dimensions.[40] One of them has been expressly recognised for a long time by public procurement regulations, which have tried to foster *competition within the specific tender*. Public procurement rules protect and promote competition—in this narrow sense—as a means to achieve value for money and to ensure the legitimacy of purchasing decisions. From this perspective, competition is seen as a means to allow the public purchaser to obtain the benefits of competitive pressure among (participating) bidders, as well as a key instrument to deter favouritism and other corrupt practices and deviations of power. Indeed, as aptly stressed by the EU Courts, '[i]t is exposure to competition within the Union in accordance with the procedures provided for those directives which avoids the risk of the public authorities indulging in favouritism'.[41]

However, a subtler and stronger dependence of public procurement on *competition in the market* exists, but it is implicit and has generally been overlooked by most public procurement studies.[42] In order to attain value for money and to work as a proper tool for the public sector, public procurement activities need to take place in competitive markets.[43] This was a clear concern in the recent reform of the EU procurement rules. The European Commission indeed stressed that 'it is vital to generate the strongest possible competition for public contracts awarded in the internal market'.[44] However, generally speaking, public procurement rules assume that markets are generally competitive—in the broad

[39] Indeed, the activities of the modern state as a buyer can hardly be overstated; see P Vincent-Jones, *The New Public Contracting. Regulation, Responsiveness, Relationality* (Oxford, Oxford University Press, 2006) 13–25, 167–99 and 347; and PC Light, 'Outsourcing and the True Size of Government' (2003–04) 33 *Public Contract Law Journal* 311.

[40] On the relationship between general interest and competition considerations in public procurement, see F Gartner, 'Des rapports entre contrats administratifs et intêret général' (2006) 22 *Révue française de droit administratif* 19, 21.

[41] See, to this effect, Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233 35 and 36; and Case T-402/06 *Spain v Commission* [2013] pub electr EU:T:2013:445 64.

[42] Exceptionally, as already indicated, the relevance of competition in the market (as protected by competition law) for the proper functioning is stressed by Trepte (n 31, 2014) 57, 61 and 122. It has been held that the notion of competition in the sphere of public procurement rules is different than the broader notion of competition that constitutes a fundamental principle of EU law, although close links between them must be acknowledged; see JF Brisson, *Les fondements juridiques du droit des marchés publics* (Paris, Imprimerie Nationale, 2004) 25; and O Black, *Conceptual Foundations of Antitrust* (Cambridge, Cambridge University Press, 2005) 9. However, as shall be seen, both concepts of competition are present in public procurement rules, and competition in the broader sense is also one of the fundamental principles of EU public procurement law. Therefore, the impact of public procurement on competition in the market should be stressed and will be of central importance in this study.

[43] See: SL Schooner, 'Pondering the Decline of Federal Government Contract Litigation in the United States' (1999) 8 *Public Procurement Law Review* 242, 248. Indeed, the case has been made convincingly by Anderson and Kovacic (n 19) 70–72. Similarly, stressing the importance of shielding public procurement from anti-competitive market practices, see DE Brunk, 'Governmental Procurement: "FAR" from a Competitive Process' in G Piga and KV Thai (eds), *Advancing Public Procurement: Practices, Innovation and Knowledge-Sharing* (Boca Raton, FL, PrAcademics Press, 2006) 156.

[44] European Commission, *Green Paper on the modernisation of EU public procurement policy. Towards a more efficient European Procurement Market* (2011) 15, available at eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0015:FIN:EN:PDF. See F Losada Fraga, 'The Green Paper on the Modernization of Public Procurement Policy of the EU: Towards a Socially-Concerned Market or Towards a Market-Oriented Society?' (2012) 2(4) *Oñati Socio-Legal Series*, available at http://ssrn.com/abstract=2009257/.

sense—or, more simply, take as a given their economic structure and competitive dynamics.[45] The existence of competitive intensity in the market is usually taken for granted, or simply disregarded, in public procurement studies. In general terms, this approach is correct in that public procurement is not designed to prevent distortions of competition between undertakings. However, *issues regarding competition in the market are not alien to public procurement*,[46] and need to receive a stronger emphasis.[47]

Public procurement rules can themselves generate significant distortions of competitive market dynamics[48]—and, in so doing, can be largely self-defeating, as they can restrict the effective chances for the public buyer to obtain best value.[49] Public procurement regulations tend to establish a market-like mechanism that, in most instances, ends up isolating parts of the market—ie, creating 'public (sub-)markets'—which become highly regulated (by public procurement rules themselves) in various aspects and that, in the end, can result in restrictions or distortions of competition that limit the ability of the public buyer to obtain value for money. Hence, in order to promote the efficiency of the procurement activities and value for money, public procurement rules need to be pro-competitive and guarantee that they do not restrict or distort competition in the market.[50]

C. Overall Perspective

Putting the previous considerations together, in my view, the increasing interest of public procurement activities from a competition law perspective as an *object* to be integrated in its scope,[51] and the evidence of the role of competition in the market as a *prerequisite* for the proper development of public procurement activities, are but a manifestation of the strong links between both sets of economic regulation.[52] Where competition law fails

[45] See: G Piga and KV Thai, 'The Economics of Public Procurement: Preface' (2006) *Rivista di Politica Economica* 3, 5; also, KV Thai, 'Public Procurement Re-examined' (2001) 1 *Journal of Public Procurement* 9, 34.

[46] Sauter and Schepel (n 6) 49.

[47] The idea is not new; see CW Sherrer, 'Achieving a Higher and More Competitive State-of-the-Art in DOD Procurement Procedures' (1982) 15 *National Contract Management Journal* 71, 76.

[48] A fact that was clearly stressed by DF Kettl, *Sharing Power. Public Governance and Private Markets* (Washington, Brookings Institution, 1993) 31. See also Anderson and Kovacic (n 19) 89–91; and G Amato, 'Practical Economic Guidelines for Reforming Regulation to Eliminate its Anticompetitive Effects' in Amato and Laudati (n 18) 459.

[49] Indeed, the need to have 'good legislation' to foster the proper and competitive functioning of procurement markets has been stressed; see L Fiorentino, 'Public Procurement and Competition' in KV Thai et al (eds), *International Public Procurement Conference Proceedings* (2006) 847.

[50] Similarly, see L Fiorentino, 'Conclusioni e proposte' in id (ed) *Lo Stato compratore. L'acquisto di beni e servizi nelle pubbliche amministrazioni* (Bologna, Il Mulino, 2007) 325, 326; and JJ Snider Smith, 'Competition and Transparency: What Works for Public Procurement Reform' (2008) 38 *Public Contract Law Journal* 85, 110–11.

[51] In this regard, see the various works by O Guézou, 'Droit de la concurrence et Droit des marchés publics: vers une notion transversale de mise en libre concurrence' (2003) *Contrats publics—Actualité de la commande et des contrats publics* 43; id, 'Droit des marchés publics et Droit de la concurrence' in C Bréchon-Moulènes (ed), *Droit des marchés publics* (Paris, Le Moniteur, 2006) III-130; and 'Champ d'action du Droit de la concurrence et marchés publics' in C Bréchon-Moulènes (ed), *Droit des marchés publics* (Paris, Le Moniteur, 2006) III-133. Also E Berkani, 'Competition Law and Public Procurement: An "Inventory of Fixtures"' (2007) 1 *Concurrences* 58; and L Idot, 'Commande publique et Droit de la concurrence: un autre regard' (2008) 1 *Concurrences* 52.

[52] On the complementarity of competition law and public procurement, see Anderson and Kovacic (n 19) 75–94; and RD Anderson and CR Yukins, *International Public Procurement Developments in 2008—Public Procurement in a World Economic Crisis* (George Washington University Law School, Legal Studies Research Paper No 458), available at http://ssrn.com/abstract=1356142.

to guarantee undistorted competition, public procurement will hardly develop optimally and the government's alternatives will be significantly impaired by the distorted conditions under which it seeks to procure goods or services. Similarly, when public procurement rules are not effectively pro-competitive, they can generate market failures that competition law is designed to minimise. In those cases, enforcement based on competition principles (ie, the design of more competition-oriented public procurement) becomes necessary if undistorted market competition is to be attained. Therefore, *the strong links between both sets of regulation claim for a common approach and for consistent application*.

II. General Approach to the Interrelationship between Competition and Public Procurement Law

A joint study of public procurement and competition law could be pursued from several different angles and focus on different aspects of the interrelationship between these two sets of economic regulation. The general approach adopted in this study towards the interrelationship between competition and public procurement law is grounded on two starting assumptions: that competition *goes first*, and that there is room for *more competition* in public procurement.

The emphasis on competition law considerations should be clear from the outset. Putting competition first is not random. The reader should be aware that, while being a study at the crossroads of competition law and public procurement and while trying to keep an open and balanced approach towards the consideration of specific elements of competition and public procurement simultaneously, the point of departure and, probably, of arrival might remain closer to the field of competition law—given that *competition is a general principle of EU (economic) law that must be taken into account in the design of all types of economic regulation*.[53] Hopefully, the study will succeed in demonstrating that competition is not alien to public procurement law and, consequently, that there is and always has been a natural place for competition considerations within the field of public procurement. In the end, in my view, competition is a fundamental principle that must be protected and furthered to the maximum possible extent within the field of public procurement.

It is also worth stressing the underlying conviction that public procurement is currently not as pro-competitive as it could (or ought to) be—or, put otherwise, that current public procurement rules and practices generate distortions in market competition dynamics—and, consequently, that there is room for significant improvement in this area. Therefore, the reader should be aware that the study is not completely neutral in that it not only adopts a positive approach towards the description of the current state of the law at the crossroads of public procurement and competition, but also aims at formulating normative recommendations that, in my view, could contribute to improving the current situation

[53] All in all, 'freedom of competition stands as a general principle of EC law'; see Case 240/83 *Waste oils* [1985] ECR 531 9. Similarly, see Case 249/85 *Albako* [1987] ECR 2345 16; Case C-126/97 *Eco Swiss* [1999] I-3055 36–37; and Case C-453/99 *Courage and Crehan* [2001] ECR I-6297 20–21. See also O Odudu, *The Boundaries of EC Competition Law: The Scope of Article 81* (Oxford, Oxford University Press, 2006) 9. Indeed, competition is one of the general principles of substantive EU law; T Tridimas, *The General Principles of EU Law*, 2nd edn (Oxford, Oxford University Press, 2006) 5.

and developing a more pro-competitive public procurement system. Given the importance of differentiating between the positive and normative aspects of the research—as the former should be less controversial and more widely accepted than the latter—normative considerations will be identified as such. However, there is always scope for residual issues in which disentangling positive and normative analysis might be particularly difficult or subtle. In those cases, the opinions offered in the study might be tainted by the general purposive approach towards the construction of a more procompetitive public procurement system. The reader might want to keep this remark in the back of her mind.

III. Aim of the Study

As mentioned in passing, and in broad terms, the object of the study is the interrelation between competition and public procurement law. More specifically, the inquiry will focus on whether competition law principles inform or condition public procurement rules and to what extent, as well as on whether existing competition and public procurement institutions generate the appropriate framework for the analysis and discipline of the purchasing activities of the public buyer—ie, whether they are adequate to ensure that competition is not distorted in markets where public procurement is particularly significant. Therefore, the main objective of the research will be to explore and analyse the possibilities for competition law enforcement in the sphere of public procurement—ie, for the establishment of more pro-competitive public procurement rules and practices[54]—and to develop an analytical framework for the appraisal of the market behaviour of the public buyer from a competition perspective.[55]

The basic research question that this study attempts to answer could be formulated in the following terms: *How can and should publicly generated competitive distortions in the public procurement field be addressed under EU economic law and, particularly, under the general framework of competition and public procurement law?* The object of the study can therefore be considered a 'macro-legal question',[56] which will need to be broken down into a series of smaller issues that help structure the research and reach partial conclusions that add up to a final answer to this broad question. Breaking down the object of analysis into smaller pieces should put the focus on each of the multiple dimensions of the integration of public procurement and competition law, one at a time.

[54] The importance of developing more competition-oriented public procurement rules and practice was emphasised by the Conseil de la Concurrence, *Jurisprudence et avis de 2001—Collectivités publiques et concurrence* (2002) 328–9, available at lesrapports.ladocumentationfrancaise.fr/BRP/024000128/0000.pdf.

[55] In general terms, this study can be conceived of as an attempt to contribute to market (or regulation) reform on the basis of two of its main primary measures; see SK Vogel, 'Why Freer Markets Need More Rules' in MK Landy et al (eds), *Creating Competitive Markets. The Politics of Regulatory Reform* (Washington, Brookings Institution Press, 2007) 25, 37.

[56] MM Siems, 'Legal Originality' (2008) 28 *Oxford Journal of Legal Studies* 147, 152–56.

IV. Structure of the Study and General Overview

A. General Overview

In order to break down the object of the study and make it manageable, I consider that the approach should be *gradual*, moving from more general to more specific issues. The questions that the research will focus on can be grouped in three broad categories: foundations or principles, general issues, and specific issues. Thus, the basic structure of the study will be divided into five parts, which comprise this *introduction*; a part on the *foundations or principles* of competition and public procurement law; a part dedicated to the *general issues* involved in the analysis of current EU competition and public procurement law as the two building blocks of the general framework for the analysis and discipline of the purchasing activities of the public buyer; a part dedicated to *special or specific issues* related to the analysis of particular public procurement rules and practices from a competition perspective; and the general *conclusions* of the study, which will be summed up and presented at the end.

B. Foundations and Principles: On the Economic and Legal Basics of Public Procurement and Competition Law

Part two is dedicated to the *economic and legal basics of public procurement and competition law*. In order properly to lay the foundations of the analysis of the EU public procurement regime from a competition perspective, the research should initially focus on the economic aspects of public procurement regulation and practice. Consequently, chapter two focuses on the economic dimensions of public procurement and on the analysis of public procurement from the prism of competition economics—with the aim of gaining a better understanding of the reality of the markets where public procurement takes place and of the competitive and other economic effects that public procurement generates. That chapter is oriented towards disentangling the multiple economic aspects of public procurement that can be relevant from a competition perspective. First, a taxonomy of public procurement markets is proposed, in order to test and, eventually, overcome the classic paradigm of '*public markets*' that has deeply influenced public procurement research and analysis so far. Second, an analysis will also be conducted of the several economic functions that public procurement develops and of the different roles that public authorities assume when they carry out purchasing activities. Finally, a framework for the analysis of the economic effects of public procurement on competition will be proposed, and its effects on market dynamics will be explored and described.

Once the economic foundations have been set, the study will seek guiding principles to inform the development of a framework of more pro-competitive public procurement rules. In this search it will be useful to reconsider the legal normative foundations of both competition and public procurement law, in terms of their basic principles and goals. Going back to the conceptual foundations of both legal corpuses will help us identify their similarities and differences, as well as the scope for larger integration and for a more consistent joint application of both sets of regulation. This inquiry will be conducted in

chapter three. First, the common foundations of both sets of economic regulation will be explored. Second, the goals of each set of regulations will be explored separately. The chapter will conclude emphasising the commonality of basic goals that exists in competition law and public procurement—mainly of economic efficiency considerations and their maximisation through competitive mechanisms—and that their joint application should naturally be based on those common principles and aim at maximising those shared goals. Therefore, part two on the foundations and basic principles of competition and public procurement law should offer some preliminary conclusions as regards the economic and legal rationales that run underneath the object of study and should provide general criteria that will inform the analyses conducted in subsequent parts of the research—as well as the normative recommendations that will be put forward for the development of a more competition-oriented public procurement system.

C. General Part: Public Procurement Viewed from a Competition Perspective, and Competition Elements of Public Procurement Rules—The Building Blocks of the Framework for the Competition Analysis of Public Procurement

Part three, which constitutes the *general part of the study*, will be dedicated to the analysis of EU competition and public procurement rules, in order to appraise to what extent they can be considered the building blocks of a framework properly designed to discipline the market behaviour of the public purchaser and to guarantee undistorted competition in the public procurement setting.

Given the potential negative effects of public procurement on competitive market dynamics (identified in chapter two), and given that the main goal of competition law is to prevent competitive distortions in the market as a means to promote economic efficiency and maximise social welfare (as concluded in chapter three), it seems reasonable to expect EU competition rules to provide some instrument that could tackle distortions of competition generated by the public buyer. Therefore, chapter four will be dedicated to testing if and to what extent current EU competition law institutions and doctrines are able to prevent anti-competitive public procurement practices. The analysis will focus on the adequacy of the rules applicable to undertakings with special or exclusive rights (art 106 TFEU) and to the granting of state aid (arts 107 to 109 TFEU), the direct application of antitrust prohibitions to the public buyer (arts 101 and 102 TFEU), and the indirect application of antitrust prohibitions through the so-called 'State action doctrine' based jointly on articles 3(3) and 4(3) TEU, and 3(1)(b), 101, 102, 119 and Protocol (No 27) TFEU (ex arts 3(1)(g), 4, 10(2), 81 and 82 TEC) to cover the competition distortions generated unilaterally by the public buyer in conducting purchasing activities. An economically oriented revision of the current jurisprudence on the subjection of the public purchaser to EU competition rules, as well as an elaboration and refinement of the state action doctrine, will also be attempted—on the grounds that they would give rise to enhanced applicability of EU competition law to the important field of activity of the public buyer.

Changing perspective, chapter five will explore how public procurement law addresses publicly generated distortions of competition and whether the EU public procurement regime is suited to pursuing competition goals in the public procurement setting—as a key element or complement of EU competition policy, understood in broad terms. It will be submitted that *public procurement rules establish a general framework for evaluating the behaviour of the government as a buyer from a competition perspective*. First, the EU case law will be explored in search of the roots of the *competition principle* now consolidated in article 18(1) of Directive 2014/24, which will also be critically assessed. Then, the study will analyse whether the principle of competition can constitute a standard of self-integration and, consequently, whether public procurement rules can be considered 'special' competition rules in the public procurement setting *lato sensu*, or rather work as a *complement* of EU competition rules. It will also be explored whether the fundamental nature of this competition principle is such as to be extended to public procurement not covered by the blueprint of the EU directives. The final section of this chapter will be dedicated to distinguishing between the newly consolidated competition principle and the traditional principles of the EU public procurement regime, with the objective of making explicit the 'plus point' that the competition principle adds to the integration of public procurement rules with exclusive regard to equality or non-discrimination issues.

Part three will then close with some preliminary conclusions as regards the existence of a general framework designed to discipline the market behaviour of the public purchaser and to guarantee undistorted competition in the public procurement setting, built upon EU competition and public procurement rules.

D. Special Part: Operationalisation of the General Framework through Current Public Procurement Rules—Proposals for the Further Development of a More Pro-Competitive Public Procurement System

Part four will focus on more specific issues directly related to public procurement rules and practices with the basic aim of operationalising the general principles and major guidelines put forward in the previous parts of the study and, more specifically, of fleshing out the competition principle in public procurement rules. To that effect, this part of the study will focus on the particular restrictions of competition that EU public procurement rules can generate, and on possible remedies and alternative rules or further developments that can effectively produce more pro-competitive results through the public procurement system.

Chapter six will be concerned with the competition impact that specific public procurement rules and practices might generate and will conduct a critical assessment of current EU public procurement directives from the perspective of the principle of competition embedded in the EU public procurement rules (ie, will look at current EU public procurement law through pro-competitive glasses). In order to classify the potential restrictive practices and to systematise the analysis, a first basic distinction will be made between restrictions deriving from the public procurement *process* itself and practices of a *more substantive nature* not directly linked to the procurement process—which present closer links with the naked exercise of market power by the public buyer. The analysis will particularly stress the novelties brought upon by the 2014 directives and, where appropriate,

assess the new rules by comparison to the 2004 regime analysed in the first edition of this book. It is important to stress that a significant number of rules remain unchanged or build upon previous versions of the EU directives. Consequently, it does not seem appropriate to delete all commentary on previous 'generations' of the rules. However, where new rules change the approach to certain issues, only the new rules will be discussed and a mention to the first edition will be included for further reference.

As regards the *restrictions of competition derived from public procurement processes* (which cover by and large most of the potential restrictions in this highly proceduralised field), a further division will be made according to the phase of the procurement procedure in which they are more likely to occur. The full cycle of public procurement will be covered—ie, the analysis will not be restricted to the selection and award phases, since competition restrictions can still take place after the public contractor has been chosen by the public buyer. Therefore, restrictions of access to the procurement process, restrictions in the evaluation of bids and the award of contracts, restrictions during the implementation of the contract, and restrictions associated to the set-up of bid protest mechanisms will be analysed.

The approach will be to identify the controlling rule in the EU public procurement directives and the interpretation that the EU case law has provided, if any. Then, the possible anti-competitive effects that the application of the rule could generate will be identified and, where possible, normative criteria to inform the exercise of discretion by the public buyer in applying those rules will be provided with the aim of offering guidelines as to how to avoid the restriction of competition. As preliminary conclusions, I will try to extract some common principles—at least related to each of the procurement phases analysed, if not directly concerned with more specific groups of rules—that could be used as guidance for decision-making in the design and running of more pro-competitive public procurement procedures.

After having examined these potential process-related or procedural restrictions of competition in the public procurement setting (and with a more restricted approach, aimed at identifying more complicated issues), the inquiry will turn to more substantive aspects related to the generation of competition distortions in the procurement setting. Amongst the possible cases for analysis, the study will cover *two examples of potential naked exercise of buyer power by the public buyer*: the squeeze of public contractors, and the effects of certain rules regulating the transfer of intellectual property rights in procurement procedures.

Chapter seven will then focus on some policies and institutional arrangements for the enforcement of public procurement rules that might or might not exist in other jurisdictions—particularly, the US or some of the EU Member States—and that could prove useful in developing a more competition-oriented EU public procurement regime. These instruments to limit further the potential competitive distortions generated by public procurement rules will be divided into those mainly oriented to limiting publicly created restrictions of competition, those mainly oriented to limiting privately created restrictions of competition, and those that could contribute to attaining more pro-competitive results or a more integrated competition and public procurement institutional framework, in general terms.

Given that this special part of the study focuses on specific issues regarding current EU public procurement rules and proposed developments—which do not facilitate the

extraction of general conclusions—and in order to avoid unnecessary repetition, part four will not include separate conclusions in addition to those reached in chapters six and seven of the study.

E. General Conclusions

Part five will summarise and elaborate on the preliminary conclusions reached in parts two to four. By synthesising the previous preliminary and partial conclusions and further developing them from a general perspective, this final part of the study will try to answer explicitly the research question of how publicly generated competitive distortions in the public procurement field can and should be addressed under EU economic law and, particularly, under the general framework of competition and public procurement law.

V. Methodology: An Eclectic and Heuristic Multi-Disciplinary and Functional Approach to EU Law

It is important to stress that, in my view, the study of EU law may require a *new methodological approach*,[57] that departs to a certain extent from the methodology followed in 'classical' legal research and, particularly, in traditional dogmatic legal research.[58] In general terms, current European legal research seems to require an eclectic or multidisciplinary approach that gives substantial flexibility to the researcher to rely on (formerly) external legal perspectives—ie, economic, comparative and others—and based on a more transparent formulation of the normative assumptions made by the researcher.[59]

Although this view is not shared by all—and may not be the majority view amongst European legal scholars[60]—I consider that restricting the study of EU law to 'classical' or dogmatic legal analysis would impoverish the research results and would eliminate the opportunity of enriching legal research with complementary views on the European integration phenomenon.[61] However, it does not mean that dogmatic legal analysis needs

[57] For recent discussion on the raising importance of methodology in legal scholarship, see R van Gestel and H-W Micklitz, 'Why Methods Matter in European Legal Scholarship' (2014) 20(3) *European Law Journal* 292–316.

[58] M Hesselink, *The New European Legal Culture* (Deventer, Kluwer, 2001) 37 and 72–80; AJ Arnaud, *Pour une pensée juridique europeénne* (Paris, Presses Universitaires de France, 1991) 293–98; L Dabin, 'Enseigner le Droit économique européen' in PH Teitgen (ed), *Mélanges Fernand Dehousse—La construction européenne* (Paris, F Nathan Labor, 1979) 205–09.

[59] M Hesselink, 'A European Legal Method? On European Private Law and Scientific Method' (2009) 15 *European Law Journal* 20, 31–35.

[60] See: DW Vick, 'Interdisciplinarity and the Discipline of Law' (2004) 31 *Journal of Law and Society* 163. See also BH Bix, 'Law as an Autonomous Discipline' in P Cane and M Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford, Oxford University Press, 2003) 975, 985.

[61] Along the same lines, see F Snyder, 'New Directions in European Community Law' (1987) 14 *Journal of Law and Society* 167; and id, *New Directions in European Community Law (Law in Context)*, 2nd edn (Cambridge, Cambridge University Press, 1990) 30. See also the part on interdisciplinary legal study of the EU Asia Inter-University Network for Teaching and Research in Public Procurement Regulation, *Legal Research Methods and Public Procurement Regulation* (2009) available at www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/legalresearchmethodsmaterials.pdf.

to be abandoned, or that its techniques and analytical approaches are not largely fit for developing European legal knowledge.

On the contrary, it is submitted that an *integrative* approach should be favoured,[62] so that insights from the various scholarly perspectives on EU law can be taken into account and can contribute to shaping the understanding of its principles and applications. Therefore, the main methodology employed in this study will be that of *traditional legal scholarship*—ie, interpretation of legal sources, with recourse to classical rules of legal construction and the general principles of EU law. However, the multi-disciplinary approach will enter the picture when recourse to some different perspective on competition and public procurement law is considered to offer valuable insights into the object of research. Given the strong political and economic implications of the conduct of public procurement activities—and, to a similar extent, of the enforcement of competition law itself—recourse to the methods of analysis used in other social sciences, and notably in economics, shall be useful to the purposes of the study.[63] In the end, research in economic law must be informed by economics.[64] This is particularly true in the case of both competition and public procurement law, as clearly market-oriented sets of economic regulation.[65]

[62] A Arnull, 'The Americanization of EU Law Scholarship' in id et al (eds), *Continuity and Change in EU Law. Essays in Honour of Sir Francis Jacobs* (Oxford, Oxford University Press, 2008) 415, 425–31.

[63] It was Holmes who stressed more than a century ago that 'for the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics'; OW Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457, reprinted in D Patterson (ed), *Philosophy of Law and Legal Theory—An Anthology* (Oxford, Blackwell Publishing, 2003) 9, 15–16. Even in stronger terms, the classic quote of Professor Charles R Henderson that 'a lawyer who has not studied economics and sociology is very apt to become a public enemy' remains of relevance almost a century after its publication in LD Brandeis, 'Living Law' (1916) 10 *Illinois Law Review* 461, 470. For discussion of this approach, see RW Hahn and PC Tetlock, 'Has Economic Analysis Improved Regulatory Decisions?' (2008) 22 *Journal of Economic Perspectives* 67.

[64] As recently recollected by AI Ogus, 'Regulation Revisited' (2009) 2 *Public Law* 332. Indeed, the consideration of economics as a normative source for legal studies is widely accepted; AL Sibony, *Le juge et le raisonnement économique en droit de la concurrence* (Paris, LGDJ, 2008) 9–10; DA Farber, 'From Plastic Trees to Arrow's Theorem' (1986) *University of Illinois Law Review* 337. However, economics should not be used uncritically; PD Klemperer, 'Alfred Marshall Lecture—Using and Abusing Economic Theory' (2003) 1 *Journal of the European Economic Association* 272.

[65] This might be particularly true in antitrust, given that '[e]conomics lies at the heart of competition, or antitrust, law'—see P Buccirossi, 'Introduction' in id (ed), *Handbook of Antitrust Economics* (Cambridge, MIT Press, 2008) ix—or, put otherwise, where law and economics are especially difficult to separate; RH Bork, *The Antitrust Paradox. A Policy at War with Itself*, 2nd edn (New York, The Free Press, 1993) 8. Very graphically, see P Lowe, 'Competition Policy as an Instrument of Global Governance' in M Monti et al (eds), *Economic Law and Justice in Times of Globalisation—Festschrift for Carl Baudenbacher* (Baden Baden, Nomos Verlagsgesellschaft, 2007) 489, 492. Also in very clear terms, the role of economics in competition law analysis was stressed by FS McChesney, 'The Role of Economists in Modern Antitrust: An Overview and Summary' (1996) 17 *Managerial and Decision Economics* 119; DP Wood, 'The Role of Economics and Economists in Competition Cases' (1999) 1 *OECD Journal of Competition Law and Policy* 82, 83; TJ Muris, 'Improving the Economic Foundations of Competition Policy' (2003) 12 *George Mason Law Review* 1; J Larson et al, 'The Role of Economics and Economists in Antitrust Law' (2004) *Columbia Business Law Review* 419; and LJ White, *The Growing Influence of Economics and Economists on Antitrust: An Extended Discussion* (AEI-Brookings Joint Center for Regulatory Studies, Working Paper No 08-05 and NYU Law and Economics Research Paper No 08-07, 2008), available at http://ssrn.com/abstract=1091531. See also EM Fox and JT Halverson (eds), *Antitrust Policy in Transition: The Convergence of Law and Economics* (Chicago, ABA Section of Antitrust Law, 1984); CA Jones, 'Foundations of Competition Policy in the EU and USA: Conflict, Convergence and Beyond' in H Ullrich (ed), *The Evolution of European Competition Law. Whose Regulation, Which Competition?*, Ascola Competition Law Series (Cheltenham, Edward Elgar, 2006) 17, 18–19; and O Budzinski, 'Monoculture versus Diversity in Competition Economics' (2008) 32 *Cambridge Journal of Economics* 295; and id, *Modern Industrial Economics and Competition Policy: Open Problems and Possible Limits* (University of Southern Denmark, Working Paper No 93/09, 2009), available

Most of the analysis conducted in the study will be based on efficiency considerations as the main normative criterion. Therefore, the analysis could be categorised as largely conditioned by a *'welfarist approach' to the economic analysis of law*.[66] This study is based on the premise that economic law necessarily has to be developed according to the mandates of economic theory and that efficiency considerations constitute the core of its objectives. Consequently, it will probably result in a *'free-market type'* study of competition in the public procurement environment.[67]

The methodology used is purposefully *multi-disciplinary*—more specifically it is an exercise of basic interdisciplinary research;[68] *and eclectic*, in that the multi-disciplinary approach will take different forms depending on the specific object of inquiry—to adapt to the different approaches that can shed a better light on the most salient features of the object of study. The goal behind pursuing this methodology is to benefit from the different perspectives taken into account, which are considered to be largely compatible and complementary, and useful to gain a better understanding of the legal issues covered by the present study.[69] The multi-disciplinary approach will hence be largely *heuristic*, in that other social sciences (and particularly economics) will be looked at for useful guidance, which will later be incorporated into the legal argument.[70] However, the core of the reasoning will still be framed in traditional legal analysis.

at www.sdu.dk/~/media/Files/Om_SDU/Institutter/Miljo/ime/wp/budzinski93.ashx. For a contrary view, see Von Quitzow (n 5) 3. This is equally applicable to public procurement. As has been clearly stated: '[P]rocurement law and regulation cannot be dissociated from the economics of procurement. To do so is to lose the basis for a fundamental understanding of the nature and purpose of such regulation'; Trepte (n 31, 2004) viii. In similar terms, S Arrowsmith and K Hartley, 'Introduction' in id (eds) *Public Procurement* (Cheltenham, Edgar Elgar, 2002) x. See also JW Whelan and EC Pearson, 'Underlying Values in Government Contracts' (1961) 10 *Journal of Public Contract Law* 298, 302–03.

[66] On the desirability of this normative criterion, see RA Posner, 'Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication' (1979–80) 8 *Hofstra Law Review* 487, 491; and JL Coleman, 'Efficiency, Utility and Wealth Maximization' (1979–80) 8 *Hofstra Law Review* 509, 526. See also JL Coleman, *Markets, Morals and the Law*, 2nd edn (Oxford, Oxford University Press, 2002) 95–132. With an elaborated claim for the use of welfare economics (ie, normative analysis based on social welfare) as the main tool to assess regulation, see L Kaplow and S Shavell, *Welfare versus Fairness* (Cambridge, Harvard University Press, 2002). The difficulty of using other evaluative criteria, such as fairness, was stressed by GJ Stigler, 'The Law and Economics of Public Policy: A Plea to the Scholars' (1972) 1 *Journal of Legal Studies* 1. See also JE Stiglitz, *Economics of the Public Sector*, 3rd edn (New York, Norton, 2000) 93–117; and WK Viscusi et al, *Economics of Regulation and Antitrust*, 4th edn (Cambridge, MIT Press, 2005) 9–10. It could be considered that this study follows a conservative economics approach; see DL Rubinfeld, 'On the Foundations of Antitrust Law and Economics' in R Pitofsky (ed), *How the Chicago School Overshot the Mark* (Oxford, Oxford University Press, 2008) 51. For a critique of the use of efficiency as the main criterion of analysis, see RP Malloy, *Law and Market Economy: Reinterpreting the Values of Law and Economics* (Cambridge, Cambridge University Press, 2000); and DM Hausman and MS McPherson, *Economic Analysis, Moral Philosophy and Public Policy*, 2nd edn (Cambridge, Cambridge University Press, 2006).

[67] For a general description of *free marketeers'* approach to economic regulation, see C McCrudden, 'Social Policy and Economic Regulators: Some Issues from the Reform of Utility Regulation' in id (ed) *Regulation and Deregulation. Policy and Practice in the Utilities and Financial Services Industries* (Oxford, Clarendon Press, 1999) 275, 276–77. For a rather strong criticism, see Kunzlik (n 9) *in totum*.

[68] See: MM Siems, *The Taxonomy of Interdisciplinary Legal Research: Finding the Way Out of the Desert* (SSRN Working Paper, 2008), available at http://ssrn.com/abstract=1146162.

[69] Ibid 18. See also RC Clark, 'The Interdisciplinary Study of Legal Evolution' (1980–81) 90 *Yale Law Journal* 1238, 1260–65; and RA Posner, *Overcoming Law* (Cambridge, Harvard University Press, 1995) 23; id, *Economic Analysis of Law*, 7th edn (New York, Wolters Kluwer, 2007) 15. However, on the potential limits of interdisciplinary studies, see B van Klink and S Taekema, *A Dynamic Model of Interdisciplinarity: Limits and Possibilities of Interdisciplinary Research into Law* (Tilburg University, Legal Studies Working Paper No 010/2008), available at http://ssrn.com/abstract=1142847.

[70] Van Klink and Taekema (n 69) 18–19.

As a part of the legal methodology, *comparative analyses* will be used. In this regard, it is important to mention that—although it has evolved to become a legal discipline in its own right that maintains a *sui generis* relation with and is to be found halfway between domestic and international law[71]—the development of EU law is a phenomenon closely related to the field of international law and, consequently, EU law is especially apt for comparative analysis.[72] The comparative analysis in European legal research can be conducted at two levels, or from two perspectives. On the one hand, in a *'classical' or 'external'* approach, EU law will be considered as the 'domestic' legislation to be compared with 'foreign' legal rules, such as those of the US[73] or other countries, or with other bodies of international regulation, such as international treaties or agreements. On the other hand, in an *'integrative' or 'internal'* approach, EU law will be compared with the domestic laws of its Member States (although this approach will often have strong implications from a constitutional law perspective). Even if EU law is considered to be the domestic law of the Member States, from a legal comparative perspective, there is a certain element of '*otherness*' that justifies the comparison with '*truly domestic*' laws and regulations of Member States.[74] Both abovementioned comparative approaches will bring different insights into EU law and, in my view, are equally relevant for its proper understanding and assessment.

In general, the purpose of these limited exercises of comparative review will be to find substantive criteria that could be applicable under EU law, or to find inspiration in trying to propose alternative regulatory solutions—ie, to find elements of other jurisdictions' competition and public procurement laws that seem desirable under the general principles identified in this study and that, given their characteristics, underlying rationale, and expected effects, are suitable candidates for a 'legal transplant' or 'importation' into EU law.[75] Even if the scope of the comparisons is relatively reduced and focuses on spe-

[71] See: N Walker, 'Legal Theory and the European Union: A 25th Anniversary Essay' (2005) 25 *Oxford Journal of Legal Studies* 581, 585; B de Witte, *European Union Law: A Unified Academic Discipline?* (European University Institute Working Papers, RSCAS No 2008/34), available at http://cadmus.eui.eu/dspace/bitstream/1814/10028/1/EUI_RSCAS_2008_34.pdf; J Shaw, 'The European Union—Discipline Building Meets Polity Building' in P Cane and M Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford, Oxford University Press, 2003) 325, 325–27; and, in general terms, P Pescatore, 'Monisme, dualisme et "effet utile" dans la jurisprudence de la Cour de Justice de la Communauté Européenne' in N Colneric et al (eds), *Une Communauté de Droit. Festschrift für Gil Carlos Rodriguez Iglesias* (Berlin, BWV Berliner Wissenshafts, 2003) 329.

[72] See the various contributions to FR van der Mensbrugghe (ed), *L'utilisation de la méthode comparative en Droit européen* (Namur, Presses Universitaires de Namur, 2004). With a focus on comparative analysis in competition law, see DJ Gerber, 'Competition Law' in M Reimann and R Zimmermann (eds), *Oxford Handbook of Comparative Law* (Oxford, Oxford University Press, 2007) III-37. See also C Joerges, 'The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline' (2004) 14 *Duke Journal of Comparative and International Law* 149, 159–61.

[73] For a general comparison of public procurement regulation amongst these two legal orders, see JJ Verdeaux, 'Public Procurement in the European Union and in the United States: A Comparative Study' (2002–03) 32 *Public Contract Law Journal* 713.

[74] See: de Witte (n 71) 4–5.

[75] The usefulness of legal transplants was stressed by the seminal work of A Watson, *'Legal Transplants and Law Reform'* (1976) 92 *Law Quarterly Review* 79; however, his views have been the object of significant criticism. For a diametrically opposing view, see O Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Review* 1. In general, on the conflicting views about the feasibility and desirability of legal transplants, see LA Mistelis, 'Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform—Some Fundamental Observations' (2000) 34 *International Lawyer* 1055, 1064–66. See generally H Xanthaki, 'Legal Transplants in Legislation: Defusing the Trap' (2008) 57 *International and Comparative Law Quarterly* 659, 662–73; W Twining, *Generalizing about Law: the Case of Legal Transplants* (Tilburg–Warwick Lectures, 2000), available at www.ucl.ac.uk/laws/jurisprudence/docs/twi_til_4.pdf; and R Peerenboom, *A Methodology for Successful Legal Transplants: A Working Outline* (paper presented at the Comparative Law

cific issues of competition law and public procurement, most careful consideration will be given to the 'legal environment' where those principles or regulatory solutions have developed, in order to try to avoid classic mistakes in comparative legal research.[76] Only solutions that, in my view, will not 'irritate' or generate 'rejection' when introduced in the system of EU law will be advanced.

It is also worth mentioning that this study adopts a rather unusual *approach to the case law of the EU judicature*. The analysis of the case law of the ECJ and the European General Court (EGC) as a fundamental source of EU law can hardly be considered a departure from 'classical' legal research.[77] However, the 'principled approach' that is about to be applied in the analysis of the case law of the EU judicature requires a brief explanation. There is no such thing as an established or generally accepted method for the analysis of EU case law,[78] but at least in a significant number of European legal studies the case law of the EU judicature is analysed in minute detail by offering a description of the circumstances underlying the case, the reasoning of the parties (and the Advocate General) and, finally, the findings of the ECJ or the EGC. Therefore, EU legal research is often based on what could be termed a 'holistic approach' to the case law of the EU judicature. However, pursuing that approach in the present study would result both in an unmanageable volume of text and information, and in very poor analytical results. Therefore, a 'principled approach' is undertaken, so that only the principles and general findings of the case law are reported and used as legal arguments.[79] Readers interested in a broader or deeper analysis of the case law might want to search for complementary case descriptions and analysis elsewhere.

The methodological approach just sketched needs to be complemented with a *functional approach* towards competition and public procurement law.[80] The study is not intended exclusively to analyse general issues relative to the integration of public procurement and competition—or, put otherwise, to the development of a framework of more

Workshop on Alternative Dispute Resolution Legal Reform Assistance Project, 2008), available at www.lerap.org/files/com_ vn/08–04–01R_PeerenboomLegalTransplant.pdf.

[76] See: O Lando, 'The Worries of a Comparatist' in *Mélanges en l'honneur de Denis Tallon. D'ici, d'ailleurs: Harmonisation et dynamique du Droit* (París, Société de Législation Comparée, 1999) 139; and JI Schwartz, 'Learning from the United States' Procurement Law Experience: On "Law Transfer" and Its Limitations' (2002) 11 *Public Procurement Law Review* 115, 118.

[77] See: Hesselink (n 58) 12 and (n 59) 37–38; HG Schermers and DF Waelbroeck, *Judicial Protection in the European Union*, 6th edn (The Hague, Kluwer, 2001) 133–37; and K Lenaerts and P van Nuffel, *Constitutional Law of the European Union*, 2nd edn (London, Thomson/Sweet & Maxwell, 2005) 793–94. See also A Arnull, *The European Union and its Court of Justice*, 2nd edn (Oxford, Oxford University Press, 2006) 622–38. For general considerations on the treatment of the EU Courts case law, see G Beck, *The Legal Reasoning of the Court of Justice of the EU*, Modern Studies in European Law (Oxford, Hart Publishing, 2013); and G Conway, *The Limits of Legal Reasoning and the European Court of Justice*, Cambridge Studies in European Law and Policy (Cambridge, Cambridge University Press, 2014).

[78] Even the ECJ seems to lack such a method, at least as regards competition law; J Fejø, 'How Does the ECJ Cite its Previous Judgments in Competition Law Cases?' in M Johansson et al (eds) *Liber Amicorum in Honour of Sven Norberg: A European for All Seasons* (Brussels, Bruylant, 2006) 195, 216–17. Regarding public procurement, see Hjelmborg et al (n 9) 39.

[79] For related discussion, with a close look at case law in the intersection of public procurement and competition, see GS Ølykke, 'How Does the European Court of Justice Pursue Competition Concerns in a Public Procurement Context?'(2011) 20 *Public Procurement Law Review* 176–92.

[80] On the importance of taking into account functional considerations, see KM Ehrenberg, 'Defending the Possibility of a Neutral Functional Theory of Law' (2009) 29 *Oxford Journal of Legal Studies* 91. See also RL Abel, 'Redirecting Social Studies of Law' (1980) 14 *Law and Society Review* 805, 817.

competition-oriented public procurement, but also aims at operationalising its main principles. To that end, a functional approach will be undertaken in the special part of the study to evaluate the function or role that specific public procurement rules and practices play in developing a more pro-competitive procurement system, how they fit within the general framework and—in the case of discrepancies or inconsistencies—how those rules can be amended or replaced, to enable them to generate the intended effects.[81]

At the very least, this functional approach will lead to the evaluation of the extent to which a given public procurement rule or administrative practice is able to develop the function intended—ie, to what extent it is achieving pro-competitive results or, on the contrary, is generating potential distortions of market dynamics. The focus will be on the competition effects that a given rule is aimed to generate or prevent, and to the expected value of those effects under the current formulation and interpretation of the rule. Whenever rules are drafted in broad terms and, consequently, are susceptible to generating both pro-competitive and restrictive effects, the functional approach will impose a purposive limitation of the discretion enjoyed by the public buyer in the application of that given rule. Therefore, this functional approach should help develop a series of relatively specific criteria that can contribute to ensuring that the general principles extracted from the framework for the analysis and discipline of the purchasing activities of the public buyer are put to work.

VI. Normative Assumptions

Given the particular character of law as a scientific social discipline, it must be acknowledged that legal studies can hardly be considered free from normative implications[82]—and, in the particular case of competition law, it is worth stressing that many issues 'are not Popperian—they cannot be falsified or proven'.[83] Hence, as previously mentioned, current legal scholarship might require a frank, explicit and transparent description of the main normative assumptions made by the researcher, in order to increase the transparency and the comparability of various research efforts.[84]

Admittedly, some of the analyses conducted in this study are heavily dependent on legal-political or ideological foundations (related to the role of government in a mixed economy, to the trade-offs between the diverse and often conflicting interests behind the implementation of public procurement regulations and competition law itself, etc). Rejection of those assumptions might imply rejection of the research as a whole. Therefore, the study shall make clear from the very outset which the preferred alternatives are while,

[81] See: Hesselink (n 58) 37–40.

[82] *Cf* A Marmor, 'Legal Positivism: Still Descriptive and Morally Neutral' (2006) 26(4) *Oxford Journal of Legal Studies* 683–704. See also R Banakar, 'Can Legal Sociology Account for the Normativity of Law?' in M Baier and K Åström (eds), *Social and Legal Norms* (London, Ashgate, 2012).

[83] DA Crane, 'Chicago, Post-Chicago, and Neo-Chicago' (2009) 76 *University of Chicago Law Review* 1911, 1932. See K Popper, *Logic der Forschung* (1935), *translated as The Logic of Scientific Discovery* (Oxford, Routledge Classics, 2002) 37–73.

[84] See: Hesselink (n 58) 35.

where possible, expressly acknowledging other possibilities and indicating the effect of a different approach on the reasoning developed and the conclusions reached.

In this regard, it has already been mentioned that the study largely rests on the assumption that competition and public procurement are two sets of economic regulation that should be included in the larger framework of European economic law.[85] It is also assumed that, as any other set of economic regulation, they should be shaped and constrained by economic principles and that their rules should be consistent with economic theory—since developing economic law that makes poor economic sense should be considered a regulatory failure.[86] Along these lines, and as already briefly mentioned (above §I.A), it is acknowledged that this approach might be at odds with the fact that public procurement activities inherently generate relevant political and governance issues that can become significant obstacles to the adoption of such an economically oriented approach to the regulation of the market behaviour of the public buyer, which may be particularly clear when public procurement is used for the promotion of secondary or horizontal considerations (see chapter three). However, from a normative perspective, it is submitted that those should also be considered cases of non-market and/or regulatory failure—and, consequently, and in view of the welfare losses that they can generate, should be avoided.

'Economic theory' embraces a broad spectrum of possible orientations, but it will here be used as free market economics, as the term is usually understood in the field of competition policy.[87] It is submitted that this is the approach that has traditionally ruled European integration, as currently stated in article 119 TFEU, which requires that the Union and Member States' activities in the field of economic policy be 'conducted in accordance with the principle of an open market economy with free competition'.[88] Therefore, the study is in general terms in line with the broader premise that the TFEU can and should be interpreted as a European Economic Constitution based on economic integration through the principles of free movement and competition.[89]

[85] The boundaries of European economic law might be difficult to establish. However, competition and public procurement should be included. For a discussion on the bounds of European economic law, see C Joerges, 'European Economic Law, the Nation-State and the Maastricht Treaty' in H Micklitz and S Weatherill (eds), *European Economic Law* (Aldershot, Ashgate, 1997) 5. See also D Linotte and R Romi, *Services publics et Droit public économique*, 4th edn (Paris, Litec, 2001) 97–104.

[86] To be sure, economic theory—and, more specifically, industrial organisation—is not free from normative or 'political' ideology itself; PE Areeda and H Hovenkamp, *Antitrust Law. An Analysis of Antitrust Principles and Their Application*, 3rd edn plus 2007 2nd Cumulative Supplement (New York, Aspen Law and Business, 2006–08) 98. See also S Martin, 'Remembrance of Things Past: Antitrust, Ideology, and the Development of Industrial Economics' in V Ghosal and J Stennek (eds), *Contributions to Economic Analysis—The Political Economy of Antitrust* (Oxford, Elsevier Science, 2007) 25, 45–47; AI Gavil et al, *Antitrust Law in Perspective. Cases, Concepts and Problems in Competition Policy*, 2nd edn (St Paul, Thomson–West, 2008) 63–72; and DJ Gerber, 'Competition Law and the Institutional Embeddedness of Economics' in J Drexl et al (eds), *Economic Theory and Competition Law* (Cheltenham, Edward Elgar, 2009) 20.

[87] Along the same lines, Martin (n 86) 41.

[88] For discussion on this position, with a particular focus on competition law and its goals, see C Townley, *Article 81 EC and Public Policy* (Oxford, Hart Publishing, 2009); L Parret, 'Shouldn't We Know What We are Protecting? Yes We Should! A Plea for a Solid and Comprehensive Debate about the Objectives of EU Competition Law and Policy' (2010) 6(2) *European Competition Journal* 339–76; and, with a view rather close to the one presented here, O Odudu, 'The Wider Concerns of Competition Law' (2010) 30(3) *Oxford Journal of Legal Studies* 1–15.

[89] For an interesting and comprehensive discussion, with a wealth of references and further readings, see Baquero Cruz (n 7) 1–84. See also F Snyder, 'Ideologies of Competition in European Community Law' (1989) 52 *Modern Law Review* 149; J Drexl, 'Competition Law as Part of the European Constitution' in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (Oxford, Hart Publishing, 2006) 633, 641–55; and

The fact that a movement towards a 'social market economy' is taking place at the EU level is not overlooked or minimised by the previous considerations.[90] However, it is suggested that the adoption of an increased social approach in EU policy should not be performed uncritically, or across the board, and that not all policies should be affected to the same extent. In this regard, it is also assumed as a normative criterion, that the policies with a clearer economic rationale and a stronger relationship with market dynamics should be less affected by this change than other policies. Whereas the adoption of a more social approach to policy could determine a significant expansion of, for example, EU labour policies, it is considered that its impact on competition and on public procurement law should be significantly minor—and even smaller as regards competition policy than as regards public procurement policy (where secondary policies could still play a residual role). The reason behind this assumption is not only that social considerations have a very limited space in both competition and public procurement (as bodies of economic regulation) and that they are better left to other fields of regulation (significantly, labour law, social security law, tax law, etc)[91] (see chapter three); but also that the distortions and unexpected consequences that an alternative approach could generate in the design and enforcement of competition and public procurement laws could be substantial.[92]

Therefore, it is assumed that the change of paradigm could alter the analysis in its outer boundaries—ie, as regards the compatibility of competition and public procurement policies with more socially oriented policies, but it should not have major implications as regards the core construction of competition and public procurement law in the majority of circumstances and, in my view, should not significantly alter the conclusions reached in an analysis of their interrelationships and joint applicability based on economic efficiency considerations.

VII. Delimitation of the Study: Exclusions and Limitations

The scope of the study is necessarily limited in various respects. It is especially worth noting that the object of the study is not the totality of public procurement regulations and

Sauter and Schepel (n 6) 11–18. For critical thoughts on this approach, see C Joerges, 'What Is Left of the European Economic Constitution? A Melancholic Eulogy' (2005) 30 *European Law Review* 461. For recent critical assessments, see the contributions to D Schiek, U Liebert and H Schneider (eds), *European Economic and Social Constitutionalism after the Treaty of Lisbon* (Cambridge, Cambridge University Press, 2011).

[90] In general terms, see L Azoulai, 'The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for Its Realization' (2008) 45 *Common Market Law Review* 1335. For a description of the phenomenon, see UB Neergaard, 'Services of General (Economic) Interest: What Aims and Values Count?' in UB Neergaard et al (eds), *Integrating Welfare Functions into EU Law—From Rome to Lisbon* (Copenhagen, Djøf Forlag, 2009) 191; E Szyszczak, 'Legal Tools in the Liberalisation of Welfare Markets' in Neergaard et al (ibid) 279; and Sauter and Schepel (n 6) 9–10.

[91] See: GJ Stigler, 'The Goals of Economic Policy' (1975) 18 *Journal of Law and Economics* 283, 284.

[92] Generally, see DA Weisbach, 'Taxes and Torts in the Redistribution of Income' (2002) 70 *University of Chicago Law Review* 493, 494. See also Posner (n 69, 2007) 14–15 and 491–537. Along these lines, warning about the unintended consequences of pursuing environmental goals through public procurement, see CL Wittmeyer, 'A Public Procurement Paradox: The Unintended Consequences of Forest Product Eco-Labels in the Global Marketplace' (2004) 23 *Journal of Law and Commerce* 69.

the broad set of different aspects that can be considered in relation to public procurement activities. The exclusions from the object of study will be detailed shortly. Limitations also apply to the sources of law and the languages used.

A. Exclusions from the Object of Study

Even if conceived in the broad terms herein described, this study cannot cover each and every aspect of public procurement practice that has potential competition implications. In this respect, various express limitations of the object of analysis need to be taken into consideration.

The study does not cover 'purely international' aspects of public procurement and, consequently, the World Trade Organization Agreement on Government Procurement (GPA) is not the object of direct analysis.[93] EU public procurement is, in all respects, treated as domestic procurement for the purposes of this study.[94] Indirectly, given that the EU directives on public procurement have been adapted to comply with GPA requirements, the analysis performed is expected to be compatible with both the latter and the GPA.[95] Moreover, marginal references to the GPA or to legal and economic doctrine developed in relation to them will be made, but no specific analysis of the application of competition law to international public procurement situations will be undertaken.[96] For similar reasons, only limited reference will be made to public procurement conducted by Member States in relation with other bodies of public procurement regulation, such as the UNCITRAL

[93] Generally, see S Arrowsmith and RD Anderson (eds), *The WTO Regime on Government Procurement. Challenge and Reform* (Cambridge, Cambridge University Press, 2011). For a recent update on the *status quaestionis* in the WTO sphere, see RD Anderson, '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' (2012) 21 *Public Procurement Law Review* 83–94 and his further update in 'The Coming into Force of the Revised WTO Agreement on Government Procurement, and Related Developments' (2014) 23 *Public Procurement Law Review* NA160–NA163. See also id, 'Current Developments on Public Procurement in the WTO' (2006) 15 *Public Procurement Law Review* NA167; id, 'Renewing the WTO Agreement on Government Procurement: Progress to Date and Ongoing Negotiations' (2007) 16 *Public Procurement Law Review* 255; and JH Grier, 'Recent Developments in International Trade Agreements Covering Government Procurement' (2005–06) 35 *Public Contract Law Journal* 385. For background information, see BM Hoekman, 'Using International Institutions to Improve Public Procurement' (1998) 13 *World Bank Research Observer* 249; and the various contributions to BM Hoekman and PC Mavroidis (eds), *Law and Policy in Public Purchasing: the WTO Agreement on Government Procurement*, Studies in International Economics (Ann Arbor, University of Michigan Press, 1997). For a general discussion on the role of the public purchaser as an international actor, see Trepte (n 31, 2004) 208–60 and 340–84.

[94] For discussion of the differences and similarities between international and domestic approaches to public procurement regulation see S Arrowsmith, 'National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict?' (1998) 114 *Law Quarterly Review* 9. For a proposal for future developments of public procurement regulations in the international arena, see CR Yukins and SL Schooner, 'Incrementalism: Eroding the Impediments to a Global Public Procurement Market' (2007) 38 *Georgetown Journal of International Law* 29.

[95] See recs (17) and (18) Dir 2014/24.

[96] For an approach to these issues, see DP Wood, 'The WTO Agreement on Government Procurement: An Antitrust Perspective' in BM Hoekman and PC Mavroidis (eds), *Law and Policy in Public Purchasing: the WTO Agreement on Government Procurement*, Studies in International Economics (Ann Arbor, University of Michigan Press, 1997) 261; and A Davies, 'Tackling Private Anti-Competitive Behaviour in Public Contract Awards under WTO's Agreement on Government Procurement' (1998) 21 *World Competition* 55.

Model Law on Public Procurement or the World Bank Guidelines on Public Procurement under IBRD Loans and IDA Credits.[97]

From a different perspective, and although a link between corrupt and anti-competitive procurement practices should be acknowledged—inasmuch as, almost by definition, corrupt practices will yield anti-competitive results, and some anti-competitive practices might be favoured by corruption[98]—the study does not cover the 'corruption aspects' of public procurement.[99] A parallel analysis of both aspects of public procurement is almost impossible to develop in an encompassing and systematic way. Moreover, it is submitted that, when anti-competitive procurement issues derive from corrupt practices, they will be more effectively analysed and fought against from an anti-corruption perspective—as competition implications will be marginal in that setting. Consequently, corruption and the fight against it in the public procurement environment are expressly excluded from this study.[100]

Also, the study will only be concerned with those aspects of public procurement or government contracts regulation that have a market interface or that generate potential market failures. Therefore, very important issues of public contract law will not be addressed—such as the symmetry of rights between the parties or, alternatively, the supremacy of the public body (and the associated exorbitant powers), or other applicable rules as regards the construction or implementation of the contracts, or the settlement of disputes related to the same. However, it is submitted that the differences in these aspects of the public contracts regime that exist across jurisdictions (and, notably, across Member States) are not significantly relevant from a competition law perspective. From an economic perspective, the approach will be the same and, consequently, only the dimensions

[97] For a general overview of the UNCITRAL Model Law, see the various contributions to S Arrowsmith (ed), *Procurement Regulation for the 21st Century: Reform of the UNCITRAL Model Law on Procurement* (St Paul, Thomson-West, 2009); CR Yukins, 'A Case Study in Comparative Procurement Law: Assessing UNCITRAL's Lessons for US Procurement' (2005–06) 35 *Public Contract Law Journal* 457; S Arrowsmith, 'Public Procurement: An Appraisal of the UNCITRAL Model Law as a Global Standard' (2004) 53 *International and Comparative Law Quarterly* 17; M Dischendorfer, 'The UNCITRAL Model Law on Procurement: How Does it Reconcile the Theoretical Goal of Total Objectivity with the Practical Requirement for Some Degree of Subjectivity?' (2003) 12 *Public Procurement Law Review* 100; and KV Thai, 'United Nations: Progress of Procurement Reforms' (2002) 2 *Journal of Public Procurement* 109. For a brief description of the World Bank Guidelines, see JJ Verdeaux, 'The World Bank and Public Procurement: Improving Aid Effectiveness and Addressing Corruption' (2006) 15 *Public Procurement Law Review* NA179. See also M De Castro Meireles, *The World Bank Procurement Regulations: A Critical Analysis of the Enforcement Mechanism and of the Application of Secondary Policies in Financed Projects* (PhD Dissertation, University of Nottingham, 2006), available at www.nottingham.ac.uk/shared/shared_procurement/theses/Marta_Meireles_master_FINAL.pdf.

[98] This is an issue that has raised significant interest among scholars, particularly in the field of law and economics. For interesting references, see M Celentani and JJ Ganuza, 'Corruption and Competition in Procurement' (2002) 46 *European Economic Review* 1273; Y Lengwiler and E Wolfstetter, 'Corruption in Procurement Auctions' in N Dimitri et al (eds), *Handbook of Procurement* (Cambridge, Cambridge University Press, 2006) 412; Verdeaux (n 97); and R Coppier and G Piga, 'Why do Transparent Public Procurement and Corruption Go Hand in Hand?' (2006) 96 *Rivista di Politica Economica* 185; OECD, *Bribery in Public Procurement. Methods, Actors And Counter-Measures* (2007); and id, *Enhancing Integrity in Public Procurement: A Checklist* (2008).

[99] See: Anderson and Kovacic (n 19) 68; and F Jenny, 'Competition and Anti-Corruption Considerations in Public Procurement' in OECD, *Fighting Corruption and Promoting Integrity in Public Procurement* (2005) 29–35—who reckon the relationship between corruption and competition is concerning, but advocate their consideration as separate challenges for public procurement regulation.

[100] Generally, see S Williams-Elgebe, *Fighting Corruption in Public Procurement: A Comparative Analysis of Disqualification or Debarment Measures* (Oxford, Hart Publishing, 2012). See also the various contributions to Racca and Yukins (n 33).

of public procurement and tender procedures that have a clear potential to generate an impact on market competition dynamics will be analysed. Therefore, the study does not cover issues such as the economic incentives of a particular contract, different remuneration structures for public contractors, risk-sharing structures, etc—which remain largely internal to the relationship between the public buyer and a given public contractor.[101]

Within the group of issues that have a market interface or generate potential market failures or competition distortions, a further limitation should be taken into account. This study will not analyse in depth the issue of whether public authorities should retain certain activities *in-house* or are under a general obligation to outsource them in the market through competitive public procurement procedures (although this issue is briefly considered below in chapter six, §II.A.i); or whether public authorities can *regain* certain activities that have at some point been outsourced (ie, 'privatised') using public procurement procedures or otherwise.[102] In other terms, the study will not cover the issue of the boundaries of the economic activities of the State or the public sector and the use of public procurement to (re-)shape them. This limitation is based on the existence of the *principle of neutrality of ownership* established in article 345 TFEU (ex art 295 TEC)—which, according to its corresponding case law, implies that Member States are free to develop any economic activities they wish to pursue under public ownership (ie, recognises the system of mixed economy that rules in most of the Member States) so that, in my view, as a matter of EU law and as long as competition in the market is not distorted by public undertakings, public initiative in the realisation of economic activities is not limited by the rules of the TFEU.

Therefore, as a matter of general approach, the analysis of the boundaries of public activity in accordance with article 345 TFEU[103] (and the subsequent subjection of public undertakings to 'general' competition law, with the potential exemption for undertakings conducting services of general economic interest ex art 106(2) TFEU)[104] is seen as an issue separate from (and, probably, prior to) the recourse of public authorities to undertakings through public procurement procedures.[105] Moreover, it is an issue that will largely be dependent on the constitutional system and structure of Member States.[106] The appraisal of this prior step regarding public intervention in the economy will not be conducted in this study, which will *solely* focus on the potential market failures and competition

[101] The interested reader will find general information and further references to the academic works in these areas in JJ Laffont and J Tirole, *A Theory of Incentives in Procurement and Regulation* (Cambridge, MIT Press, 1993). For updated references, see GL Albano et al, 'Procurement Contracting Strategies' in N Dimitri et al (eds), *Handbook of Procurement* (Cambridge, Cambridge University Press, 2006) 82–120.

[102] For general discussion on these trends on the redesign of the public sector and the constraints created by EU competition and public procurement rules, see A Sánchez Graells and E Szyszczak (2014), 'Modernising Social Services in the Single Market: Putting the Market into the Social', in JM Beneyto and J Maillo (eds), *Fostering Growth: Reinforcing the Internal Market* (Madrid, CEU Ediciones, 2014) 61–88.

[103] See Joined Cases C-105/12 to C-107/12 *Essent and Others* [2013] pub electr EU:C:2013:677. See also B Akkermans and E Ramaekers, 'Article 345 TFEU (ex Article 295 EC), Its Meanings and Interpretations' (2010) 16(3) *European Law Journal* 292–314; and F Losada Fraga, T Juutilainen, K Havu and J Vesala, 'Property and European Integration: Dimensions of Article 345 TFEU' (2012) 148(3) *Tidskrift utgiven av Juridiska föreningen i Finland* 203.

[104] See N Fiedziuk, *Services of General Economic Interest in EU Law* (Oisterwijk, Wolf Legal Publishers, 2013).

[105] On the relationship between art 345 TFEU and other rules that could alter its content—notably, arts 119 and 120 TFEU—see Szyszczak (n 7) 227–30; and Jones and Sufrin (n 18) 615.

[106] On this, referring to Spanish law, A Huergo, 'La libertad de empresa y la colaboración preferente de las administraciones con empresas públicas' (2001) 154 *Revista de Administración Pública* 129, 151–57.

distortions *once* the public authority has decided not to keep an activity in-house or, in more general terms, once the decision has been made to source goods, services or works from the market.[107] However, the limits that the 2014 public procurement directives create around that decision of keeping certain activities within the *public sphere* will be assessed in detail.

Finally, the study does not address all types of tendering procedures conducted by public authorities. Particularly, the use of tender procedures for quasi-regulatory purposes (ie, the use of tender procedures for the granting of licences, authorisations, or other types of permits) is expressly excluded from the study.[108] Consequently, only public procurement processes in which the public authority is actually buying goods or (out-)sourcing services will be considered, while all other types of procurement-like processes will be excluded from this study.[109]

B. Limitations on the Sources Used in the Study

One of the implied restrictions of legal research in EU law is that it cannot be exhaustive for several reasons, amongst which the vastness of the pool of available legal and scholarly material and the diversity of languages are paramount.

As regards the *sources of law and legal commentary* consulted, this study focuses on *primary and secondary EU law*, as well as on the case law of the EU judicature, in the fields of competition and public procurement. More specifically, as regards competition law, the legal sources are primarily restricted to the provisions of the TFEU and the case law that interprets them. As regards public procurement, the legal sources are mainly limited to the provisions of the TFEU on the four freedoms and the general EU public procurement rules, as recently consolidated and revised in Directive 2014/24[110] (on substance), and Directive 2007/66[111] (on remedies), as well as their interpreting case law. It is worth noting that most of the rules in Directive 2014/24 build upon the previous regulation in Directive

[107] The logic hereby applied is in line with Case C-480/06 *Commission v Germany* [2009] ECR I-4747, where a clear-cut division between both spheres of state market intervention is delineated. See also Commission Staff Working Paper concerning the application of EU public procurement law to relations between contracting authorities ('public–public cooperation') (2011).

[108] In economic terms, both types of bidding procedures are substantially different and generate diverse strategic behaviour on the part of the bidders; see PR Milgrom and RJ Weber, 'A Theory of Auctions and Competitive Bidding' (1982) 50 *Econometrica* 1089, 1093; and RP McAfee and J McMillan, *Incentives in Government Contracting* (Toronto, Toronto University Press, 1987) 63. However, some of the main issues for the promotion of a competitive environment in the two types of auctions might be common to both (such as the need to prevent collusion and foster participation); see PD Klemperer, 'What Really Matters in Auction Design' (2002) 16 *Journal of Economic Perspectives* 169.

[109] These markets (for licences, radio spectrum, polluting rights, etc) have some peculiarities that would require specific consideration before my analyses and conclusions can be applied, such as the preservation of competition is even more compelling (and complex) in the markets where the object of the public tender is an input for downstream competition—see GL Albano et al, 'Fostering Participation' in N Dimitri et al (eds), *Handbook of Procurement* (Cambridge, Cambridge University Press, 2006) 267.

[110] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L94/65.

[111] Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (Directive 2007/66) [2007] OJ L335/31.

2004/18,[112] which will still be used as a comparative benchmark where appropriate (see above IV.D).

It should be stressed that there are other, very relevant substantive procurement directives that cover fields excluded from Directive 2014/24 or specific types of contracts. In that regard, the reader should take into account the existence of Directive 2014/25[113] on utilities procurement, which repeals 2004/17,[114] and Directive 2014/23[115] on concession contracts, which creates a new set of rules applicable to works concessions (previously covered by Directive 2004/18) and services concessions (previously unregulated). However, given that most of the rules that will be studied are common to all substantive directives, with some particularities, this study is limited to the assessment of Directive 2014/24. It is worth remembering, though, that most of the conclusions and suggestions based on Directive 2014/24 are immediately transferrable to the procurement activities covered by Directives 2014/23 and 2014/25.

Along these lines, it is worth clarifying that the Council also adopted a Directive on procurement in the fields of *defence and security*.[116] Directive 2009/81 established a special and more permissive system of procurement rules in the defence sector[117] and did not alter significantly the content of Directive 2004/18—on which it relied and whose requirements cannot be avoided (even in the defence and security sectors) by having undue recourse to the specific rules established in Directive 2009/81 (see art 3 regarding mixed contracts). This approach has been carried forward in the approval of Directive 2014/24, which includes specific coordination provisions with Directive 2009/81 (rec (13), arts 3, 15 and 16). In any case, this study will not analyse in detail the sector-specific rules contained in the defence procurement directive—to which reference will only be made sparingly, and to which the conclusions reached cannot be applied automatically due to the need to take proper account of the *regulatory* dimension of defence procurement and

[112] 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 (Directive 2004/18) [2004] OJ L134/114.

[113] Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L 94/243. See T Kotsonis, 'The 2014 Utilities Directive of the EU: codification, flexibilisation and other misdemeanours' (2014) 23 *Public Procurement Law Review* 169–87.

[114] 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 (Directive 2004/17) [2004] OJ L134/1.

[115] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts [2014] OJ L 94/1. See R Craven, 'The EU's 2014 Concessions Directive' (2014) 23 *Public Procurement Law Review* 188–200. For a critical assessment of the creation of this new regulatory instrument, see A Sánchez Graells, 'What Need and Logic for a New Directive on Concessions, Particularly Regarding the Issue of their Economic Balance?' (2012) *European Public Private Partnership Law Review* 94–104.

[116] Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (Directive 2009/81) [2009] OJ L216/76.

[117] See M Trybus, *Buying Defence and Security in Europe. The EU Defence and Security Procurement Directive in Context* (Cambridge, Cambridge University Press, 2014); B Heuninckx, 'The EU Defence and Security Procurement Directive: Trick or Treat?' (2011) 20 *Public Procurement Law Review* 9–28; M Weiss, 'Integrating the Acquisition of Leviathan's Swords? The Emerging Regulation of Defence Procurement in the EU', in P Genschel and M Jachtenfuchs (eds), *Beyond the Regulatory Polity? The European Integration of Core State Powers* (Oxford, Oxford University Press, 2013) 27–45; and E Andresen, 'The New EU Defense and Security Procurement Directive' (2011) 18 *Columbia Journal of European Law* 22.

the particularly complex equilibria that need to be reached between competition and other (public interest) considerations in this highly regulated economic sector (see eg, art 13, regulating specific exclusions from the scope of Directive 2009/81).[118]

As mentioned in passing, the legal sources used in the field of public procurement also include the *EU case law* interpreting the above-mentioned Directives 2004/18 and 2007/66, and their preceding public procurement and remedies directives,[119] as well as the case law interpreting the successive EU financial regulations, Council Regulation 966/2012[120] and Commission Delegated Regulation[121], which repealed Council Regulation 1605/2002[122]and Commission Regulation 2342/2002[123]—which establish the procurement rules applicable to the EU Institutions.[124] All this case law will prove useful for the analysis of the issues raised by Directive 2014/24, regardless of the strict different legal basis that was the object of the interpretation carried out by the EU Courts.

No other corpuses of legislation or jurisprudence will be considered—other than for the purposes of the abovementioned limited comparative exercises. In particular, domestic competition and public procurement laws of the Member States are not considered in a systematic way; neither are the case law and administrative doctrine developed in their enforcement by national courts and administrative authorities. Similarly, decisions and interpretative notices of the European Commission are not considered in a systematic way—but will be used when they are considered particularly useful to illustrate the analyses conducted in the study.

Legal *scholar commentary* in law reviews, monographs and other legal works will be selectively used, focusing mainly on commentaries referring to EU public procurement and competition law except in the comparative aspects of the study, where commentary

[118] Nonetheless, it might be worth mentioning in passing that Dir 2009/81 also has a pro-competitive orientation—see eg rec (15), where express reference is made to competition considerations and the need to interpret its content in accordance with Dir 2004/18—so that the main conclusions of the study should find proper accommodation within the framework of the new defence directive, subject to the required adjustments and eventual limitations.

[119] The relevance of the previous case law is particularly clear, given that Dir 2014/24 strongly relies on this body of interpretative criteria; see rec (1) Dir 2014/24. In this regard, for reference on how to transfer part of the prior case law to the context of the new directives—with cross-references and analysis—C De Koninck and T Ronse (eds), *European Public Procurement Law. The European Public Procurement Directives and 25 Years of Jurisprudence of the Court of Justice of the European Communities—Texts and Analysis* (The Hague, Kluwer Law International, 2008); C De Koninck and P Flamey (eds), *European Public Procurement Law. Part II: Remedies. The European Public Procurement Directives and 15 years of Jurisprudence of the Court of Justice of the European Communities—Texts and Analysis* (The Hague, Kluwer Law International, 2009).

[120] Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 [2012] OJ L298/1.

[121] Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union [2012] OJ L362/1.

[122] Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (Regulation 1605/2002) [2002] OJ L248/1.

[123] Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of the Financial Regulation (Regulation 2342/2002) [2002] OJ L357/1.

[124] The rules set by Regulations 1605/2002 and 2342/2002 are based on the 'general' EU directives in the field of public procurement and contain numerous rules identical to those currently set by Dir 2004/17 and Dir 2004/18. Consequently, the interpretative considerations made under either of the regimes are relevant to the other. See Case T-495/04 *Belfass* [2008] ECR II-781 93.

will be referred to the domestic law of Member States—which is otherwise substantially excluded from the study.

As regards *linguistic limitations*, this study is restricted to the consideration of sources in English, French, Spanish, Italian, Portuguese and Catalan. Materials in other languages are expressly excluded from the object of the research. However, even amongst the included languages, the approach undertaken cannot and does not intend to be exhaustive, and the selection of sources in the different languages does not intend to be proportionate. Hence, a *heavy reliance on English-language materials* is clearly acknowledged, as they constitute the largest source of European legal commentary.[125]

Finally, it is important to stress an *implicit temporal restriction*, since my aim has been to state the law as I best understood it on 6 November 2014.

[125] Shaw (n 71) 333–35.

Part Two

Foundations and Principles The Economic and Legal Basics of Public Procurement and Competition Law

Part two of this study focuses on the economic and legal foundations of a framework for the appraisal of public procurement from a competition perspective. Each of these aspects is analysed separately and in general terms, in order to set the analytical context for the more specific inquiries conducted later in parts three and four. The main objective of this part is to bring to light some of the elements that, in my view, justify the normative options advanced in chapter one and that will remain largely implicit in other parts of this study.

Firstly, from an *economic perspective*, chapter two will develop some criteria for a better understanding of public procurement as an economic activity and its impact on the competition dynamics of the markets in which the public buyer sources goods, services and works. Public procurement is a complex reality, and even more so when analysed from an economic perspective. Hence, some of the analyses conducted here will aim at disentangling the multiple functions and roles that public procurement and contracting agencies develop, with the aim of indicating the type of activities that will be the object of the study, and of setting aside those aspects of public procurement regulations and activities for whose appraisal competition law is unprepared (as they belong more naturally to other branches of law, such as administrative or constitutional law; or, more simply, because they involve non-legal considerations). The rest of the chapter will be oriented towards indicating the types of direct and indirect effects that public procurement can have on market dynamics—which will be the source of competitive restrictions and distortions that, in my view, competition and public procurement law should deter and prevent. The conclusions reached in chapter two provide an economic understanding of the public procurement rules and activities that will be covered by the rest of this study, as well as of the type of potential competitive distortions whose avoidance is essential.

Secondly, from a *legal perspective*, chapter three will explore the basic objectives and goals that competition law and public procurement law aim at attaining. The analysis will initially focus on both sets of rules jointly, as instances of economic regulation. Then, the specific objectives pursued by competition law and public procurement law will be explored separately. Finally, on the basis of previous findings, an analysis will be held to

determine whether the goals of both sets of regulations actually offer sufficient common ground for the development of a more integrated approach that would lead to a more competition-oriented public procurement system. Suffice it to advance here that the conclusions reached in chapter three, based on a welfarist approach to economic regulation, will offer the normative basis for the analysis and recommendations of the rest of this study.

2

An Economic Approach to Public Procurement and Competition

I. Introduction

The analysis of the economic rationale of any given set of regulations affecting the functioning of the market is essential to understand its ends and to adequately design the corresponding regulatory instruments. This is particularly true in the case of both competition law and public procurement law, as clearly market-oriented sets of economic regulation (chapter one, §V). Therefore, this part of the study is dedicated to the economics of competition and public procurement and, more specifically, to the research sub-question: *why is public procurement relevant from the perspective of competition economics and which are the main competitive distortions that derive from public procurement as an economic activity?* The purpose of this inquiry is to gain a better understanding of the economic reality of the markets where public procurement activities take place (§II), of the functions that public procurement is designed to develop (§III), of the different roles that public buyers play (§IV), and of the competitive and other economic effects that public procurement rules generate in the market (§V).

Firstly, it will be submitted that the general conception of 'public markets', as those markets where the public buyer is the single buyer, should not be used as the paradigm for the design of public procurement rules. Whereas it might be an adequate (and simplified) conceptualisation of some of the markets where public procurement takes place—such as defence procurement, or medical equipment or education services, in some countries—the fact that a large part of public procurement takes place in 'regular' or 'private markets' cannot be overlooked. The public buyer sources a great variety of goods and services that are also acquired by 'private' buyers (such as companies and consumers) and, in that respect, all these agents compete for their purchase (§V.C). However, the simultaneous presence of public and other buyers in the demand-side of most markets may have been overlooked (or its importance minimised) by having had recourse to the stylised simplification of 'public markets' (§II.A). Therefore, in order to gain a more detailed insight into procurement markets, a *taxonomy* of the markets where public procurement takes place seems necessary to differentiate the type of public procurement rules applicable in each of them or, at least, to design rules that allow sufficient flexibility to take these peculiarities into account (§II.B).

Secondly, with a similar aim and to distinguish between the several dimensions of public procurement, the *various functions* developed by public procurement regulations

will be separately considered from an economic perspective. As an economic instrument of regulation, public procurement is generally used in the pursuit of three different—and, to a certain point, conflicting—functions. Public procurement is conceived of as a *public investment or public expense tool* (and, consequently, as an instrument of macroeconomic policy, §III.A), as a *working tool* or regulatory mechanism for governmental or public action (ie, as a specialised administrative procedure for the satisfaction of operational needs of the public sector, §III.B), and as a *tool of sectoral regulation* (and, more specifically, of public sector regulation; that is, as a part of administrative law, §III.C). In my view, the specific aims of each of these different functions or stages of the public procurement process should not be unnecessarily bundled—and, remarkably, the design and implementation of public procurement as a working tool (where the competition analysis of public procurement naturally lies) should be substantially set free from the political considerations that are usually associated with the other two functions[1]—since this is where the design of more pro-competitive rules and administrative practices can make a more significant contribution towards enhancing social welfare.

Thirdly, and from yet a different economic perspective, the several roles developed by the public buyer will be analysed. The focus of this part of the analysis will be to try to disentangle the various roles that public procurement regulations assign to the public buyer—ie, its role properly as a 'buyer' (and, hence, as an 'agent', §IV.A), its role as a 'gatekeeper' (particularly in those instances where the government sources services or goods to be provided directly by the contractor to the public, §IV.B), and its role as a 'market-maker'—particularly when the government sets up centralised purchasing (electronic) platforms and, consequently, gives rise to two-sided public procurement markets (§IV.C).

Finally, the *economic effects of public procurement regulation on market dynamics* will be explored. Public procurement rules, as other types of economic regulation, have a potential to generate market failures, to distort the competition dynamics of the markets where they apply—and, with more intensity, in publicly dominated markets (§V.A). Using an extension of the classical monopsony model (a model of a single dominant buyer with fringe competition) will serve the purpose of identifying the competitive and welfare effects that a single dominant (public) buyer can generate both on its fringe (buying) competitors and on suppliers active in the market, and ultimately on aggregate social welfare (§V.B). Therefore, the design of public procurement rules should be conducted with the express acknowledgement of their potential competition impact and with the clear purpose of minimising their negative effects on market dynamics. To this end, an *analysis of public procurement rules as a potential source of market failure* will be undertaken. Special emphasis will be put on the abovementioned *waterbed effects*[2] (ie, the impact that public procurement regulations can have on other buyers and on public contractors, §V.C), on public procurement rules' *pro-collusive features* (§V.D), and, finally, on *other various potential competitive distortions* arising from new procedures such as the competitive dialogue or the recently introduced innovation partnership (eg, technical levelling or

[1] *Contra*, CF Stover, 'The Government Contract System as a Problem in Public Policy' (1963–64) 32 *George Washington Law Review* 701, 702.

[2] See: OFT, *Assessing the Impact of Public Sector Procurement on Competition* (2004) 7, 13–14, 37, 69 and 97–101, available at www.oft.gov.uk/shared_oft/reports/comp_policy/oft742c.pdf.

further incentives for bidders' collusion, §V.E). These effects on market dynamics can take place at the same time, depending on how public procurement rules are designed and implemented.[3]

All the abovementioned considerations regarding the economics of public procurement and the behaviour of the public buyer, as well as their impact on competition in the market, should provide useful criteria for the analysis to be conducted in the rest of this current investigation—which will be summarised (§VI).

II. Types of 'Public Procurement Markets'

A. The Limitations of the 'Public Market' Paradigm

As has been mentioned in passing, the proper assessment of the role of public procurement and competition law requires a preliminary analysis of the economic reality that they are regulating. Arguably, most studies and regulatory decisions in the public procurement arena are based on the (implied) assumption that the government purchases goods and hires services in 'pure' public procurement markets (or simply, 'public markets').[4] The most usual example of those markets would be the procurement of defence equipment and weapon systems, where the buyers' population is generally limited to governments and their agencies—at least in legal markets. In such markets, public authorities would be the single buyer for the given goods or services and their decisions would not be led (exclusively) by economic considerations (ie, price levels and the associated budgetary constraints) but only by the pursuance of the public interest (defined in very broad terms) and certain ramifications such as national security, public order, etc. In those public markets, then, 'standard' economic analysis would not be (fully) applicable and, consequently, there would be significant room for departure from general economic considerations and policy-making recommendations. However, in my view such a general line of analysis might be misleading—given that some of the basic assumptions of the model are questionable—particularly inasmuch as even those prototypical 'public markets' do not constitute solid realities, but group a large number of heterogeneous markets.[5] While the procurement of a jet fighter surely fits within the paradigm—although, arguably, some of its supplies

[3] For a brief summary of the direct and indirect economic effects of public procurement, see E Uyarra and K Flanagan, *Understanding the Innovation Impacts of Public Procurement* (Manchester Business School Working Paper No 574, 2009) 10–13, available at http://ssrn.com/abstract=1507819.

[4] For a standard description of the stylised figure of public markets on which such analyses are based, see C Bovis, *Public Procurement in the European Union* (New York, Palgrave-Macmillan, 2005) 2, 18–23 and 106–07; and id, 'Public Procurement and the Internal Market of the Twenty-First Century: Economic Exercise versus Policy Choice' in T Tridimas and P Nebbia (eds), *European Union Law for the Twenty-First Century: Rethinking the New Legal Order* (Oxford, Hart Publishing, 2004) 291, 293–94. In my view, such an assumption, even if useful for the purposes of certain types of economic analysis, should have a significantly more restricted role to play in the legal study of public procurement—which does not need to be limited or restricted to that paradigm of 'public markets'. Similarly, see PA Trepte, 'Book Review—Christopher Bovis, EC Public Procurement: Case Law and Regulation' (2007) 44 *Common Market Law Review* 1555.

[5] Along the same lines, OFT, *Assessing the Impact of Public Sector Procurement on Competition* (2004) 1 and 37–38. See also PA Trepte, *Regulating Procurement. Understanding the Ends and Means of Public Procurement Regulation* (Oxford, Oxford University Press, 2004) 11–18.

or spare parts might not—the procurement of sleeping bags, office furniture, catering or cleaning services, or energy for military premises, and other significant requirements generally subsumed in defence procurement do not easily enter the framework.[6]

The same applies to education or health services—another two main sources of government expense—where the supply of general goods and services to public healthcare and education systems hardly differs from the supply to other collective premises, such as private schools and hospitals, or even business offices. Therefore, any reference to defence or health procurement as separate and distinct economic realities that might merit a different treatment from that of other 'commercial' markets means that the analysis remains at a level of generalisation that can lead to inappropriate recommendations, as well as inadequate regulatory and legislative decisions. As a matter of fact, the government buys a significant number of standard goods and services (or of goods and services that would be standard *but for* certain public procurement regulations and practices) and from substantially the same firms that supply non-public buyers (ie, the business community, private households, etc).[7] In these 'commercial' markets, regulatory decisions based on a strictly monopsonistic paradigm could well prove ineffective or counterproductive—since different economic realities require diverse regulatory treatment if the most efficient results are to be achieved.[8]

Moreover, even when it is applicable—because, for a given product or service, the public buyer is actually the only source of demand—this conception of 'public markets' results in a paradigm that resembles, but does not exactly fit in the economic model of monopsony, inasmuch as the public buyer is generally considered by most legal commentators not to be guided by rational economic decision-making criteria—but by non-economic concerns loosely derived or related to the public interest.[9] Therefore, extracting conclusions and applying the economic rationale developed in monopsonistic models to support conclusions based on a rationale founded on the non-economic behaviour of the public buyer is a further potential source of misguidance for public policy design and regulatory intervention.

All in all, the analysis and reasoning based on an 'artificial' public market construction results in overlooking and omitting all the effects (both positive and negative) that public procurement can generate in the 'natural' markets where the public buyer is really developing its procurement activities. The limitations of the 'public market' analysis derive from its narrow boundaries. Indeed, in the 'public market' setting—where the public buyer would be operating in a separate market where no other agents would be active on the demand side—it is generally held that the decisions that the public buyer makes (eg, whether to buy through open or restricted, negotiated or sole-source procedures)

[6] In very similar terms, Trepte (n 5) 32–35.

[7] DF Kettl, *Sharing Power. Public Governance and Private Markets* (Washington, Brookings Institution, 1993) 15–16 and 31; SL Schooner, 'Fear of Oversight: The Fundamental Failure of Businesslike Government' (2001) 50 *American University Law Review* 627, 634. See also F Naegelen and M Mougeot, *Les marchés publics: règles, stratégies, politiques* (Paris, Economica, 1993) vi–x.

[8] Kettl (n 7) 20.

[9] Those studies are probably based on the core assumption underlying most economic studies of public procurement, which construct models based on the monopsony of the public buyer; see eg: Naegelen and Mougeot (n 7); and M Mougeot and F Naegelen, 'Marchés publics et théorie économique: une guide de l'acheteur' (1997) 107 *Revue d'économie politique* 3. However, the fact that non-economic considerations are taken into account by the (monopsonistic) public buyer significantly departs from those economic models and questions the applicability of their conclusions; a fact largely overlooked by non-economist commentators.

would only affect its interests, in terms of better value-for-money, administrative costs, etc. Therefore, all efficiency and cost-benefit analyses exclusively focus on the position of the public buyer (hence, from a narrow demand-side approach) and largely omit the effects on suppliers and, especially, on the rest of purchasers of the same goods and services. In the end, the analysis is partial and, hence, it results in a poor and limited market analysis. Thus, a more careful consideration of the types of markets where the public purchaser sources goods and services might shed some light on the criteria that should guide regulatory decisions—and competition analyses—in the public procurement setting.

B. A More Detailed Taxonomy of 'Public Procurement Markets'

In order to gain a better understanding of the diversity of markets that can be affected by public procurement activities, a taxonomy of 'public markets' will now be advanced on the basis of four complementary criteria: the regulatory situation of the target market (§II.B.i), the relative importance of public procurement in the market (§II.B.ii), the temporal framework in which market transactions take place (§II.B.iii), and the geographic scope of the target market (§II.B.iv). Moreover, the effects of the activities developed in such 'public markets' can extend to 'purely private' or 'commercial markets', when public procurement activities have a prescriptive role or in cases of adjacent markets (§II.B.v). Each of these elements will be analysed in turn.

i. The 'Regulatory Situation' of Public Procurement Markets

According to their 'regulatory situation', an initial distinction can be made between 'open' and 'regulated' markets. This criterion aims to underscore the particular complexity of analysing the effects of public procurement on competition dynamics in markets already subject to sectoral regulation, where a triple overlap of different sets of economic regulation arises between: (i) competition law, as general law, (ii) sectoral regulation, as special law regulating the *supply* in these markets, and (iii) public procurement rules, as special law regulating (part of) the *demand* in these markets (since players active in regulated markets usually serve *both* public and non-public buyers).

Under these circumstances, the main problems and difficulties encountered generally in regulated markets—where competition law needs to be adapted to fit the particularities imposed by sectoral regulation on the regulated undertakings[10]—can be magnified if public

[10] The delimitation between competition and regulation is still an open issue with far reaching implications, and exploring all of those goes beyond the scope of this study. Suffice it to point out here that, in my view and in line with recent developments in this field (particularly in the US), it seems clear that, in a simplified manner, competition law should be adjusted (ie, reduced) when its application in regulated sectors could defeat the purpose and objectives of sectoral regulation. If this is the case, then it may even be necessary to go so far as to refrain from applying competition law at all in regulated industries if the allegedly anti-competitive practices have been the object of specific regulation and effective supervision by the sectoral agency; along these lines, see *Credit Suisse Securities (USA) LLC v Billing*, 551 US 264 (2007). In my view, the reasoning is similar to the ultimate justification for art 106(2) TFEU—which may restrict the application of competition law when it is necessary for the proper development of services of general economic interest (chapter four, §II.B). Notwithstanding this analogy, the European approach to the delimitation between competition and regulation favours a concurrent application of regulation and competition law in all cases. See Case T-336/07 *Telefónica and Telefónica de España v Commission* [2012] pub electr EU:T:2012:172 and Case C-295/12 P *Telefónica and Telefónica de España v Commission* [2014] pub electr EU:C:2014:2062.

procurement rules impose a given type of behaviour on the public buyer that clashes with the general requirements of sectoral regulation—such as, for instance, setting maximum procurement prices below the minimum authorised tariffs, bundling requirements that are subject to separate regulatory regimes (and, consequently, generating potential regulatory conflicts and incompatibilities or limiting the number of potential suppliers in a given contract) etc. Moreover, certain procurement processes might not be applicable or feasible in regulated environments, where suppliers might face regulatory restrictions against certain procurement requirements, such as complying with technical specifications set by the public buyer that depart from the standards approved by the regulatory agency, or selling goods or services at fixed prices when those commodities are subject to daily pricing in a different type of market auction or otherwise (as could be the case for energy markets, under certain pool-like regulatory environments).

All these potential peculiarities might require the establishment of exceptions or certain derogations from general public procurement rules, in order to accommodate the specific features of regulated markets—indeed, public procurement in 'regulated' sectors has traditionally been the object of separate regulation in the EU.[11] Moreover, when analysing the competitive dynamics of regulated sectors from a competition point of view, the existence of public procurement regulations should also be taken into careful consideration, since, for instance, *indicia* of otherwise collusive behaviour cannot only be explained by the sectoral regulation itself (but may be the result of the joint applicability of sectoral and public procurement rules).[12] Therefore, an analysis of public procurement activities in regulated sectors might be biased by the existence of sectoral regulation and lead to recommendations not suited to 'open' markets.

For their part, 'open' markets where no sectoral regulation is applicable—or where the requirements of sectoral regulation do not generate any relevant particularities from a competition law perspective—are still to be analysed bearing in mind the currently applicable public procurement regulations. For instance, when defining a relevant market for the purpose of competition analysis, it might be necessary to conduct an assessment of whether a broader range of products or services would be included in the market *but for* the current public procurement regulations and practices. That will be relevant particularly in those cases in which public procurement practice might have 'artificially' segmented a market, isolating public demand and a certain part of the original supply by imposing unnecessary procurement requirements (see below §V.B). In those cases, the proper integration of the public procurement factor into the analysis might alter the results of an otherwise 'standard' market analysis and provide enhanced market information and decision-making criteria.

[11] Some of the discrepancies between general public procurement rules and the rules applicable to these 'excluded' sectors derived, in part, from the existence of a different regulatory situation—see JM Fernández Martín, *The EC Public Procurement Rules. A Critical Analysis* (Oxford, Clarendon Press, 1996) 15; and Trepte (n 5) 24–26 and 166–67.

[12] See: RC Marshall and MJ Meurer, 'Bidder Collusion and Antitrust Law: Refining the Analysis of Price Fixing to Account for the Special Features of Auction Markets' (2004–05) 72 *Antitrust Law Journal* 83, 86.

ii. The Relative Importance of the Public Buyer in the Market: Exclusive, Dependent, Commercial and Private Markets

As a second criterion for the differentiation of public procurement markets, the relative importance of public procurement activities in a given market needs to be taken into account. This is probably the single most important factor in distinguishing the various types of markets where the public buyer is active—particularly because all situations that depart from public monopsony have so far been largely neglected in the analysis of competition dynamics in public procurement markets.[13]

Indeed, the relative importance of the public buyer is essential to differentiate between markets where protection of undistorted competition is necessary and can be conducted by means of competition law remedies, and other markets where it is not as necessary or feasible—be it because they operate almost without being affected by the public buyer (who represents a minor or negligible proportion of demand in those markets), be it because they belong more naturally to the field of regulation (because the public buyer is the only source of demand and, as a mirror image of monopoly, *monopsony is probably better suited to regulation than to competition law*).[14] In general terms, four broad categories of markets can be distinguished according to the criterion of public procurement's relative importance.[15] Rather obviously, these four categories form a continuum and, in certain instances, determining whether a particular market belongs to one category or another might be difficult. However, this theoretical distinction can help focus the inquiry in the markets where competition policy is both more necessary and more likely to produce efficiency-enhancing results.

Exclusive Markets. First of all, *exclusive markets* are those that better fit the paradigmatic conception of 'public markets' as monopsonistic markets.[16] In these markets, for

[13] See: OFT (n 2) 40 and 43–51. Similarly, Trepte (n 5) 131.

[14] Along the same lines, WP Rogerson, 'Economic Incentives and the Defense Procurement Process' (1994) 8 *Journal of Economic Perspectives* 65, 65–69.

[15] The relative importance of the public buyer should be appraised in markets properly defined according to the criteria generally used in competition law enforcement—ie, according to the products or services concerned (or objective dimension), the geographic (and the temporal) dimensions of the market; see Commission Notice on the definition of relevant market for the purposes of EU competition law (Notice on the Definition of Relevant Market) [1997] OJ C372/5. See Note by the Delegation of the European Union, *Roundtable on Market Definition* (DAF/COMP/WD(2012)28). See also TE Kauper, 'The Problem of Market Definition under EC Competition Law' (1996–97) 20 *Fordham International Law Journal* 1682. As will be further developed, geographic and temporal criteria might require adjustments in order to define markets that duly take into consideration the particularities that public procurement regulations can generate. In any case, however, the general methodology for the definition of relevant markets for the purposes of competition law is applicable—although it might generate specific problems; see R McMillan, Jr, 'Special Problems in Section 2 Sherman Act Cases Involving Government Procurement: Market Definition, Measuring Market Power, and the Government as a Monopsonist' (1982) 51 *Antitrust Law Journal* 689, also published as (1983–84) 14 *Public Contract Law Journal* 262.

[16] See generally: F Machlup, *The Economics of Sellers' Competition. A Model Analysis of Sellers' Conduct* (Baltimore, Johns Hopkins Press, 1952) 126–32; RL Bish and PD O'Donoghue, 'A Neglected Issue in Public-Goods Theory: The Monopsony Problem' (1970) 78 *Journal of Political Economy* 1367, 1369; GJ Stigler, *The Theory of Price*, 4th edn (New York, Macmillan, 1987) 216–18; RD Blair and JL Harrison, *Monopsony: Antitrust Law and Economics* (Princeton, Princeton University Press, 1993) 36–129; id, 'Antitrust Policy and Monopsony' (1990–91) 76 *Cornell Law Review* 297; id, 'Cooperative Buying, Monopsony Power, and Antitrust Policy' (1992) 86 *Northwestern University Law Review* 331; JM Jacobson and GJ Dorman, 'Joint Purchasing, Monopsony and Antitrust' 36 *Antitrust Bulletin* (1991) 1, 5–23; and, recently updated, RD Blair and CP Durrance, 'The Economics of Monopsony' in ABA, *Issues in Competition Law and Policy* (Chicago, ABA Section of Antitrust Law, 2008) 393, 397–99. With a special focus on monopsony power in public procurement markets, see TL Brown et al, 'Managing Public Service Contracts: Aligning Values, Institutions, and Markets' (2006) 66 *Public Administration*

some regulatory or de facto circumstances, the public buyer is actually the only source of demand for a given product or service. It is important to stress that this exclusivity will often be exogenous to the nature of the product itself considered (as, in the absence of any regulation, the same product could be destined to alternative uses) so, in most cases, the exclusivity of the market will result directly from that regulatory limitation—since, *but for* that restriction, a broader market could be defined.[17] The definition of the market is, therefore, limited to demand-side considerations and restricted by the regulatory impositions. In these cases, not overlooking the regulatory constraints applicable to the given product or service will be essential for a proper assessment of the market from a competition perspective and to the formulation of sound policy recommendations. When the proper definition of the market results in the existence of an *exclusive market*—such as that for weapons systems—it is submitted that the focus of the analysis will probably be more adequately directed towards the regulation of that market than towards competition law considerations[18]—since public procurement rules and practices constrain the behaviour of undertakings in a way equivalent to sectoral regulation in most respects, and these markets present specific economic problems that might be better addressed through regulatory solutions.[19]

Review 323, 326; and Orkand Corporation (prepared by), *Monopsony: A Fundamental Problem in Government Procurement* (Washington, Aerospace Research Center, Aerospace Industries Association of America, 1973). See also PJ Slot and A Johnston, *An Introduction to Competition Law* (Oxford, Hart Publishing, 2006) 6; and G Lunghini and PA Mori, 'Per una politica economica della concorrenza' in N Lipari and I Musu (eds), *La concorrenza tra economia e diritto* (Milano, Cariplo-Laterza, 2000) 203.

[17] In similar terms, see Kettl (n 7) 31–32.

[18] The regulatory nature of public procurement in the defence sector has been stressed by many; see eg BA Peterson, 'The Defense Industry: An Illusion of a Free Market' (1986–87) 20 *National Contract Management Journal* 105, 107–08; WE Kovacic, 'The Sorcerer's Apprentice: Public Regulation of the Weapons Acquisition Process' in R Higgs (ed), *Arms, Politics, and the Economy: Historical and Contemporary Perspectives* (Washington, The Independent Institute, 1990) 104; and JR Fox *with* JL Field, *The Defense Management Challenge: Weapons Acquisition* (Cambridge, MA, Harvard Business Press, 1988) 15–17 and 300. Therefore, the exclusion of the defence sector from general public procurement regulations in the EU seems justified in the regulatory-like requirements of these particular markets. In that regard, see generally the Communication from the Commission, The application of Article 296 of the Treaty in the field of defence procurement (COM(2006) 779 final) and Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (Directive 2009/81) [2009] OJ L216/76. In general terms, it implies a relaxation of the general procurement regime to take into account the particularities of the defence sector. On that subject, for further references, see M Trybus, *European Defence Procurement Law: International and National Procurement Systems as Models for a Liberalised Defence Procurement Market in Europe* (The Hague, Kluwer Law International, 1999) 47–96; id, 'The Challenges Facing the European Defence-Related Industry—Commission Communication COM (96) 08' (1996) 5 *Public Procurement Law Review* CS98; and id, *Buying Defence and Security in Europe. The EU Defence and Security Procurement Directive in Context* (Cambridge, Cambridge University Press, 2014). See also, T Kirat, 'Les marchés publics de la défense et la concurrence: quelles perspectives pour un marché européen des équipements de défense?' in G Canivet (ed), *La modernisation du Droit de la concurrence* (Paris, LGDJ, 2006) 439; and B Heuninckx, 'Towards a Coherent European Defence Procurement Regime?' (2008) 17 *Public Procurement Law Review* 1. The previous situation of defence procurement in the EU was criticised (for the over-reaching scope of the prior exemption); see Trepte (n 5) 32–35; and id, *Public Procurement in the EU: A Practitioner's Guide*, 2nd edn (Oxford, Oxford University Press, 2007) 239–42.

[19] For instance, *hold-up problems* given that potential government contractors might be reluctant to invest in assets and technology specific to the production of the product for which the public buyer is a monopsonist if they fear that they will not be able to recover their investment if the government takes advantage of their investment in specific assets to drive a hard bargain later; see Rogerson (n 14) 67–69. In general, on *hold-up*, see OE Williamson, *The Economic Institutions of Capitalism* (New York, Free Press, 1985); and J Tirole, 'Procurement

Dependent Markets. Secondly, *dependent markets* are those where the public purchaser is the main economic player and, while other buyers are active (ie, there is *fringe* non-public demand), market dynamics are largely defined by public procurement regulations and practices. These markets can include, for instance, goods and services used as inputs for downstream services in health and education markets where, at least in most developed countries, the main buyer (and, often, also the provider of the subsequent services) is public—but there are also private competitors providing the same type of services. In these markets, the effect of public procurement decisions and practices on competitive dynamics is highly relevant, since most offerors would not be able to remain in business if they only satisfied the 'private' demand for their products and services (which is insufficient to support the upstream industry and, sometimes, even a single upstream competitor). Moreover, by being active simultaneously in the provision of goods and services to both public and private buyers, public contractors face the need to develop common solutions applicable to all contracts[20] (unless otherwise prevented from so doing by public procurement regulations, such as restrictions on the use of proprietary intellectual property (IP) rights to be transferred to the public purchaser, below chapter six, §III.B), or to assume increased costs derived from the need to produce differentiated products for the public and the private tranches of the market (and, consequently, to pass through those increased costs via prices, either to the public or private buyers, or to both of them).

Hence, when facing the need to adjust their offer to the needs of either the public or the private buyer, it is rational for suppliers to stick to public requirements[21]—knowing that the other buyers will adjust their behaviour *as if* the market was competitive (or will have to assume the additional costs of not doing so)—and, consequently, private demand will have access to a more limited variety of goods or services or in less favourable economic conditions than in situations where public procurement is less influential (*rectius*, restrictive). In some situations, the outcome might be neutral, inasmuch as public and private needs are homogeneous. However, when that is not so (ie, when private and public demands have some distinguishing peculiarities) certain public procurement regulations or practices might alter market dynamics. Sometimes, the result might be welfare reducing, particularly if restrictions imposed by public procurement regulations or practices are random or unjustified.

Commercial Markets. Thirdly, *commercial markets* are those markets where the public buyer is one amongst many purchasers of a given good or service—such as information and communication technologies (ICT) products, software, office supplies, furniture, most type of vehicles, etc—and, in principle, the public buyer does not determine market dynamics any more than any other agent with equivalent buying power (as suppliers are relatively free to redirect their goods and services from public demand to private demand).

and Renegotiation' (1986) 94 *Journal of Political Economy* 235. It is important to stress that these problems do not arise in other markets where, even if investment in specific assets might be necessary, producers and sellers are able to exploit them profitably trough trade with non-public (as well as public) buyers. This characteristic of certain procurement markets might suffice to grant them regulatory treatment.

[20] JN Dertouzos, 'Introduction' in AG Bower and JN Dertouzos (eds), *Essays in the Economics of Procurement* (Santa Monica, RAND—National Defense Research Institute, 1994) 1, 5.

[21] Indeed, public contractors will face increased pressure to maintain efficiency and contracts' competitiveness and to adjust to public sector requirements; see F Cabrillo et al, 'Introducción' in id (eds), *Estrategias para un gobierno eficaz* (Madrid, LID Editorial Empresarial, 2008) 10.

In these markets, the commercial practices of the public purchaser should be analysed according to the same general rules applicable to other undertakings that eventually hold buying power—that is, in commercial markets, public power buyers should be subject to the same checks and rules that any other power buyers face.

To be sure, in some instances dependent and commercial markets might be difficult to differentiate and, in the last resort both refer to markets where the public purchaser holds significant buying power, but in different degrees.[22] Therefore, a joint analysis will usually be able to capture the particularities of both types of '*publicly dominated*' *purchasing markets*, although some of the dynamics and (anti-)competitive effects identified in the analysis will rather obviously be less intense in *commercial* than in *dependent* markets—which, eventually, might be closer to exclusive markets as regards some regulatory-like features.

Private Markets. Finally, *private markets* are those where public procurement is only anecdotal—for instance, the market for luxury products, where public purchases are expected to be exceptional. Consequently, public procurement regulations and practices should hardly ever generate a significant impact on their competitive dynamics, other than by chance. In these markets, given the limited importance of this activity, it will be rare to find instances of anti-competitive public procurement. In any case, given that public procurement activities are not limited by reason of the object of the procurement and that public activity can, in principle, be developed in all fields, the existence of such private markets will be a factual circumstance—and it is hard to envisage a clear category of markets where the impact of public procurement regulations and practices can be safely overlooked completely.

Focus of the Inquiry on Publicly Dominated Markets. In the light of the above, it is submitted that *the focus of competition analysis should be mainly directed towards 'publicly dominated' purchasing markets, that is, dependent and commercial markets* where the public buyer can exert a significant influence on market dynamics, since the aggregation and exercise of (public) buyer power can have adverse effects on the degree of competition, both in the short and in the long term.[23] To be sure, neither exclusive nor private markets are irrelevant to these purposes. However, as anticipated, *exclusive markets* are probably better conceived of as regulated markets in themselves—while *private markets* can be left to general competition law and economics criteria.

A Further Precision. Within this framework, and to be precise, one cannot properly think of a *single* public buyer,[24] because a relatively large number of units of different public bodies conduct independent purchases.[25] Therefore, depending on the level of

[22] On the importance of taking into account the privileged position of the public buyer (and the relative bargaining power that potential government contractors have) depending on the structure of the market, see RP McAfee and J McMillan, *Incentives in Government Contracting* (Toronto, Toronto University Press, 1987) 125–26. See also WB Burnett, 'Competition in the Weapons Acquisition Process: The Case of US Warplanes' (1987) 7 *Journal of Policy Analysis and Management* 17.

[23] N Dimitri et al, 'When Should Procurement Be Centralized?' in N Dimitri et al (eds), *Handbook of Procurement* (Cambridge, Cambridge University Press, 2006) 47, 71; GL Albano and M Sparro, 'Flexible Strategies for Centralized Public Procurement' (2010) 1(2) *Review of Economics and Institutions*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1887791. For further analysis, see below §IV.C and chapter six.

[24] OFT (n 2) 46.

[25] Fully centralised procurement models are rare, and most countries have a hybrid or decentralised model of procurement, even if a trend towards centralisation (of certain supplies, mainly standardised items) can be identified—especially after the information and communication technological revolution—and has gained

centralisation of public procurement activities, certain *competition among public buyers* could exist even in markets that, at first sight, might seem monopsonistic. In that case, all markets could tend to present a certain degree of demand competition that could lead to their classification as commercial or private markets where each and every single independent purchasing unit would hold a relatively limited buying power, if any. In such an environment, tailoring competition rules to the public procurement setting—or, put otherwise, designing pro-competitive public procurement rules—might seem a relatively worthless exercise, as the competition amongst public buyers could be thought of as a market mechanism that is self-regulated. However, recent trends towards standardisation, centralisation and the use of eCatalogues point in the opposite direction. Consequently, notwithstanding the theoretical possibility of buyer competition in the public sector, it is my view that competition amongst public buyers cannot reach a sufficient degree of intensity to prevent the exercise of buyer power and, in more general terms, to exclude anti-competitive effects (below §V).

Indeed, when focusing attention on the public buyer, the analysis is tackling simultaneously—and, somehow, inseparably—the potential restrictions generated by the public buyer power per se and by the restrictive public procurement regulations that generate or reinforce that buying power. Therefore, given that in any economy (or legal order) most public purchasing entities are constrained by the same procurement rules—and that real demand-side competition amongst public entities is hardly conceivable (other than as a result of insufficient coordination or, otherwise, of an express and unlikely policy to promote such competition)—it is submitted that it will be helpful to conduct the analyses around a simplified, *single* dominant public buyer *paradigm*, and that the ensuing conclusions will be largely applicable to a '*multi*-public purchaser' scenario. It is on this assumption that the abovementioned market taxonomy will be used—distinguishing between exclusive, dependent, commercial and private markets based on the relative importance of public procurement activities *as if* performed by a single buying entity (see below §V.B). In my view, the general conclusions reached under this simplified or stylised approach will not restrict their general validity.

iii. Temporal Considerations of Relevance for Public Procurement Markets

The temporal factor can be of relevance in the definition and analysis of public procurement markets, particularly in two cases: (1) on the one hand, where exceptional circumstances determine that public tenders only take place on a very limited number of occasions, separated by a relatively long time period—generating conditions where the competitive paradigm could actually shift *from competition in the market* to a *competition for the market* scenario and (2) on the other hand, where public procurement activities refer to future goods (or services or works, but primarily goods) and the contracting authority funds or sponsors the required research and development (R&D) activities for one or several selected contractors—in this case, generating a potential for *deferred* anti-competitive effects. In both cases, taking into account the temporal dimension of public procurement activities can be relevant and can require separate or additional competition

importance in the EU directives. See Dimitri et al (n 23) 48–51, 57–58 and 76. This is now very clear in arts 37–39 Dir 2014/24. See chapter six.

analysis. However, it should be borne in mind that both cases will be relatively exceptional and, consequently, the conclusions reached in relation to each of these special types of public procurement markets cannot be extrapolated to the majority of public procurement markets—where the temporal element will remain largely irrelevant for the purposes of competition analysis.

Very Infrequent Procurement Procedures. In the case of certain goods, services or works for which contracts are tendered very infrequently—particularly those that imply a very long lead time (ie, the period of time between the initiation of any process of production and the completion of that process), that involve goods or works (primarily) with a long service life (ie, its expected lifetime, or the acceptable period of use in service), or that satisfy very rare or exceptional needs of the contracting authority (such as a unique infrastructure)—the proper definition of the relevant public procurement market might need to include a temporal dimension or, at least, the conclusions of a standard competition analysis might need to be adjusted to take into account the *windowing* of commercial opportunities for competing undertakings.[26] Put otherwise, in cases of very infrequent procurement processes, the relevant framework for competition analysis might be that of competition *for the market* rather than competition *in the market*.[27] In these cases, however, the sole fact that public buyers tender contracts infrequently should not be sufficient to support the change of analytical paradigm. If the non-public part of the market does not present such strong temporal restrictions—because, for instance, a given public buyer (or group of public buyers) only buys cars every five years, while there is a continuous market for new and used cars for non-public buyers—the temporality of public demand should be adjusted for analytical purposes—given that *but for* the regulatory or practical restriction associated with the public procurement activities, the market is not one that justifies an analysis under the competition for the market paradigm. Where the analysis under a competition for the market approach is justified, different public procurement markets shall be identified for each relevant window of public demand, and the competition analysis shall be limited to the effects generated in that period (particularly as regards the difficulty of compensating short and long term effects in markets with such discontinuous functioning). In the remaining cases, a proper analysis should disregard temporal elements that stem solely from public procurement rules or practices.

Procurement of Future Goods—Competition Implications of Publicly Funded R&D Activities. As mentioned, under certain conditions, the public buyer can tender contracts for future goods (or services or works—inasmuch as the R&D criterion applies to them) and, consequently, fund the R&D activities of the public contractor(s).[28] In these cases, the temporal element can acquire particular significance for the competition analysis of such public procurement activities, since potential anti-competitive effects can be generated in the short term as regards the development of R&D activities themselves, but there is also room for potentially deferred anti-competitive effects.[29] In this regard, the analysis of the

[26] S Bishop and M Walker, *Economics of EC Competition Law: Concepts, Application and Measurement*, 2nd edn (London, Sweet & Maxwell, 2002) 434.

[27] On this, see PA Geroski, 'Competition in Markets and Competition for Markets' (2003) 3 *Journal of Industry, Competition and Trade* 151.

[28] See generally: RN Flint, 'Independent Research and Development Expenditures: A Study of the Government Contract as an Instrument of Public Policy' (1964) 29 *Law and Contemporary Problems* 611.

[29] On the adjustment of competition analysis to R&D markets, focusing on barriers to R&D competition, see S Park, 'Market Power in Competition for the Market' (2009) 5(3) *Journal of Competition Law and Economics* 571.

procurement rules and practices shall not be restricted to short-term considerations, but shall also take into account the effects in the market for the future goods, once they are developed. These considerations will be particularly relevant if those goods (or services or works) are not for the exclusive use of the public buyer, since the public contractor could find itself in a starting position that prevented the development of effective competition in 'private' markets (or tranches of the market) from the outset (that is, an undue first mover advantage). This is particularly relevant in the context of the newly created *innovation partnerships* (art 31 Dir 2014/24), where contracting authorities will be partnering with economic operators to develop innovative products, services or works that cannot be met by purchasing products, services or works already available on the market. The commercial exploitation of those products beyond the innovation partnership is not regulated (there is only a requirement for the potential IP rights to be clearly allocated, art 31(6) Dir 2014/24), which may be a source of potential distortions of competition that will deserve careful analysis.

iv. Relevance of the Geographic Dimension of the Market

Finally, the analysis of public procurement markets might be influenced by geographical considerations in a way that differs from the general criteria applicable to competition law analysis. In this regard, it should be noted that the relevant market is generally defined from a geographic perspective as the area in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different.[30] However, even if one of the main objectives of EU public procurement directives has been the integration of the internal market (below, chapter three), sometimes public procurement rules and practices can 'artificially' restrict the geographic dimension of the market by limiting the possibility of cross-border contract awards.[31] In those cases, where the apparently national (or regional) character of the market would not be so *but for* public procurement rules and practices—ie, in those cases where the apparent geographic dimension of the market is the result, or an imposition, of public procurement rules—the geographic dimension of public procurement markets should be adjusted (ie, broadened) to include the areas that would be in the same market in the absence of the geographically restrictive rule. In this regard, it may be particularly useful to take into consideration the geographic dimension of non-public tranches of the market, or resort to an analysis from the perspective of potential offerors.

v. Other Considerations: 'Prescriptive Role' of Public Procurement and 'Adjacent' Markets

Even in cases of exclusive markets, but more generally in the case of dependent and

[30] See: Notice on the Definition of Relevant Market [1997] OJ C372/5 at 8.

[31] On this, see C Bovis, *EC Public Procurement: Case Law and Regulation* (Oxford, Oxford University Press, 2006) 23. A related issue is that of 'domestic preferences' or 'buy national' policies and their use or impact in the promotion of national economies of the countries implementing them (see eg, S Vagstad, 'Promoting Fair Competition in Public Procurement' (1995) 58 *Journal of Public Economics* 283; and SJ Evenett and BM Hoekman, 'Government Procurement: Market Access, Transparency, and Multilateral Trade Rules' (2005) 21 *European Journal of Political Economy* 163)—which have a strong international trade focus and, consequently, remain outside the scope of this study (chapter one, §VII.A).

commercial markets, the effects of public procurement regulations and practices on market dynamics can be reinforced by the 'prescriptive role' of public procurement under certain circumstances, or by the extension of those effects to 'adjacent' markets.[32] Both cases will be relatively rare—when compared to the majority of public procurement markets, where there seems to be limited scope for this type of effect—but can be particularly relevant for a proper competition analysis in those circumstances.

Prescriptive Role of Public Procurement. As regards the *prescriptive role* of public procurement, it should be taken into account that certain public procurement decisions can be used as information devices or marketing techniques by public contractors. For instance, mention of the fact of being a public supplier can be used as a sign of quality by the public contractor—eg, by using mentions such as 'By Appointment to Her Majesty the Queen' or 'Proud Supplier of the Army' which identify the supplier as a reputed or trustworthy furnisher in public procurement markets. Therefore, the public buyer should take into account its own condition of *reference customer* for some, or most, of its suppliers.[33] In this way, and where the market gives informative value to such mentions, the effects of public procurement could trespass the limits of the given market and be used as a *prescriptive* instrument. However, and subject to trade mark law and fair competition regulations, this effect seems to be largely irrelevant for competition law analyses.[34]

Leveraged (Multiplying) Effects in Adjacent Markets. It is perhaps most important to mention that some procurement decisions in markets relatively isolated from private demand have *indirect effects* in clearly commercial markets. In these cases, the potential impact of public procurement decisions and practices needs to be analysed, to the maximum possible extent, in light of their potential *multiplying effects* in the *adjacent markets*—a possibility that can give rise to strategic behaviour on the part of the potential public contractors; particularly if being awarded a specific public contract is strategically important as a *leverage* in the adjacent (non-public) market. In these cases, when evaluating the desirability of any given alternative, the public buyer should not only take into account the specific conditions of the competition developed within the tender and in the market concerned, but also consider the expected effects of its purchasing decision on the adjacent market(s). Sometimes, avoidance of the undesirable competition effects in the adjacent market(s) will require a change in the public procurement rules or requirements, in order to avoid granting a leveraged position—albeit not necessarily a dominant one—to the public contractor.[35]

[32] The relatively vague expression of *adjacent markets* is used to refer both to product or service markets that are upstream or downstream of the market being considered (in the proper sense of the expression), as well as to those markets that are situated 'laterally' to the procurement market being considered—ie, markets for very similar products or services, whose only difference with the products or services under consideration is created by a regulatory restriction, that would be included in the same market but for a given public procurement rule or practice, or some other similar regulatory constraint.

[33] OFT (n 2) 49 and 99.

[34] Unless, eventually, from the perspective of the discretion of the public body when authorising or not the use of such commercial claims, if it could hypothetically be configured as an abuse of a dominant position—which remains unclear and is, in any event, heavily dependent on the facts of a potential case.

[35] These considerations are largely based on the observation of the circumstances giving rise to the decision of the UK CAT in *Napp Pharmaceutical Holdings Limited and Subsidiaries v Dir Gral Fair Trading* [2002] CAT 1. Of interest for the purposes of this study, *Napp* systematically bid excessively low prices in the hospital segment of the market for sustained release morphine products in order to prevent new entry into the community segment

In these cases, properly assessing the impact of public procurement decisions on the competition dynamics of adjacent markets might be as challenging as it is relevant, and, where appropriate, guidance might be sought from competition authorities in order to complement the analyses conducted by the purchasing entity (on the interaction of public procurement and competition authorities, see below chapter seven, §IV). In any case, the circumstances under which undesirable restrictions of competition in adjacent markets can arise are relatively rare, so the conduct of an in-depth competition impact analysis should ideally follow only in those cases where sufficient indicia exist.

C. Preliminary Conclusion as Regards the Proposed Taxonomy of Public Procurement Markets

The combination of the abovementioned criteria in a given case shall prove helpful in setting a better analytical framework than a general recourse to a stylised or simplified paradigm of 'public markets'—which remains one of the possible configurations for public procurement markets (but, most likely, not the predominant one). In general, and unless expressly indicated to the contrary, the analyses conducted in the present study will be based (either expressly or implicitly) on the case of open, publicly dominated markets where there are no particular temporal, geographic or other complementary criteria that impose specific constraints or restrict the general validity of the conclusions reached.

This 'base case' is chosen on the assumption that it is the one that accommodates most of the actual markets where public procurement activities take place and the one that allows for the relatively isolated analysis of the (expected) effects of public procurement regulations on competitive market dynamics—since the conclusions shall not be restricted to considering specific features of the market that might not be present in others. Therefore, the conclusions reached in this study shall not be automatically or uncritically extended to other types of public procurement markets (with a different relative importance of the public buyer, with an overlapping body of sectoral regulation, or where temporal, geographic or other considerations are of particular relevance). Nonetheless, most of the conclusions and criteria shall be largely applicable to most public procurement markets—although, it shall be stressed, they might require certain adjustments.

of the market (ie, private purchasers of the drug). The UK CAT clearly configured sales to hospitals as a 'strategic gateway' and the only viable means of gaining entry to the community segment of the market. By preventing new entry and *leveraging* its position in the hospital segment, *Napp* was able to charge supracompetitive prices in the community segment (up to ten times higher than the price in the hospital segment). In that particular case, *Napp* was sanctioned for the abuse of its dominant position (which was protected by patents on the affected drugs). Regardless of the specifics of the case, it is my view that similar situations can arise in more general terms, even where one of the markets (or segments of a given market) is an *exclusive* public procurement market, and even in the absence of a proper dominant position on the part of the bidder, as long as similar strategic leverage effects (or *pull-through effects*) can be generated in adjacent markets. Similar cases have been reported, see OFT (n 2) 14 and 50–51. Therefore, this possibility should be taken into account in the design of public procurement rules, in order to at least build in an *escape* clause that avoids the automatic generation of these undesirable situations—in the particular case of *Napp*, the situation could probably have been avoided through the enforcement of a clear policy against excessively low bids, but more sophisticated remedies might be required under other circumstances.

III. Economic Dimensions of Public Procurement

From a different perspective, and regardless of the type of market in which public procurement takes place, it is submitted that the proper assessment of public procurement from an economic point of view also requires a distinction based on the different functions that public procurement performs in a given economy.[36] Indeed, public procurement has at least three relevant economic dimensions that are difficult to separate. On the one hand, public procurement is a public expense (non-payroll) tool by which the government decides how much, in which projects and when to deploy public funds for the sourcing of goods, works or services, in the public interest. On the other hand, public procurement is the working tool through which the decisions made in the previous phase are implemented.[37] Through public procurement, the government complements its own capabilities (human resources, equipment, etc) by commissioning a given project to an undertaking or by sourcing goods or services from a supplier or contractor. In this more limited role, public procurement serves as an instrument of election for the government, through which it is able to identify and select its contractors. Finally, if public procurement could be configured as an *economic sector* by itself—or as a part of the economic activity of the public sector—public procurement could be conceived of as a tool of sectoral regulation, inasmuch as it is a body of rules aimed at disciplining the purchasing behaviour of the public buyer (or, put differently, a body of rules aimed at controlling the administrative discretion exercised by governmental units and civil servants in the conduct of procurement activities).

The abovementioned functions of public procurement are strongly inter-related and might be difficult to differentiate in any particular instance. However, given this economic multidimensionality of public procurement, it is essential to separate its analysis as a 'pure' policy tool (at a first phase, or strategic level of the procurement process, §III.A), as a 'working' tool (at a second phase, or operational level, §III.B), and as a 'regulatory' tool (aiming to set the boundaries of administrative discretion throughout the process, §III.C), and to try to highlight which aspects might be of greater interest for an analysis of public procurement from a competition policy perspective.

A. Public Procurement as a Public Investment/Public Expense Tool

Firstly, it is to be recalled that public procurement is a very relevant tool of public expense[38]

[36] With reference to two separate functions for public procurement, one micro-economic (*supply function*) and another macro-economic (*instrumental function*), see C Jeanrenaud, 'Public Procurement and Economic Policy' (1984) 55 *Annals of Public and Cooperative Economics* 151, 152–53, also published as 'Marchés publics et politique économique' in id (ed), *Regional Impact of Public Procurement* (Saint-Saphorin, Georgi, 1984); and P Quertainmont, 'Le rôle économique et social des marchés publics' in D Batselé et al (eds), *Les marchés publics á l'aube du XXIe siècle* (Brussels, Bruylant, 2000) 76, 96–98. See also, AS Miller and WT Pierson Jr, 'Observations on the Consistency of Federal Procurement Policies with Other Governmental Policies' (1964) 29 *Law and Contemporary Problems* 277, 277–78.

[37] In similar terms, see Trepte (n 5) 59.

[38] For economic studies on this use of public procurement and its effects on growth, see the seminal works of RJ Barro, 'Government Spending in a Simple Model of Endogenous Growth' (1990) 98 *Journal of Political Economy* S103; and id, 'Economic Growth in a Cross Section of Countries' (1991) 106 *Quarterly Journal of Economics* 407. See also S Devarajan et al, 'The Composition of Public Expenditure and Economic Growth' (1996) 37 *Journal of Monetary Economics* 313. For a recent review of the literature, see A Irmen and J Kuehnel,

and, consequently, an important instrument of macroeconomic policy with which the government tries to influence behaviour and infuse growth in communities and economic sectors.[39] Indeed, as the recent financial crisis has shown (again),[40] governments resort to increased public expense through public procurement as a short-term macroeconomic policy to try to foster demand and to keep jobs to fight rampant unemployment rates,[41] at least in those sectors of the economy most directly related to public procurement—and, particularly, in construction markets.[42]

This aspect of public procurement is strongly conditioned by political issues, and particularly by those linked to (re-)distribution of wealth (which might tilt the balance between direct financial aid through subsidies or pensions and public procurement or other types of indirect or non-payroll public expense, one way or the other, depending on the prevailing political view) and those linked to the different views on which areas require larger investments (infrastructure, telecommunications, and so forth), or which projects can yield larger societal returns (such as deciding between funding R&D projects or increasing financial help to prospective university students, or between funding renewable energy projects or cancer-related medical research). In this context, public procurement is one amongst many instruments—such as tax, labour and monetary policies—that need to be coordinated in the best possible way to try to foster economic development and the achievement of political goals.[43]

Certain aspects of public procurement will escape the analytical framework used for competition evaluation—such as the wealth redistribution and other social issues involved in the strategic phase of public procurement (ie, project selection decisions should probably not be the object of strict competition law review, but should be left to political accountability mechanisms); or the governance aspects involved in public procurement processes (ie, transparency and anti-corruption measures embedded in public procurement regulations), all of which largely escape efficiency considerations (although they can clearly generate major impacts on market dynamics) and are better guided by 'standards

Productive Government Expenditure and Economic Growth (Heidelberg University, Department of Economics, Discussion Paper Series No 464, 2008), available at www.awi.uni–heidelberg.de/with2/Discussion%20papers/papers/dp464.pdf.

[39] For discussion of the use of procurement by the government as a body politic, see Trepte (n 5) 133–207. Also SL Schooner, 'Desiderata: Objectives for a System of Government Contract Law' (2002) 11 *Public Procurement Law Review* 103, 108–09; C Bentivogli and S Trento, *Economia e politica della concorrenza. Intervento antitrust e regolamentazione* (Rome, Nuova Italia Scientifica, 1995, repr 1997) 29–30; M Cancian, 'Acquisition Reform: It's not as Easy as It Seems' (1995) 2 *Acquisition Review Quarterly* 189; and Quertainmont (n 36) 91–96.

[40] RD Anderson and CR Yukins, *International Public Procurement Developments in 2008—Public Procurement in a World Economic Crisis* (George Washington University Law School, Legal Studies Research Paper No 458), available at http://ssrn.com/abstract=1356142.

[41] This has been particularly clear in the latest economic crisis. See the analysis carried out by K Dawar, *Regulating Public Restraints of Competition: Lessons from the 2008–2012 Crisis* (PhD thesis, IHEID Geneva, 2014) on file with author.

[42] See: Jeanrenaud (n 36) 154; and A Mattera, *Le marché unique européen, ses règles, son fonctionnement* (Paris, LGDJ, 1990) (the Spanish translation by C Zapico Landrove, *El mercado único europeo. Sus reglas, su funcionamiento* (Madrid, Civitas, 1991) is used) 386–87. The general ideas can be traced back to Keynes, see Trepte (n 5) 139–40; and have been criticised, see eg, RJ Barro, *Getting it Right. Markets and Choices in Free Society* (Cambridge, MA, MIT Press, 1996) 110–13. See also M Eichenbaum and JDM Fisher, 'How Does Any Increase in Government Purchases Affect the Economy?' (1998) 22 *Economic Perspectives* 29; MA Hooker and MM Knetter, 'The Effects of Military Spending on Economic Activity: Evidence from State Procurement Spending' (1997) 29 *Journal of Money, Credit and Banking* 400.

[43] Similarly, Trepte (n 5) 62.

of a higher order'.[44] These decisions belong more naturally to the political sphere—whose institutions are better suited to addressing these issues[45]—and are better left to public scrutiny and political accountability mechanisms.[46] To be sure, it is submitted that even at this general and strategic level, public procurement decisions should be competition-oriented whenever possible—ie, if two comparable investment projects could yield different competitive results, other things being equal (and based on general economic constitutional rules), the most pro-competitive (or least restrictive) should always be preferred. However, competition concerns will remain largely marginal at this very general level of economic planning and will hardly become a relevant decision-making criterion. Hence, the analysis will not focus on strategic or macroeconomic aspects of public procurement.[47]

B. Public Procurement as a 'Working' Tool for the Public Sector

Once the strategic planning of public procurement policies has been completed and their objectives and priorities set (mainly through budgetary allocations and funding for different investment projects), the dimension of public procurement as a 'working' tool for the public sector becomes all the more relevant. Once a given goal is set (such as constructing a new infrastructure) or a given activity is funded (eg, the creation of an agency for the defence of the environment, or any other administrative unit in support of the predefined political goals), public procurement regulations become the implementing tool used by the government.[48] From an economic perspective, at this stage, public procurement can be conceptualised as a *regulatory mechanism* to select the best available suppliers of goods and services for the public purchaser,[49] to achieve the most efficient results,[50] and to ensure that the result of the procurement process does not depend on the bidders' identity (ie, that it implements a 'fair' allocative rule).[51]

In my view, at this operational level, public procurement should be free from ideological and political content—since those values and preferences have already shaped the original decision of which projects to finance, or which activities to fund (above §III.A)—and

[44] Indeed, introducing wealth re-distribution considerations in economic analysis might require setting the efficiency criterion aside and focusing the debate on which is the most desirable set of preferences (ie, whether equity or wealth promotion is more desirable), or on the political weighting of citizen preferences—which lies outside of the scope of this study (as indicated above, chapter one). Along the same lines, see H Demsetz, *The Organization of Economic Activity—Efficiency, Competition, and Policy* (New York, Basil Blackwell, 1989) 40.

[45] Demsetz (ibid) 290.

[46] Along the same lines, S Arrowsmith, *The Law of Public and Utilities Procurement. Regulation in the EU and the UK*, vol 1, 3rd edn (London, Sweet & Maxwell, 2014) 2.

[47] See: TC Daintith, 'Legal Analysis of Economic Policy' (1982) 9 *Journal of Law and Society* 191, 194.

[48] Arrowsmith (n 46) 2.

[49] The design of such mechanisms for the selection of suppliers has attracted the attention of economists, see DP Baron, 'Design of Regulatory Mechanisms and Institutions' in R Schmalensee and RD Willig (eds), *Handbook of Industrial Organization* (Oxford, Elsevier, 1992) 1347, 1418–24; and VL Smith, 'Bidding and Auctioning Institutions: Experimental Results' in Y Amihud (ed), *Bidding and Auctioning for Procurement Allocation* (New York, NYU Press, 1976) 43, 59–60.

[50] However, the economic recommendations for the efficient design of procurement mechanisms are not always taken into consideration. For instance, see A Schotter, 'Auctions and Economic Theory' in Y Amihud (ed), *Bidding and Auctioning for Procurement Allocation* (New York, NYU Press, 1976) 3, 9; and W Vickrey, 'Auctions, Markets, and Optimal Allocation' in Y Amihud (ed), *Bidding and Auctioning for Procurement Allocation* (New York, NYU Press, 1976) 13, 17.

[51] Schotter (n 50) 10.

limited to a purely commercial activity of the public purchaser, necessarily more restricted and technical than at more general levels of economic planning.[52] In some aspects, public procurement processes should not differ significantly from all other administrative procedures—in the sense that they should be conducted in an equally professional, technical and value-free fashion by public servants and political appointees involved in the process. All in all, public procurement is just an instrument for the achievement of the already defined political (and economic) goals and, consequently, should be confined to their efficient procurement.

Even if the trend to rely increasingly on government contractors for the supply of goods and services at all levels of government might require a more strategic approach to procurement in order to obtain better results at this operational level,[53] and regardless of the fact that new technologies have significantly altered the mechanics of public procurement (and will probably continue to do so in a progressive migration to e-procurement),[54] the *basic function* of public procurement rules remains unchanged and will hardly be altered in the future; ie, *public procurement rules are an instrument for the implementation of governmental functions and, consequently, should be shaped and implemented in light of contributing to the maximum possible extent to achieving those pre-determined objectives in an efficient manner*. As an instrument or working tool for the government, therefore, public procurement should have no other intrinsic goal than to promote the efficient satisfaction of government's pre-defined needs (chapter three).[55]

Such a neutral approach towards the design and implementation of public procurement as a working tool for the government will be particularly relevant in the context of competition analysis. In this vein, it is to be stressed that, in my view, public procurement should be conceived of and designed as a regulatory mechanism to achieve the most efficient results and, consequently, constitutes a particularly suitable object for competition policy analysis (which is also based on the design of regulatory mechanisms aimed at promoting and preserving economic efficiency). Since operational public procurement rules and decisions are susceptible of generating significant impacts (both positive and negative) on the competitive dynamics of the markets where the public buyer sources goods, works and services (§V below), an instrumental aspect of public procurement neutrality will depend on its design in a pro-competitive way (given that the generation of competitive externalities should be factored into the estimation of the efficiency of the public procurement mechanisms). Therefore, in its role as a working tool for the government, public procurement should be set up as a pro-competitive regulatory mechanism. As anticipated, the natural focus for competition analysis lies in the use of public procurement as a working tool for the government, since this is the function in which public procurement works as a proper *market-like* mechanism, where the market interface is clearer, and where the benefits of the development of a more competition-oriented public procurement process can

[52] *Contra*: S Arrowsmith, 'Public Procurement as an Instrument of Policy and the Impact of Market Liberalisation' (1995) 111 *Law Quarterly Review* 235, 244–48.

[53] Kettl (n 7) 179–97; S Kelman, 'Strategic Contracting Management' in JD Donahue and JS Nye Jr (eds), *Market-Based Governance: Supply Side, Demand Side, Upside and Downside* (Washington, Brookings Institution Press, 2002) 88, 89.

[54] G Callender and D Matthews, 'The Economic Context of Government Procurement: New Challenges and New Opportunities' (2002) 2 *Journal of Public Procurement* 216, 217.

[55] *Cf* Fernández Martín (n 11) 38–88.

improve the functioning of procurement activities to the benefit of the public buyer—as well as contributing to improving social welfare in more general terms.

C. Public Procurement as a Tool of 'Sectoral' Regulation

As already mentioned, if public procurement is understood as one of the main functions to be conducted by the public sector and the latter can somehow be configured as an *economic sector* by itself—ie, if public procurement is conceived as part of the economic activities of the public sector—public procurement could be understood as a tool of *sectoral regulation* (ie, as a body of rules aimed at disciplining the purchasing behaviour of the public buyer and at setting the bounds of administrative discretion throughout the public procurement process). In this function, transparency and accountability issues are dominant and the objective of public procurement is to ensure the efficient and proper expenditure of public funds from a different perspective—mainly that of preventing corruption.[56] However important this function of public procurement may be, it remains, nonetheless, largely irrelevant from the perspective of competition law analysis—since competition-distorting procurement practices will merit the same competition treatment regardless of whether they are the result of legal or illegal action (ie, whether the procedure that led to the setting or implementation of anti-competitive procurement requirements was conducted according to these rules of sectoral regulation, or not). Consequently, it will not be taken into further consideration in the present study.

IV. The Role of Public Authorities as Purchasing and Contracting Authorities

As a final complementary aspect to the previous economic perspectives on the public procurement phenomenon, it is worth showing an overview of the different roles that public buyers develop in carrying out public procurement activities. Even if, under certain circumstances, these roles might not be clear-cut and they can be played more or less simultaneously by public authorities in a given procurement process, it might be interesting to try to analyse each of them separately, in order to gain a better insight into their nature. It is submitted that the three paramount roles that are relevant for this analytical purpose are that of the public buyer as an *agent* (§IV.A), as a *gatekeeper* (§IV.B), and as *market maker* (§IV.C).

A. Public Buyers as Agents

The basic functional conceptualisation of the activities of public buyer fits within the *agency model*.[57] However, there is no single agency relationship involved in public

[56] On this function of public procurement, see Trepte (n 5) 12–18.

[57] For an analysis of public procurement under agency theory, see CR Yukins, 'A Versatile Prism: Assessing Procurement Law Through the Principal-Agent Model' (2010) 40(1) *Public Contract Law Journal* 63. For further

procurement,[58] and agency theory can be used to underline and examine different aspects of the complex and multiple relationships implied in public procurement. Firstly, there is an agency relationship between the government (as agent) and citizens (as principals). In this regard, the public buyer shall conduct public procurement activities (in the same way, generally speaking, as all other activities) to satisfy the public interest and they can be held accountable through democratic procedures. Analysing this agency relationship is useful to appraise certain aspects of public procurement decisions, particularly those related to the function of public procurement as an investment or expense tool. A second agency relationship exists between the actual public buyer (be it a civil servant, a specialised administrative unit, or a different agent) and the user of the procured goods, services or works (generally, a different administrative unit within the public sector, as principal). The framework of this agency relationship is particularly useful to analyse issues related to the transparency and administrative efficiency of the public procurement system, which are largely related to the function of public procurement as a tool of sectoral regulation. Finally, a third agency relationship exists between the public buyer (as principal) and the government contractor (as agent), which is particularly clear in the case of relatively complex procurement activities that involve significant non-contractible elements.[59] This third agency relationship can be used to appraise some of the elements involved in the function of public procurement as a 'working' tool for the government—and, hence, is the one that has a greater relevance for our purposes.

Economic research in the public procurement field has largely focused on the design of mechanisms that can alleviate the agency problems in the public buyer-government contractor relationship,[60] whereas legal scholarship seems to have been more interested in the agency relationship between the civil servant and the purchasing authority (or government), particularly as regards corruption issues.[61] Both strings of agency analysis provide important insights to understand the public procurement environment and to explain the root or origin of some of the distortions that it generates in the market—particularly when competition distortions stem from information asymmetries or other agency

discussion, with special emphasis on information asymmetries and transaction costs involved, see Kettl (n 7) 21ff; and RP McAfee and J McMillan, 'Bidding for Contracts: A Principal–Agent Analysis' (1986) 17 *RAND Journal of Economics* 326. For discussion on the adequacy of public procurement rules to address the agency problem, see MD McCubbins et al, 'Administrative Procedures as Instruments of Political Control' (1987) 3 *Journal of Law, Economics and Organization* 243; and SM Greenstein, 'Procedural Rules and Procurement Regulations: Complexity Creates Trade-Offs' (1993) 9 *Journal of Law, Economics and Organization* 159. For an overview of agency-related literature on procurement, see Brown et al (n 16). More generally, on agency theory, see the seminal works by EF Fama and MC Jensen, 'Separation of Ownership and Control' (1983) 26 *Journal of Law and Economics* 301; and id, 'Agency Problems and Residual Claims' (1983) 26 *Journal of Law and Economics* 327; and SJ Grossman and OD Hart, 'An Analysis of the Principal–Agent Problem' (1983) 51 *Econometrica* 7. See also GM MacDonald, 'New Directions in the Economic Theory of Agency' (1984) 17 *Canadian Journal of Economics* 415. For a recent summary, see SP Shapiro, 'Agency Theory' (2005) 31 *Annual Review of Sociology* 263.

[58] ES Savas, *Privatization and Public–Private Partnerships* (New York, Chatham House, 2000) 176; similarly, PA Trepte, 'Transparency Requirements' in R Nielsen and S Treumer (eds), *New EU Public Procurement Directives* (Copenhagen, Djøf Forlag, 2005) 49, 51ff.

[59] O Hart et al, 'The Proper Scope of Government: Theory and an Application to Prisons' (1997) 112 *Quarterly Journal of Economics* 1127. See also K Eggleston and R Zeckhauser, 'Government Contracting for Healthcare' in Donahue and Nye Jr (n 53) 29, 36; and P Frumkin, 'Service Contracting with Non-Profit and For-Profit Providers: On Preserving a Mixed Organizational Ecology' in Donahue and Nye Jr (n 53) 66.

[60] See eg: McAfee and McMillan (n 22) 16–18.

[61] On this agency relationship, Trepte (n 5) 70–111 and (n 58) 53–58.

problems that make the public buyer deviate from otherwise standard market behaviour. However, in my view none of those bodies of research is specifically fit for the purposes of analysing the effects on market competition of public procurement activities. Economic literature is limited to *internal* aspects of the relationship between government contractors and the public buyer—and, therefore, its scope is largely restricted to the economic relations between agent and principal *once* the contract has been entered into. Hence, it can offer very limited insights into the *external* aspects of those relationships—ie, the market interface between the public buyer and potential contractors, and the effects that public procurement can generate on market dynamics—particularly *before* the contract is awarded (or, more precisely, by reason of the award of the public contract). Therefore, agency theory is a limited tool for the appraisal of the *competition effects* of public procurement activities and, consequently, will not be explored in further detail.

B. Public Buyers as Gatekeepers

A second role that can be attributed to public buyers is that of *gatekeepers*,[62] or 'administrators' of business opportunities,[63] in the sense that public buyers could be seen as being entrusted with the task of providing fair or equal access to work paid by the taxpayer—and, in extreme cases, public buyers could seem to be entrusted with spreading contract opportunities according to non-market criteria (such as the pursuit of industrial or social 'secondary policies'). Under certain conceptions, then, public buyers as gatekeepers would assume a certain function of market control. In this regard, the public buyer would be developing a pseudo-regulatory function that would resemble more an activity of economic planning than a regular market interaction—and, consequently, could generate a large potential for competitive distortions.[64] It is important to stress that such a gatekeeping function does not fit well with a free market system and could result in a significant departure from the proper functioning of the public procurement system. Therefore, it is my view that gatekeeping aspects of public procurement are largely undesirable, since they represent a major source of potential competitive distortions. Hence, the rest of the study will not explore ways in which the role of the public buyer as a gatekeeper could be improved or strengthened—in fact, some of the proposals for a more competition-oriented public procurement system could have a negative impact on the ability of public buyers to assume gatekeeping roles (which is a secondary or derivative effect of such proposals that also seems desirable).

C. Public Buyers as Market-Makers

A relatively new role of public buyers can be identified in the creation of central purchasing

[62] See generally: RH Kraakman, 'Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy' (1986) 2 *Journal of Law, Economics and Organization* 53.

[63] Arrowsmith (n 46) 6.

[64] Moreover, even if left outside the scope of this study, it seems important to stress that gatekeeping activities developed by the public buyer can also be a major source of corruption and other irregular practices. Hence, from various perspectives, it seems a role to be minimised. See D Lewis, 'Corruption and Competition' in OECD, *Fighting Corruption and Promoting Competition* (2014).

agencies.[65] These agencies are set up as public sector intermediaries, since they are created with the main purpose of assuming tender functions on behalf of a relatively large number of public buyers—and, sometimes, are also assigned regulatory functions concerning the procurement of certain goods and services,[66] such as the drafting of general procurement policies. Central purchasing agencies aggregate demand and tender (framework) contracts for certain types of goods and services (works are generally excluded) that will be later assigned or transferred to 'final' public buyers. In a way, central purchasing agencies could be considered as market-makers, since they create a *market platform* or *two-sided market* for the provision of goods and services to final public buyers.[67] This is particularly clear where central purchasing bodies not only act as agents for ultimate contracting authorities, but when they acquire goods or services for resale and, consequently, act as wholesale intermediaries (as now expressly authorised under arts 2(1)(14) and 37 Dir 2014/24). The existence of such a platform can be legally reinforced by making acquisitions from the central agency mandatory for final public buyers (art 37(1) *in fine* Dir 2014/24)—who would be prevented from acquiring those goods or services from the market, either in all circumstances, or when the conditions offered by undertakings are not more favourable than those offered by the central purchasing agency.[68]

For analytical purposes, the market activities of these central purchasing agencies can be split into two. As regards *demand* of goods and services, their market behaviour does not depart significantly from the behaviour of final public buyers independently considered (that is, from the role of the public buyer as an agent); with the relevant exception that they accumulate buying power and, consequently, can generate and accumulate competitive effects of a larger magnitude. In this regard, *as such*, the purchasing behaviour of central agencies does not seem to require a special analysis. As far as the *offer* of those goods and services to final public buyers is concerned, the potential competitive effects will depend substantially on whether there is room for competition between the central agency and undertakings for the supply to final public buyers, or not. If competition is excluded and intermediation by the central agency is legally mandated, there seems to be no or very limited scope for competitive analysis.[69] On the contrary, if competition is pos-

[65] Central agencies have existed for a relatively long time in the US and some EU Member States. However, their regulation as a matter of EU law is relatively recent; see Trepte (n 5) 127–29. The current situation as regards the existence of central purchasing bodies in the EU Member States has been described in the Public Procurement Network, *Comparative Study on Centralized Public Procurement* (2009) available at www.publicprocurementnetwork.org.

[66] GL Albano et al, 'Regulating Joint Bidding in Procurement' (2009) 5 *Journal of Competition Law and Economics* 335, 350.

[67] In general, on the economics of two-sided markets and their competition implications, see M Armstrong, 'Two-Sided Markets: Economic Theory and Policy Implications' in JP Choi (ed), *Recent Developments in Antitrust. Theory and Evidence*, CESifo Seminar Series (Cambridge, MA, MIT Press, 2007) 39; JC Rochet and J Tirole, 'Competition Policy in Two-Sided Markets, with a Special Emphasis on Payment Cards' in P Buccirossi (ed), *Handbook of Antitrust Economics* (Cambridge, MA, MIT Press, 2008) 543; and DS Evans and R Schmalensee, 'Markets with Two-Sided Platforms' in ABA, *Issues in Competition Law and Policy* (Chicago, ABA Section of Antitrust Law, 2008) 667.

[68] See: L Carpineti, 'Shall Public Entities Be Obliged or Free to Buy Through a Central Procurement Agency? Some Insights' in G Piga and KV Thai (eds) *International Public Procurement Conference Proceedings—Enhancing Best Practices in Public Procurement* (2008) 77. For further analysis from a legal perspective, see chapter six.

[69] A different issue would be the analysis of the decision to reserve to the central purchasing agency the supply of those goods and services, which could theoretically be (i) considered a case of public–public cooperation or *in-house* provision and, hence, subject to the specific rules of the EU directives (chapter six, §II.A.ii); or, otherwise, (ii) considered the granting of an exclusive right, to be appraised under art 106 TFEU (chapter four,

sible (for the supply of final public buyers or, even further, for the supply of any customers) 'standard' competition law mechanisms should apply to the central purchasing agency as an undertaking.[70] This will be particularly relevant if the provisions in article 39(2) of Directive 2014/24 take up in practice, given that it expressly foresees that a Member State shall not prohibit its contracting authorities from using centralised purchasing activities offered by central purchasing bodies located in another Member State—and, consequently, paves the way for EU-wide competition amongst central purchasing bodies.

To sum up, for the purposes of this study, the role of central purchasing agencies as market-makers does not seem to require any significant amendments of the general analytical framework, and the conclusions reached will be equally applicable to the procurement activities of these agencies—with the only (but very relevant) caveat that, given that they aggregate (significant) buying power, the (anti-)competitive effects they can generate will be larger; and, consequently, potential restrictions of competition generated by central purchasing agencies will be of particular concern.[71]

V. Public Procurement as a Market Failure: Difficulties in Recreating a Competitive Scenario and Competition-Restricting Effects

After having explored several different dimensions of public procurement activities in previous sections, the enquiry now turns towards the analysis of the effects that the market behaviour of the public buyer can generate on competitive dynamics. Economic research in the public procurement area has largely been focused on 'tender-specific' aspects such as the option between auctions and alternative award methods (ie, direct negotiation),[72] the optimal design of contracts, the proper design of remuneration schemes,[73] the allocation of risks,[74] the generation of adequate incentives for bidders (both during the tendering

§II.B). However, art 37(4) Dir 2014/24 now expressly foresees that contracting authorities may award a public service contract for the provision of centralised purchasing activities to a central purchasing body without applying the procedures provided for in that Directive, Moreover, such public service contracts may also include the provision of ancillary purchasing activities. Hence, the possibilities of applying specific rules to that decision (other than art 106 TFEU) seem very limited.

[70] In this regard, the development of a clearly economic 'downstream' activity would exclude the difficulties for the direct application of competition law to this type of public buyer (chapter four, §III).

[71] See: Trepte (n 5) 268–69.

[72] For reviews of the literature, see RM Stark and MH Rothkopf, 'Competitive Bidding: A Comprehensive Bibliography' (1979) 27 *Operations Research* 364; R Engelbrecht-Wiggans, 'Auctions and Bidding Models: A Survey' (1980) 26 *Management Science* 119; and PR Milgrom, 'Auctions and Bidding: A Primer' (1989) 3 *Journal of Economic Perspectives* 3. More recently, see P Bajari and S Tadelis, 'Incentives versus Transaction Costs: A Theory of Procurement Contracts' (2001) 32 *RAND Journal of Economics* 387; and JJ Horton, *Procurement, Incentives and Bargaining Friction: Evidence from Government Contracts* (Kennedy School of Government, Working Paper, 2008), available at http://ssrn.com/abstract=1094622; and P Bajari et al, 'Auctions versus Negotiations in Procurement: An Empirical Analysis' (2009) 25 *Journal of Law, Economics, and Organization* 372.

[73] S Reichelstein and K Osband, 'Incentives in Government Contracts' (1984) 24 *Journal of Public Economics* 257; and S Reichelstein, 'Constructing Incentive Schemes for Government Contracts: An Application of Agency Theory' (1992) 67 *Accounting Review* 712.

[74] As an example and with references to other works, see T Kirat (ed), *Économie et droit du contrat administratif: L'allocation des risques dans les marchés publics et les délégations de service public* (Paris, Documentation Française,

phase and the implementation of the contracts),[75] the setting up of monitoring systems,[76] or the avoidance of undesired practices (such as collusion and corruption).[77]

However, from an economic point of view, the competition facet of public procurement has been a largely neglected area of study.[78] This section aims to conduct a review of the more general economic analyses of buyer power and buyer-dominated markets and to apply them to public procurement. In order to do so, some preliminary issues should be clarified, in order to set the proper context for the more specific analysis of the competitive effects generated by public procurement rules and practices.

In this regard, the fact that *public procurement regulations and practices are a source of market failure* has largely been omitted in economic studies in this field. The existence of a particular type of market failure (ie, externalities) has usually been used as a main economic argument in order to justify public provision of public goods (be it through direct governmental production or through public procurement).[79] However, a different type of market failure—ie, the effect of public procurement regulations themselves on the functioning of the markets where the public buyer sources all types of goods, services and works, and the impact that they can have on other agents—has received much less attention. This section will focus on this less explored aspect of the economic analysis of public procurement, which in my view bears direct and significant relevance to the development of a sound competition policy in this field.

Several aspects will be analysed. Firstly, public procurement will be analysed as a market-like regulatory instrument capable of generating market distortions (§V.A). Second, a model for the (partial or approximated) appraisal of such potential distortions will be briefly presented (§V.B)—and its basic insights will be used to frame the analysis of the potential competition distortions that can derive from public procurement. Finally, the three main types of competitive distortions that can derive from public procurement

2005). See also A Calveras et al, 'Wild Bids. Gambling for Resurrection in Procurement Contracts' (2004) 26 *Journal of Regulatory Economics* 41.

[75] General studies in this area include the very remarkable contributions of McAfee and McMillan (n 22); and JJ Laffont and J Tirole, *A Theory of Incentives in Procurement and Regulation* (Cambridge, MA, MIT Press, 1993). For recent comprehensive studies, see also PD Klemperer, *Auctions: Theory and Practice* (Princeton, Princeton University Press, 2004); and PR Milgrom, *Putting Auction Theory to Work* (Cambridge, Cambridge University Press, 2004). For a recent non-technical survey of auction theory, see PD Klemperer, 'Auction Theory' in ABA, *Issues in Competition Law and Policy* (Chicago, ABA Section of Antitrust Law, 2008) 539. On more specific incentive-related issues, see S Dasgupta, 'Competition for Procurement Contracts and Underinvestment' (1990) 31 *International Economic Review* 841.

[76] See, eg: TL Brown and M Potoski, 'Managing Contract Performance: A Transaction Cost Approach' (2003) 22 *Journal of Policy Analysis and Management* 275.

[77] See the various studies in R Engelbrecht-Wiggans et al (eds), *Auctions, Bidding, and Contracting: Uses and Theory* (New York, NYU Press, 1983); Bower and Dertouzos (n 20); and G Piga and KV Thai (eds), *The Economics of Public Procurement* (Hampshire, Palgrave-Macmillan, 2007).

[78] In general, public procurement has received less attention than it merits from the academic economic community; see KV Thai, 'Public Procurement Re-examined' (2001) 1 *Journal of Public Procurement* 9, 10. See also OECD, 'Procurement Markets' (1999) 1 *OECD Journal of Competition Law and Policy* 83, 110. For an exception, see L Johnson, 'Gains from a Unified European Community Public Procurement Market: An Analysis Using Auction Theory' (1990) *Brigham Young University Law Review* 1727, 1729.

[79] See: McAfee and McMillan (n 22) 137–40; and Trepte (n 5) 9–11. Generally, on the treatment of public goods and the associated externalities, see T Cowen (ed), *The Theory of Market Failure. A Critical Examination* (Fairfax, VA, George Mason University Press, 1988). See also JR Davies and JR Hewlett, *An Analysis of Market Failure. Externalities, Public Goods and Mixed Goods* (Gainesville, University Presses of Florida, 1977) 4–47; CJ Dahlman, 'The Problem of Externality' (1979) 22 *Journal of Law and Economics* 141; and JP Kalt, 'Public Goods and the Theory of Government' (1981) 1 *CATO Journal* 565.

rules and practice will be explored: direct *waterbed effects* (§V.C), indirect *pro-collusive* effects (§V.D), and *other effects* (§V.E).

A. Public Procurement as a Market-Like Regulatory Instrument

It can hardly be overemphasised that public procurement is a mechanism of government economic intervention,[80] and that public procurement regulations and administrative practices can significantly alter the competitive structure of markets[81]—particularly by altering long-term incentives and competitive dynamics among public contractors.[82]

However, the role of public procurement in influencing the development of competitive markets has largely been neglected,[83] and the study of public procurement regulations from a *market failure perspective* is underdeveloped.[84]

The intuition behind the present approximation to the public procurement phenomenon from a market failure perspective is relatively simple and straightforward. The existence of public procurement regulations distorts demand (and sometimes offer) in the market since, in the absence of public procurement rules, the government would behave more like the private buyer (and public contractors would not adopt strategies any different from those pursued *vis-à-vis* the rest of buyers or users of a given product or service).[85] Therefore, inasmuch as public procurement rules impose (or allow for) a certain market

[80] See: CE Lindblom, *The Market System. What It Is, How It Works, and What To Make of It* (New Haven, Yale University Press, 2001) 8–9 and 246; W Adams and HM Gray, *Monopoly in America. The Government as Promoter* (New York, Macmillan, 1955) 101; SL Carroll and LC Scott, 'The Modification of Industry Performance through the Use of Government Monopsony Power' (1975) 3 *Industrial Organization Review* 28; DK Round, 'The Impact of Government Purchases on Market Performance in Australia' (1984) 1 *Review of Industrial Organization* 94, 94–106; G Mele, 'Appalti pubblici e concorrenza: regolamentazione e criticità funzionali del mercato nazionale' (2007) 34 *Economia e politica industriale* 105; and MC García-Alonso and P Levine, 'Strategic Procurement, Openness and Market Structure' (2008) 26 *International Journal of Industrial Organization* 1180.

[81] OECD, *Public Procurement: The Role of Competition Authorities in Promoting Competition* (2007) 7. See also S Arrowsmith and K Hartley, 'Introduction' in id (eds) *Public Procurement* (Cheltenham, Edgar Elgar, 2002) ix; Arrowsmith (n 46) 2 and 6–7; S Nicinski, 'Les évolutions du Droit administratif de la concurrence' (2004) 14 *Actualité juridique—Droit admnistratif* 751; and A Laguerre, *Concurrence dans les marchés publics* (Paris, Berger–Levrault, 1989) 110. See also TA Mathisen and G Solvoll, 'Competitive Tendering and Structural Changes: An Example from the Bus Industry' (2008) 15 *Transport Policy* 1.

[82] FM Scherer and D Ross, *Industrial Market Structure and Economic Performance*, 3rd edn (Boston, Houghton Mifflin, 1990) 146–48; Dimitri et al, 'Introduction' in Dimitri et al (n 23) 3; Naegelen and Mougeot (n 7) 211. See also, OECD *Observer Policy Brief—Fighting Cartels in Public Procurement* (2008) 2, available at www.oecd.org/dataoecd/45/63/41415052.pdf; OFT (n 2) 2 and 40; and UK, HM Treasury, *Transforming Government Procurement* (2007) 4. In similar terms, see N Caldwell et al, 'Promoting Competitive Markets: The Role of Public Procurement' (2005) 11 *Journal of Purchasing and Supply Management* 242, 247; and L Cabral et al, 'Procuring Innovations' in Dimitri et al (eds) (n 23) 483, 505.

[83] See: Caldwell et al (n 82) 242 and 247.

[84] The terms *market failure* and *market distortion* are used interchangeably to refer to the existence of factors that prevent the attainment of efficient market equilibrium. Generally, see FM Bator, 'The Anatomy of Market Failure' (1958) 72 *Quarterly Journal of Economics* 351; and above n 78.

[85] It should be reckoned that public authorities can, in some instances, conclude contracts that are subject to private contract law and, consequently, it could seem that, in those cases, they act without being subject to the constraints of public procurement law. However, at least in the EU, compliance with public procurement rules is mandatory, regardless of the (private or public) contract law applicable to the ensuing contracts—an issue that is outside the scope of this study (chapter one, §VII.A). Therefore, the remainder of the analysis will be conducted under the premise that public procurement rules are of relevance for all public procurement activities (with the only relative exception of public procurement conducted under the relevant value thresholds, or 'unregulated' procurement, on which see chapter six, §II.A.ii).

behaviour that differs from that of the private buyer (because they aggregate buyer power, generate barriers to access public demand, impose certain standards not frequently used in the market, increase transaction costs—amongst other potential distortions), they constitute a potential source of market imperfection or market failure—in the sense that they will force the market equilibrium to depart from the optimal equilibrium in the absence of regulation.[86]

The kinds of market distortions generated by public procurement regulations, *a priori*, seem to be primarily of two types. On the one hand, by means of price and non-price distortions, they generate a direct negative impact on market competition dynamics (primarily on the form of a *waterbed effect*, see §V.C below) and impose an efficiency loss on society (ie, a direct negative externality). On the other hand, they set up a market structure that, under certain conditions, increases the likelihood of collusion in the market (see below §V.D) and can further reduce the level of competition in the market by diminishing the long-term incentives of potential bidders to compete (ie, generates further derived negative externalities). Moreover, specific public procurement procedures can generate the room for additional market distortions (§V.E).

In order to justify fully the view that public procurement is a source of potential distortions in market competition dynamics, it is important to stress that—either implicitly or explicitly—*public procurement regulations are designed as market-like mechanisms*.[87]

Given their strong reliance on competition amongst bidders in order to attain value for money (below chapter three), public procurement regulations have at their roots an embedded principle of competition (below chapter five) and try to incorporate, to the largest possible extent, market-like or competition-promoting mechanisms.[88] From an economic point of view, public procurement regulations should be seen as regulatory mechanisms that try to foster competition among potential sellers in order to extract the best possible economic conditions in all transactions conducted by the public buyer.[89]

However, a fact that is usually overlooked is that *these market-like mechanisms do not substitute, but rather function within, the 'actual' or broader market*. In my view, by losing perspective and isolating the analysis of public procurement mechanisms from the market with which they interact, their effects on competition dynamics are generally not taken into consideration and, consequently, most conclusions and normative recommendations remain partial and, sometimes, flawed.

It is submitted that it is an excessive simplification to assume that public procurement regulations create a market-like environment or mechanism that operates in a vacuum, or in absolute isolation from the 'actual' markets where the goods and services procured by the public buyer are traded.[90] In this sense, it is important to stress that public procure-

[86] Kettl (n 7) 32–35.

[87] See: BM Hoekman, 'Introduction and Overview' in BM Hoekman and PC Mavroidis (eds), *Law and Policy in Public Purchasing: The WTO Agreement on Government Procurement*, Studies in International Economics (Ann Arbor, University of Michigan Press, 1997) 3. See also ILO Schmidt and JB Rittaler, *A Critical Evaluation of the Chicago School of Antitrust Analysis*, Studies in Industrial Organisation no 9 (Boston, Kluwer, 1989) 10–11.

[88] See: C Bovis, *EC Public Procurement Law* (London, Longman, 1997) 3.

[89] In this regard, it is almost self-evident that the rules disciplining the market behaviour of potential suppliers and contractors should be the same in a public procurement and in an 'open' market context—inasmuch as the exercise of market power by power sellers or through collusion would generate the same negative economic effects in both settings.

[90] Such a simplification would only relate to a reality where public procurement took place in *pure monopsonistic markets*, where the public buyer constituted the only source of demand and, consequently, public procurement

ment regulations only cover or discipline a certain part of the total market demand (with the only rare exception of pure *monopsonistic* or pure *public* markets; see above §II) and, consequently, they generate a potential for market distortions through interaction with other agents developing non-regulated activities.

The more the market-like mechanisms created by public procurement regulations depart from the rules and dynamic trends of the 'actual' markets, the larger the potential for market distortions and the associated negative economic effects will be. Equally, the more public procurement regulations impose (or allow for) a market behaviour of the public buyer that departs from standard competitive trends in demand—particularly, by generating market (buying) power, or similarly disrupting non-market or regulatory effects—the more competition in the 'actual' market will be altered and, predictably, the larger the inefficiencies generated by this body of regulation will be.

Moreover, public procurement regulations can not only generate distortions *directly* associated to the market behaviour of the public buyer and induce *indirect* distortions derived from the activity of the remaining economic agents, but they can also give rise to other detrimental economic effects inasmuch as they generate incentives for *strategic market and non-market behaviour*[91] and can significantly raise *transaction costs*.[92] Finally, when public procurement regulations are driven by non-economic criteria—in pursuit of so-called 'secondary policies'—the losses in efficiency can be even larger because this 'instrumentalisation' of public procurement further distorts competition in the markets concerned[93] (below chapter three, §IV.A).

In this regard, and as a result of their various sources of potential market distortions, which have just been identified, it should be stressed that *public procurement regulations have the same flaws and present the same possibilities for the generation of market failures as any other body of sectoral regulation*—and, particularly, resemble the regulation of 'special' sectors (such as telecommunications, energy, postal services, etc), where the adoption of apparently market-like mechanisms can result in sub-optimal or inefficient outcomes.[94] It is submitted that, once this fact is brought to light, the need for basic competition

regulations applied to the whole market—hence, a situation where the market-like mechanism created by public procurement regulations *would be the entire market*. However, as already seen, most public procurement markets do not present these structural features (above §II).

[91] Indeed, public procurement regulations generate opportunities for strategic behaviour that can give rise to anti-competitive effects in the market; see OE Williamson, *The Mechanisms of Governance* (Oxford, Oxford University Press, 1996) 297; EA Blackstone, 'Monopsony Power, Reciprocal Buying, and Government Contracts: The *General Dynamics* Case' (1972) 17 *Antitrust Bulletin* 445; and RD Blair and DL Kaserman, *Antitrust Economics*, 2nd edn (Oxford, Oxford University Press, 2008) 423–24 and 432.

[92] See: Trepte (n 5) 122–28. Also Mougeot and Naegelen (n 9) 13–15. In general, on the importance of accounting for the negative effects that increases in transaction costs generate, OE Williamson, 'Transaction-Cost Economics: The Governance of Contractual Relations' (1979) 22 *Journal of Law and Economics* 233; id, 'Transaction Cost Economics' in R Schmalensee and RD Willig (eds), *Handbook of Industrial Organization* (Oxford, Elsevier, 1989) 136, *reprinted in* OE Williamson, *The Mechanisms of Governance* (1996) 54; and id, 'Antitrust Lenses and the Uses of Transaction Cost Economics Reasoning' in TM Jorde and DJ Teece (eds), *Antitrust, Innovation, and Competitiveness* (Oxford, Oxford University Press, 1992) 137.

[93] Miller and Pierson Jr (n 36) 309; Brown et al (n 16).

[94] That is to say, regulatory intervention can sometimes generate 'derived externalities'; see C Wolf Jr, *Markets or Governments. Choosing between Imperfect Alternatives* (Cambridge, MA, MIT Press, 1988) 26, 77–79 and 165–66. Interestingly, Wolf considers that a more market-oriented approach to defence procurement would reduce the non-market failures that it generates. The argument is easily extendable to other markets. See generally id, 'A Theory of Non-Market Failure: Framework for Implementation Analysis' (1979) 22 *Journal of Law and Economics* 107, and id, 'Market and Non-Market Failures: Comparison and Assessment' (1987) 7 *Journal of Public Policy* 43.

principles to be called upon in order to correct or, at least minimise, the effect of public procurement regulations on market dynamics is clearly seen.

B. A Model for the Analysis of Public Buyer Behaviour and the Effects of Public Procurement Regulation

As already mentioned (above §II.C), competition policy analysis in public procurement markets will be particularly interesting and likely to contribute to the efficient functioning of publicly dominated (ie dependent and commercial) markets where, in different degrees, the public buyer holds significant (buying) market power and, consequently, can influence market dynamics.[95]

Building upon this basic insight, the appraisal of the competitive effects of public procurement seems to be particularly suitable for the application of economic theory related to monopsonistic or quasi-monopsonistic markets. It is further submitted that, in order to analyse properly the potential competition distortions that public procurement can generate, a first approximation or partial analysis should focus on the pricing distortions that it can produce in the market. The insights and conclusions derived from such pricing distortions will provide useful guidance for the analysis of non-pricing distortions—which will arguably be more relevant and widespread, and whose analysis is harder to specify in a model[96] (even if it should be kept in mind that the conclusions of the model based on pricing theory cannot be uncritically extended to other types of non-price competitive distortions—which might merit further scrutiny).

Regarding the first type of restrictions that can derive from public procurement (ie, pricing distortions), the analysis of the market dynamics and competitive impacts in this type of market with a *single dominant public buyer* can be represented as an extension of a basic monopsony model where there is no pure monopsonist, but a dominant buyer.[97] It is submitted that alternative models of analysis, such as those based on a concept of 'competition for the market' are not appropriate, since competition in public procurement markets takes place 'in the market' (except in the case of public concessions or similarly exceptional circumstances; see above §II.B.iii). Indeed, 'competition for the market' is not the relevant paradigm because most of the conditions required for a 'bidding market' to exist are not present in most public procurement markets (the conditions being that competition is 'winner take all', 'lumpy' and 'begins afresh for each contract, and for each customer', easy entry of new suppliers into the market, and the presence of a 'bidding system' or 'bidding process').[98] Therefore, the mere presence of a 'bidding system' is insuf-

[95] OFT (n 2) 97.

[96] Indeed, the analysis of non-pricing competition—and, as a specification, of non-pricing competitive distortions—cannot be easily apprehended in widely accepted economic models. The issue is not new; see, GJ Stigler, '*Price and Non-Price Competition*' (1968) 76 *Journal of Political Economy* 149; M Spence, 'Nonprice Competition' (1977) 67 *American Economic Review* 255; and, more recently, O Budzinski, *Modern Industrial Economics and Competition Policy: Open Problems and Possible Limits* (University of Southern Denmark, Working Paper No 93/09, 2009), available at www.sdu.dk/~/media/Files/Om_SDU/Institutter/Miljo/ime/wp/budzinski93. ashx.

[97] On this market structure, characterised by the presence of a dominant buyer and a fringe of competitive buyers, Blair and Harrison (n 16, 1993) 49–51 and (n 16, 1990–91) 322–24; and Blair and Durrance (n 16) 402–03.

[98] See: PD Klemperer, 'Competition Policy in Auctions and Bidding Markets' in Buccirossi (n 67) 583, 585–89. Similarly, see Bishop and Walker (n 26) 434–43.

ficient to warrant the analysis of public procurement markets under the paradigm of 'competition for the market' that characterises (economically defined) bidding markets. In the proposed model, the *single large buyer* is accompanied by several smaller buyers, who are termed *fringe buyers*.[99] Due to its size, the dominant buyer acts as a price setter,[100] whereas the fringe buyers act as price takers because their purchases are too small to influence price in the market.[101] Therefore, behaving competitively, fringe firms will buy the input up to the point where their collective demand equals the price set by the dominant buyer. In this setting, the dominant buyer's problem is to adjust its purchases to maximise profit subject to the competitive behaviour of the fringe buyers. Complications and further developments to this model might be required in cases where fringe buyers can be relatively large and/or the industry surrounding the public buyer is relatively concentrated. Similar issues arise when there are significant (or power) buyers other than the dominant public buyer and also, when the single or various dominant buyers face a supply that is not perfectly competitive, in which case issues regarding two-sided monopoly negotiations and the countervailing nature of monopsony power arise.[102]

However, regardless of the potential theoretical complications, it is submitted that the general economic insights required for the analyses conducted in other parts of the study can be properly grasped from the basic model regarding a *single dominant public buyer*.

In Figure 1, D_f represents the demand by the competitive fringe, D_{db} represents the demand of the dominant buyer, and D_t represents the total demand curve (which aggregates D_f and D_{db}). S_t is the supply curve (or total supply). Knowing that, for any price that it sets, the competitive fringe will purchase the quantity where D_f equals the price (ie, the competitive fringe acts as a price taker); the dominant buyer incorporates this behaviour into its decision calculus by subtracting D_f from S_t to obtain the residual supply, which is denoted as S_r. The curve marginal to S_r, which is labelled *mfc*, represents the marginal factor cost for the dominant buyer (ie, its incremental costs incurred by employing one additional unit of input). The exercise of *monopsony power* leads the dominant buyer to purchase Q_{db} where the marginal factor cost (*mfc*) equals D_{db}, which determines price equal to P' from the residual supply. Circumscribing my analysis to the 'residual' market isolated by the dominant buyer, and in the absence of monopsony power, the dominant

[99] It should also be stressed that the model assumes the existence of economies of scale and perfectly competitive supply (ie, complies with the 'zero profit condition' as regards suppliers).

[100] In this dominant buyer framework, the greater the control of the market by the key buyer, in terms of its market share with respect to that of the competitive fringe, the greater is its ability to exert power to reduce price below the competitive level; see PW Dobson et al, *The Welfare Consequences of the Exercise of Buyer Power* (Office of Fair Trading, Research Paper No 16, 1998), available at www.oft.gov.uk/shared_oft/reports/comp_policy/oft239.pdf. However, measurement of buyer power cannot exclusively rely on market shares, but needs to take into account the critical effects of the elasticities of supply and of fringe demand; see RD Blair and JL Harrison, 'The Measurement of Monopsony Power' (1992) 37 *Antitrust Bulletin* 133, 142–50; and JM Jacobson and GJ Dorman, 'Monopsony Revisited: A Comment of Blair and Harrison' (1992) 37 *Antitrust Bulletin* 151, 165.

[101] The working of the model necessarily focuses on price formation. However, other public procurement practices not directly related to price can generate similar market failures. Similarly, see Dobson et al (n 100) 22–26.

[102] For a general analysis of some of these alternative scenarios, see Scherer and Ross (n 82) 519–36; PW Dobson and M Waterson, 'Countervailing Power and Consumer Prices' (1997) 107 *Economic Journal* 418; and id, 'Retailer Power: Recent Developments and Policy Implications' (1999) 14 *Economic Policy* 133, 147ff. See also G Langus, *Essays in Competition Economics—Buyer Power under Imperfect Price Information and Uncertain Valuation* (PhD Dissertation, European University Institute, Department of Economics, 2008), *available at* cadmus.iue.it/dspace/bitstream/1814/9863/2/2008_ Langus.pdf.

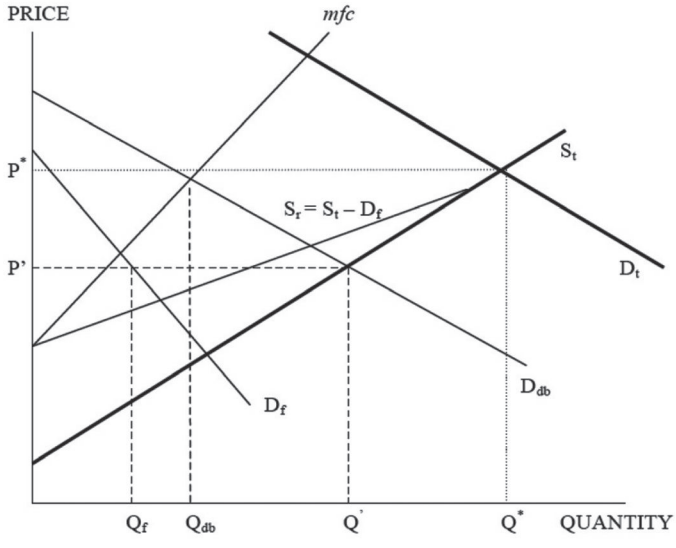

Figure 1

Source: Based on RD Blair and JL Harrison, 'Antitrust Policy and Monopsony' (1990–91) 76 *Cornell Law Review* 297, 323.

buyer would purchase a larger quantity determined by the intersection of S_r with D_{db}. Therefore, the exercise of monopsony power can be seen in the withholding of demand conducted by the dominant buyer, which decides to limit the purchases where *mfc* intersects D_{db}. At a price of P' the fringe will purchase Q_f where P' equals D_f. As a result, sellers will provide Q', which is equal to the sum of Q_{db} and Q_f. The *mfc* exceeds the price of the input (P') and, consequently, *there is a loss in allocative efficiency derived from the fact that sub-optimal quantities of the input are traded*—ie, Q' is lower than the quantity that would result from a competitive equilibrium in this market (Q*). As a result, the behaviour of the dominant buyer leads to the same sort of allocative inefficiency that would result from pure monopsony: *there are unrealised gains from further trade*. Since *mfc* exceeds P', the value created by employing one more unit of the input exceeds the social cost of doing so (but not the *private* cost to the power buyer)—so that society would be better off by an increase in trade, while the dominant buyer would be worse off (since it would be paying a higher price for *all* of its inputs). In other words, the dominant buyer internalises the effect on market prices of its own demand and restricts it to the point where its position is optimal (ie, maximises its profits)—imposing a significant loss of social welfare.[103] In short, the behaviour of the *dominant buyer leads to a deadweight social welfare loss analogous to that of pure monopsony*.[104]

[103] For a succinct description of these effects and the necessary conditions for their generation, see RD Blair and DL Kaserman, *Antitrust Economics* (Homewood, Irwin Publications, 1985) 309–11; and RA Posner, *Economic Analysis of Law*, 7th edn (New York, Wolters Kluwer, 2007) 333–35.

[104] ET Sullivan and JL Harrison, *Understanding Antitrust and Its Economic Implications*, 4th edn (Newark, LexisNexis, 2003) 303. On the welfare effects of monopsony power, see Dobson et al (n 100).

In rather simplified terms, the model shows how, as a result of the exercise of buying power by the (public) single dominant buyer, the price it pays for any given products or services is lower than under regular equilibrium conditions—which results in limited exchanges in the market (ie, reduced trade), potential foreclosure of suppliers, and worse market conditions for fringe buyers—both in terms of reduced variety and (in the long run) in higher prices. On the aggregate, there is a net loss of social welfare.

Even if it can be argued that the public buyer does not have a pricing behaviour identical to that of a hypothetic (private) single dominant buyer—because public buyers generally do not (willingly) withhold demand in order to lower prices in the market—in the public procurement setting, 'equivalent' pricing effects can be generated;[105] particularly by rules imposing price caps that are lower than the prices that would be payable in an unregulated market equilibrium (P*) or that, for other reasons, generate the same truncation of supply that is captured in the model (although such reasons admittedly might require some adjustments for their analysis as non-pricing distortions). In the public procurement setting, this 'break-up' of the supply function can be generated by rules and administrative practices that restrict the possibilities of some or most potential suppliers taking part in tendering procedures—so that, de facto, a 'residual' supply curve is artificially generated by public procurement rules and practices and, in the end, results in pricing distortions. In such cases of truncation of supply, the 'excluded' suppliers find their market opportunities limited to supplying fringe buyers (for which non-excluded suppliers also compete).[106] As a result, the market 'shrinks'—since total quantities are reduced if compared with the optimal equilibrium—and social welfare is consequently reduced.[107] In extreme cases, the restrictions imposed by the public procurement rules and practices can be such as to effectively break up the market in two: one exclusively for the public buyer and another for fringe buyers (who, then, become the only buyers in the 'spun-off' or 'private' market). It is submitted that these (pricing and non-pricing) effects of public procurement rules on market dynamics and the ensuing loss of social welfare will be largely the same in these cases and in the more stylised case considered in the model.[108]

Moreover, this loss of social welfare is not the only effect generated by the behaviour of the dominant buyer, since it adds up to redistributive effects that result from the extraction of surplus by the dominant buyer from both suppliers and fringe buyers.[109]

Even if these redistributive effects are neutral from an efficiency standpoint—and, consequently, in my view they should not be determinant factors in shaping a competition policy in the public procurement environment—given that the result is that the public buyer extracts value from other undertakings and/or consumers (depending on the type of market where competition-restrictive public procurement takes place), these

[105] See: BundesKartellamt, *Buyer Power in Competition Law—Status and Perspectives* (2008) 3–4, available at www.bundeskartellamt.de/wEnglisch/download/pdf/2008_ProfTagung_E.pdf.

[106] Implicitly, the public buyer is considered an 'obligatory trading partner' because there are no sufficient or reasonable alternative sources of demand—which is consistent with the fact that the analysis is limited to publicly dominated markets (§II.C above). This should not be strictly understood as requiring that *each and all* suppliers must contract with the public buyer in order to remain in the market—but that very few (or, at worst, none of them) can develop their activities viably without satisfying public demand.

[107] In similar terms, OFT (n 2) 128–33.

[108] Therefore, even if it may imply a substantial level of simplification (particularly as regards the analysis of non-pricing distortions), the model described above will be used as the basic analytical framework in the remainder of this section.

[109] This effect was stressed by OFT (n 2) 69.

redistributive effects might merit closer attention than in other economic settings.[110] It should also be recalled that the deadweight loss identified by the model refers only to *static welfare considerations* and that, from a dynamic perspective, *the exercise of monopsony power can generate additional detrimental welfare effects in the long run* arising from damage to the viability of producers and, probably, of all or some of the fringe buyers (at least if they develop downstream market activities). These additional effects will be further analysed (below §V.C).

Consequently, in my view, market distortions generated by dominant buyers (both public and private) can have a significant impact on social welfare and should constitute a primary focus of competition policy (above chapter one, §I.A). The extension of competition policy to public procurement should be concerned with this type of market failure and curb public procurement rules and practices that can generate effects analogous to those of pure monopsony—even if they result from non-price distortions generated by the public buyer, ie, from inefficient public procurement rules and practices.

In general, competition concerns generated by public procurement can be classified in three categories: *category I* refers to the failure by the public sector to exercise countervailing market power against suppliers with market power; *category II* identifies restrictions on competition arising from procurement practices such as participation restrictions, high participation costs, excessive contract aggregation or long-term contracts, as well as additional long-term effects and effects on other buyers (ie, *waterbed or knock-on effects*); and *category III* refers to an excessive focus on short-run price competition at the expense of long-run, non-price competition.[111] This study will be particularly concerned with *category II effects*, since these are the ones that can generate clearer negative impacts on competitive dynamics, as well as those that might be easier to correct by means of a system of more competition-oriented public procurement rules.

C. Direct Competition-Distorting Effects: Waterbed Effects

As a specification of the detrimental welfare effects that competition-distorting public procurement can generate according to the extension of the 'classical' monopsony model just reviewed, the distortions that can arise from the behaviour of the public buyer can also be analysed from the perspective of the creation of *waterbed effects* in the market. The term 'waterbed effects' is normally used to refer to situations whereby differential buyer power results in a gain for some buyers at both the relative and absolute expense of other buyers.[112] Ultimately, as a result of this waterbed effect, welfare is likely to be reduced—be it a result of increases in prices for the rivals of the power buyer (assuming

[110] See: RG Noll, '"Buyer Power" and Economic Policy' (2005) 72 *Antitrust Law Journal* 589, 591–92.

[111] OFT (n 2) 23 and 142–47.

[112] The most characteristic use of the expression 'waterbed effect' is as a shorthand term for a situation in which (non-cost-related) price reductions are negotiated with suppliers by large buyers and result in higher prices being charged by suppliers to smaller buyers. The expression was coined by the UK's competition authorities in a series of inquiries into the grocery retailing sector. See R Inderst and TM Valletti, *Buyer Power and the 'Waterbed Effect'* (CEPR Working Paper, 2007), available at www3.imperial.ac.uk/portal/pls/portallive/docs/1/7799702.pdf. For a general overview of the abovementioned sectoral inquiries, with a clear focus on buyer power, PW Dobson, 'Exploiting Buyer Power: Lessons from the British Grocery Trade' (2004–05) 72 *Antitrust Law Journal* 529.

certain additional conditions leading to price discrimination are met),[113] or be it a result of the exit of weaker suppliers or fringe competitors from the market.[114] Indeed, if the rise of a powerful buyer erodes suppliers' profits, then in the long run some suppliers may be forced to exit or merge with other suppliers in order to survive. This may lead, in particular, to a rise in the wholesale prices faced by less powerful retailers.[115] As a result of this additional concentration of the upstream industry and higher wholesale prices, fringe input buyers can eventually be forced to exit the downstream market. The aggregate effect of the reduction in competition in both wholesale and retail markets is very likely to produce a loss of welfare.[116]

Even if waterbed effects have so far been analysed in wholesale markets or markets for intermediate products—where the anti-competitive effect leading to a loss in consumer welfare largely derives from the distortions of market competition in the downstream market (and where they can be more easily analysed in standard pricing models), public procurement both in final products markets and in wholesale markets (even in those cases where the public buyer does not compete downstream with the other (fringe) buyers of the intermediate product) can also generate market distortions of a 'waterbed-type' (even if as a consequence of non-price elements)[117] and, particularly, can result in higher prices in the non-public fringe of the market (and, particularly, for consumers).[118] In these instances, the waterbed effect generated by public procurement regulations and administrative practices is highly likely to affect welfare negatively.[119]

[113] PW Dobson and R Inderst, 'Differential Buyer Power and the Waterbed Effect: Do Strong Buyers Benefit or Harm Consumers?' (2007) 28 *European Competition Law Review* 393, 393 and 397–99; and id, 'The Waterbed Effect: Where Buying and Selling Power Come Together' (2008) 225 *Wisconsin Law Review* 331, 333 and 341–52. See also AA Foer, 'Mr Magoo Visits Wal-Mart: Finding the Right Lens for Antitrust' (2006–07) 39 *Connecticut Law Review* 1307, 1326–27.

[114] See: A Majumdar, *Waterbed Effects, 'Gatekeepers' and Buyer Mergers* (University of East Anglia, CCP Working Paper 05-7, 2006) available at else.econ.ucl.ac.uk/conferences/supermarket/maj.pdf. See also WS Grimes, 'Buyer Power and Retail Gatekeeper Power: Protecting Competition and the Atomistic Seller' (2004– 05) 72 *Antitrust Law Journal* 563, 566 fn 14.

[115] See: R Inderst and N Mazzarotto, 'Buyer Power in Distribution' in ABA, *Issues in Competition Law and Policy* (Chicago, ABA Section of Antitrust Law, 2008) 1953, 1965–68.

[116] See: C Doyle and R Inderst, 'Some Economics on the Treatment of Buyer Power in Antitrust' (2007) 28 *European Competition Law Review* 210, 216; Dobson and Inderst (n 113) 333; and Inderst and Valletti (n 112) 1–3. This dynamic potentially harmful effect for consumers is embedded in some competition policy guidance documents, such as the Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/1. However, some studies report positive effects on suppliers' incentives to innovate and increase competitiveness—which might generate dynamic efficiency; see Inderst and Mazzarotto (n 115) 1970–72; R Inderst and C Wey, 'Buyer Power and Supplier Incentives' (2007) 51 *European Economic Review* 647; and id, *Countervailing Power and Dynamic Efficiency* (CEPR Working Paper, 2007), available at www.nice.tu–berlin.de/fileadmin/documents/nice/forschung/countervailing_power_dynamic_ efficiency_inderst_wey.pdf. Such potential dynamic efficiencies could offset, in part, the inefficiencies generated by waterbed effects in the same markets. However, this question remains an empirical one and needs to be taken into account on a case-by-case basis.

[117] Along the same lines, the importance of waterbed effects in this context has been stressed by BundesKartellamt (n 105) 3–4.

[118] This theoretical possibility has already been supported by empirical studies; see M Duggan and FM Scott Morton, 'The Distortionary Effects of Government Procurement: Evidence from Medicaid Prescription Drug Purchasing' (2006) 121 *Quarterly Journal of Economics* 1, 23–24. A similar effect was previously reported by FM Scott Morton, 'The Strategic Response by Pharmaceutical Firms to the Medicaid Most-Favored-Customer Rules' (1997) 28 *RAND Journal of Economics* 269.

[119] On the possibility that competitive distortions generated by a 'waterbed effect' result in a reduction of aggregate welfare—equivalent to the generation of a negative externality—see Grimes (n 114) 574–75. *Contra*, see DK Round, 'Countervailing Power and a Government Purchasing Commission: An Opportunity to Promote

The waterbed effect in certain 'public procurement' markets (ie, in *exclusive markets* and in other '*publicly dominated*' *markets*) might be less self-evident than in other markets because the public buyer is generally not considered a (buying) competitor of the undertakings procuring inputs for their market activities or of the consumers towards which the products are finally marketed. However, from an economic perspective, whenever the public buyer sources goods, services or works that could as well be demanded by undertakings or consumers—for the same or a different activity, this factor being irrelevant—it is effectively competing in the market for the purchase of those goods, the hiring of those services, or the commissioning of those works. Therefore, '*publicly dominated*' *markets* cannot be considered in isolation, nor can it be assumed that public demand does not interact with private demand. On the contrary, it is particularly important to stress the existing buying competition between the public and other buyers (ie, fringe buyers) and to analyse the possible existence of *waterbed effects* that result from competition-distorting public procurement rules and that have a negative impact on the commercial conditions applicable to non-public buyers.[120]

In order to assess properly when the public buyer is to be found in such a competitive position, the characteristics of the sourced goods or services (or of the admissible suppliers) that are 'created' by public procurement regulations themselves should be disregarded because, *in the absence of public procurement regulations*, the public buyer would be shopping in the exact same markets as undertakings and consumers do (above §II). For instance, when the public buyer sources information and communication technology (ICT) products, the fact that it restricts the potential supply to vendors able to prove they have more than a given number of years' experience does not generate a separate 'public' market for ICT products where only those vendors and the public buyer are active (ie, an exclusive or monopsonistic market). It is submitted that, properly understood, this phenomenon should be analysed with the model proposed (above §V.B) as a *'truncation' of the supply curve by the public buyer*—either willingly, or as a result of mandatory public procurement regulations[121]—whereby it 'skims' the market and leaves the fringe buyers, for instance, more exposed to dealing with less experienced suppliers (and, from the opposite perspective, limits relatively inexperienced suppliers' market opportunities to serve non-public buyers).

By selecting the type of vendors that have access to public demand (ie, the *residual* supply, in terms of the model), the public buyer is setting the framework for the appearance of waterbed effects. For instance, in the previous example, excluded vendors might

Increased Competition in Australian Industries' (1977) 36 *Australian Journal of Public Administration* 197, 201–04.

[120] As already mentioned (n 101), other types of (non-price) effects can also be identified as a result of public procurement rules and practices, such as an impact on the number of suppliers, the range of products available, or the technologies used; see OFT (n 2) 13–14.

[121] Indeed, in publicly dominated markets, public procurement regulations can have the negative effect of 'truncating' the offer function—even to the point of artificially generating two markets for the same product. In general terms, the effect of such an artificial division of the market is well known (as it is exactly the same with collusive market fragmentation or allocation practices), and *both* the government and the remaining buyers (and, in the end, consumers) end up paying more than they would in the absence of public procurement regulations. Moreover, as has already been seen, such a division is more than likely to generate a deadweight welfare loss. Therefore, as shall be stressed later, the benefits of public procurement regulations—and particularly of the rules that are more likely to result in these types of negative economic effects—need to be assessed against these very relevant (non-trivial) economic costs.

need to raise their prices in the non-public tranche of the market in order to be able to recoup their fixed costs. Also, as they have a relatively large part of their production committed to serving the public buyer, experienced vendors can indulge in charging (or be pressed to charge, depending on the commercial conditions that they can extract from the public buyer) supra-competitive prices in the non-public tranche of the market. Alternatively, and depending on the specific concurring circumstances, public contractors can find themselves in a good position to undercut their rivals' prices in the non-public tranche of the market, as a part of a predatory strategy to prevent them from acquiring the required experience and, thus, becoming effective competitors in the public tranche of the market.[122] As a result of either of these strategies, the competitive dynamics of the market will be altered—compared to the conditions prevailing in a scenario free from public procurement rules and requirements—and, in a significant number of cases, the result will be negative from a welfare perspective.[123]

In these cases, the waterbed effect does not necessarily derive from a strategy of exercise of buying power on the part of the public buyer, but more probably from similar price and non-price effects generated—maybe unnoticed and most probably unwillingly—by public procurement regulations and administrative practices. In these cases, it is remarkable that *the expected welfare losses derived from competition-restricting public procurement rules and practices could be larger than in the case of a 'wilful' monopsonist*, since the public buyer might not be in a position to capture most of the economic rent extracted from suppliers and other buyers—particularly where the economic rent generates additional compliance costs that are not fully recoverable through higher procurement prices by public contractors, or when price increases in the non-public tranche are only partially captured as producer surplus by government contractors—in which case, the economic rent generated by procurement regulations will mainly be dissipated in welfare losses as a result of inappropriate or excessive regulation of market activity. In such cases, a revision of public procurement rules with a more pro-competitive view can result in welfare increases without having a negative impact on the public buyer—and could even result in an improvement of the welfare of the public buyer depending on how the market forces allocate the increase in welfare derived from more efficient rules. Once the effects of more

[122] Generally, this issue was analysed by CW Sherrer, 'Predatory Pricing: An Evaluation of its Potential for Abuse under Government Procurement Contracts' (1980–81) 6 *Journal of Corporation Law* 531. Unfortunately, the case law of the ECJ in relation to 'buyer power' or monopsonistic situations is relatively limited. However, new trends of development in this area can be identified in other jurisdictions—remarkably, the US, and the SCt decision in *Weyerhaeuser Co v Ross–Simmons Hardwood Lumber Co*, 549 US 312 (2007)—which might indicate that future developments of the ECJ case law might be anticipated, among others, in cases of predatory (over)bidding. An older US precedent involving anti-competitive (over)bidding—although as a result of collusive practices between the three largest buyers in the market—can be found in *American Tobacco v United States*, 328 US 781, 801–04 (1946). On the economics underlying predatory buying, see Blair and Harrison (n 16) 64–68 and 154–56; SC Salop, 'Anticompetitive Overbuying by Power Buyers' (2004–05) 72 *Antitrust Law Journal* 669, 671; JB Kirkwood, 'Buyer Power and Exclusionary Conduct: Should Brooke Group Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding' (2004–05) 72 *Antitrust Law Journal* 625; and RO Zerbe Jr, 'Monopsony and the Ross–Simmons Case: A Comment on Salop and Kirkwood' (2004–05) 72 *Antitrust Law Journal* 717, 718–19. See also Grimes (n 114) 563. For a more general and comparative approach to the treatment of buyer power, see R Scheelings and JD Wright, '"Sui Generis"?: An Antitrust Analysis of Buyer Power in the US and the EU' (2006) 39 *Akron Law Review* 207, 210.

[123] Some of these situations could be captured by existing antitrust rules and remedies (particularly predatory strategies), but other types of milder waterbed effects or other practices that directly impose anti-competitive behaviour on public contractors could pass antitrust muster (see chapter four).

pro-competitive procurement are taken into account, the expected benefits on social welfare expansion are likely to be even larger.[124]

In the light of this analysis, it is submitted that from an economic perspective public procurement rules should be designed in the most pro-competitive (or least competition-restricting) way possible, after conducting a cost–benefit analysis of the advantages that a given public procurement rule, practice or requirement can generate, and the waterbed and other (anti-)competitive effects that they are likely to cause (see below §V.D and §V.E). Acknowledging the existence of these possible distortions—that result in a welfare loss for society and that, somehow, can also result in a cross-subsidy of public procurement by other economic agents—can help measure the cost of public procurement regulations[125] and, consequently, lead to improvements in their design with the aim of reaching better results in terms of economic efficiency.

D. Indirect Competition-Distorting Effects: Increased Bidder Collusion and Other Effects of Price Signalling

> The formal rules governing public procurement can make communication among rivals easier, promoting collusion among bidders. While collusion can emerge in both procurement and 'ordinary' markets, procurement regulations may facilitate collusive arrangements.[126]

Indeed, the fact that public procurement rules increase the likelihood of collusion among bidders has been convincingly proven in economic literature,[127] and has also been stressed for a long time by legal doctrine.[128] It is out of question that, under most common market conditions, procurement regulations significantly increase the transparency of the market and facilitate collusion among bidders through repeated interaction.[129]

[124] On the importance of incorporating dynamic effect considerations into public procurement policy analysis, see A Finkelstein, 'Static and Dynamic Effects of Health Policy: Evidence from the Vaccine Industry' (2004) 119 *Quarterly Journal of Economics* 527.

[125] See: Duggan and Scott Morton (n 118) 24.

[126] OECD, *Public Procurement: Role of Competition Authorities* (2007) 7. Generally, see RC Marshall and LM Marx, *The Economics of Collusion. Cartels and Bidding Rings* (London, MIT Press, 2012); and SE Weishaar, *Cartels, Competition and Public Procurement. Law and Economics Approaches to Bid Rigging* (Cheltenham, Edgar Elgar, 2013). See also A Heimler, 'Cartels in Public Procurement' (2012) 8(4) *Journal of Competition Law & Economics* 849–62.

[127] GJ Stigler, 'A Theory of Oligopoly' (1964) 72 *Journal of Political Economy* 44, 48; RP McAfee and J McMillan, 'Bidding Rings' (1992) 82 *American Economic Review* 579; D Konstadakopoulos, 'The Linked Oligopoly Concept in the Single European Market: Recent Evidence from Public Procurement' (1995) 5 *Public Procurement Law Review* 213, 216; GL Albano et al, 'Preventing Collusion in Public Procurement' in Dimitri et al (n 23) 347, 351–52, 357–58 and 371; Johnson (n 78) 1734; Klemperer (n 98) 584 and 590–97; Blair and Kaserman (n 91) 188; OECD, *Policy Brief—Fighting Cartels in Public Procurement* (2008) 3; OFT (n 2) 79–81; and G Spagnolo, *Self-Defeating Antitrust and Procurement Laws?* (Fondazione Eni Enrico Mattei Working Paper No 52.00, 2002), available at www.cepr.org/meets/wkcn/6/6607/papers/spagnolo.pdf.

[128] MA Flamme, *Traité théorique et pratique des marchés publics* (Brussels, Bruylant, 1969) I-182–83. See also WE Kovacic, *The Antitrust Government Contracts Handbook* (Chicago, ABA Section of Antitrust Law, 1990); and PA Trepte, 'Public Procurement and the Community Competition Rules' (1993) 2 *Public Procurement Law Review* 93, 114.

[129] See: OECD, *Procurement Markets* (1999) 85–87 and 92–95; id, *Competition in Bidding Markets* (2006) 11, 19 and 23–32; BD Bernheim and MD Whinston, 'Multimarket Contact and Collusive Behavior' (1990) 21 *RAND Journal of Economics* 1; A Skrzypacz and H Hopenhayn, 'Tacit Collusion in Repeated Auctions' (2004) 114 *Journal of Economic Theory* 153; Albano et al (n 127) 352–53; WE Kovacic et al, 'Bidding Rings and the Design

However, this key finding has not generated as strong a legislative reaction as could have been expected—and most public procurement regulations still contain numerous rules that tend to increase transparency and result in competition-restrictive outcomes (such as bid disclosure, pre-bid meetings, restrictions on the issuance of invitations to participate in bidding processes to a relatively pre-defined or stable group of firms, etc).[130] Nonetheless, the situation remains complex, since in some limited circumstances transparency can prove pro-competitive and 'reserve prices' might have a function to play in competitive scenarios that are not highly competitive,[131] and can be used strategically by the public buyer to induce competition among bidders.[132] Moreover, price transparency can be a deterrent to private participation in some cases, particularly in industries where pricing information might be particularly sensitive.[133] Therefore, choosing the adequate level of transparency is a complicated task—also because it has major implications as regards other objectives of the public procurement system (oversight, anti-fraud, etc)—and the generation of a pro-collusion scenario seems intrinsic to the system.

In the end, given that public procurement regulations are likely to facilitate collusion amongst bidders, it is not surprising that a large number of cartel cases prosecuted in recent years have taken place in public procurement settings,[134] and that the main focus of the (still very limited) antitrust enforcement efforts in the public procurement setting lies with bid-rigging and collusion amongst bidders.[135] Nonetheless, if the main concern of competition policy in the public procurement environment were to lie with *private*

of Anti-Collusive Measures for Auctions and Procurements' in N Dimitri et al (eds), *Handbook of Procurement* (Cambridge, Cambridge University Press, 2006) 381, 402; RA Miller, 'Economy, Efficiency and Effectiveness in Government Procurement' (1975–76) 42 *Brooklyn Law Review* 208, 215–33; and JM Kuhlman, 'Price Fixing, Non-Price Competition and "Focal Point" Pricing: A Rose by Any Other Name?' (1978) 10 *Antitrust Law and Economics Review* 75. In extreme situations, the public buyer can even be the origin of restrictive practices, such as in those cases where the procurement officer contacts certain suppliers with the intention of simulating a competitive tender; see G Clamour, *Intérêt général et concurrence. Essai sur la pérennité du droit public en économie de marché* (Paris, Dalloz, 2006) 269. However, these cases should be dealt with more adequately by the anti-corruption instruments of public procurement regulations and, therefore, will not be discussed further (see chapter one, §VII.A).

[130] However, some contracting authorities do adopt certain anti-collusion measures when designing their public procurement processes; see L Carpineti et al, 'The Variety of Procurement Practice: Evidence from Public Procurement' in Dimitri et al (n 23) 14, 37–38.

[131] LM Ausubel and P Cramton, 'Dynamic Auctions in Procurement' in Dimitri et al (n 23) 220, 226–27; Kovacic et al (n 129) 401; and GL Albano et al, 'Fostering Participation' in Dimitri et al (n 23) 267, 272–83.

[132] McAfee and McMillan (n 22) 144–46; and Carpineti et al (n 130) 26. See also CJ Thomas, 'Using Reserve Prices to Deter Collusion in Procurement Competition' (2005) 53 *Journal of Industrial Economics* 301, 303; and H Cai et al, 'Reserve Price Signalling' (2007) 135 *Journal of Economic Theory* 253.

[133] Flamme (n 128) I-183.

[134] KL Haberbush, 'Limiting the Government's Exposure to Bid Rigging Schemes: A Critical Look at the Sealed Bidding Regime' (2000–01) 30 *Public Contract Law Journal* 97, 98; and RD Anderson and WE Kovacic, 'Competition Policy and International Trade Liberalisation: Essential Complements to Ensure Good Performance in Public Procurement Markets' (2009) 18 *Public Procurement Law Review* 67. For a description of cartel activity related to US procurement markets, see Kovacic et al (n 129) 381–88 and 407. For an update on cases, see A Sánchez Graells, 'Public Procurement: A 2014 Updated Overview of EU and National Case Law' (2014) *e-Competitions, Bulletin on Public Procurement* Art 40647.

[135] See, amongst others, OECD (n 82) 3–5; and Haberbush (n 134) 114–20. However, it is important to stress that some of the proposed remedies or modifications to current public procurement regulations that could contribute to reducing the likelihood of collusion run counter to other important goals of procurement regulation (such as transparency, see chapter three, §IV.D) or, even more importantly, can have undesired (and maybe unexpected) negative consequences in market dynamics, since they tend to accentuate the waterbed effects described here (above §V.C). Therefore, their implementation should be subject to further consideration.

restrictions of competition (ie, bid-rigging), there would not be a need to implement changes other than those already proposed[136]—which will not be analysed in detail here (see chapter one). However, in my view, this is not the case.

Maybe what is most noteworthy from the perspective of public restrictions and distortions of competition in public procurement markets, the potential for *collusion or coordination among public buyers*,[137] and other *non-collusive effects* on bidders' and buyers' behaviour derived from *price signalling*,[138] have received significantly less attention by both legal and economic doctrine. Collusion or coordination among public buyers might be a result of public procurement rules or practices when they impose a certain degree of harmonisation or homogenisation of the economic conditions under which different (independent) public bodies conduct their procurement activities. For instance, if the maximum reservation prices used by (otherwise) independent public buyers are set by a centralised unit, the effect on prices will be the same as that derived from a private buying cartel. Similarly, even if there is no express or formal centralisation of pricing conditions, a problem of 'collusion' between buyers (loosely defined) can arise, since they are (or can be) fully informed of the prices paid in previous tenders by other public buyers. It is similar to an exchange of information between public purchasers (which, in the private sector, would be considered a buying cartel). This potentially negative effect, derived from a limitation of the (already scarce) competition amongst public buyers that could be expected to take place in publicly dominated markets, has been largely omitted in the analysis of competition dynamics in public procurement markets. The same reasoning applies when independent buyers are forced to use common technical specifications, or when any other price or non-price aspect of their demand is (unduly) harmonised by regulations or administrative practices in the public procurement field. Therefore, in view of these economic insights, it seems that the transparency generally associated to public procurement procedures should be minimised to the maximum possible extent when designing the procurement system.

E. Other Competition-Distorting Effects

Additional competition distorting effects can derive from tendering procedures which generate significant flows of information between the candidates and the public buyer, and amongst candidates. In cases where the procurement process facilitates the exchange of information that would otherwise remain confidential to the parties, there seems to

[136] An interesting summary of proposals for the reform of procurement regulations to reduce the likelihood of collusion can be found in OECD (n 81) 8–9 and 17–42.

[137] See: A Winterstein, 'Nailing the Jellyfish: Social Security and Competition Law' (1999) 6 *European Competition Law Review* 324, 333. A different issue is that of collusion between buyers and bidders, which has strong corruption components and, consequently, will not be analysed in detail (chapter one, §VII.A). On that issue, see AT Ingraham, 'A Test for Collusion between a Bidder and an Auctioneer in Sealed-Bid Auctions' (2005) 4 *Berkeley Electronic Journal of Economic Analysis and Policy* 10.

[138] See: M Dufwenberg and U Gneezy, 'Information Disclosure in Auctions: An Experiment' (2002) 48 *Journal of Economic Behavior and Organization* 431, 442; RM Isaac and JM Walker, 'Information and Conspiracy in Sealed-Bid Auctions' (1985) 6 *Journal of Economic Behavior and Organization* 139, 140–41 and 146–49; A Ockenfels and R Selten, 'Impulse Balance Equilibrium and Feedback in First Price Auctions' (2005) 51 *Games and Economic Behavior* 155; and S Arrowsmith et al, *Regulating Public Procurement: National and International Perspectives* (London, Kluwer Law International, 2000) 440.

be scope for further restrictions of competition, both generated by the public buyer or as a result of coordination or collusion amongst candidates. That seems to be the case of particularly complex tender procedures and, especially, of competitive dialogue. This new procedure was introduced by Directive 2004/18,[139] and has now been consolidated in Directive 2014/24, which has also created a similarly complex innovation partnership that creates similar issues. The basic aim of these procedures is to allow for a close cooperation between undertakings and public agencies in the definition of particularly complex or innovative projects.

The scope and purpose of the competitive dialogue and the innovation partnership procedures makes them particularly prone to the generation of competitive distortions. Given that contracting authorities who carry out particularly complex or innovative projects might resort to these procedures when they find it objectively impossible to define the means of satisfying their needs or of assessing what the market can offer in the way of technical solutions and/or financial/legal solutions, or when they aim to develop works, goods or services that do not exist in the market, their need to rely strongly on tenderers' proposals and *know-how* and to try to find a common solution—or, at least, a common 'core' definition of the project that operates as the basis for (price) competition within the tender procedure—sets the stage for important distortions of competition to take place and, most importantly, for *technical levelling*[140] and *price signalling*.[141]

EU public procurement directives have established certain mechanisms to try to prevent these undesired effects, such as the provision that the solutions proposed by a bidder cannot be disclosed to other tenderers or to third parties without its previous consent (arts 30(3) and 31(4) Dir 2014/24). However, the practical implications of such a *Chinese wall* or *ban on cherry-picking* remain largely controversial[142] and the development of the technical dialogue itself is particularly prone to *leakage of information*, especially because the dialogue that is to take place in the stage before the invitation to tender is designed to cover *all aspects of the contract*, *including price*.[143] Besides, in this setting, tenderers could find incentives to agree to such disclosure of proposals and other confidential information for collusive (or strategic) purposes—and the fact that the contracting authority mediates among them should not insulate the practice from standard competition law scrutiny. Similar issues can arise from the unrestricted circulation of eCatalogues or from giving unrestricted access to 'electronic markets' to suppliers that can, then, use this access to

[139] For a description of the new competitive dialogue procedure, see A Rubach-Larsen, 'Competitive Dialogue' in R Nielsen and S Treumer (eds), *New EU Public Procurement Directives* (Copenhagen, Djøf Forlag, 2005) 67; and S Treumer, 'Competitive Dialogue' (2004) 13 *Public Procurement Law Review* 178. See also C Bovis, 'Public Procurement in the European Union: Lessons from the Past and Insights to the Future' (2005–06) 12 *Columbia Journal of European Law* 53, 86–88; and id (n 31) 171–73 (for further details, chapter six, §II.A.ii).

[140] See: SW Feldman, 'Traversing the Tightrope between Meaningful Discussions and Improper Practices in Negotiated Federal Acquisitions: Technical Transfusion, Technical Levelling, and Auction Techniques' (1987–88) 17 *Public Contract Law Journal* 211.

[141] A risk already pointed out in the Commission Green Paper, 'Public Procurement in the European Union: Exploring the Way Forward' (COM(96) 583). Similarly, Treumer (n 139) 186. See also Trepte (n 5) 279. However, this risk has nonetheless been underestimated or simply overseen by some commentators; eg, Rubach-Larsen (n 139) 76.

[142] Since, for instance, a confidentiality waiver could be imposed as a condition to participate in the tender; see Treumer (n 139) 182. *Contra*, Rubach-Larsen (n 139) 76–77. Concern has been expressed as to the impossibility of the buyer coming up with a combined solution constructed upon different parts of several bidders' proposals (as a potential instance of unnecessary rigidity); see Trepte (n 58) 61–62.

[143] See: Rubach-Larsen (n 139) 75; and Treumer (n 139) 185.

gather business and confidential information from competitors (an issue not resolved in art 36 Dir 2014/24).

Therefore, public procurement regulations—particularly when they opt for apparently flexible solutions that generate increased scope for exchanges of information or technical levelling (such as the competitive dialogue procedure, innovation partnerships or electronic catalogues)—can lead to additional direct and indirect competition distortions, which should be taken into account and minimised in order to construct a more competition-oriented system.

VI. Conclusions to this Chapter

The brief review of the economics of public procurement conducted in this chapter offers some preliminary conclusions that should inform the analyses to be conducted in the rest of the study.

From a *descriptive perspective*, the analyses conducted above have shown how public procurement is a complex reality with multiple economic implications, and that its proper analysis requires having recourse to more detailed paradigms than the 'classic', (exceedingly) simplified description of 'public markets'. A possible taxonomy of public procurement markets has been advanced on the basis of several criteria, such as the regulatory situation, the relative importance of the public buyer in the market, temporal, geographic and other complementary criteria. In order to set the basic case for the inquiry conducted in this study, I have chosen to focus on open, publicly dominated markets where there are no particular temporal, geographic or other criteria that impose specific constraints or restrict the general validity of the conclusions reached.

Also from a descriptive perspective, the several functions that public procurement can develop have been analysed, and it has been concluded that competition analyses have their proper object in the appraisal of public procurement as a working tool of the public sector; ie, as a market-like mechanism oriented towards the implementation of policies or projects previously defined in the most efficient way. In a related fashion, the several roles that public buyers can develop in the market (as agents, as gatekeepers, and as market-makers) have also been explored, and it has been concluded that the different roles assigned to the public buyer should not significantly alter the appraisal of public procurement activities from a competition perspective.

Therefore, the basic conclusion to be extracted from a descriptive perspective is that the proper object for the competition appraisal of public procurement lies in its consideration as a market-like mechanism used by the public buyer, and that its effects can be better ascertained in open, publicly dominated markets. This has set the scenario for the conduct of economic analyses aimed at answering the research sub-question with which this chapter is concerned.

From this *analytical perspective*, public procurement has been conceptualised as a market-like regulatory instrument that can generate (derived) market failures, and a model for the appraisal of the competitive effects of public procurement (ie, *single dominant public buyer* model) has been advanced. According to the model, public procurement

regulations are susceptible to generating both direct and indirect effects on competition dynamics in the markets concerned. As regards direct effects, the market behaviour of the public buyer can give rise to *waterbed effects* that are similar to those generated in non-public instances of the exercise of buyer power. Public procurement can also generate indirect effects through the setting of a scenario particularly prone to collusion, both on the demand and the supply side, as a result of the transparency of the tendering procedures and the associated price signalling. Finally, certain specific procurement procedures that generate an increased scope for the exchange of information between the public buyer and the candidates (and, indirectly, amongst the latter) can generate additional effects of technical levelling and price signalling.

The existence of all such potentially negative competition effects that can be detrimental to social welfare constitutes, in my view, a solid normative basis for the development of a more competition-oriented public procurement system. Given that this study focuses primarily on public restrictions of competition derived from public procurement activities, the primary concern in the remainder of the inquiry will be to attempt to minimise these potential distortions of competition which have a public and regulatory origin (ie, waterbed effects and other distortions such as technical levelling or price signalling, or category II effects), whereas potential distortions that involve tenderers (mainly, collusion) will remain largely outside the scope of the analyses conducted in the following chapters.

3

Basics of Competition and Public Procurement Regulation

I. Introduction

After having considered some economic aspects underlying public procurement activities and the foundations for their appraisal from a competition economics perspective (chapter two), this chapter focuses on the normative basis or the objectives of competition and public procurement law and, more specifically, on the research sub-question of whether *there is a common normative basis (ie, principles and goals) for the development of a general analytical framework based on a more integrated approach to public procurement and competition law*. The approach undertaken in this analysis is based on the assumptions that both public procurement and competition law (as two sets of economic regulation included in the larger framework of European economic law) should be shaped and constrained by economic principles, and that their rules should be consistent with economic theory (and, more specifically, with free market economics) and substantially guided by economic efficiency considerations (chapter one, §VI).

The point of departure adopted in this chapter is that, whenever it is necessary to bring together two sets of regulation within the same constitutional economic framework or background, it is necessary to resort to their basic principles for guidance—in search of the *greatest common divisor* upon which to build solutions that are coherent with both bodies of rules. Such principles synthesise the legislative decisions framing a particular set of rules—and, from a functional perspective, should be taken into consideration when interpreting and applying them, in order to ensure that the legal rules adopted contribute towards reaching the set objectives. Furthermore, reliance on such principles should determine future legislative and policy decisions in each of these fields—if development of the regulatory framework is to be consistent and to offer the necessary degree of internal cohesion and logic. Hence, it is submitted that the analysis of the public procurement system from a competition law perspective has as a prerequisite the proper understanding of the principles that underlie and form the basis of each of these two sets of economic regulation. As shall be seen in this chapter, both sets of regulation share some core principles and goals—notably those of economic efficiency and the promotion of welfare—which, once brought to the surface, will allow for a better understanding of their relationship.

On the other side of the coin, when trying to approximate two different corpuses of rules, it will not be uncommon to find some conflicting principles and goals. Therefore, the efforts should be directed towards maximising the effectiveness of the shared

principles, while minimising the spillovers generated by the contradictions or conflicting goals inherent in the system. Such a balance will necessarily be delicate and will need to take into account the particulars of a broad set of situations. However, some general interpretative rules need to be set, so that the operation of the system is sound—particularly in those instances where both groups of rules are to be jointly applied. In the case of competition law and public procurement, it is my view that a useful approach will be that of stressing their basic or 'core' objectives and of minimising their instrumental use in the pursuit of 'secondary policies'—inasmuch as most of the potential for contradiction and inconsistency between them stems from a multiple-goal approach to each, or both, of these sets of economic regulation. In the end, narrowing down their function will pave the way towards a more consistent application and a more competition-oriented approach to public procurement.[1]

The analysis conducted in this chapter will be structured in three steps. First, the general common principles of both sets of rules *qua* economic regulation will be explored, trying to identify the ground on which they are developed and the actual possibilities for their use to generate (enhanced) pro-competitive results (§II). Second, the goals of each set of regulation will be explored separately, focusing on the objectives most commonly attributed to competition law (§III) and public procurement law (§IV). As anticipated, given the relative disagreement and the value judgements involved in the issue of the definition of the goals of economic regulation—and, with particular intensity, in the case of competition law—this will probably be one of the aspects of the study where a clearer normative position will need to be taken. And, in this case, the view that economics goes first in competition law, and that economic efficiency and social welfare should be the controlling goals of competition policy will be adhered to (above chapter one, §II).[2]

The chapter will conclude by emphasising the commonality of basic goals that exist in competition law and public procurement (§V). The existence of shared goals will constitute the basis on which to justify a common approach to competition and public procurement law. The remainder of the study will be based on these conclusions on the principles and goals of competition law and public procurement regulations, as well as their required trade-offs.

II. Principles Common to Competition and Public Procurement Law as Two Sets of Economic Regulation

According to classical economic theory, regulation—or, more generally, governmental intervention in the market is justified where *market failure* (or market imperfection) arises

[1] In similar terms, advocating for the narrowing of competition policy's goals, see DJ Neven, 'Competition Policy Objectives' in C-D Ehlermann and LL Laudati (eds), *European Competition Law Annual 1997: The Objectives of Competition Policy* (Oxford, Hart Publishing, 1998) 111, 116–17.

[2] Given the general and rather abstract nature of these issues, and that some of the main debates regarding the objectives and goals of economic regulation (and competition or antitrust in particular) have taken place outside the EU, the academic literature used in this chapter will not be limited to EU law. However, it is submitted that the general constructions and insights offered by all scholars—European, from the US or elsewhere—are equally relevant to this inquiry and can contribute to a more complete analysis.

and where governmental intervention constitutes an effective (and, arguably, efficient) instrument to remedy that failure.[3] When certain conditions impede the adequate functioning of the market, regulatory intervention can contribute to attaining better results by setting market-oriented rules or norms that can reach near-market outcomes. On the contrary, where markets work properly, public intervention cannot increase the efficiency of the system and economic regulation becomes undesirable for its distorting potential.[4]

However, even in the presence of market failures, a general preference for a regulatory intervention over market solutions should not be taken for granted because regulation has problems and failures of its own that require close scrutiny (ie, there are so-called *government or non-market failures*).[5] Regulation has its own problems (eg, limited information, bounded rationality and capture risk, among others)[6] that can generate

[3] See: AE Kahn, *The Economics of Regulation: Principles and Institutions* (New York, Wiley, 1970) 116–23, 172–78, 221–24 and 236–44; KJ Arrow, 'Political and Economic Evaluation of Social Effects and Externalities' in MD Intriligator (ed), *Frontiers of Quantitative Economics* (Amsterdam, North-Holland Publishing, 1971) 3, 4 and 18–20; OE Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications: A Study in the Economics of Internal Organization* (New York, Free Press, 1975) 219–21; RH Haveman, *The Economics of the Public Sector*, 2nd edn (Santa Barbara, Wiley, 1976) 30–46; S Breyer, *Regulation and its Reform* (Cambridge, MA, Harvard University Press, 1982) 15–34; RW Boadway and DE Wildasin, *Public Sector Economics*, 2nd edn (Boston, Little, Brown and Co, 1984) 55–82; LB Schwartz et al, *Free Enterprise and Economic Organization: Government Regulation*, 6th edn (New York, Foundation Press, 1985) 64–71; and CV Brown and PM Jackson, *Public Sector Economics*, 4th edn (Cambridge, Blackwell, 1990) 27–60. See also JE Stiglitz, *Economics of the Public Sector*, 3rd edn (New York, Norton, 2000) 77–90. However, normative analysis might fall short of explaining why regulation takes place—as the capture theory has shown; see GJ Stigler, 'The Theory of Economic Regulation' (1971) 2 *Bell Journal of Economics and Management Science* 3; S Peltzman, 'Toward a More General Theory of Regulation' (1976) 19 *Journal of Law and Economics* 211; and GS Becker, 'A Theory of Competition among Pressure Groups for Political Influence' (1983) 98 *Quarterly Journal of Economics* 371. See also WK Viscusi et al, *Economics of Regulation and Antitrust*, 4th edn (Cambridge, MIT Press, 2005) 392–96.

[4] Indeed, regulation can generate significant anti-competitive impacts; see the contributions to G Amato and LL Laudati (eds), *The Anticompetitive Impact of Regulation* (Cheltenham, Edward Elgar, 2001). For a criticism of the concept of market failure and a strong—albeit sometimes unconvincing—defence of unrestricted free market, see BP Simpson, *Markets Don't Fail* (New York, Lexington Books, 2005).

[5] C Wolf Jr, 'A Theory of Non-Market Failure: Framework for Implementation Analysis' (1979) 22 *Journal of Law and Economics* 107; who builds upon the insights brought forward by RH Coase, 'The Problem of Social Cost' (1960) 3 *Journal of Law and Economics* 1, 17–19 and id, 'The Regulated Industries: Discussion' (1964) 54 *American Economic Review* 194. Similarly, S Breyer, 'Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform' (1979) 92 *Harvard Law Review* 547; KA Shepsle and BR Weingast, 'Political Solutions to Market Problems' (1984) 78 *American Political Science Review* 417; JM Buchanan, 'Market Failure and Political Failure' (1988) 8 *Cato Journal* 1, 4–9; JE Stiglitz, 'On the Economic Role of the State' in A Heertje (ed), *The Economic Role of the State* (Oxford, Blackwell, 1989) 11, 38–39; JJ Pincus, 'Market Failure and Government Failure' in S King and P Lloyd (eds), *Economic Rationalism: Dead End or Way Forward* (St Leonards, Allen and Unwin, 1993) 261; A Ogus, *Regulation: Legal Form and Economic Theory* (Oxford, Clarendon Press, 1994) 55–75; OE Williamson, *The Mechanisms of Governance* (Oxford, Oxford University Press, 1996) 195–213; J Black, *Critical Reflections on Regulation* (LSE, Centre for Analysis of Risk and Regulation Discussion Paper No 4, 2004), available at www.lse.ac.uk/collections/CARR/pdf/Disspaper4.pdf; and C Winston, *Government Failure vs Market Failure. Microeconomics Policy Research and Government Performance* (Washington, AEI—Brookings Joint Center for Regulatory Studies, 2006). Also, RG Holcombe, *Public Sector Economics* (Belmont, Wadsworth, 1988) 400–01; MK Landy and MA Levin, 'Creating Competitive Markets: The Politics of Market Design' in MK Landy et al (eds), *Creating Competitive Markets. The Politics of Regulatory Reform* (Washington, Brookings Institution Press, 2007) 1, 5ff; and PH Schuck, 'Concluding Thoughts: How the Whole is Greater than the Sum of Its Parts' in MK Landy et al (eds), *Creating Competitive Markets. The Politics of Regulatory Reform* (Washington, Brookings Institution Press, 2007) 343; and MS Gal and I Faibish, 'Six Principles for Limiting Government-Facilitated Restraints on Competition' (2007) 44 *Common Market Law Review* 69. For an alternative view, see B Bozeman, 'Public-Value Failure: When Efficient Markets May Not Do' (2002) 62 *Public Administration Review* 145.

[6] For a clear summary and an application of these criteria to regulation conducted at the European level, see K Gatsios and P Seabright, 'Regulation in the European Community' (1989) 5 *Oxford Review of Economic Policy* 37, 39–59. Amongst these issues, a particularly relevant trend of literature stresses the public choice dimension

unexpected consequences,[7] or derived market and non-market failures—so no direct comparison between unregulated and perfectly regulated markets is to be made.[8] The proper assessment has to be between imperfect unregulated markets and imperfectly regulated markets.[9] Overseeing the limitations and problems inherent to any of the solutions would generate a bias towards excessive intervention or towards excessive abstention by the government—and neither of these outcomes is optimal in all situations. Moreover, the design of efficient economic regulation cannot be conducted in a vacuum, but needs to factor administrability and enforcement considerations into its overall rationality analysis.[10] These general considerations apply to competition law and public procurement law, as sets of economic regulation.[11]

Notwithstanding these concerns, in general terms, both competition and public procurement rules are desirable sets of economic regulation because they *are targeted at the correction of market failure*,[12] and are therefore capable of achieving better results than

of antitrust as regulation; see WF Shughart II and RD Tollison, 'The Positive Economics of Antitrust Policy: A Survey Article' (1985) 5 *International Review of Law and Economics* 39; RD Tollison, 'Public Choice and Antitrust' (1985) 4 *Cato Journal* 905; TJ DiLorenzo, 'The Origins of Antitrust: An Interest-Group Perspective' (1985) 5 *International Review of Law and Economics* 73; id, 'The Origins of Antitrust. Rhetoric vs Reality' (1990) 12 *Regulation* 26; BL Benson et al, 'Interest Groups and the Antitrust Paradox' (1987) 6 *Cato Journal* 801; H Hovenkamp, 'Antitrust's Protected Classes' (1989–90) 88 *Michigan Law Review* 1; ME DeBow, 'The Social Costs of Populist Antitrust: A Public Choice Perspective' (1991) 14 *Harvard Journal of Law and Public Policy* 205; WF Shughart II, 'Public-Choice Theory and Antitrust Policy' in FS McChesney and WF Shughart II (eds), *The Causes and Consequences of Antitrust: The Public-Choice Perspective* (Chicago, University of Chicago Press, 1995) 7; FS McChesney, 'In Search of the Public-Interest Model of Antitrust' in ibid 25.

[7] For an economic approach to these problems, see R Norton, 'Unintended Consequences' in DR Henderson (ed), *The Fortune Encyclopedia of Economics* (New York, Warner Books, 1993) 92.

[8] Particularly, because a completely unregulated market is not a viable, practical alternative; see PL Joskow and RG Noll, 'Regulation in Theory and Practice: An Overview' in G Fromm (ed), *Studies in Public Regulation* (Cambridge, MIT Press, 1981) 1, 2 and 35–40.

[9] See: C Wolf Jr, *Markets or Governments. Choosing between Imperfect Alternatives* (Cambridge, MA, MIT Press, 1988) 6. Also NK Komesar, *Imperfect Alternatives. Choosing Institutions in Law, Economics and Public Policy* (Chicago, University of Chicago Press, 1994) ix; Stiglitz (n 3) 89; Viscusi (n 3) 10; and C Bentivogli and S Trento, *Economia e politica della concorrenza. Intervento antitrust e regolamentazione* (Rome, Nuova Italia Scientifica, 1995, repr 1997) 36–37. Warnings against the so-called *nirvana approach* in normative analysis need to be remembered; see H Demsetz, *The Organization of Economic Activity—Efficiency, Competition, and Policy* (New York, Basil Blackwell, 1989) 3; EA Robinson, 'The Problem of Management and the Size of Firms' (1934) 44 *Economic Journal* 240, 250; and Williamson (n 5) 210.

[10] Williamson (n 5) 287; PE Areeda and H Hovenkamp, *Antitrust Law. An Analysis of Antitrust Principles and Their Application,* 3rd edn plus 2007 2nd Cumulative Supplement (New York, Aspen Law and Business, 2006–08) 99.

[11] Even if it could seem obvious, this apparently minor point has given rise to substantial criticism of mainstream antitrust theory; see FS McChesney, 'Antitrust and Regulation: Chicago's Contradictory Views' (1991) 10 *Cato Journal* 775; and id, 'Be True to Your School: Chicago's Contradictory Views of Antitrust and Regulation' in McChesney and Shughart II (n 6) 323.

[12] See: U Böge, 'Competition and Regulation: What Role Can the State Play for a Better Functioning of the Markets?' in AM Mateus and T Moreira (eds), *Competition Law and Economics. Advances in Competition Policy and Antitrust Enforcement* (The Hague, Kluwer Law International, 2007) 345, 346–47. *Cf* Black (n 5) 7–11. As already indicated, this study adheres to the 'orthodox' view of regulation and, while acknowledging that the other aims mentioned are also desirable, we consider that *economic* regulation must be focused on the project of welfare economics, ie, directed towards the correction of market failure. Along these lines, see Breyer (n 3); Ogus (n 5) 29–46; RG Noll, 'Economic Perspectives on the Politics of Regulation' in R Schmalensee and RD Willig (eds), *Handbook of Industrial Organization* (Oxford, Elsevier, 1989) 1253, *reprinted in* AI Ogus (ed), *Regulation, Economics and the Law*, International Library of Critical Writings in Economics (Cheltenham, Edward Elgar, 2001) 35, 36–43; and CR Sunstein, 'The Functions of Regulatory Statutes' in *After the Rights Revolution: Reconceiving the Regulatory State* (Cambridge, MA, Harvard University Press, 1990) 47, reprinted in Ogus (ibid) 3, 4–13.

completely unregulated markets.[13] In the case of competition law, its main aim is to react to and correct competition failures and, particularly, the inefficient exercise of market power by undertakings.[14] In the case of public procurement, identifying a single market failure that justifies its existence might be troublesome—as competition failures, information failures, internalities, externalities, the provision of public goods and distortions generated by the political implications of government contracts, etc, are all present to a certain extent. The existence of all these market and non-market irregularities clearly distorts the functioning of competitive dynamics in the public procurement setting (above chapter two, §V) and requires careful consideration of procurement regulations in order to avoid them and to provide effective remedies that contribute to increase the overall efficiency of the regulatory system. Therefore, *both sets of economic regulation are justified in general terms in correcting market failures*, and their integration and joint application seem to leave room for significant developments—as long as certain limits are respected. Indeed, the analysis of competition law and public procurement rules should also start from the premise that *both are sets of economic regulation that have flaws or limitations of their own*—which, under certain circumstances, might claim for a restricted application (or a more market-oriented approach). Excesses in competition law development might chill innovation,[15] and distort the incentives that markets generate for socially desirable economic behaviour.[16] On its part, excesses in public procurement regulations can either pose difficulties to the proper performance of the government's functions, generate market distortions (particularly in markets where the public buyer is relatively more important; above chapter two, §II.B.ii), or both. Consequently, setting limits to the development of both sets of economic regulation—some of which will be reciprocally imposed on one another—will be important if the negative effects that excessive regulation of economic activities can easily bring forward are to be avoided.

From a different perspective, both competition law and public procurement regulations are sets of economic regulation of a *horizontal nature*[17]and both have the specificity

[13] On the view of antitrust as one among various forms of economic regulation, see LC Thurow, *The Zero–Sum Society. Distribution and the Possibilities for Economic Change* (New York, Basic Books 1980) 124; FH Easterbrook, 'The Limits of Antitrust' (1984–85) 63 *Texas Law Review* 1; TJ Muris, 'Looking Forward: The Federal Trade Commission and the Future Development of US Competition Policy' (2003) *Columbia Business Law Review* 359, 365; WE Kovacic, 'US Antitrust Policy and Public Restraints on Business Rivalry' in ABA, *Issues in Competition Law and Policy* (Chicago, ABA Section of Antitrust Law, 2008) 209–11; and G Clamour, *Intérêt général et concurrence. Essai sur la pérennité du droit public en économie de marché* (Paris, Dalloz, 2006) 141–46 and 160. See also R Dibadj, 'Saving Antitrust' (2004) 75 *University of Colorado Law Review* 745, 748. Similarly, public procurement has also been characterised as an important set of economic law; see C Bovis, *Public Procurement in the European Union* (New York, Palgrave-Macmillan, 2005) 12; and id, *EC Public Procurement: Case Law and Regulation* (Oxford, Oxford University Press, 2006) 19.

[14] *Cf* DS Evans, 'Economics and the Design of Competition Law' in ABA (n 13) 99.

[15] See generally: D McGowan, 'Innovation, Uncertainty and Stability in Antitrust Law' (2001) 16 *Berkeley Technology Law Journal* 729; and JB Baker, 'Beyond Schumpeter vs Arrow: How Antitrust Fosters Innovation' (2007) 74 *Antitrust Law Journal* 575.

[16] In fact, some scholars have strongly doubted that it is possible to devise a set of antitrust rules that creates more economic welfare than it destroys; DJ Dewey, *The Antitrust Experiment in America* (New York, Columbia University Press, 1990) 133–57. Recently, ES Rockefeller, *The Antitrust Religion* (Washington, Cato Institute, 2007).

[17] Even if public procurement could be seen as a vertical or sectoral body of regulation (because it limits its scope to the activities of the public buyer) it does not apply only to a given and specific economic sector (such as telecommunications, energy, transport, etc.). Hence, its configuration as a horizontal set of rules seems more adequate for the analytical purposes of this enquiry.

of affecting the whole of the market—even if their main addressees are either private or public economic agents. However, antitrust might be of a more universal applicability, inasmuch as competition rules apply constantly in all sectors of economic activity. For their part, public procurement rules discipline the activity of the public purchaser and, consequently, their applicability to a given economic sector will depend on the intensity and frequency of the activities of the public purchaser. Therefore, while both sets of rules apply concurrently to all economic sectors, antitrust will always have to be taken into consideration, while public procurement rules might be ignored in those markets where the public buyer is not present—or where its presence is largely marginal. Nevertheless, given the puissance of public procurement and its extension to almost every sector of economic activity (see above chapter one, §I.B) it will be rare to find markets only subject to competition law. Hence it must be concluded that, given their horizontal approach and concurrent application, overlap between competition law and public procurement will be frequent and will determine the competitive dynamics in most markets—to a larger or more restricted extent. Hence, in my view, the need to align both sets of economic regulation becomes almost self-evident.

In addition, it is also submitted that both sets of economic regulation are *ill-equipped for the pursuance of non-economic goals* (below §III and §IV) and that both are subject to substantial risks of instrumentalisation, politicisation and use with populist finalities. Subversion of the appropriate role of both sets of economic regulation is common and, while competition policy seems to be (currently) more detached from non-economic goals, public procurement rules and practices are still significantly conditioned by them. Moreover, both sets of economic regulation not only need to be narrowed down to their core economic goals, but *should also be evaluated and designed exclusively on welfare grounds*.[18] Hence, it is submitted that, in correcting the different market failures that justify them, these sets of economic regulation will only be desirable if and to the extent that they increase social welfare.

Competition law and public procurement regulations are *designed to discipline the market behaviour of some of the main players in a free market economy*—competition law

[18] The difficulty of using other evaluative criteria, such as fairness, was stressed by GJ Stigler, 'The Law and Economics of Public Policy: A Plea to the Scholars' (1972) 1 *Journal of Legal Studies* 1. See also Stiglitz (n 3) 93–117; and Viscusi et al (n 3) 9–10. Along the same lines, with an elaborated claim for the use of welfare economics (ie, normative analysis based on social welfare) as the main tool to assess regulation, see L Kaplow and S Shavell, *Welfare versus Fairness* (Cambridge, MA, Harvard University Press, 2002). Some of the basic tenets of their work were anticipated in id, 'The Conflict between Notions of Fairness and the Pareto Principle' (1999) 1 *American Law and Economics Review* 63, and 'Any Non-Welfarist Method of Policy Assessment Violates the Pareto Principle' (2001) 109 *Journal of Political Economy* 281. Their work gave rise to a very technical and heated debate; see H Chang, 'A Liberal Theory of Social Welfare: Fairness, Utility and the Pareto Principle' (2000) 110 *Yale Law Journal* 173, replied by L Kaplow and S Shavell in 'Notions of Fairness Versus the Pareto Principle: On the Role of Logical Consistency' (2001) 110 *Yale Law Journal* 237; and, later, M Fleurbaey et al, 'Any Non-Welfarist Method of Policy Assessment Violates the Pareto Principle: A Comment' (2003) 111 *Journal of Political Economy* 1382, rebutted by L Kaplow and S Shavell in 'Any Non-Welfarist Method of Policy Assessment Violates the Pareto Principle: Reply' (2004) 112 *Journal of Political Economy* 249. Their arguments have been further developed in Kaplow and Shavell, 'Fairness versus Welfare: Notes on the Pareto Principle, Preferences, and Distributive Justice' (2003) 32 *Journal of Legal Studies* 331. However, criticisms have continued; see A Ripstein, 'Too Much Invested to Quit' (2004) 20 *Economics and Philosophy* 185, and L Kaplow and S Shavell, 'Reply to Ripstein: Notes on Welfarist versus Deontological Principles' (2004) 20 *Economics and Philosophy* 209. On these issues, see also M Baldassarri and G Piga, 'Distributive Equity and Economic Efficiency: Trade-Off and Synergy' in M Baldassarri et al (eds), *Equity, Efficiency and Growth: the Future of the Welfare State* (Houndmills, Macmillan, 1996) 257.

is mainly aimed at producers' and other offerors' behaviour,[19] while public procurement rules primarily curb the behaviour of the public buyer[20]—and their remedies and regulatory instruments are designed to maintain competition conditions undistorted—or to promote economic efficiency even in the absence of distortions. None of these sets of rules contains tools properly designed to attain goals other than the adequate development of market activities. Therefore, they have a very narrow purpose, and aim at attaining the basic economic objective of maintaining (and promoting) undistorted competition in the market as a means to attain increased welfare (below §V). Social goals (mainly, redistribution of income) based on justice, fairness or other related concepts fall outside their scope and should be left to specific public policies and other fields of regulation,[21] such as taxation and other social programmes, that are better designed to offer adequate solutions—subject to political will and other social considerations.[22]

As already mentioned, in their main function—ie, in disciplining the market behaviour of some of the main players in a free market economy—*both bodies of regulation interact and partially overlap*, at least as regulation of competition in the market is concerned. Both sets of regulation are concerned with *competition*.[23] Public procurement rules protect and

[19] Private buyer behaviour is rarely the object of detailed competition law analysis, other than in a relatively limited set of cases regarding retail distribution; see C Doyle and R Inderst, 'Some Economics on the Treatment of Buyer Power in Antitrust' (2007) 28 *European Competition Law Review* 210; and R Inderst and N Mazzarotto, 'Buyer Power in Distribution' in ABA (n 13) 1953. However, as has been already stressed (chapter two) there are many other important instances where antitrust should be applied to the buying behaviour of economic agents, given its implications in market competitive dynamics.

[20] However, it is submitted that public procurement is also a set of economic regulation with a major focus and impact on the activity and market behaviour of private agents. Public procurement not only sets the framework in which the public buyer procures supplies, works and services. This regulation also establishes the limits within which private actors interact with the public purchaser. However, given the main focus that public procurement regulations have on the public buyer and its behaviour, most of such limits are implicit, but they are of major importance.

[21] It is true, that 'whatever the overt objective [of economic regulations] the implicit objective is always to alter the distribution of income and this is almost always the real reason for the existence of any regulation'; Thurow (n 13) 123. However, this does not mean that redistributive considerations should be fully taken into account by each and all types of economic regulation. Rather, they should be left to specific types of economic regulation, such as taxation.

[22] The original idea goes back to RA Musgrave, *The Theory of Public Finance. A Study in Public Economy* (New York, McGraw-Hill, 1959). An interesting and detailed analysis is provided by Kaplow and Shavell (n 18, 2002) 33–34. Their arguments had already been outlined in S Shavell, 'A Note on Efficiency vs Distributional Equity in Legal Rulemaking: Should Distributional Equity Matter Given Optimal Income Taxation?' 71 *American Economic Review* 414 (1981); and in L Kaplow and S Shavell, 'Why the Legal System is Less Efficient than the Income Tax in Redistributing Income' (1994) 23 *Journal of Legal Studies* 667, and id, 'Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income' (2000) 29 *Journal of Legal Studies* 821. Along the same lines, and more specifically in relation to the goals of competition law, see V Korah, *An Introductory Guide to EC Competition Law and Practice*, 9th edn (Oxford, Hart Publishing, 2007) 11. See also C Kaysen and DF Turner, *Antitrust Policy: An Economic and Legal Analysis* (Cambridge, Harvard University Press, 1959) 11–12; Viscusi et al (n 3) 66–67; and R Schmalensee, 'Thoughts on the Chicago Legacy in US Antitrust' in R Pitofsky (ed), *How the Chicago School Overshot the Mark* (Oxford, Oxford University Press, 2008) 11, 13. *Contra*, amongst others, T Prosser, *The Limits of Competition Law. Markets and Public Services* (Oxford, Oxford University Press, 2005) 34. Also, for a criticism of this line of thought—particularly the works of Kaplow and Shavell—see C Sanchirico, 'Taxes versus Legal Rules as Instruments for Equity: A More Equitable View' (2000) 29 *Journal of Legal Studies* 797; and id, 'Deconstructing the New Efficiency Rationale' (2001) 86 *Cornell Law Review* 1003.

[23] Some authors have held that these sets of regulation are not necessarily concerned with the same concept or type of competition; see O Black, *Conceptual Foundations of Antitrust* (Cambridge, Cambridge University Press, 2005) 9. In similar terms, it has been held that the notion of competition in the sphere of public procurement rules is different from the broader notion of competition that constitutes a fundamental principle of EU law,

promote competition as a means to achieve value for money and to ensure the legitimacy of purchasing decisions. From this perspective, competition is seen as a technique that allows the public purchaser to obtain the benefits of competitive pressure among (participating) bidders (below §IV.B), as well as a key instrument to deter favouritism and other corrupt practices and deviations of power (below §IV.D). In more general terms, competition law is concerned with maintaining healthy markets as a means of attaining allocative and productive efficiency and, in the end, of maximising welfare (below §III.B). Therefore, competition law's concern with *competition* might seem broader than that of public procurement regulation—which, in some sense, is no more and no less than a particularisation of competition law rationale in the limited setting of public tenders.[24]

Indeed, antitrust law focuses on competition in the markets, in general terms, as the basic means to attain allocative efficiency and, consequently, to maximise social welfare.[25]

However, public procurement regulations—while implicitly relying on the existence of competitive markets—put a special stress on a narrower concept of competition, strictly limited to the particular bidding process or otherwise competitive contracting procedure. Public procurement assumes that markets are generally competitive (in the sense of competition pursued by antitrust) or, more simply, take as a given their economic structure and competitive dynamics.[26] Therefore, given that public procurement strongly relies on competitive markets and focuses on a narrower (but by no means incompatible) aspect of competition, it will be necessary to ensure that the design of public procurement rules and administrative practices, while fit and appropriate to promote competition in the narrower sense (ie, competition *within* the procurement process), do not generate unnecessary distortions to competition in its broader sense (competition *in the market* concerned by public procurement activities).

In the end, it should be stressed that, by overlapping and interacting, both bodies of economic regulation generate significant constraints (or are relevant determinants) to each other. By attaining its goals—ie, by keeping healthy and competitive markets—antitrust enhances government's chances of obtaining value for money and of running an undistorted procurement system. By promoting and effectively relying on competition, public procurement rules avoid distorting the competitive dynamics of those markets where the behaviour of the public buyer is particularly relevant. However, where competition law

although close links between them must be acknowledged; see JF Brisson, *Les fondements juridiques du droit des marchés publics* (Paris, Imprimerie Nationale, 2004) 25. However, in my opinion and as is argued in the text, both concepts of competition are present in public procurement rules, and competition in the broader sense is also one of the fundamental principles of EU public procurement law (for details, see below chapter five).

[24] In this sense, more than being two sides of the same coin, public procurement regulation is embedded in the broader framework of competition law and policy, and constitutes a specialised or complementary set of economic regulation rules to discipline the market behaviour of the public buyer. See Brisson (n 23); and id, 'Les offres du secteur public marchand' in F Lichère (ed), *Le nouveau droit des marchés publics* (Paris, L'hermès, 2004) 148, 151–52; and C Yannakopoulos, 'L'apport de la protection de la libre concurrence à la théorie du contrat administratif' (2008) 2 *Revue du Droit publique et de la science politique* 421, 444. See also DK Round, 'The Impact of Government Purchases on Market Performance in Australia' (1984) 1 *Review of Industrial Organization* 94, 94 and 105–06. On this, see below chapter five, §II.C.

[25] See: SF Ross, *Principles of Antitrust Law* (Westbury, Foundation Press, 1993) 1–11; and D Hay, 'The Assessment: Competition Policy' (1993) 9 *Oxford Review of Economic Policy* 1, 2–6.

[26] G Piga and KV Thai, 'The Economics of Public Procurement: Preface' (2006) *Rivista di Politica Economica* 3, 5; also, KV Thai, 'Public Procurement Re-examined' (2001) 1 *Journal of Public Procurement* 9, 34. For further references, see chapter one, §I.B.

fails to guarantee undistorted competition conditions, public procurement will hardly develop optimally and government's alternatives will significantly be impaired by the distorted conditions on which it seeks to procure goods or services. Similarly, when public procurement rules are not effectively pro-competitive, they can generate market failures that competition law is initially designed to attack and minimise. In those cases, enforcement of competition law's principles (ie, the design of more competition-oriented public procurement rules) becomes necessary if undistorted market competition is to be attained (see above chapter two, §VI). Therefore, *the strong links between both sets of regulation seem to cry out for a common approach and consistent application*. The development of such a common approach should take into due consideration the more specific goals of both sets of economic regulation, which are revisited in the following sections.

III. The Goal(s) of Competition Law

A. Brief Overview of the Discussion Regarding this Topic

Setting the goals of competition law has given rise to long-lasting and relevant discussions between lawyers, economists and political scientists, as well as amongst members of each of these disciplines. The need to clarify the goals of competition law is a precondition to its adequate rationalisation and the basis on which to construe a coherent set of rules.[27] This is particularly relevant because competition law has become one of the main components of the economic constitution (or economic constitutional law), particularly in most developed countries,[28] such as the US[29] and the EU and its Member States.[30] Moreover,

[27] This has become commonplace, especially since Bork made a strong claim for such clarification and ignited a debate that is still to be exhausted. See RH Bork, *The Antitrust Paradox. A Policy at War with Itself*, 2nd edn (New York, The Free Press, 1993) 50. See also ILO Schmidt and JB Rittaler, *A Critical Evaluation of the Chicago School of Antitrust Analysis*, Studies in Industrial Organisation no 9 (Boston, Kluwer, 1989) 107; and Williamson (n 5) 279.

[28] P Buccirossi, 'Introduction' in id (ed), *Handbook of Antitrust Economics* (Cambridge, MIT Press, 2008) xiii.

[29] Antitrust laws in general, and the Sherman Act in particular, have been considered the *Magna Carta* of economic freedom by the US SCt; see *United States v Topco Assocs* 405 US 596, 610 (1972).

[30] J Baquero Cruz, *Between Competition and Free Movement: The Economic Constitutional Law of the European Community* (Oxford, Hart Publishing, 2002); Bentivogli and Trento (n 9) 12 and 43–44; E-U Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (Freiburg, Freiburg University Press, 1991); id, 'Theories of Justice, Human Rights and the Constitution of International Markets' (2004) 37 *Loyola University of Los Angeles Law Review* 407; and Clamour (n 13) 365. *Cf* M Poiares Maduro, *We the Court. The European Court of Justice and the European Economic Constitution. A Critical Reading of Article 30 of the EC Treaty* (Oxford, Hart Publishing, 1998, repr 2002) 67–68 and 77–78. On the substantial contribution of competition to the development of the EU (and its internal market), see RD Anderson and A Heimler, 'What Has Competition Done for Europe? An Inter-Disciplinary Answer' (2007) 4 *Aussenwirtschaft* 419, 421–26; and J Munkhammar, *What Competition Has Done for Europe* (EEI Policy Papers, 2007), available at www.european-enterprise.org/public/docs/eeipolicypaper8.pdf. However, it could be argued that the situation at the EU level might change with some of the amendments to the TEC introduced by the Treaty of Lisbon—and particularly the substitution of previous art 3(1)(g) TEC with Protocol (No 27) TFEU—as competition may no longer be an express objective of the Treaty; see A Riley, 'The EU Reform Treaty and the Competition Protocol: Undermining EC Competition Law' (2007) 28 *European Competition Law Review* 703; LC Datou, 'Protectionism: Towards a more Politicised Deal Environment in Europe?' (2008) *European Antitrust Review* 50; R Lea, 'An Economically Liberal European Union Will Not Be Delivered by the EU Reform Treaty' (2008) 28 *Economic Affairs* 70, 72; and N Petit and N Neyrinck, 'A Review of the Competition Law Implications of the Treaty on the Functioning

the importance of such a query is almost self-evident if one considers the large volume of academic works dedicated to exploring the purpose and foundations of competition law.[31]

Indeed, in the past, there was no universal concept of antitrust or of the underlying concept of competition;[32] its goals seemed to be fuzzy and the main principles that informed this discipline were subject to substantial criticism and discussion in both the fields of law and economics. Maybe as a consequence of such an unclear situation (and of the strong political implications that competition policy has), antitrust authorities and judges pursued a wide diversity of objectives and based their decisions and rulings on diverse rationales[33]—which sometimes conflicted with sound economic theory and offered criticisable results that have endured in antitrust doctrine and case law for a relatively long period of time.[34] Particularly in the case of the EU, competition law was used to pursue alternative (or even conflicting) goals.[35]

of the European Union' (2010) 2(1) *CPI Antitrust Journal* 1, 2–4. *Contra*, see A Kaczorowska, *European Union Law* (New York, Routledge, 2009) 50. For further discussion on the potential impact (or lack of) of the Treaty of Lisbon on the system of EU competition law; chapter one, §VI and chapter four, §IV.D.

[31] The literature is almost unmanageable and references are legion. For some recent pieces, with numerous references to previous works, see the various contributions to Ehlermann and Laudati (n 1); as well as LA Sullivan and WS Grimes, *The Law of Antitrust: An Integrated Handbook* (St Paul, West Group, 2000) 2–19; H Hovenkamp, 'Post-Chicago Antitrust: A Review and Critique' (2001) *Columbia Business Law Review* 257; and KN Hylton, *Antitrust Law. Economic Theory and Common Law Evolution* (Cambridge, Cambridge University Press, 2003) 40. For discussion, see MM Dabbah, *The Internationalisation of Antitrust Policy* (Cambridge, Cambridge University Press, 2003, repr 2005) 49–58. Also recent, see BH McDonnell and DA Farber, 'Are Efficient Antitrust Rules Always Optimal?' (2003) 47 *Antitrust Bulletin* 807; DA Farber and BH McDonnell, '"Is There a Text in This Class?" The Conflict between Textualism and Antitrust' (2004–05) 14 *Journal of Contemporary Legal Issues* 619; WH Rooney, 'The Public Square for Antitrust Discourse' (2004) *Columbia Business Law Review* 263; A Pera and V Auricchio, 'Consumer Welfare, Standard of Proof and the Objectives of Competition Policy' (2005) 1 *European Competition Journal* 153; JJ Flynn, 'The Role of Rules in Antitrust Analysis' (2006) *Utah Law Review* 605; and the contributions to J Drexl et al (eds), *Economic Theory and Competition Law* (Cheltenham, Edward Elgar, 2009).

[32] On the diverging conceptions of competition, see J High, 'Competition' in DR Henderson (ed), *The Fortune Encyclopedia of Economics* (New York, Warner Books, 1993) 622; J Vickers, 'Concepts of Competition' (1995) 47 *Oxford Economic Papers* 1; and JS Metcalf, *Evolutionary Economics and Creative Destruction* (London, Routledge, 1998) 10–39. See also GJ Stigler, *The Organization of Industry* (Chicago, University of Chicago Press, 1968, repr 1983) 5–22; and D Hildebrand, *The Role of Economic Analysis in the EC Competition Rules*, 2nd edn (New York, Kluwer Law International, 2002) 109–81; and WJ Kolasky, 'What Is Competition? A Comparison of US and European Perspectives' 49 *Antitrust Bulletin* (2004) 29.

[33] RA Posner, *Antitrust Law*, 2nd edn (Chicago, The University of Chicago Press, 2001) 2; H Hovenkamp, *The Antitrust Enterprise. Principle and Execution* (Cambridge, MA, Harvard University Press, 2005); Antitrust Modernization Commission, *Report and Recommendations* (April 2, 2007), available at govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf (35–36); and DA Crane, 'Technocracy and Antitrust' (2008) 86 *Texas Law Review* 1159, 1211–12.

[34] Indeed, poor economic consistence led to important criticisms of antitrust policy, such as the influential work of Bork (n 27); or the works of DT Armentano, *The Myths of Antitrust. Economic Theory and Legal Cases* (New Rochelle, Arlington House, 1972), *Antitrust Policy. The Case for Repeal* (Washington, Cato Institute, 1986) and *Antitrust and Monopoly: Anatomy of a Policy Failure*, 2nd edn (New York, Holmes and Meier, 1990). See also Dewey (n 16); and Thurow (n 13) 145–53; and, more recently, some of the contributions to G Hull (ed), *The Abolition of Antitrust* (New Brunswick, Transaction Publishers, 2005).

[35] F Souty, *Le Droit et la politique de la concurrence de l'Union Européenne*, 3rd edn (Paris, Montchrestien, 2003) 11–41; G Monti, 'New Directions in EC Competition Law' in T Tridimas and P Nebbia (eds), *European Union Law for the Twenty-First Century: Rethinking the New Legal Order* (Oxford, Hart Publishing, 2004) 177, 188–90; and R van den Bergh, 'The "More Economic Approach" and the Pluralist Tradition of European Competition Law' in D Schmidtchen et al (eds), *The More Economic Approach to European Competition Law* (Tübingen, Mohr Siebeck, 2007) 27, 27–32.

Commentary on those decisions and rulings tended to be sharp and to raise heated debate as regards the proper goals of competition law. Probably the most remarkable debate concerned the legislative intent behind the approval of the Sherman Act.[36]

However, the inquiry concerning this legislative intent has demonstrated a limited ability to shed light on the goals of this legal discipline.[37] In the last resort, antitrust is a largely specialised corpus of economic regulation and as the market economy (and economic theory) evolves, its goals—but particularly its techniques and remedies—might change.[38]

So, analysis of legislative intent might lose (or have lost) relevance over time,[39] and be substituted by economic analysis.[40] As a consequence, the debate tilted towards a clearly normative analysis of antitrust rules as a body of economic regulation and, particularly, towards the normative recommendations of the *Chicago School*[41] which strongly emphasised the pursuit of *economic efficiency* (usually termed, somewhat confusingly, as consumer welfare)[42] as the sole desirable goal of antitrust[43]—in a clear move away from re-distributive welfare considerations, and from the basic focus on market structure by the *Harvard School*[44]—although the current prevailing view may have softened some of the *Chicago School*'s most extreme positions, in order to accommodate certain concerns regarding excessive permissiveness of anti-competitive conduct.[45]

[36] For a review of the evolution of the ideology behind antitrust laws, see WH Page, 'The Ideological Origins and Evolution of Antitrust Law' in ABA (n 13) 1, 1–17; and S Martin, 'The Goals of Antitrust and Competition Policy' in ABA (n 13) 19, 20.

[37] Some authors have found a clear intent in the approval of the US antitrust statute; especially, see RH Bork, 'Legislative Intent and the Policy of the Sherman Act' (1966) 9 *Journal of Law and Economics* 7. However, his findings can hardly be considered conclusive, as substantial research indicates the mix of reasons and goals that led to the approval of the Sherman Act; see KG Elzinga, 'The Goals of Antitrust: Other than Competition and Efficiency, What Else Counts?' (1976–77) 125 *University of Pennsylvania Law Review* 1191; RH Lande, 'Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged' (1982–1983) 34 *Hastings Law Journal* 65; and Dewey (n 16) 128–29. However, the limited conclusions that can be reached with that analysis do not impede the adoption of the consumer welfare standard or, arguably, of any welfare standard with a sound economic justification; see Hovenkamp (n 33) 39–45.

[38] See: AA Foer, 'The Goal of Antitrust; Thoughts on Consumer Welfare in the US' in P Marsden (ed), *Handbook of Research in Trans-Atlantic Antitrust* (Cheltenham, Edward Elgar Publishing, 2007) 566.

[39] Similarly, see Areeda and Hovenkamp (n 10) 59; F Jenny, 'Competition and Efficiency' in Barry Hawk (ed), *Antitrust in a Global Economy*, Annual Proceedings of the Fordham Corporate Law Institute 1993 (Deventer, Kluwer Law, 1994) 185, 188; G Monti, *EC Competition Law* (Cambridge, Cambridge University Press, 2007) 2–3; and Dabbah (n 31) 51. See generally DA Farber and PP Frickey, *Law and Public Choice. A Critical Introduction* (Chicago, University of Chicago Press, 1991) 101.

[40] DW Carlton, 'Using Economics to Improve Antitrust Policy' (2004) *Columbia Business Law Review* 283.

[41] But see: ER Elhauge, 'Harvard, not Chicago: Which Antitrust School Drives US Supreme Court Decisions?' (2007) 2 *Competition Policy International* 59. On the influence of the Chicago and Harvard Schools, see WE Kovacic, 'The Intellectual DNA of Modern US Competition Law for Dominant Firm Conduct: The Chicago Harvard Double Helix' (2007) *Columbia Business Law Review* 1; and DA Crane, 'Chicago, Post-Chicago, and Neo-Chicago' (2009) 76 *University of Chicago Law Review* 1911, 1920–33.

[42] For clarification of the economic concept of efficiency and its proper use, see P Heyne, 'Efficiency' in DR Henderson (ed), *The Fortune Encyclopedia of Economics* (New York, Warner Books, 1993) 9.

[43] Bork (n 27) xi.

[44] Most of the basic propositions of the Harvard School can be found in Kaysen and Turner (n 22) 11–18, 44–48, 113–19 and 127–33.

[45] For a general description of this evolution, see also WE Kovacic and C Shapiro, 'Antitrust Policy: A Century of Economic and Legal Thinking' (2000) 14 *Journal of Economic Perspectives* 43. For a comparison with the parallel development of competition law in the EU, see G Amato, *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market* (Oxford, Hart Publishing, 1997) 1–45 and 95–108. For a critical view of some of the Chicago School's excesses, see the various articles included in Pitofsky (n 22). On the current situation, see TA Piraino, Jr, 'Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the

As a result of these debates and of the development of competition policy, a broad consensus on the goals of antitrust law has emerged,[46] and significant convergence has been achieved (towards US standards, deeply influenced by the Chicago School).[47] A change of goals might have been particularly clear in the EU, where a 'more economic approach' towards competition law and policy has recently been adopted.[48] The breadth of goals formerly attributed to competition law has been significantly reduced and *economic efficiency is clearly at the centre of contemporary antitrust conceptions*.[49]

There is still some room for delimiting the precise contours of this goal (eg, total welfare versus consumer welfare, a more dynamic approach, etc),[50] but the general consensus

21st Century' (2007) 82 *Industrial Law Journal* 345, 348, 362–67 and 409; O Budzinski, 'Monoculture versus Diversity in Competition Economics' (2008) 32 *Cambridge Journal of Economics* 295, 296–313; and Monti (n 39) 53–79.

[46] PE Areeda, 'Introduction to Antitrust Economics' (1983) 52 *Antitrust Law Journal* 523. Consensus about the goals of antitrust laws is, indeed, greater than at any other time in the last half century; see Hovenkamp (n 33) 1; and Posner (n 33) ix. See also Schmalensee (n 22) 12–13; TE Kauper, 'Influence of Conservative Economic Analysis on the Development of the Law of Antitrust' in Pitofsky (n 22) 40, 47; and A Pera, 'Changing Views of Competition, Economic Analysis and EC Antitrust Law' (2008) 4 *European Competition Journal* 127, 127 and 141–44. *Contra*, Budzinski (n 45) 304 and 313.

[47] Crane (n 33) 1211; CA Jones, 'Foundations of Competition Policy in the EU and USA: Conflict, Convergence and Beyond' in H Ullrich (ed), *The Evolution of European Competition Law. Whose Regulation, Which Competition?*, Ascola Competition Law Series (Cheltenham, Edward Elgar, 2006) 17, 30–31. Hovenkamp (n 33) 10 and 31; and RT Pitofsky, 'Antitrust at the Turn of the Twenty-first Century: A View from the Middle' (2002) 76 *St John's Law Review* 583; but see D De Smet, 'The Diametrically Opposed Principles of US and EU Antitrust Policy' (2008) 29 *European Competition Law Review* 356, 358. In any event, convergence in the antitrust field is but an example of a wider convergence and consensus in the area of public sector economics; see Stiglitz (n 3) 9–12.

[48] See: H Ullrich, 'Introduction' in id (n 47) 3, 11–12; and W-H Roth, 'The "More Economic Approach" and the Rule of Law' in D Schmidtchen et al (eds), *The More Economic Approach to European Competition Law* (Tübingen, Mohr Siebeck, 2007) 37, 41. See also DJ Neven, 'Competition Economics and Antitrust in Europe' (2006) 21 *Economic Policy* 741, 752–62. However, the adoption of this approach is not free from criticism; see ILO Schmidt, 'The Suitability of the More Economic Approach for Competition Policy: Dynamic v Static Efficiency' (2007) 28 *European Competition Law Review* 408, 410–11. On the political economy of such a revision of goals, C Kirchner, 'Goals of Antitrust and Competition Law Revisited' in Schmidtchen et al, 7.

[49] For discussion, see AI Gavil et al, *Antitrust Law in Perspective. Cases, Concepts and Problems in Competition Policy*, 2nd edn (St Paul, Thomson-West, 2008) 17–32.

[50] Indeed, despite the existing support for the goal of '*consumer welfare*', it should be acknowledged that there is currently no clear consensus as to whether it encompasses static or dynamic efficiency goals, or both, or how to make them compatible; see Foer (n 38) 567; and GJ Werden, *Essays on Consumer Welfare and Competition Policy* (Working Paper, 2009), available at http://ssrn.com/abstract=1352032. As regards the difficulty in restricting the welfare goal of competition law to (strict) consumer or to total welfare, it is important to stress that consensus among economists—even if not absolute—points towards the adoption of a total welfare standard; see S Bishop and M Walker, *Economics of EC Competition Law: Concepts, Application and Measurement*, 2nd edn (London, Sweet & Maxwell, 2002) 23–27; M Motta, *Competition Policy: Theory and Practice* (Cambridge, Cambridge University Press, 2004) 30; MD Whinston, *Lectures on Antitrust Economics* (Cambridge, MA, MIT Press, 2006) 6–7; J Farrell and ML Katz, *The Economics of Welfare Standards in Antitrust* (University of California, Berkley, CPC Paper 06-061, 2006), available at works.bepress.com/joseph_farrell/6/; K Heyer, 'Welfare Standards and Merger Analysis: Why Not the Best?' (2006) 2 *Competition Policy International* 54; DW Carlton, 'Does Antitrust Need to Be Modernized?' (2007) 21 *Journal of Economic Perspectives* 155, 156–58. In the end, 'the controversy boils down to the question of whether distributive issues should matter for the application of competition law'; Buccirossi (n 28) xv. As already stressed, this study supports the view that (re)distributional issues fall outside the scope of competition law and should be left to specific public policies and other fields of regulation (above n 22 and accompanying text). Consequently, it is assumed that the proper goal of antitrust is total welfare; but see qualified opposing views, such as those of DJ Neven and L-H Röller, 'Consumer Surplus vs Welfare Standard in a Political Economy Model of Merger Control' (2005) 23 *International Journal of Industrial Organization* 829; SC Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The* True *Consumer Welfare Standard* (AMC Statement, 2005), available at govinfo.library.unt.edu/amc/public_studies_ fr28902/

is that *competition law is exclusively concerned with economic goals*, that *it should promote increased efficiency (both productive and allocative),* and that *it should not only focus on static efficiency but also allow for dynamic efficiency*.[51] Therefore, the role currently assigned to competition law is primarily to contribute to the achievement of the maximum attainable welfare standard[52] through protection of the undistorted functioning of the market. However, the debate is neither completely abandoned,[53] nor free from strong criticism[54]—and further revisions,[55] refinements and developments can be expected;[56] particularly related to or derived from developments in competition economics.[57]

According to the prevalent current view, therefore, antitrust is oriented towards the correction of market failure in those cases in which the exercise of market power distorts market dynamics,[58] with the aim of fostering and protecting the adequate functioning of

exclus_conduct_pdf/051104_Salop_Mergers.pdf; or R Pittman, 'Consumer Surplus as the Appropriate Standard for Antitrust Enforcement' (2007) 2 *Competition Policy International* 205. See also KJ Cseres, 'The Controversies of the Consumer Welfare Standard' (2006) 3 *Competition Law Review* 121, 122.

[51] JF Brodley, 'The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress' (1987) 62 *New York University Law Review* 1020, 1026–28; J Ellig, 'Conclusion' in id (ed), *Dynamic Competition Policy and Public Policy: Technology, Innovation, and Antitrust Issues* (Cambridge, Cambridge University Press, 2001) 264, 264–67; TM Jorde and DJ Teece, 'Innovation, Dynamic Competition and Antitrust Policy' (1990) 12 *Regulation* 35. Along the same lines, WJ Baumol and JA Ordover, 'Antitrust: Source of Dynamic and Static Inefficiencies?' in TM Jorde and DJ Teece (eds), *Antitrust, Innovation, and Competitiveness* (Oxford, Oxford University Press, 1992) 82; and Foer (n 38) 586. It might be interesting to note that all these considerations cannot be easily included in a single economic model (chapter two, §V.B), since economic models either focus on static or dynamic issues, but can hardly take both perspectives into account simultaneously. An attempt to go past the restrictions of formal models and to build antitrust on the basis of a new concept of 'workable competition' was attempted by JM Clark, 'Toward a Concept of Workable Competition' (1940) 30 *American Economic Review* 241. This basic approach was later developed and refined in id, *Competition as a Dynamic Process* (Washington, Brookings Institution, 1961) 63–89, 387–406 and 465–90. For discussion of Clark's and others' proposals for the adoption of a workable competition paradigm, see GW Stocking, 'On the Concept of Workable Competition as an Antitrust Guide' (1956) 2 *Antitrust Bulletin* 3; id, 'Economic Change and the Sherman Act: Some Reflections on "Workable Competition"' (1958) 44 *Virginia Law Review* 537; SH Sosnick, 'A Critique of Concepts of Workable Competition' (1958) 72 *Quarterly Journal of Economics* 380; and id, 'Toward a Concrete Concept of Effective Competition' (1968) 50 *American Journal of Agricultural Economics* 827. Even if this approach has not been followed in mainstream competition policy, the works around the concept of workable competition offer valuable qualitative insights and normative recommendations.

[52] See: GJ Stigler, 'Law or Economics?' (1992) 35 *Journal of Law and Economics* 455, 458; and Areeda and Hovenkamp (n 10) 4.

[53] See: Foer (n 38) 569.

[54] See: Rockefeller (n 54) 3–13. It is remarkable that assimilation of antitrust and religion is a relatively recurring recourse for antitrust critics; see DJ Dewey, 'The Economic Theory of Antitrust: Science or Religion?' (1964) 50 *Virginia Law Review* 413; JG van Cise, 'Religion and Antitrust' (1978) 23 *Antitrust Bulletin* 455; and DH Chapman, *Molting Time for Antitrust. Market Realities, Economic Fallacies, and European Innovations* (New York, Praeger, 1991) 85–116.

[55] See, eg: NW Averitt and RH Lande, 'Using the "Consumer Choice" Approach to Antitrust Law' (2007) 74 *Antitrust Law Journal* 175.

[56] See: Komesar (n 9) 14.

[57] Areeda and Hovenkamp (n 10) 134. For a succinct review of the current state of development of competition economics, see L Peeperkorn and V Verouden, 'The Economics of Competition' in J Faull and A Nikpay (eds), *The EC Law of Competition*, 2nd edn (Oxford, Oxford University Press, 2007) 3. For more detailed studies of competition economics, see Bishop and Walker (n 50); and the various contributions to Buccirossi (ed) (n 28). It is important to stress that, in any case, future developments of economic theory should not part ways with general competition theory; see L Makowski and JM Ostroy, 'Perfect Competition and the Creativity of the Market' (2001) 1 *Journal of Economic Literature* 479.

[58] Bentivogli and Trento (n 9) 35–36. For discussion on the prevalent view, see A Jones and B Sufrin, *EC Competition Law: Text, Cases, and Materials,* 3rd edn (Oxford, Oxford University Press, 2008) 35–55.

the market (as a mechanism; ie, protecting competition *as a process*),[59] and as the means to promoting and maximising welfare.[60] This approach leans towards a restricted enforcement of antitrust laws, which should be largely limited to those areas where the exercise of market power can be detrimental to welfare[61]—that is, can generate welfare losses, once both static and dynamic effects are assessed—and to adopt a cautionary approach towards those business practices that generate mixed effects on welfare in the short- and mid-term but might be desirable in the long-run.[62]

Nevertheless, it also forms part of current consensus that antitrust is no panacea to tackle and solve the notorious and diverse economic problems that a market economy generates,[63] and that competition law is not necessarily the optimal or the exclusive mechanism of economic regulation.[64] Optimal results can hardly be expected from antitrust enforcement (or from any other regulatory intervention)—in the sense that perfect Pareto efficiency can hardly be promoted in current societies and in real market settings—but the second-best decisions that antitrust authorities can make based on criteria of welfare promotion are better than an absolute de-regulation of the markets, inasmuch as antitrust statutes and authorities are capable of promoting socially desirable behaviour by market agents.[65]

Even if, in my view, the current position as regards competition law's goal is relatively settled, it is submitted that reviewing the debate and the evolution of legal and economic doctrine on the goals of competition law is necessary to attain an adequate vision of its purpose—and, particularly, to avoid re-opening areas of discussion that have already been settled by doctrine.[66] Moreover, as shall be seen, most of the (alternative) goals traditionally attributed to competition law that have been dropped along the way (social, political and redistributive goals)[67] are still generally attributed to public procurement rules (below

[59] This position seems to have been adopted by the EGC, see Case T-168/01 *GlaxoSmithKline* [2006] II-2969 118, confirmed on appeal by the ECJ, Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline v Commission* [2009] ECR I-9291. Similarly, see M Monti, 'La nueva política europea de la competencia' in JM Beneyto and J Maillo (eds), *El nuevo Derecho comunitario y español de la competencia. Descentralización, análisis económico y cooperación internacional* (Barcelona, Bosch, 2002) 15, 16; and P Roth and V Rose (eds), *Bellamy and Child European Community Law of Competition*, 6th edn (Oxford, Oxford University Press, 2008) 40–41. See also EM Fox, 'We Protect Competition, You Protect Competitors' (2003) 26 *World Competition* 149; and L Parret, 'Shouldn't We Know What We are Protecting? Yes We Should! A Plea for a Solid and Comprehensive Debate about the Objectives of EU Competition Law and Policy' (2010) 6(2) *European Competition Journal* 339.

[60] PJ Slot and A Johnston, *An Introduction to Competition Law* (Oxford, Hart Publishing, 2006) 21; and Viscusi et al (n 3) 70–71. However, under certain circumstances, protection of competition might not be aligned with welfare-maximisation objectives and, in those cases, a preponderance of welfare maximisation considerations might be preferable; see PJ Hammer, 'Antitrust Beyond Competition: Market Failures, Total Welfare, and the Challenge of Intramarket Second-Best Tradeoffs' (1999) 98 *Michigan Law Review* 849, 850ff.

[61] See, amongst many others, Jenny (n 39) 220.

[62] In similar terms, K Suzumura, 'Competition, Welfare, and Competition Policy' in U Schmidt and S Traub (eds), *Advances in Public Economics: Utility, Choice and Welfare—A Festschrift for Christian Seidl*, Theory and Decision Library C no 38 (Dordrecth, Springer, 2005) 1, 8–10.

[63] See: Areeda and Hovenkamp (n 10) 98. Similarly, A Schaub, 'Competition Policy Objectives' in Ehlermann and Laudati (n 1) 119, 126.

[64] Hovenkamp (n 33) 7–10.

[65] Viscusi et al (n 3) 80; Bentivogli and Trento (n 9) 46–48.

[66] See: Martin (n 66) 79–84.

[67] Indeed, a number of politico-social-economic objectives have been abandoned, such as income redistribution, protection of small business, dispersion or pulverisation of economic power (ie, fight against concentration), and labour-keeping policies (see below §III.C).

§VI). Therefore, if it is right to assume that competition law and public procurement rules are two sets of economic regulation with strong similarities—as is submitted here—the abandonment of some of the goals currently assigned to public procurement rules can be expected in the future, for the same reasons that those goals have been left outside the scope of competition law in the past. With this aim, this section will briefly explore the economic (§III.B), and social and political goals (§III.C) attributed to antitrust on the road towards current consensus regarding economic efficiency as the sole goal of antitrust. It will also take into consideration the peculiarly European goal of market integration, as a related (but distinct) economic goal of competition policy that, in my view, should also lose relevance in competition policy design (§III.D).

B. Economic Goals

As has already been mentioned, 'purely' economic goals have been placed at the centre of competition policy[68] and other political and social considerations have been largely abandoned.[69] Given that antitrust laws form part of the economic regulation of *every* market, a shift towards the sole pursuit of economic goals is all the more justified and can significantly contribute to clarifying antitrust doctrine and to improving its enforcement. It is broadly accepted today that competition policy should be aimed at maximising economic efficiency[70] or, in other terms, at maximising welfare (although sometimes defined in confusing or imprecise terms as consumer welfare rather than total welfare).[71] Therefore, *promotion of competition (as a process) is not an end in itself, but exclusively a means of attaining economic efficiency and, consequently, of maximising total social welfare*.[72]

It is important to underscore that consumer welfare (defined in strict terms) and

[68] On the increasing importance of economics in EU competition policy, see Jones (n 47) 30–34; DJ Gerber, 'Two Forms of Modernisation in European Competition Law' (2008) 31 *Fordham International Law Journal* 1235, 1247 and 1258; FS McChesney, 'Talking 'bout my Antitrust Generation: Competition For and In the Field of Competition Law' (2003) 52 *Emory Law Journal* 1401, 1407; and Posner (n 33) ix. Similarly, albeit more moderate, Martin (n 31) 83.

[69] This does not mean, however, that a welfare-based antitrust policy cannot contribute indirectly to achieving those objectives, as was stressed by Elzinga (n 37) 1195; F Jenny, 'Competition Policy Objectives' in Ehlermann and Laudati (n 1) 29, 31; and A Fels and G Edwards, 'Competition Policy Objectives' in Ehlermann and Laudati (n 1) 53, 54–58 and 63. The ascendancy of economic (ie, efficiency considerations) and the diminishing relevance of competing goals in EU competition policy is stressed by O Odudu, *The Boundaries of EC Competition Law: The Scope of Article 81* (Oxford, Oxford University Press, 2006) 9–22.

[70] The stigma that efficiency considerations carried was diluted in the 1970s, when a greater appreciation of efficiency benefits developed; see OE Williamson, 'Allocative Efficiency and the Limits of Antitrust' (1969) 59 *American Economic Review* 105. Efficiency is present in most competition laws; C Noonan, *The Emerging Principles of International Competition Law* (Oxford, Oxford University Press, 2008) 64.

[71] Bishop and Walker (n 50) 23–27; Bork (n 27) 50–90; Schmidt and Rittaler (n 27) xiii–xiv and 21; Bentivogli and Trento (n 9) 29; and Schmalensee (n 22) 13. See also P Kalbfleisch, 'The Assessment of Interests in Competition Law: A Balancing Act' in M Monti et al (eds), *Economic Law and Justice in Times of Globalisation—Festschrift for Carl Baudenbacher* (Baden Baden, Nomos Verlagsgesellschaft, 2007) 455, 456.

[72] See: P Lowe, 'Competition Policy as an Instrument of Global Governance' in Monti et al (n 71) 489, 491–92; LH Summers, 'Competition Policy in the New Economy' (2001) 69 *Antitrust Law Journal* 353; and G Lunghini and PA Mori, 'Per una politica economica della concorrenza' in N Lipari and I Musu (eds), *La concorrenza tra economia e diritto* (Milano, Cariplo-Laterza, 2000) 203, 204. Indeed, competition can be a good proxy for efficiency in most cases; see Posner (n 33) 28–29. On the close relationship between competition and efficiency, F Deng and GK Leonard, 'Allocative and Productive Efficiency' in ABA (n 13) 449, 451–56; and Brodley (n 51) 1021. Similarly, Werden (n 50) 22.

allocative efficiency are not exactly equal goals,[73] and some tensions might exist between them.[74] The tension mainly derives from the concept of efficiency adopted—be it based on Pareto or Kaldor-Hicks criteria—and from the concept of consumer welfare—either as social or aggregate welfare or as consumer surplus.[75] These may be relevant distinctions in those cases in which complex efficiency analyses are required in order properly to balance pro- and anti-consumer effects of a given welfare-increasing situation under antitrust analysis. However, these situations will be rare.[76]

In general terms, and from a purely economic perspective, adoption of a Pareto concept of efficiency[77] might be overly restrictive, as it would trigger antitrust intervention in cases where total wealth could be expanded. Requiring that most or all of the efficiencies generated by a given market circumstance (such as a merger, etc) get transferred to consumers might chill innovation and business activity. Sometimes, efficiencies will mainly lie in the hands of producers—even at the expense of consumer surplus—but the aggregate effect will be welfare-enhancing. These situations require a *trade-off between consumer surplus and social or aggregate welfare that might need to be incorporated in antitrust analysis*.[78] In these circumstances, adoption of a Kaldor-Hicks (or potential Pareto superiority)[79] approach to efficiency might be more adequate to the development of sound antitrust doctrine and enforcement—inasmuch as keeping the adequate incentives to desirable business conduct is a must if antitrust is to achieve not only static efficiency, but also dynamic efficiency goals.[80] Significant difficulties will probably arise in trying to enforce any of these standards[81]—particularly because of lack of data to perform the required

[73] The relationship between consumer welfare and efficiency has given rise to significant discussion; see Brodley (n 51) 1023–42. For a more general overview of the discussion about consumer welfare and efficiency, see Dibadj (n 14) 746–55.

[74] Van den Bergh (n 35) 28. See also DW Carlton and JM Perloff, *Modern Industrial Organization*, 4th edn (Boston, Pearson-Addison Wesley, 2005) 634–37.

[75] See: D Keenan, 'Value Maximization and Welfare Theory' (1981) 10 *Journal of Legal Studies* 409.

[76] Areeda and Hovenkamp (n 10) 121; Crane (n 33) 1212; Foer (n 38) 576; and EM Fox, 'The Efficiency Paradox' in Pitofsky (n 22) 77, 78.

[77] Pareto efficiency exists where it is impossible to change from one allocation to another that can make at least one individual better off without making any other individual worse off—or, in other words, a situation will only be Pareto efficient if it generates advantages to some to the prejudice of none; see V Pareto, *Manuale di economia politica con una introduzione alla scienza sociale* (Milano, Società Editrice Libraria, 1906, repr 1919).

[78] OE Williamson, 'Economies as an Antitrust Defense: The Welfare Trade-Offs' (1968) 58 *American Economic Review* 18; and id, 'Allocative Efficiency and the Limits of Antitrust' (1969). This approach was summarised by Bork (n 27) 111. See also Hammer (n 60) 904–25.

[79] Such an approach implies that there is no increase in economic welfare unless, as a result of the implementation of a given rule or policy, those who gain would in principle be able to compensate fully those who lose and still be better off themselves—ie, unless there is a *net* gain of economic welfare. These ideas were advanced by AC Pigou, *The Economics of Welfare*, 4th edn (London, Macmillan, 1932)—whose insights were later developed into a more structured rule of hypothetical compensation; see N Kaldor, 'Welfare Propositions of Economics and Interpersonal Comparisons of Utility' (1939) 49 *Economic Journal* 549, 550; and JR Hicks, 'The Foundations of Welfare Economics' (1939) 49 *Economic Journal* 696, 711–12. The issue remains open as to how to effectuate such compensation, which it is submitted should be left to the tax system and other distributive public policies. On the desirability of this normative criterion, see RA Posner, 'Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication' (1979–80) 8 *Hofstra Law Review* 487; and JL Coleman, 'Efficiency, Utility and Wealth Maximization' (1979–80) 8 *Hofstra Law Review* 509.

[80] On the tensions between a static and a dynamic approach to economic goals, see Schmidt and Rittaler (n 27) xvii, and Van den Bergh (n 35) 30–31.

[81] For discussion on the different welfare standards available in the design of competition policy, see A Renckens, 'Welfare Standards, Substantive Tests, and Efficiency Considerations in Merger Policy: Defining the Efficiency Defense' (2007) 3 *Journal of Competition Law and Economics* 149, 153–60.

positive economic analyses—but keeping an open and broad efficiency goal as a normative criterion for antitrust policy seems desirable. It is submitted that *the goal of competition law and policy is to protect and promote economic efficiency (through protection and promotion of competition as a process) as a means to contribute to social welfare (understood as aggregate or total welfare)*.

In any case, regardless of the precise efficiency or welfare standard adopted, the broad consensus that competition policy should maximise welfare poses a further analytical question in determining the extent of the antitrust intervention. If welfare is generally maximised when there is effective and undistorted competition in the market, the question arises of whether competition policy should only aim at maintaining the level of rivalry that naturally emerges in a given market, or whether it should also adopt measures to increase competition in certain sectors or markets—even if not necessarily to the maximum possible extent, as it would in some cases be inefficient.[82] In general terms, and given the problems that antitrust enforcement has of its own,[83] a pro-active (or ex ante) competition policy oriented at altering the structure of the markets does not seem desirable[84]—with the only limited exception of merger control.[85] In the end, it would be equivalent to other forms of economic planning, and competition law should not be used with regulatory purposes. While competition law is concerned with preventing illegal interference with the market, regulation implies the power to alter an existing, legal, situation. Competition law may not be used to make an existing market more competitive, unless some element of the market is illegal.[86] Consequently, proper competition law enforcement should not be replaced by regulatory intervention.

Indeed, semi-economic objectives (with clear political colours and more properly understood as industrial policy) such as limiting the size that companies or the level of concentration that markets can attain have already been abandoned as desirable antitrust goals. It is submitted that competition policy should not be aimed at planning the economy or at conducting industrial policy, in the sense that competition authorities are in the best position to know which market structure would yield theoretically optimal results—that is particularly true in the case of platform or multi-sided markets, in markets where innovation is the key driver to growth and development,[87] and even in more traditional markets where consumer preferences might largely determine the structure of the offer. Economic regulation through competition policy has to escape any economic planning temptations

[82] Along the same lines, see Amato (n 45) 109–13.

[83] For a strong criticism of the ability of current competition theory and enforcement to advance its stated goals, see RW Crandall and C Winston, 'Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence' (2003) 17 *Journal of Economic Perspectives* 3. However, their work is not free from criticism, see JB Baker, 'The Case for Antitrust Enforcement' (2003) 17 *Journal of Economic Perspectives* 27; and GJ Werden, *The Effect of Antitrust Policy on Consumer Welfare: What Crandall and Winston Overlook* (AEI-Brookings Joint Center for Regulatory Studies, Related Publication No 04-09, and US Department of Justice Antitrust Division Discussion Paper No EAG 03-2, 2004), available at http://ssrn.com/abstract=384100.

[84] See: Hovenkamp (n 33) 14–15; Areeda and Hovenkamp (n 10) 132; Easterbrook (n 13); id, 'Ignorance and Antitrust' in TM Jorde and DJ Teece (eds), *Antitrust, Innovation, and Competitiveness* (Oxford, Oxford University Press, 1992) 119; and Monti (n 35) 190–94.

[85] See: GJ Stigler, 'Mergers and Preventive Antitrust Policy' (1955) 104 *University of Pennsylvania Law Review* 176.

[86] J Temple Lang, *The Use of Competition Law Powers for Regulatory Purposes* (paper presented at the Regulatory Policy Institute Annual Competition Policy—Competition Policy in Regulated Sectors, 2007), available at www.rpieurope.org/2007%20Conference/JTL%20Paper%20July%2007.pdf.

[87] See, eg: DS Evans and R Schmalensee, 'Markets with Two-Sided Platforms' in ABA (n 13) 667.

and the structural intervention needs to be restricted—mainly, to merger control and, in some extreme instances, in abuse of dominance or monopolisation cases (where there are no remedies available of a less interventionist nature).[88]

However, *there seems to be a greater role to be played by competition policy in those sectors and market activities that are already subject to economic regulation* (eg, utilities or, for the purposes of this study, public procurement). Given that all economic regulation aims at correcting market failures and, hence, at promoting the competitive and non-distorted functioning of the markets (to the largest possible extent), more intervention of competition policy in regulated and deregulated sectors is desirable and there is still substantial room for improvement.[89] Inserting a more pro-competitive (ie, an efficiency and welfare-based) rationale in these areas of economic regulation can yield significant results and can further the effectiveness of competition law in the sectors concerned. Development of new remedies—such as empowering antitrust authorities to fight against certain public restrictions of competition currently shielded from antitrust scrutiny—or reinforcement of *competition advocacy* initiatives might be required. In sum, *the scope for protection and promotion of competition might be larger in regulated than in non-regulated markets*.

C. Social and Political Goals

An authorised sector of doctrine, even if accepting the usefulness of economic efficiency analysis, has raised arguments against the consideration of consumer welfare as the *exclusive* competition goal.[90] Economic efficiency is considered inadequate to constitute a goal by itself, and it has been defended that efficiency goals should be subordinated to other social and political considerations—or, at least, offer a more coordinated or integrated

[88] In any case, it is submitted that the adoption of structural decisions by antitrust authorities should only take place in those instances where the available information clearly supports the conclusion that altering the structure of the market in the envisaged way will be efficient and will increase consumer welfare—and, besides, where the proposed structural remedies are both feasible and expected to be effective. For recent discussion, see FP Maier-Rigaud, 'Behavioural versus Structural Remedies in EU Competition Law', in P Lowe, M Marquis and G Monti (eds), *European Competition Law Annual 2013: Effective and Legitimate Enforcement of Competition Law* (Oxford, Hart Publishing, forthcoming), available at http://ssrn.com/abstract=2457594.

[89] For discussion on the role of competition in regulated and deregulated markets, see D Bush, 'Mission Creep: Antitrust Exemptions and Immunities as Applied to Deregulated Industries' (2006) *Utah Law Review* 761, 764; and IS Forrester and S Keegan, 'The Tension between Regulation and Competitive Market Forces in Europe' (2006) 21 *Tulane European and Civil Law Forum* 125.

[90] Again, the literature is legion. As noteworthy examples, see RT Pitofsky, 'The Political Content of Antitrust' (1978–79) 127 *University of Pennsylvania Law Review* 1051; LB Schwartz, '"Justice" and Other Non-Economic Goals of Antitrust (Comments on Pitofsky, The Political Content of Antitrust)' (1978–79) 127 *University of Pennsylvania Law Review* 1076; RH Lande, 'The Rise and (Coming) Fall of Efficiency as the Ruler of Antitrust' (1988) 33 *Antitrust Bulletin* 429; id, 'Chicago's False Foundation: Wealth Transfers (Not Just Efficiency) Should Guide Antitrust' (1989) 58 *Antitrust Law Journal* 631; id, 'Proving the Obvious: The Antitrust Laws Were Passed to Protect Consumers (Not Just to Increase Efficiency)' (1998–99) 50 *Hastings Law Journal* 959; Dabbah (n 31) 21 and 52; and id, *EC and UK Competition Law. Commentary, Cases and Materials* (Cambridge, Cambridge University Press, 2004) 6–8; R Whish, *Competition Law*, 5th edn (New York, Lexis Nexis-Elsevier, 2003) 19–25; F Dennozza, 'Forme di mercato e tutela della concorrenza' in N Lipari and I Musu (eds), *La concorrenza tra economia e diritto* (Milano, Cariplo-Laterza, 2000) 217, 218–27; Roth (n 48) 42; Schmidt and Rittaler (n 27) 64 and 107–10; Komesar (n 9) 31–34; Korah (n 22) 12–18; I Musu, 'Il valore della concorrenza nella teoria economica' in Lipari and Musu (above), 5, 25; N Irti, 'La concorrenza come statuto normativo' in Lipari and I Musu (above) 59, 61; Hildebrand (n 33) 105–09; Clamour (n 13) 119–34; Monti (n 39) 15–18 and 20–52; and JB Kirkwood and RH Lande, 'The Chicago School's Foundation is Flawed: Antitrust Protects Consumers, not Efficiency' in Pitofsky (n 22) 89.

approach between all those economic and non-economic goals.[91] Policies other than antitrust (eg, industrial or social policies) should not be trumped by antitrust and its efficiency considerations.[92] In the end, antitrust policy is considered one amongst various economic (and non-economic) policies and, hence, its goals need to be adjusted to the necessities and requirements of other policies.

In my view, this approach might be inadequate and represent a step backwards towards a multi-purposed antitrust policy that would lead to significant confusion and difficulty of analysis. One of the main advantages of an efficiency-oriented antitrust policy is that it provides adequate tools for consistent and systematic analysis of business behaviour and market dynamics.[93] The standards, even if open-ended, are clear and the soundness and predictability of competition policy are promoted. On the contrary, having a multipurposed antitrust policy would undermine most of the advances made in the last decades, would reduce the rigour of competition analysis, and would sink into arbitrariness and politicisation of this field of law and economics.[94]

If, and to the extent that it was deemed desirable, it would be preferable to have an efficiency-based competition policy and to allow for government intervention on criteria other than competition concerns, than to have a multi-purpose competition policy that is designed to accomplish goals other than economic efficiency and maximisation of welfare.[95] Having this two-step mechanism of governmental intervention would at least allow for adequate cost and benefit analyses—as conduct that would be desirable from a competition perspective (ie, efficiency-enhancing behaviour) might be prohibited or restricted on other political or social grounds, but the cost of such governmental intervention would be evident (and would need to be compensated by the benefits produced by such a policy). Similarly, efficiency-destroying conduct could be mandated, but the cost of such a policy in terms of welfare would also have to be made explicit. At least one of the benefits of keeping an efficiency-based competition policy would be to generate pressure on governmental intervention in the market because the costs of such intervention would be disclosed.[96]

In any event, antitrust laws have been assigned social and political goals throughout their history and only recently this trend seems to have been abandoned.[97] These goals have ranged from income redistribution to the protection of small business, the dispersion or pulverisation of economic power (ie, fight against concentration), or labour-keeping

[91] Some of the socio-political goals attributed to antitrust, other than smallness for its own sake—as defended, for instance, by DJ Dewey, 'The New Learning: One Man's View' in HM Mann and JF Weston (eds), *Industrial Concentration: the New Learning* (Boston, Little, Brown and Co, 1974) 1—may coincide with efficiency (defined in terms of serving consumers' long-run interests) and, hence, they should *also* guide antitrust policy; EM Fox, 'The Modernization of Antitrust: A New Equilibrium' (1980–81) 66 *Cornell Law Review* 1140.

[92] This approach might derive from considering antitrust as a macroeconomic tool of intervention, whereas the natural field of antitrust is microeconomics; PC Carstensen, 'Antitrust Law, Competition and the Macroeconomy' (1980–81) 14 *University of Michigan Journal of Law Reform* 173.

[93] The superiority of efficiency goals derives, at least in part, from their greater ability to provide clear criteria for decision making. In this sense, see Bork (n 27) 79. Along the same lines, see Amato (n 45) 125.

[94] In similar terms, see KP Ewing Jr, *Competition Rules for the 21st Century. Principles from America's Experience*, 2nd edn (Alphen aan den Rijn, Kluwer Law International, 2006) 193–94; and Areeda (n 46) 59.

[95] Foer (n 38) 578–79.

[96] Along the same lines, stressing the importance of keeping the cost of alternative policies transparent; D Wolf, 'Competition Policy Objectives' in Ehlermann and Laudati (n 1) 129, 132.

[97] However, developments in the area of corporate social responsibility (CSR) might bring back pressures to include social and political goals in the design of competition policies. The possibility of a new swing of the pendulum towards socio-political goals in antitrust has been raised by Posner (n 33) 23.

policies. The bottom line is that the economic approach to antitrust was criticised for omitting redistributive considerations (such as those concerning the distribution of wealth between producers and consumers, between big and small companies, or between companies and workers). In general terms, all economic policies pursue alternative goals (stabilisation of the economy, allocation or redistribution of resources), whose mix depends to a large extent on political decisions.[98] The fact that antitrust focuses exclusively on allocative goals as a way to enhance efficiency and to maximise consumer welfare was criticised by those who preferred to instrumentalise this economic policy in order to attain conflicting goals (ie, redistributive purposes).

In my opinion, it is easy to see that populism sparked most of these alternative goals of competition policy.[99] Indeed, each of these socio-political goals was based on a more interventionist conception of antitrust policy and tended to assign to it some functions that competition laws are badly equipped to perform.[100] To be sure, competition laws and their standard remedies might be well-designed to disperse economic power (through the prohibition of mergers or the break-up of large firms, as structural remedies in abuse of dominance or monopolisation cases), but they do not have the adequate tools to protect small businesses (in fact, the best protection to small businesses would probably be no antitrust at all), to redistribute income (at best, they could prevent some behaviour that might shift economic rents from consumers to producers, but that is a very poor income redistribution function) or to promote labour-keeping policies (which, again, might be better served by the absence of antitrust, inasmuch as cartels and monopolies do not need to be so concerned about efficiency, and so can keep oversized work forces).

Other than as a result of having inadequate remedies, it is submitted that antitrust laws are ill-positioned to pursue socio-economic goals because they have a narrow scope. Antitrust interventions are not of a general reach, but only affect a limited number of companies at a time. Therefore, including socio-political goals in this field of economic regulation would always be flawed (as not being inclusive enough)—and would most probably result in highly inefficient (and discriminatory) regulatory interventions. Therefore, competition laws would pass over most of the agents whose behaviour should be controlled if socio-political goals other than promotion of consumer welfare were to form the core of antitrust policy.[101]

More importantly, even if antitrust laws were re-shaped to provide for a setting more adequate to those ends, pursuance of those socio-political goals in the antitrust sphere—or elsewhere—would make poor economic sense or only be attainable by incurring very significant costs. The basic criticism against most of the socio-political goals assigned to antitrust has been that they reduce the efficiency of the economy and that, contrary to their stated purposes, end up harming not only the stakeholders they wanted to protect but the economy and society as a whole. Policies oriented at redistributing income, at protecting small businesses, at limiting the size of businesses or at protecting labour above certain thresholds, all come at a significant cost for society.

Some of these goals (such as income redistribution and labour regulation) are better

[98] Bentivogli and Trento (n 9) 28–29. On the problem of (re-)distribution, in general, see AM Okun, *Equality and Efficiency, the Big Trade-off* (Washington, Brookings Institution, 1975).

[99] See: Areeda and Hovenkamp (n 10) 98–143.

[100] Posner (n 33) 2.

[101] Along the same lines, see Areeda and Hovenkamp (n 10) 110–19.

attained by other fields of regulation (tax and labour law),[102] while others (such as limiting the size of companies or protecting small businesses) are openly anti-competitive and efficiency-reducing objectives that hardly fit in an open-market economy.[103] In any case, it should be a matter for politicians to conduct the corresponding cost-benefit analysis, to determine whether those policies are desirable at a given level of cost and, if so, to enact proper general regulations that select and enforce such non-economic goals. But that exercise should not rest with the antitrust authorities or the courts.[104]

D. Creation of the Internal Market, as a Purely European Goal

As a complement to the prior discussion, it is worth recalling that competition policy in the EU used to be strongly linked to the internal market strategy,[105] and competition rules were viewed as an instrument to avoid private undertakings compartmentalising the market and annulling the public efforts to build the internal market—mainly through free movement rules.[106] So much so, that it was considered that EU competition policy had the double goal of the promotion of integration between Member States and the promotion of effective and undistorted competition.[107] The creation of a single market where competition is not distorted has been and remains one of the main objectives of the TFEU (below chapter four, §IV.D). Therefore, EU competition policy has always been significantly conditioned by the broader goal of market integration, and has particularly focused on territorial restrictions and other business behaviour that tended to keep market fragmentation. The main objective was to avoid private agents adopting behaviour that neutralised public efforts to eliminate barriers to intra-EU trade.[108]

[102] See above: n 22. Moreover, as clearly expressed by Monti (n 39) 85, 'once a standard that applies distributive criteria is deployed, the question of how the distribution is to be carried arises, and the diversity of consumer interests makes this a difficult question to answer'.

[103] Indeed, control of the size or income of private companies and protection of businesses from competition are objectives more naturally related to centrally planned economies. In limiting the breadth of the market mechanism (by reducing incentives to compete, innovate and increase efficiency) they pay lip service to the promotion of social welfare and, more often than not, produce undesired outcomes.

[104] Hovenkamp (n 33) 44–45; and Areeda and Hovenkamp (n 10) 99.

[105] BE Hawk, 'The American (Anti-Trust) Revolution: Lessons for the EEC?' (1988) 9 *European Competition Law Review* 53, 54; JHH Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403, 2476–78; C-D Ehlermann, 'The Contribution of EC Competition Policy to the Single Market' (1992) 29 *Common Market Law Review* 257; RB Bouterse, *Competition and Integration—What Goals Count? EEC Competition Law and Goals of Industrial, Monetary and Cultural Policy* (Deventer, Kluwer Law and Taxation, 1994) 1–11; C Bovis, *EC Public Procurement Law* (London, Longman, 1997) viii. Indeed, it has been held that unification of the single market is an 'obsession of the Community authorities'; see Whish (n 90) 23. Also, Slot and Johnston (n 60) 2; A Albors-Llorens, *EC Competition Law and Policy* (Portland, Willan, 2002) 1–2; Pera (n 46) 162; and J Drexl, 'Competition Law as Part of the European Constitution' in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (Oxford, Hart Publishing, 2006) 633, 648–49.

[106] See: Joined Cases 56 and 58/64 *Consten and Grundig* [1966] ECR 429, and Case 32/65 *Italian Republic v Council and Commission* [1966] ECR 563; which echoed the conclusions of the Spaak Report, 16. See P Pescatore, 'Public and Private Aspects of Community Competition Law' (1986–87) 10 *Fordham International Law Journal* 373.

[107] DJ Gerber, 'The Transformation of European Community Competition Law?' (1994) 35 *Harvard International Law Journal* 97, 98, 101–03 and 143–44; and Bishop and Walker (n 50) 3–6. Along the same lines, see Schaub (n 63) 126–27; and W Sauter, *Competition Law and Industrial Policy in the EU* (Oxford, Clarendon Press, 1997) 116–22.

[108] M Cini and L McGowan, *Competition Policy in the European Union* (New York, St Martin's Press, 1998) 4 and 12–13; and Van den Bergh (n 35) 31.

In fact, the adoption of the market-integration goal as one of the main objectives of EU competition policy might have been one of the reasons for the development of the 'double barrier' theory—which allowed for the concurrent application of EU and national competition laws to the same business practice on the grounds that EU rules protect the intra-EU trade (or the internal market), while national laws of Member States protect their respective domestic markets.[109] Such theory has a difficult economic justification, but is fully consistent with a market-integration policy goal.[110]

As the achievement of the integration objective has come closer and the EU internal market has become a consolidated reality, EU competition policy has regained momentum as an independent policy and has refocused on economic efficiency considerations—and, more precisely, on consumer welfare.[111] However, the internal market objective and competition policy are not yet entirely separate concepts[112]and enforcement of EU competition policy will probably still be under the influence of integration goals in the future, at least to some extent.

E. Preliminary Conclusion regarding the Objective of Competition Law

This summary has shown that there has been substantial debate as regards the objectives or goals of competition law. Notwithstanding that debate, a consensus has been reached as regards the restriction of the goal of competition law to economic considerations and, there is a majority view which considers that competition law should protect competition as a process, in order to maximise social welfare. Inasmuch as the pursuit of alternative or secondary goals (of a social or industrial nature) conflicts with the main economic goals—which will be the case in most circumstances—competition law should disregard such 'secondary' considerations and be guided exclusively by economic criteria. In the EU, market integration considerations have been historically important, but have lost *momentum* as the evolution of the internal market reached maturity. Therefore, in my view, as a part of EU economic law, *competition law should be guided by economic efficiency considerations and have as its goal the protection of competition as a process, in order to maximise social welfare*—even if the specific contours of this criterion (ie, total or consumer welfare) remain relatively undefined. In my opinion, and in the light of the

[109] Building on more general statements made by the ECJ in Case 14/68 *Walt Wilhelm* [1969] ECR 1 3; see UB Neergaard, *Competition and Competences: The Tensions between European Competition Law and Anti-Competitive Measures by the Member States* (Copenhagen, Djøf Forlag, 1998) 29–30 and 33–35.

[110] The theory has been most recently applied, in a revised way, in Case C-17/10 *Toshiba Corporation ea* [2012] pub electr EU:C:2012:72. This has led to a wave of criticism concerning due process rights (and in particular, *ne bis in idem* guarantees). For discussion of the case and its implications, see G Monti, 'Managing Decentralized Antitrust Enforcement: Toshiba (Case C-17/10)' (2014) 51 *Common Market Law Review* 261–80.

[111] Amato (n 45) 45 (who considers that the Maastricht Treaty gave rise to the assertion of 'competition as an autonomous fundamental principle'). A review of the purpose of competition law in the Commission's yearly reports on competition policy shows how internal market considerations have progressively lost relative importance vis-à-vis economic efficiency considerations. This shift of focus was particularly acute in 2000; see Commission Communication, XXXth Report on Competition Policy (SEC(2001) 694 final, 21). This general approach has subsequently crystallised in soft law documents, such as the Communication from the Commission, Guidelines on the application of Article 101(3) of the Treaty (formerly Article 81(3) TEC) [2004] OJ C101/97, 33. See D Vaughan et al, *EU Competition Law: General Principles* (Richmond, Richmond Law and Tax, 2006) 2–13. Also, Slot and Johnston (n 60) 3 and 311–13; Anderson and Heimler (n 30) 428–32; and Odudu (n 69) 21.

[112] Vaughan et al (n 111) 13; and an extended discussion in Baquero Cruz (n 30) 98–103.

position of most economists, the proper goal should be specified *as the maximisation of total social welfare*.

IV. Goals of Public Procurement

A. A More Limited Discussion on the Goals of Public Procurement

Contrary to what has happened with competition law, the goals of public procurement have not given rise to such a widespread and long-running debate. The basic aspects of public procurement rules—such as their goals, their relation to the functions of government, or to the undertakings with which contracts are made—have been mostly omitted by doctrine,[113] which has tended to focus on particular details of the procurement systems (such as the types of contracts, economic incentives, share of risks and costs between government and contractors, etc). However, it is submitted that a proper analysis of public procurement rules requires taking into consideration several general issues such as their use as public policy tools, their function as a policy for the safeguard of government integrity,[114] their impact on government and contractors' performance, or their goals.[115]

Indeed, even if not always made explicit, several goals of public procurement rules have largely conditioned their development and determined the functions that they have been called upon to serve. At least nine primary goals of procurement systems have been identified: competition; integrity; transparency; efficiency of the procurement system; customer satisfaction; best value for money; wealth distribution; risk avoidance; and uniformity of rules.[116] Some of them are closely related, some are instrumental to one another, while others are in open conflict;[117] and not all of them are equally desirable. Most noteworthy, economic objectives will have a particularly remarkable role in shaping public procurement regimes.[118] Moreover, no system can achieve all of those goals simultaneously, so

[113] JW Whelan and EC Pearson, 'Underlying Values in Government Contracts' (1961) 10 *Journal of Public Contract Law* 298. Similarly, WW Thybony, 'What's Happened to the Basics?' (1975) 9 *National Contract Management Journal* 71. This assertion has not lost currency; see SL Schooner, 'Desiderata: Objectives for a System of Government Contract Law' (2002) 11 *Public Procurement Law Review* 103.

[114] The importance of safeguarding procurement integrity has been stressed by RL Allen, 'Integrity: Maintaining a Level Playing Field' (2002) 11 *Public Procurement Law Review* 111; and Schooner (n 113) 104–05. See also E Dietrich, 'The Potential for Criminal Liability in Government Contracting: a Closer Look at the Procurement Integrity Act' (2004–05) 34 *Public Contract Law Journal* 521, 522. However, as already stressed (chapter one, §VII.A), issues related to anti-corruption goals and mechanisms are left outside the scope of this study.

[115] Whelan and Pearson (n 113) 303.

[116] SL Schooner, 'Fear of Oversight: The Fundamental Failure of Businesslike Government' (2001) 50 *American University Law Review* 627, 709–10, and id (n 113) 104–09; and SL Schooner et al, *Public Procurement Systems: Unpacking Stakeholder Aspirations and Expectations* (George Washington University Law School, Public Law and Legal Theory Working Paper, Legal Studies Research Paper, 2008), available at http://ssrn.com/abstract=1133234. See also CE Delpiazzo, 'Los principios generales en la contratación pública' in JC Cassagne and E Rivero Ysern (eds), *La contratación pública* (Buenos Aires, Hammurabi, 2007) 543.

[117] JN Dertouzos, 'Introduction' in AG Bower and JN Dertouzos (eds), *Essays in the Economics of Procurement* (Santa Monica, RAND—National Defense Research Institute, 1994) 1, 4.

[118] PA Trepte, *Regulating Procurement. Understanding the Ends and Means of Public Procurement Regulation* (Oxford, Oxford University Press, 2004) 63. That is particularly true, at least in the EU; see Bovis (n 13) 25. Also OECD, *OECD Observer Policy Brief—Fighting Cartels in Public Procurement* (2008) 2, available at www.oecd.org/dataoecd/45/63/41415052.pdf; and id, *Public Procurement: The Role of Competition Authorities in Promoting Competition* (2007) 7.

their pursuance will require certain trade-offs.[119] As shall be seen, *competition, integrity and transparency can be considered the overarching and most desirable goals of public procurement regulation*;[120] and a proper balance with the efficiency of the procurement systems needs to be reached.[121] As shall also be stressed, this is the set of goals of public procurement that gives way to a greater consistency with competition policy goals (below §V).

Conversely, and as was the case with antitrust law, public procurement has been instrumentalised to achieve socio-political aims that differ from and often contradict its basic goals (competition, integrity and transparency)[122] and function—ie, providing the public buyer with those goods and services required for his proper functioning, in the best possible conditions as to price, quality, timely delivery, etc.[123] Goals such as market integration objectives (below §IV.E), industrial policy[124] and innovation policy,[125] promotion of small

[119] Schooner et al (n 116) 4; Thai (n 26) 26–27; and PA Trepte, 'Transparency Requirements' in R Nielsen and S Treumer (eds), *New EU Public Procurement Directives* (Copenhagen, Djøf Forlag, 2005) 49, 52.

[120] Schooner (n 113) 104–06 and 110. Similarly, although with some terminological differences, see Trepte (n 118) 3. Also S Arrowsmith et al, *Regulating Public Procurement* (London, Kluwer, 2000) 27–72; S Arrowsmith, *The Law of Public and Utilities Procurement*, 2nd edn (London, Sweet & Maxwell, 2005) x; id, 'The Past and Future Evolution of EC Public Procurement Law: From Framework to Common Code?' (2005–06) 35 *Public Contract Law Journal* 337, 351–52; and S Kelman, *Procurement and Public Management. The Fear of Discretion and the Quality of Government Performance* (Washington, AEI Press, 1990) 11. See also F Weiss and D Kalogeras, 'The Principle of Non-Discrimination in Procurement for Development Assistance' (2005) 14 *Public Procurement Law Review* 1, 2–3 and 6; S Brown, 'APEC Developments—Non-Binding Principles of Value for Money and Open and Effective Competition' (1999) 8 *Public Procurement Law Review* CS16; and S Schiavo-Campo and HM McFerson, *Public Management in Global Perspective* (Armonk, ME Sharpe, 2008) 251–53.

[121] The position defended in the text, where the efficiency of the system and the focus on competition as a means to achieve value for money are preferred, has been strongly criticised by S Arrowsmith, 'The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies' (2011–12) 14 *Cambridge Yearbook of European Legal Studies* 1; and P Kunzlik, 'Neoliberalism and the European Public Procurement Regime' (2012–13) 15 *Cambridge Yearbook of European Legal Studies* 283. However, it has been praised by CR Yukins and J Cora, 'Feature Comment: Considering the Effects of Public Procurement Regulations on Competitive Markets' (2013) 55(9) *Government Contractor* 64. For some specific rebuttal of the criticisms, see the introduction to this second edition, and A Sánchez Graells, *My Approach to Public Procurement and Competition: A Rebuttal to Prof Arrowsmith (2012) and Prof Kunzlik (2013)* (13 October 2014), available at howtocrackanut.blogspot.co.uk/2014/10/my-approach-to-public-procurement-and.html.

[122] See: C Jeanrenaud, 'Public Procurement and Economic Policy' (1984) 55 *Annals of Public and Cooperative Economics* 151, 152–53 also published as 'Marchés publics et politique économique' in id (ed), *Regional Impact of Public Procurement* (Saint-Saphorin, Georgi, 1984).

[123] Whelan and Pearson (n 113) 302; Thybony (n 113) 72–77.

[124] PA Geroski, 'Procurement Policy as a Tool of Industrial Policy' (1990) 4 *International Review of Applied Economics* 182; and LJ White, *Antitrust Policy and Industrial Policy: A View from the US* (AEI-Brookings Joint Center for Regulatory Studies, Working Paper No 08-04 and NYU Law and Economics Research Paper No 08-05, 2008), available at http://ssrn.com/abstract=1091244.

[125] See: PA Geroski, 'Competition and Innovation' in European Commission, *Research on the 'Cost of Non–Europe': Basic Findings.* Vol II—*Studies on the Economics of Integration* (1988) 339–88; C Edquist et al (eds), *Public Technology Procurement and Innovation* (Boston, Kluwer Academic, 2000); M Rolfstam, *Public Technology Procurement as a Demand-Side Innovation Policy Instrument—An Overview of Recent Literature and Events* (Lund University, Institute of Technology, 2005), available at www.druid.dk/uploads/tx_picturedb/dw2005–1635.pdf; M Rolfstam and L Hommen (eds), *Innovation and Public Procurement. Review of Issues at Stake. Final Report*, Study for the European Commission (No ENTR/03/24) (2005), available at ftp.cordis.lu/pub/innovation–policy/studies/full_study.pdf; B Aschhoff and W Sofka, *Innovation on Demand—Can Public Procurement Drive Market Success of Innovations* (ZEW Discussion Paper No 08-052, 2008), available at ftp.zew.de/pub/zew–docs/dp/dp08052.pdf; and E Uyarra and K Flanagan, *Understanding the Innovation Impacts of Public Procurement* (Manchester Business School Working Paper No 574, 2009), available at http://ssrn.com/abstract=1507819. See also Communication from the Commission, Pre-commercial procurement: Driving innovation to ensure sustainable high quality public services in Europe (COM(2007) 799 final). For recent discussion, see M Rolfstam, *Understanding Public Procurement of Innovation: Definitions, Innovation Types and Interaction Modes* (Working Paper, 2012), available

businesses,[126] social[127] or labour-related policies[128] (such as the promotion of minimum wages in procurement),[129] environmental[130] and other considerations,[131] have been the object of so-called 'secondary' [132] or 'horizontal policies'.[133]

at http://ssrn.com/abstract=2011488.

[126] See: P-H Morand, 'SMEs and Public Procurement Policy' (2003) 8 *Review of Economic Design* 301; AG Sakallaris, 'Questioning the Sacred Cow: Reexamining the Justifications for Small Business Set Asides' (2006–2007) 36 *Public Contract Law Journal* 685; K Loader, 'The Challenge of Competitive Procurement: Value for Money versus Small Business Support' (2007) 27 *Public Money and Management* 307; and J Marion, 'Are Bid Preferences Benign? The Effect of Small Business Subsidies in Highway Procurement Auctions' (2007) 91 *Journal of Public Economics* 1591.

[127] P Bolton, 'Government Procurement as an Instrument of Policy' (2004) 121 *South African Law Journal* 619; id, 'Government Procurement as a Policy Tool in South Africa' (2006) 6 *Journal of Public Procurement* 193; RB Watermeyer, 'The Use of Targeted Procurement as an Instrument of Poverty Alleviation and Job Creation in Infrastructure Projects' (2000) 9 *Public Procurement Law Review* 226; and id, 'Facilitating Sustainable Development Through Public and Donor Procurement Regimes: Tools and Techniques' (2004) 13 *Public Procurement Law Review* 30.

[128] C McCrudden, 'Social Policy Issues in Public Procurement: A Legal Overview' in S Arrowsmith and A Davies (eds), *Public Procurement: Global Revolution* (London, Kluwer Law International, 1998) 219; id, 'International Economic Law and the Pursuit of Human Rights: A Framework for Discussion on the Legality of "Selective Purchasing" Laws under the WTO Government Procurement Agreement' (1999) 2 *Journal of International Economic Law* 3; id, 'Using Public Procurement to Achieve Social Outcomes' (2004) 28 *Natural Resources Forum* 257; id, 'Buying Social Justice: Equality and Public Procurement' (2007) 60 *Current Legal Problems* 121; id, *Buying Social Justice. Equality, Government Procurement and Legal Change* (Oxford, Oxford University Press, 2007); B Bercusson and N Bruun, 'Labour Law Aspects of Public Procurement in the EU' in R Nielsen and S Treumer (eds), *New EU Public Procurement Directives* (Copenhagen, Djøf Forlag, 2005) 97; and V Martinez, 'Les péripéties du critère social dans l'attribution des marchés publics' in G Clamour and M Ubaud-Bergeron (eds), *Contrats publics. Mélanges en l'honneur du professeur Michel Guibal* (Montpellier, Presses de la Faculté de Droit de Montpellier, 2006) 251.

[129] This has been very recently declared incompatible with the EU public procurement rules in Case C-549/13 *Bundesdruckerei* [2014] pub electr EU:C:2014:2235. For related discussion, see K Jaehrling, 'The State as a "Socially Responsible Customer"? Public Procurement between Market-Making and Market-Embedding' (2014) *European Journal of Industrial Relations* (forthcoming).

[130] P Kunzlik, 'Environmental Issues in International Procurement' in Arrowsmith and A Davies (n 128, 1998) 199; P Kunzlik, 'The Legal Dimension of Greener Public Purchasing' in OECD, *The Environmental Performance of Public Procurement* (2003) 153; id, '"Green Procurement" Under the New Regime' in R Nielsen and S Treumer (eds), *New EU Public Procurement Directives* (Copenhagen, Djøf Forlag, 2005) 117; id, 'Green Public Procurement—European Law, Environmental Standards and "What to Buy" Decisions' (2013) 25(2) *Journal of Environmental Law* 173; J McCadney, 'The Green Society? Leveraging the Government's Buying Powers to Create Markets for Recycled Products' (1999–2000) 29 *Public Contract Law Journal* 135; C Ribot, 'La commande publique éco-responsible' in G Clamour and M Ubaud-Bergeron (eds), *Contrats publics. Mélanges en l'honneur du professeur Michel Guibal* (Montpellier, Presses de la Faculté de Droit de Montpellier, 2006) 283.

[131] Other policies have included, for example, the ban on certain ideologies and/or organisations on the basis of the protection of constitutional values; see H-J Prieβ and C Pitschas, 'Secondary Policy Criteria and Their Compatibility with EC and WTO Procurement Law. The Case for the German Scientology Declaration' (2000) 9 *Public Procurement Law Review* 171, 172–86.

[132] On these issues, see S Arrowsmith, 'Public Procurement as an Instrument of Policy and the Impact of Market Liberalisation' (1995) 111 *Law Quarterly Review* 235; PA Trepte, *Public Procurement in the EU: A Practitioner's Guide*, 2nd edn (Oxford, Oxford University Press, 2007) 63–87. For a review of these policies in EU legislation and case law, see the various contributions to S Arrowsmith and P Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law. New Directives and New Directions* (Cambridge, Cambridge University Press, 2009). See also Arrowsmith (n 120, 2005) 287–96 and 1225–312; Bovis (n 13) 97–98 and 115–17; and id, 'Public Procurement and the Internal Market of the Twenty-First Century: Economic Exercise Versus Policy Choice' in T Tridimas and P Nebbia (eds), *European Union Law for the Twenty-First Century: Rethinking the New Legal Order* (Oxford, Hart Publishing, 2004) 291, 304–07; E Reid, 'Protecting Non-Economic Interests in the European Community Legal Order: A Sustainable Development?' (2005) 24 *Yearbook of European Law* 385; and Clamour (n 13) 743–53.

[133] S Arrowsmith,'Horizontal Policies in Public Procurement: A Taxonomy' (2010) 10(2) *Journal of Public Procurement* 149.

Some of these secondary policies are largely consistent with the main goals of public procurement—such as market integration objectives, which can contribute to the increase of competition in certain sectors of economic activity—but others are completely unrelated to the core function and objectives of the public procurement system,[134] and could significantly jeopardise its proper implementation,[135] not to mention the issue of their limited effectiveness.[136] To that extent, it is submitted that some secondary policies should be abandoned or, at least, re-adjusted to become more competition-oriented.[137] As already mentioned, the use of public procurement as an instrument of (macroeconomic) policy should be separated from its function as a working tool of the government and, in this dimension, it should be set free from such secondary policies—precisely in order to increase the efficiency of the primary policy objectives that are to be implemented through procurement activities. Doing otherwise can be a source of market distortions that will rarely contribute to increasing social welfare (see above chapter two, §III).[138] Therefore, the pursuit of such 'secondary' policies through public procurement will not be included amongst the desirable objectives of this body of economic regulation—on the assumption that, if so, they should be left to other branches of regulation, such as tax, labour or environmental law (above §II).

From a different perspective, in my view, in analysing the main goals of public procurement a distinction should be made between *internal and external objectives of the system*. While transparency and efficiency of the public procurement rules are mostly internal to the public buyer—in the sense that they exclusively relate to the way in which the government organises its purchasing activities to ensure the political legitimacy and efficiency of the political and administrative institutions—*competition is the predominant external goal of public procurement*—inasmuch as it should be considered not only an internal objective in reinforcing legitimacy (by avoiding favouritism, which is more properly the object of transparency goals), or an internal instrument to reinforce the efficiency of the purchasing activities (by obtaining best value for money, although that is one of its paramount effects), or to guarantee non-discrimination between participants in a given tender; but also as the main constraint on the public buyer's market behaviour. Indeed, *competition goals of the public procurement system shall also be interpreted as rules oriented to curbing the public buyer's market behaviour* that could have a substantial negative impact on the competitive dynamics of those markets where the activities of the public purchaser are relatively more important.

[134] Indeed, they have been considered extraneous goals of public procurement; see SL Schooner, 'Commercial Purchasing: The Chasm between the United States Government's Evolving Policy and Practice' in S Arrowsmith and M Trybus (eds), *Public Procurement: The Continuing Revolution* (The Hague, Kluwer Law International, 2003) 137, 159 fn 105; and Schooner et al (n 116) 14.

[135] The clash generated by the pursuit of certain secondary policies was soon stressed; see C Turpin, *Government Procurement and Contracts* (Essex, Longman, 1989) 67.

[136] Indeed, their effectiveness should be questioned, given the structural shortcomings of this regulatory instrument; see DE Black, 'An Evaluation of Federal Contract Set-Aside Goals in Reducing Socioeconomic Discrimination' (1986–87) 20 *National Contract Management Journal* 87, 93–97; id, 'Socioeconomic Contract Goal Setting within the Department of Defense: Promises Still Unfulfilled' (1988–89) 22 *National Contract Management Journal* 67; and TA Denes, 'Do Small Business Set-Asides Increase the Cost of Government Contracting?' (1997) 57 *Public Administration Review* 441.

[137] For further discussion on the compatibility of public procurement activities based on such secondary policies with EU competition law, see below chapter four, §VI.C.iii.

[138] For general discussion on the conflicts between such secondary policies and the main economic goals of public procurement regulations, Trepte (n 118) 133–207.

B. Competition (Value for Money, or Best Value)

Promotion of competition has traditionally been viewed as a way to guarantee that the public buyer obtains the goods and services it requires in the best possible market conditions—ie, as an instrument to ensure *value for money* or *best value* in public purchases—and, consequently, ensuring competition has become the main goal of public procurement regulation,[139] as the main instrument to protect and promote the interests of taxpayers and funding agencies financing public procurement projects.[140] Increased competition in public procurement generally yields better economic outcomes and improves the conditions in which the public buyer sources goods and services in the market;[141] consequently, as the importance of economic considerations in public procurement regulation grows, so competition requirements gain relevance.[142] This has been recognised constantly and incontrovertibly throughout the history of public procurement,[143] and constitutes one

[139] Turpin (n 135) 66–67; Schooner (n 113) 104; WE Kovacic, 'Regulatory Controls as Barriers to Entry in Government Procurement' (1992) 25 *Policy Sciences* 29, 30; HC Casavola, 'Internationalizing Public Procurement Law: Conflicting Global Standards for Public Procurement' (2006) 6 *Global Jurist Advances* 7, 25; LA Perlman, 'Guarding the Government's Coffers: The Need for Competition Requirements to Safeguard Federal Government Procurement' (2006–07) 75 *Fordham Law Review* 3187, 3190, 3228–43; Schooner et al (n 116) 13–14; Schooner (n 113); and J-Y Chérot, *Droit public économique*, 2nd edn (Paris, Economica, 2007) 650. But see DF Kettl, *Sharing Power. Public Governance and Private Markets* (Washington, Brookings Institution, 1993) 3–9. For a very strong criticism of this approach, in relation to the EU rules, see Arrowsmith (n 121) 25–34.

[140] Arrowsmith et al (n 120) 8 and 28–31. Indeed, the use of competitive procurement mechanisms can lead to a substantial improvement of the economic results of this activity, to the benefit of taxpayers; see L Yuspeh, 'A Case for Increasing the Use of Competitive Procurement in the Department of Defense' in Y Amihud (ed), *Bidding and Auctioning for Procurement Allocation* (New York, NYU Press, 1976) 104, 125–26; RP McAfee and J McMillan, *Incentives in Government Contracting* (Toronto, Toronto University Press, 1987) 47–53. At least in the EU, this basic foundation of modern procurement regimes contains an implicit shift from the protection of the interests of the public buyer to the protection of free movement and competition in the markets; see GA Benacchio and M Cozzio, 'Presentazione' in id (eds), *Appalti pubblici e concorrenza: La difficile ricerca di un equilibrio* (Trento, Universita degli studi di Trento, 2008) 2.

[141] This point was clearly made by H Demsetz, 'Why Regulate Utilities?' (1968) 11 *Journal of Law and Economics* 55 (although introducing the concept of *competition for the field* in the context of his critique of the natural monopoly theory and its use as a justification for the regulation of utilities). See also RA Miller, 'Economy, Efficiency and Effectiveness in Government Procurement' (1975–76) 42 *Brooklyn Law Review* 208, 210. Similarly, RG Holcombe, *Public Sector Economics* (1988) 394–95 and 399–400. Along these lines, it has been proven that increasing competition is welfare enhancing, unless very specific circumstances concur; see O Compte and P Jéhiel, 'On the Value of Competition in Procurement Auctions' (2002) 70 *Econometrica* 343, 344. Focusing on the specific circumstances under which increased competition reduces the bid-taker's surplus, see H Hong and M Shum, 'Increasing Competition and the Winner's Curse: Evidence from Procurement' (2002) 69 *Review of Economic Studies* 871. Similarly, see G Loyola, *On Bidding Markets: The Role of Competition* (Universidad Carlos III, Economics Department, Working Paper No 08-33, Economic Series, 2008), available at e-archivo.uc3m.es/dspace/bitstream/10016/2730/1/we083318.pdf. To be sure, measuring the effectiveness of competition in public procurement is no easy task—see JJ Anton and DA Yao, 'Measuring the Effectiveness of Competition in Defense Procurement: A Survey of the Empirical Literature' (1990) 9 *Journal of Policy Analysis and Management* 60; but most studies tend to point in the same direction: that increased competition generates value for money. See, eg, WD Duncombe and C Searcy, 'Can the Use of Recommended Procurement Practices Save Money?' (2007) 27 *Public Budgeting and Finance* 68.

[142] See, eg: O Dekel, 'The Legal Theory of Competitive Bidding for Government Contracts' (2008) 37 *Public Contract Law Journal* 237, 243. This approach has been criticised by way of comparison with private sector procurement practices; Kelman (n 120) 62 and 78; and id, 'Remaking Federal Procurement' (2001–02) 31 *Public Contract Law Journal* 581. However, this point of view has also been criticised for disregarding the different nature of private and public procurement; Schooner (n 116, 2001) 630 and 715–18. On the different nature and constraints between private and public procurement, see also McAfee and McMillan (n 140) 6–8.

[143] G Jèze, *Les principes généraux du Droit administrative*, 3rd edn (Paris, Marcel Giard, 1934) vol III, part I, 73–75, 91–92 (the Spanish translation by JN San Millán Almagro, *Principios generales del Derecho administrativo*

of the basic foundations of current public procurement regulations.[144] Indeed, the ECJ has repeatedly stressed that that the purpose of the public procurement directives 'is to develop effective competition in the field of public contracts'.[145]

Indeed, guaranteeing free and open competition in the public procurement arena has become a general legal principle (see art 18(1) Dir 2014/24 and the discussion in chapter five), and the main objective of public bodies in pursuing the public interest[146]—as well as in guaranteeing the exercise of the freedom to conduct a business.[147] Indeed, efforts

(Buenos Aires, Depalma, 1950) is used). The first general rule imposing competitive tendering for the award of public contracts is reported to have been instituted by Ordinance of December 4th, 1836; see A Laguerre, *Concurrence dans les marchés publics* (Paris, Berger-Levrault, 1989) 14–15 (1989); and P Schultz, *Eléments du Droit des marchés publics* (Paris, LGDJ, 1996) 89. Similarly, regarding Belgium, see MA Flamme, *Traité théorique et pratique des marchés publics* (Brussels, Bruylant, 1969) I-305. Along the same lines, since 1884, Italian law has also imposed competition requirements for public procurement processes; see A Cuneo, *Appalti pubblici e privati*, 7th edn (Padova, CEDAM, 1972) 66. Similarly, as far back as 1809, the US Congress decreed the first of a long series of laws imposing a requirement for the use of formal advertising (ie, public tenders) with the purpose of giving the government the benefit of competition by formal advertising; Thybony (n 113) 72; Thai (n 26) 13; AG Thomas, *Principles of Government Purchasing* (New York, D Appleton and Co, 1919) 45–53 and 112–22; and JP Tanney, *Government Contract Law and Administration* (Chicago, Callaghan, 1930) 22–23.

[144] The ECJ has consistently indicated that, together with the free movement of goods and services, the opening up of public procurement to undistorted competition in all the Member States is the *principal objective* of the Community rules (for a detailed and expanded analysis, see below chapter five, §II). For recent references, see Case C-26/03 *Stadt Halle* [2005] ECR I-1 44; Case C-340/04 *Carbotermo* [2006] ECR I-4137 58; Case C-337/06 *Bayerischer Rundfunk and others* [2007] ECR I-11173 39; and Case C-454/06 *Pressetext Nachrichtenagentur* [2008] ECR I-4401 31. In similar terms, the ECJ has also indicated that public procurement directives are intended in particular to promote the development of effective competition in the fields to which they apply; see Joined Cases C-21/03 and C-34/03 *Fabricom* [2005] ECR I-1559 26, quoting Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7213 81 and the case law cited there. See also Opinion of AG Ruiz-Jarabo Colomer in Case C-412/04 *Commission v Italy* 51. Also, S Rodrigues et al, 'Chronique des marchés publics dans la jurisprudence communautaire (1 Juillet 2004–30 Juin 2007)' (2007) 510 *Revue du marché commun et de l'Union Européenne* 463, 464. Along the same lines, as regards the US federal procurement, US FAR 6.101(a) establishes full and open competition as the main policy; see ME Grossberg, 'The Competitive Bidding Requirement' (1965–66) 44 *Texas Law Review* 82; JW Whelan, 'An Introduction to the United States Federal Government System of Contracting' (1992) 1 *Public Procurement Law Review* 207; RC Nash, Jr and J Cibinic Jr, *Formation of Government Contracts*, 3rd edn (Washington, George Washington University, 1998) (chapter three); RC Nash, Jr, 'Competition: Reaching a Happy Median' (2005) 19 *Nash and Cibinic Reporter* 55, 177; WN Keyes, *Government Contracts under the Federal Acquisition Regulation,* 3rd edn (Eagan, Thomson/West, 2003) 166–81; and ABA, *Government Contract Law. The Deskbook for Procurement Professionals*, 3rd edn (Chicago, ABA Section of Public Contract Law, 2007) 59–82.

[145] Case C-138/08 *Hochtief and Linde-Kca-Dresden* [2009] ECR I-9889 47, with references to Case C-27/98 *Fracasso and Leitschutz* [1999] ECR I-5697 26; Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233 34; Case C-470/99 *Universale-Bau* [2002] ECR I-11617 89; and Case C-247/02 *Sintesi* [2004] ECR I-9215 35.

[146] See: Trepte (n 146) 63; and F Neumayr, 'Value for Money v Equal Treatment: The Relationship between the Seemingly Overriding National Rationale for Regulating Public Procurement and the Fundamental EC Principle of Equal Treatment' (2002) 11 *Public Procurement Law Review* 215, 215–20. See also Yannakopoulos, *Protection de la libre concurrence* (2008) 421, 425–29; S Destours, 'Le Droit de la concurrence, source du Droit des marchés publics?' in F Lichère (ed), *Le nouveau droit des marchés publics* (Paris, L'hermès, 2004) 39ff. In general terms, on the interrelationship between competition and public interest, see Clamour (n 13) 16ff. For an economic perspective, see WN Washington, 'A Review of the Literature: Competition versus Sole-Source Procurements' (1997) 4 *Acquisition Review Quarterly* 173; and Compte and Jéhiel (n 141) 343.

[147] Indeed, unrestricted access to public tenders has been considered a manifestation or a guarantee of the freedom to conduct a business recognised by most Member States' constitutions, as well as by art 49 TFEU and art 16 of the Charter of Fundamental Rights of the European Union [2000] OJ C364/1. Hence, unjustified restrictions to access to the public procurement process would not only breach EU directives' mandates and competition principles (below chs 5 and 6), but would also be contrary to constitutional mandates at both the EU and the domestic level.

to increase competitive pressure in the public procurement environment have been considered the main tool to improve the conditions in which the public buyer conducts its procurement operations,[148] so a clear pro-competitive orientation has become commonplace in public procurement regulations.[149]

Competition is generally fostered through the publicity of calls for tenders, on the assumption that strong competition will arise among potential suppliers once they are acquainted with the public buyer's needs.[150] As the ECJ has also recongnised repeatedly, procurement 'legislation contains fundamental rules of EU law in that it is intended to ensure the application of the principles of equal treatment of tenderers and of transparency in order to open up undistorted competition in all the Member States'.[151] Open and competitive procurement processes imply that the public purchaser will not limit the number of competitors that can participate (or, at least, not below a number of participants that ensures effective competition), and that the public buyer will award the contract to the bidder that offers the most advantageous conditions—be it determined exclusively as regards prices, or be it decided by taking into account a broader set of criteria to determine the most economically advantageous offer. A further development of the aforementioned requirements may easily lead to the need to avoid discriminatory practices that could exclude potential competitors—for instance, by establishing technical specifications that only a few or one of the potential suppliers could meet—or that could diminish their incentives to compete for the public contract—such as preferential treatment or other schemes that could handicap certain competitors who would be discouraged from participating in the tender process.[152]

Therefore, in a simplified way, it can be considered that competition goals tend to be interpreted in the public procurement system as mainly requiring (i) systematic diffusion of information (ie, of contract opportunities) as regards public tenders for contracts, (ii) admission of the largest possible number of competitors (hence, abolishing discriminatory practices in the tendering process), and (iii) award of the contract to the offer that yields better value for money to the public purchaser, according to objective and pre-established

[148] These efforts might derive from neo-classical influences to public procurement regulation; see C Bovis, 'Public Procurement in the European Union: Lessons from the Past and Insights to the Future' (2005–06) 12 *Columbia Journal of European Law* 53; and id (n 132) 293–98. See also Kunzlik, 'Neoliberalism and the European Public Procurement Regime' (2013) *in totum*.

[149] See: D Wallace, 'The Changing World of National Procurement Systems: Global Reformation' (1995) 4 *Public Procurement Law Review* 57; and Trepte (n 118) 3. This is clearly the case in most EU Member States; see, eg, F Moderne, 'La contratación pública en el Derecho administrativo francés contemporáneo' in JC Cassagne and E Rivero Ysern (eds), *La contratación pública* (Buenos Aires, Hammurabi, 2007) 253, 268; and A Travi, 'La contratación pública en Italia' in JC Cassagne and E Rivero Ysern (eds), *La contratación pública* (Buenos Aires, Hammurabi, 2007) 321, 333–37.

[150] See generally: D Coviello and M Mariniello, 'Publicity Requirements in Public Procurement: Evidence from a Regression Discontinuity Design' (2014) 109 *Journal of Public Economics* 76–100.

[151] Case C-213/13 *Impresa Pizzarotti* [2014] pub electr EU:C:2014:2067 63, with reference to its judgments in Case C-70/06 *Commission v Portugal* [2008] ECR I-1 40; Case C-213/07 *Mikhaniki* [2008] ECR I-9999 55; Case C-251/09 *Commission v Cyprus* [2011] ECR I-13 37–39; and Case C-336/12 *Manova* [2013] pub electr EU:C:2013:647 28.

[152] It is to be stressed that equal treatment (or, in other words, non-discrimination) is instrumental to achieving a truly competitive public procurement system that yields value for money to the public buyer. See H-J Prieβ, 'Distortions of Competition in Tender Proceedings: How to Deal with Conflicts of Interest (Family Ties, Business Links and Cross-Representation of Contracting Authority Officials and Bidders) and the Involvement of Project Consultants' (2002) 11 *Public Procurement Law Review* 153, 154. *Cf* Neumayr (n 146) 218–20, 226 and 232. On the interrelationship between equal treatment and competition, see below chapter five, §IV.

criteria.[153] This approach to competition requirements in the public procurement setting is consistent with its consideration as an exclusively *internal goal*—ie, solely, or mainly, focused on providing value for money to the public purchaser and to avoid discrimination among participants in a given tender.[154] However, it is submitted that, as it stands, this competition requirement falls short both of ensuring value for money for the public purchaser in the long term, and of guaranteeing that the market behaviour of the public buyer does not alter competitive dynamics. Both issues lie at the heart of the competition requirement in the public procurement setting once it is considered from a broader perspective—ie, once it is considered as the predominant *external goal* of public procurement.[155]

There are numerous practices and decisions of the public buyer that, while being perfectly respectful with the abovementioned limited competition requirements (open access, non-discrimination and objective award criteria), generate a significant negative impact in the market (for details, see below chapter six). The distortion of the competitive dynamics that such behaviour generates not only imposes economic consequences on the producers and other buyers active in that market—an externality that, by itself, would justify a more competition-oriented approach to public procurement rules (above chapter two)—but also impairs the ability of the public purchaser to obtain value for money in future transactions. Inasmuch as the current market behaviour of the public purchaser (probably in search of short-term efficiencies or value for money) alters the competitive dynamics of a market and reduces its efficiency, it is reducing its chances of benefitting from 'healthy' markets in future procurements—ie, the dynamic or long-term efficiency of the procurement system is diminished.[156] In general terms, the level of discretion of the public buyer in conducting the process needs to be limited[157]—or, at least, the exercise of discretion must be reined in and guided by predictable and non-discriminatory criteria with a clear pro-competitive bias.

Therefore, in my view, a proper construction of the competition goal common to most public procurement regulations requires taking into account the long-term effects of the market behaviour of the public purchaser on its ability to obtain value for money, as well as its impact on the competitive dynamics of the markets where the public buyer develops

[153] These are, succinctly, the main underlying principles of EU public procurement directives and of other main public procurement regulations; see Bovis (n 105) 25.

[154] This largely internal perspective has traditionally dominated the conception of the competition principle as applied in the public procurement setting by the EU judicature; see Case C-19/00 *SIAC Construction* [2001] ECR I-7725 34; Case C-470/99 *Universale-Bau* [2002] ECR I-11617 93; and Case T-345/03 *Evropaïki Dynamiki v Commission (CORDIS)* [2008] ECR II-341 143. However, a broader principle of competition is to be found in the case law (see below chapter five, §II) and has now been consolidated in art 18(1) Dir 2014/24.

[155] See: C Escuin Palop, 'Principios inspiradores del procedimiento de contratación pública' (2005) 46 *Contratación administrativa práctica* 29.

[156] The trade-off between short- and long-run effects of competition requirements in the public procurement setting has been stressed, even in the absence of pro-competitive policies, as the terms of a contract and the source selection procedure for that contract will affect anticipatory behaviour of firms on current as well as future procurements; see Dertouzos (n 117) 2–3.

[157] Along the same lines, the need to limit the discretion of the public purchaser if increased competition is to be promoted has been stressed by Schooner (n 134) 137; id (n 116) *passim*; and id (n 113) 110. *Contra* Kelman (n 120) 10; and Neumayr (n 146) 218. See also JA Pegnato, 'Assessing Federal Procurement Reform: Has the Procurement Pendulum Stopped Swinging?' (2003) 3 *Journal of Public Procurement* 145. For an economic view, see L Cameron, 'Limiting Buyer Discretion: Effects on Performance and Price in Long-Term Contracts' (2000) 90 *American Economic Review* 265.

its activities—or, put otherwise, the competition objective needs to develop its *external* dimension. In short, the competition goal of public procurement should be construed as also requiring rules oriented to curbing the public buyer's market behaviour, which could have a substantial negative impact on the competitive dynamics of the markets.[158] This requires constructing the competition goal of public procurement going beyond the traditional requirements to ensure a competitive public procurement (ie, open access, non-discrimination and objective award criteria)—which, however, significantly contribute to guaranteeing a pro-competitive approach in public procurement regulations and, consequently, are not to be overlooked or discarded—and to include its *external* dimension. In other words, the attainment of the competition goal requires developing a pro-competitive public procurement system that avoids publicly generated distortions of competition (see below chapter five, §II.B).

C. Efficiency (of Public Procurement Itself)

Given its relative importance in the total expenditure of the government, the efficiency of the procurement activities will largely determine the efficiency of public institutions.[159] In general, the efficient functioning of the government and efficiency in the expenditure of the public budget are common requirements in all countries. Therefore, efficiency is a general concern in the design of public procurement systems and maximising the efficiency of the procurement system is considered a goal in itself.[160]

In general terms, public procurement can be considered a source of potential inefficiencies for several reasons, such as its costs of implementation and administration,[161] the cost that specific demands of the public buyer generate when the products or services purchased are not generally marketed (ie, not off-the-shelf procurement), and the costs of increased prices when public procurement rules fail to meet the competition requirement and to obtain value for money (see above §IV.B).[162] Indirect costs, derived from the rigidity of the public procurement system have also been highlighted as one of its main sources of inefficiency.[163]

However, it seems impossible to think of any public procurement rules that would not generate some administrative costs and, sometimes, the particular needs of the public sector will impede the acquisition of commercial products or services—for the sole fact that in certain instances the public buyer might be the only source of demand for certain

[158] Along the same lines, D Katz, *Juge administratif et Droit de la concurrence* (Marseille, Faculté de Droit et de Science Politique, 2004) 101–03.

[159] As regards the importance of functional values such as economy, efficiency and effectiveness in the design of public institutions (ie, government), see C Harlow and R Rawlings, *Law and Administration*, 2nd edn (Charlottesville, Butterworths, 1997) 132–41.

[160] Arrowsmith et al (n 120) 31–32; Kovacic, Regulatory Controls as Barriers to Entry in Government Procurement (1992) 33–34. *Contra* D Waldo, *The Administrative State. A Study of the Political Theory of American Public Administration*, 2nd edn (New Brunswick, Transaction Publishers, 2007) 202. Even in sharper contradiction, see Kettl, *Sharing Power* (1993) 17–20.

[161] See: O Soudry, 'A Cost-Effective Policy in Competitive Bidding for Public Procurement' (2003) 7 *German Working Papers in Law and Economics* 5.

[162] Indeed, public procurement has been pin-pointed as one of the main sources of inefficiency in the public sector, together with (the lack of) organisational incentives, and personnel and budgetary restrictions. See Stiglitz (n 3) 201.

[163] Kelman (n 120) 1 and 10; and Neumayr (n 146) 218. Similarly, Kovacic (n 139) 36–38.

goods or services, or that it might need to differentiate the products and services used from those available to the general public. However, both areas offer significant room for improvement in terms of enhanced efficiency by the public buyer if this latter is able to draft rules that take into account their impact on administration costs, and if it can maximise the sourcing of commercial products already available in the market.

Nevertheless, some measures oriented at increasing the efficiency in these two aspects—and particularly as regards the reduction of administrative costs—might have negative effects as regards the inefficiency of the system derived from distortions to competition.[164]

Certain of these measures—such as aggregation of contracts or tender of framework agreements or indefinite delivery, indefinite quantity contracts (ID/IQ), or specially the centralisation of procurement needs through central purchasing bodies—will have a dubious net effect on the efficiency of the public procurement system as the savings in administrative costs will probably be more than outweighed by the loss of efficiency derived from the distortion of competition in the market. Moreover, even if the net effect were positive, the public buyer would be generating an externality that would impose the costs of his efficiency-enhancing policy on the producers and the rest of consumers active in the given market. Therefore, further analysis needs to be undertaken from a competition perspective before implementing certain rules that might seem desirable from the exclusive point of view of the public buyer.

In sum, it is hard to imagine a public procurement system that would not generate some frictions with the competition dynamics of the markets. Any set of rules that constrains and disciplines the behaviour of the public buyer will generate some additional costs to private agents willing to contract with the government (such as information, bidding, negotiation and other costs) and will restrict certain market behaviour that would otherwise be permitted to both offerors and the public buyer. To some extent, this will necessarily alter market behaviour and competitive dynamics. In the end, the trade-off between the efficiency (and transparency) of the system and the smooth working of the markets where the public buyer is present might require a certain degree of tolerance of minor restrictions of competition that generate a net efficiency (ie, increase and promote social welfare)—or that, if not for any other good reason, contribute to the adequate governance of the state.

However, there are reasons to think that current public procurement regulations contain certain rules and give rise to some practices that, in addition to making a very limited contribution to the efficiency of the public procurement system, generate significant distortions in the competitive dynamics of certain markets (for a detailed analysis, see below chapter six). In those cases, the adoption of more competition-oriented public procurement rules would not only provide more efficiency to the public procurement system—at least when the reduction in competition-derived inefficiency is larger than the contribution to the efficiency of the system of the amended or abrogated rules—but would also be more consistent with the enforcement of competition policy and would limit the externalities generated by public procurement rules for other economic agents. In those cases, the efficiency objective should not be abandoned, but its balance with competition goals might need to be reassessed.

[164] The tension between both goals is stressed in Schooner et al (n 116) 14.

D. Transparency (Oversight, Anti-Fraud Objectives)

Finally, as has been stressed by most commentators, another of the basic goals of the public procurement process is to guarantee that it is conducted in a transparent manner.[165] Transparency guarantees public supervision of the activities of the public buyer, increases accountability and limits the scope for corruption and other fraudulent practices.[166] Transparency reinforces the rights of the interested parties in the administrative procedure that generally channels public procurement processes—which justifies the rights of limited access to the file, personal notifications, etc. Transparency also indirectly contributes to attaining the competitive goals of public procurement as it allows market agents to monitor potential business opportunities[167] and reinforces their incentives to compete and participate in public tenders by building up trust in the system—as long as transparency does not disclose misbehaviour by the public buyer, private agents will be more confident that they will not be treated discriminately and will have stronger incentives to undertake the costs and risks of bidding for public contracts.[168]

However, over a certain limit, transparency of the public procurement process generates certain risks for the competitive dynamics of the markets[169]—particularly where public tenders represent a large part of the market sales—as disclosure of excessive information (about market participants, the content of their bids, the prices charged to the public buyer, etc) can increase the risk of collusion and other anti-competitive practices. In concentrated markets where public procurement rules play a significant role—be it because the public buyer is the only or the largest buyer, or be it because the public buyer is a strategic player in the sector—excessive transparency generates incentives to collusion. In that case, the market failure is generated (to a large extent) by public procurement rules (see above chapter two, §V.D), and enforcement of antitrust rules might be distorted and result in inefficient outcomes (under- or over-deterrence).

In those cases, adjusting public procurement rules to a more restricted level of transparency—while preserving the main objectives of keeping the process publicly accountable, and guaranteeing the procedural and administrative rights of bidders—might improve

[165] The importance of transparency in the EU public procurement system has been stressed by the ECJ by extending the obligation to conduct a transparent procurement even when the EU directives are not applicable (fully, or at all). See Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745 60–61; Case C-59/00 *Vestergaard* [2001] ECR I-9505 20–21; Case C-231/03 *Coname* [2005] ECR I-7287 16–17; Case C-458/03 *Parking Brixen* [2005] ECR I-8585 46–49; Case C-6/05 *Medipac-Kazantzidis* [2007] ECR I-4557 33 and 53; Case C-507/03 *Commission v Ireland* [2007] ECR I-9777 30–31; and Case C-454/06 *Pressetext Nachrichtenagentur* [2008] ECR I-4401 32–33. For discussion, see below chapter five §III.D.

[166] Anti-fraud objectives have been long recognised as one of the main goals and justifications for public procurement regulations (Jèze (n 143) 73) and transparency has become one of the key principles of EU public procurement directives from their very inception; Bovis (n 13) 125–28.

[167] Bovis (n 105) 59–60; Trepte (n 118) 59.

[168] Schooner (n 113) 104.

[169] Preoccupation about the risks generated by an excess of transparency has been expressed by Bovis (n 13) 128–30. As seen (above chapter two), the excess of transparency can result in lower price competition if certain conditions are met—mainly, an oligopolistic or highly concentrated market structure. For discussion of recent cases, see A Sánchez Graells, *The Difficult Balance between Transparency and Competition in Public Procurement: Some Recent Trends in the Case Law of the European Courts and a Look at the New Directives* (University of Leicester School of Law Research Paper No 13-11, 2013), available at http://ssrn.com/abstract=2353005. For additional background, C Estevan de Quesada, 'Competition and Transparency in Public Procurement Markets' (2014) 23 *Public Procurement Law Review* 229.

the efficiency of the public procurement system and might be more consistent with the enforcement of competition policy; this would again contribute to limiting the externalities generated by public procurement rules for other economic agents and to generating a positive effect on the competitive dynamics of markets where the public procurement activity is particularly relevant.

E. Market Integration as a Purely (and Transitory) European Goal

As in the case of competition law—and in line with both sets of economic regulation as two of the main pillars of the internal market project—EU public procurement law has been strongly influenced by the goal of market integration.[170] Indeed, in their effort to reach an internal market, EU institutions placed market integration as the paramount goal of public procurement regulations and made it a key element in the 1992 strategy for the completion of the single market.[171] Discrimination and protectionism in public procurement was considered a non-tariff barrier to intra-EU trade,[172] and significant efforts were put into getting the Member States to abandon those policies.[173] Given the political instrumentalisation of this 'multi-purpose' device (above §IV.A), the EU institutions had to overcome a significant initial reluctance to market integration through public procurement by Member States. Non- or partial compliance with public procurement directives was widespread among Member States and the ECJ had to issue numerous decisions condemning their resistance to opening up public procurement markets.[174]

[170] See: A Mattera, *Le marché unique européen, ses règles, son fonctionnement* (Paris, LGDJ, 1990) (the Spanish translation by C Zapico Landrove, *El mercado único europeo. Sus reglas, su funcionamiento* (Madrid, Civitas, 1991) is used) 385–419. For scholars such as Arrowsmith (n 121), this remains the sole and limited goal of EU public procurement rules.

[171] See: JA Sohrab, 'The Single European Market and Public Procurement' (1990) 10 *Oxford Journal of Legal Studies* 522, 524; Arrowsmith (n 120, 2005–06) 339; and JL Piñar Mañas, 'Origen y fundamentos del Derecho europeo de contratos públicos' in JC Cassagne and E Rivero Ysern (eds), *La contratación pública* (Buenos Aires, Hammurabi, 2007) 275. See also Bovis (n 105) 1–2, (n 148) 113–14 and (n 132) 291. However, public procurement had previously been largely neglected as a discipline of European law and policy, which led Bovis to call it the 'Cinderella' of European integration; id (n 13) 1 and 14–17.

[172] See: PA Geroski, 'European Industrial Policy and Industrial Policy in Europe' (1989) 5 *Oxford Review of Economic Policy* 20, 29–30.

[173] J-M Rainaud, 'Les marchés publics dans la Communauté Économique Européenne' (1972) 153 *Revue du marché commun* 365, 367; A Mattera, 'La libéralisation des marchés publics et semi-publics dans la Communauté' (1973) 165 *Revue du marché commun* 204, 205; id, 'Les marches publics: Dernier rempart du protectionnisme des États' (1993) 3 *Revue du marché unique européen* 5; M-A Flamme and P Flamme, 'Vers l'Europe des marchés publics? (A propós de la Directive "Fournitures" du 22 Mars 1988)' (1988) 320 *Revue du marché commun* 455, 457–59; M Emerson et al, *1992. La nuova economia europea. Una valutazione degli effetti economici del completamento del mercato interno della Comunità Europea* (Bologna, Il Mulino, 1990) 91–101; F Weiss, 'Public Procurement Law in the EC Internal Market 1992: The Second Coming of the European Champion' (1992) 37 *Antitrust Bulletin* 307, 310–7; and A Cox, *Public Procurement in the European Community—The Single Market Rules and the Enforcement Regime after 1992* (Warwickshire, Earlsgate Press, 1993).

[174] A situation reviewed and strongly criticised by JM Fernández Martín, *The EC Public Procurement Rules. A Critical Analysis* (Oxford, Clarendon Press, 1996) 93–145. Similarly, F Weiss, *Public Procurement in European Community Law* (London, Athlone Press, 1993). See also Bovis (n 105) 6 and 22; and Brisson (n 23) 65–73. Generally, on the difficulties that improper or non-implementation of EU directives were generating for the attainment of the internal market objectives, see D Anderson, 'Inadequate Implementation of EEC Directives: A Roadblock on the Way to 1992?' (1988) 11 *Boston College International and Comparative Law Review* 91, 94. A situation that, in relation to public procurement, might not have changed; LE Ramsey, 'The New Public Procurement Directives: A Partial Solution to the Problems of Procurement Compliance' (2006) 12 *European Public Law* 275, 291.

Important progress has been made and the gradual liberalisation of public procurement markets in the EU has taken place.[175] Compliance by Member States is still imperfect,[176] but the trends are positive.[177] Moreover, despite the recent use of public procurement as a lever for the further development of the internal market within the context of the Europe 2020 strategy,[178] this has not been based on integration for its own sake, but on the strategic use of public procurement optimisation as a tool to foster economic growth and economic efficiency in competitiveness.[179] Consequently, the market integration objective is being phased out or, at least, re-oriented towards substantive economic goals. However, in my view, current EU public procurement rules and practice still present the problem of being excessively focused on preventing discrimination based on nationality (which has overshadowed other discrimination problems), on protectionist policies and on competition restrictions in European public procurement.[180]

In any case, it is submitted that the goal of market integration is largely compatible with the three fundamental goals of public procurement.[181] It is clearly beneficial from a competition perspective, as greater openness of public procurement markets must promote increased competition for public contracts across the EU and, in more general terms, provide incentives for companies to increase efficiency.[182] Moreover, EU public procurement rules place a strong emphasis on transparency. The only area where a clash of conflicting goals exists is that of the efficiency of the public procurement system. EU rules impose increased administration costs—particularly derived from EU-wide publicity and translation of documents—that need to be outweighed by the efficiencies deriving from increased competition. The basic assumption is that the positive effects derived from increased competition will more than offset the increased costs of the system.[183] Therefore,

[175] Fernández Martín (n 174) 4–37; JA Winter, 'Public Procurement in the EEC' (1991) 28 *Common Market Law Review* 741, 743–52; and AB Adler, 'The Utilities Directive—A Giant Step Down the Long and Winding Road toward Opening Public Procurement Markets in the EC' (1994) 17 *Boston College International and Comparative Law Review* 111, 113–15.

[176] CJ Gelderman, PW Th. Ghijsen and MJ Brugman, 'Public Procurement and EU Tendering Directives—Explaining Non-compliance' (2006) 19(7) *International Journal of Public Sector Management* 702–14.

[177] Commission Staff Working Document, *Annual Public Procurement Implementation Review 2012* (SWD(2012) 342 final).

[178] Indeed, it has been stressed that in order to contribute to the objectives of the Europe 2020 strategy, 'public procurement policy must ensure the most efficient use of public funds and procurement markets must be kept open EU-wide'; European Commission, *Europe 2020: A strategy for smart, sustainable and inclusive growth* (COM(2010) 2020 final). See also European Commission, *EU public procurement legislation: delivering results. Summary of evaluation report* (2012) and, in more detail, Commission Staff Working Paper, *Evaluation Report. Impact and Effectiveness of EU Public Procurement Legislation* (2011), available at ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/er853_1_en.pdf.

[179] As clearly stressed in the Single Market Act, 'this simplification must be carried out in a way that does not close procurement to cross-border competition'; Communication from the Commission, *Single Market Act: Twelve levers to boost growth and strengthen confidence "Working together to create new growth"* (COM(2011) 0206 final).

[180] *Cf* Arrowsmith (n 121) 25–34.

[181] *Cf* Trepte (n 132) 3.

[182] Geroski (n 172) 33.

[183] For studies forecasting the effects of the completion of the internal market for public procurement, see European Commission, *Research on the 'Cost of Non-Europe': Basic Findings. Vol I—Basic Studies: Executive Summaries* (1988) 69; P Cecchini, *Europa 1992: Una apuesta de futuro* (Madrid, Alianza, 1988); and Emerson et al, 1992. *La Nuova Economia Europea* (1990) 16–25. For an ex post appraisal of the economic effects of those measures, see J Pelkmans, *European Integration. Methods and Economic Analysis*, 2nd edn (Harlow, Longman, 1997) 76; H Gordon et al, 'The Economic Impact of the European Union Regime on Public Procurement: Lessons for the WTO' (1998) 21 *World Economy* 159; and P Ziltener, 'The Economic Effects of the European Single

there should be no significant reservations as regards the desirability of promoting market integration in the EU public procurement field.

However, once the internal market has reached maturity, the transitory goal of market integration is being progressively substituted by other secondary policies (notably, social and environmental policies). Unlike the case of EU competition policy—which, as already mentioned, has opted for a more economic approach after progressively abandoning the market integration goal (above §IV.D)—EU public procurement policy seems to be on a path that might significantly diverge from its basic and fundamental goal of promoting competition by 'reintroducing' secondary policies.[184] Paradoxically, it is also stressing in a more definite manner the importance of competition goals (see art 18(1) Dir 2014/24 and chapter five below). Therefore, in order to ensure consistency, it will be necessary to redefine EU public procurement policy once the market integration goal is totally or partially abandoned, in order to maintain or develop competition-oriented rules that can contribute to increasing effective competition for government contracts in the EU.

F. Preliminary Conclusion regarding the Objectives of Public Procurement Law

From the discussion above, it is my view that public procurement regulation should have competition, transparency and efficiency as its main goals. To be sure, the pursuit of these goals generates some frictions and a difficult balance amongst them must be reached. However, once the competition objective is analysed in further detail, two dimensions can be identified: an internal dimension, largely limited to competition within tender procedures (which is more easily balanced against transparency and efficiency considerations), and an external dimension, concerned with the effects of public procurement in the markets affected by the activities of the public buyer. Once this latter dimension is identified, in my opinion, the balance between competition, efficiency and transparency objectives might need to be reassessed, and *competition considerations should be given particular relevance*.

V. Conclusions to this Chapter: Common Goals of Competition Law and Public Procurement

As has been seen in this chapter, economic efficiency and maximisation of welfare constitute the common core of goals of competition law and public procurement.[185] Both sets of regulation are based on the same economic principle—that, in the long term, competitive markets generate the most efficient outcomes (and generate value for money, in terms of public procurement goals) and contribute to social welfare—and are oriented

Market Project: Projections, Simulations and Reality' (2004) 11 *Review of International Political Economy* 953.

[184] AI Matei and L Matei, 'Modernisation of the Public Procurement Market. Towards a Strategy of Public Marketing Specific on the Single Market' (2012) 1(1) *Societal Innovations for Global Growth* 497–511.

[185] In similar terms, RA Givens, *Antitrust: An Economic Approach*, 44th rel (New York, Law Journal Press, 2007) 1–15.

towards correcting similar market failures—and so, both focus on curbing the undesirable market behaviour of different market agents.[186] Therefore, the approximation of both sets of economic regulation needs to build upon considerations of economic efficiency and on welfare grounds and, ultimately, to aim at contributing to the development of a system that ensures undistorted market competition—particularly in markets related to public procurement activities.

However, given their governance implications, public procurement regulations have two other core goals that entail a certain conflict, or impose a complex trade-off, with the promotion of undistorted market competition: transparency and efficiency of the procurement system. Under certain circumstances, the efficiency and transparency of the public procurement system can generate competitive distortions that give rise to a loss of efficiency (in terms of value for money) of the procurement system itself and to a negative economic effect for the rest of the agents in the market where the public buyer carries out its activities (through the various types of externality-like economic effects identified, see above chapter two). In these cases, the adoption of more competition-oriented procurement rules that minimise the conflict between efficiency, transparency and competition goals will be instrumental in achieving a more consistent enforcement of competition and public procurement policies, and in promoting welfare.[187]

As has been briefly discussed, it is also worth noting that the pursuit of non-economic goals by either competition or public procurement policy is inadequate. However, while there is a broad consensus about dropping socio-political considerations from the list of antitrust goals (where economic considerations have gained preference over alternative and conflicting policy objectives), the pursuit of secondary policies of a socio-political nature is still a common trend in the public procurement arena. Inasmuch as these non-economic goals are kept as a part of the aims of public procurement regulations, the clash between their implementation and keeping undistorted market dynamics is evident. In this case, competition and public procurement policy are pursuing conflicting goals—indeed, public procurement is pursuing conflicting goals itself—and the outcome cannot be expected to be optimal. If it is correct to assume that both competition law and public procurement rules are primarily concerned with economic efficiency (as is understood here), and that undistorted competition is their shared and basic goal, competition criteria should be given preference when competition clashes with other objectives. Therefore, substantial revision of the pursuit of secondary policies in public procurement seems to be a must for a more competition-oriented procurement.

To sum up, this chapter has stressed that economic efficiency and welfare maximisation through undistorted competitive processes in the markets where public procurement

[186] The interdependency between competition and public procurement law has been stressed by many authors; eg, C Munro, 'Competition Law and Public Procurement: Two Sides of the Same Coin?' (2006) 15 *Public Procurement Law Review* 352, 353; D Brault, *Politique et pratique du Droit de la concurrence en France* (Paris, LGDJ, 2004) 135–36; D Castro-Villacañas Pérez, 'La Doctrina *in house providing* y el Derecho de Defensa de la Competencia. Algunos Comentarios sobre el Caso TRAGSA' in Ll Cases (ed), *Anuario de la Competencia 2006* (Madrid, Marcial Pons, 2007) 351, 351 and 378.

[187] The importance of ensuring consistency between public procurement and other public policies in general, and antitrust in particular, was strongly emphasised by AS Miller and WT Pierson Jr, 'Observations on the Consistency of Federal Procurement Policies with Other Governmental Policies' (1964) 29 *Law and Contemporary Problems* 277, 279–81, 294 and 309–11. See also ET Grether, 'Consistency in Public Economic Policy with Respect to Private Unregulated Industries' (1963) 53 *American Economic Review* 26, 27–28, 30, 32 and 35–36.

activities take place form the common normative basis for the development of a general analytical framework based on a more integrated approach to public procurement and competition law. Therefore, the remainder of the study will be oriented (implicit or explicitly) towards analysing competition and public procurement law from a welfare economics perspective, and will try to highlight the competition aspects of the public procurement system and the ways in which a more pro-competitive approach can be adopted to further the common goal of economic efficiency.

Conclusions to Part Two: Legal and Economic Normative Foundations of a More Competition-Oriented Public Procurement System

The analyses conducted in chapters two and three have shown that there exists a strong normative basis for the development of a more competition-oriented public procurement system.

On the one hand, from an *economic perspective*, an analysis of public procurement (ie, of the market behaviour of the public buyer) and its impact on market dynamics has revealed the existence of potential competition distortions that would have a negative impact on social welfare. By underlying the fact that—at least in a large number of instances—public procurement activities take place in markets where other buyers (ie, undertakings and consumers) are active, the existence of potential direct and indirect negative effects has become apparent. Such waterbed effects and other indirect effects (related to collusion, price signalling, technical leverage and other potential distortions) can give rise to the type of distortions that competition law is designed to prevent. Therefore, from an economic standpoint, public procurement constitutes a source of potential distortions of competition and, consequently, merits further scrutiny from a competition perspective—which, currently, has mostly omitted the analysis of the market behaviour of the public buyer (above chapter one).

On the other hand, an *overview of the basic goals and objectives* of competition law and public procurement law has shown that there is significant commonality between both sets of economic regulation as to justify a much more competition-oriented approach to public procurement. In general terms, both sets of economic regulation of a horizontal nature aim at correcting market failures and, in a significant number of instances, overlap (however, such cases have so far been largely unexplored). Moreover, from the perspective of welfare economics and its normative assumptions (which currently dominate competition economics and are very significant, if not dominant, also in the public procurement field) it has been seen that economic considerations—particularly, economic efficiency and social welfare—are the core goals of both competition law and public procurement law. Therefore, even if it may require certain balances and trade-offs with complementary goals of public procurement (such as transparency and efficiency of the system), a revision from a competition perspective is largely consistent with the basic goals and functions of public procurement. In a more competition-oriented approach, the pursuit of 'secondary'

policies by means of public procurement will need to be significantly reassessed and minimised in those instances in which it generates a potential for market distortions.

The rest of the study will be based on these basic or fundamental findings derived from the appraisal of competition law and public procurement law from a welfare economics perspective.

Part Three

General Part
The Building Blocks of a Framework for the Competition Analysis of Public Procurement

Part three, which constitutes the *general part of this study*, will be dedicated to the analysis of EU competition and public procurement rules to appraise to what extent they can be considered the building blocks of a framework properly designed to discipline the market behaviour of the public purchaser and to guarantee undistorted competition in the public procurement setting.

Chapter four will adopt the *perspective of competition law* and will look into how and to what extent publicly generated distortions of competition are addressed under current EU competition law rules, as interpreted by the EU case law. It will also explore the ways in which, in my view, current rules should be improved or further developed in order to attain better results.

Chapter five will then change perspective and take a look at competition considerations from a *public procurement viewpoint*, examining the place for competition concerns in EU public procurement rules and their implications in trying to tackle publicly generated competition distortions in the procurement setting. It will pay particular attention to the interpretative difficulties created by the consolidation of the principle of competition in article 18(1) of Directive 2014/24 and will offer interpretative guidance with the aim of establishing a competition-oriented procurement framework that will be further developed in chapter six.

The conclusions of part three will build upon the previous findings and sketch the contours and implications of a framework for the appraisal of the market behaviour of the public buyer on the basis of EU competition and public procurement rules. This general framework will be consistent with the basic elements identified in part two and will later on be operationalised and further defined in part four through the study of more specific aspects of public procurement processes and practices.

4

EU Competition Law and Public Procurement: The Inability of EU Competition Rules to Rein in Anti-Competitive Public Procurement

I. Introduction

The purpose of this chapter is to explore the research sub-question: how does EU competition law currently address publicly generated competitive distortions in the public procurement field, and how should it be developed to provide more effective solutions? Therefore, it is dedicated to inquiring if and to what extent current EU competition law institutions and doctrines are able to prevent anti-competitive public procurement practices and, if limitations or shortcomings are identified, to carry out developments or revisions that could contribute to designing a more complete set of competition rules applicable to the public buyer. As anticipated in the introduction to the study (above chapter one), given the potential negative effects of public procurement on competitive market dynamics (above chapter two) and that the main goal of competition law is to prevent distortions of competition in the market as a means to promote economic efficiency and maximise social welfare (above chapter three), it would seem reasonable to expect competition rules to provide instruments against distortions or restrictions generated by the public buyer.[1] This chapter will explore to what extent that is the situation and, if it is not, whether EU competition law can be further developed to capture publicly generated distortions of competition in the public procurement setting or, on the contrary, whether they remain off-bounds for competition law and should therefore be addressed by means of different regulatory instruments—such as public procurement law (on this not necessarily alternative approach, below chapter five).

A priori, not all competition rules seem to be equally well placed to tackle publicly created restrictions of competition.[2] In theory, it would seem logical for competition rules directly aimed at the public sector to offer well-adapted mechanisms to prevent competitive

[1] Particularly in view of the conception of competition law as a system comprising all legal expressions of competition policy, broadly defined (advanced above chapter one, §I.A).

[2] Some of them, such as merger control rules, are immediately left outside the analysis, since their inability to tackle those restrictions and distortions of competition is straightforward—and, consequently, deserves no further consideration.

distortions in the public procurement setting.[3] In this regard, the first step in this chapter will be to examine whether the EU competition rules aimed specifically at Member States (ie, the competition rules applicable to the granting of state aid; arts 107 to 109 TFEU, ex arts 87 to 89 TEC) and/or the rules aimed at public undertakings and undertakings with which the states maintain a close link through the granting of special or exclusive rights (art 106 TFEU, ex art 86 TEC), provide such tools to rein in anti-competitive purchasing behaviour (§II). However, the research will soon show that the award of public contracts generally lies outside the scope of both sets of rules, as public contracts will hardly meet the criteria for being considered either 'aid' (§II.A) or 'special or exclusive rights' (§II.B) granted by Member States to the public contractors.

The inquiry will then focus on the *direct* application of 'core' competition law prohibitions (arts 101 and 102 TFEU, ex arts 81 and 82 TEC) to the public buyer (§III). It will be concluded that, as the law currently stands and due to a very narrow definition of the concept of undertaking by the interpretative case law, 'pure' procurement activities remain largely shielded from competition law scrutiny (§III.D).

Hence, the possibility for *indirect* application of competition rules to the public buyer under the 'state action doctrine' (arts 3(3) TEU, 4(3) TEU, 3(1)(b) TFEU, 119 TFEU and Protocol (No 27) TFEU, together with arts 101 and 102 TFEU; ex arts 3(1)(g), 4, 10(2) and 81 and 82 TEC jointly) will be considered (§IV). Nonetheless, the analysis will show that competition distortions generated unilaterally by the public buyer in conducting purchasing activities *as such* are also not effectively covered by this instrument under current EU competition law.

In view of these results and the preliminary conclusions derived from the assessment of EU competition law as it currently stands (§V)—and with a stronger normative emphasis, the inquiry will then turn towards exploring whether amendments or developments of current EU competition rules could achieve better results to ensure pro-competitive public procurement rules and practices and, more specifically, lead to developments in the two areas of current competition law where shortcomings have been identified and where, in my opinion, developments are feasible and would yield significant results.[4]

First, the inquiry will return to the direct application of 'core' competition rules to the public buyer. In this regard, arguments will be presented in relation with the adoption of a more economic approach towards the definition of undertaking and, particularly, towards the twin issue whether public procurement activities constitute by themselves 'economic activities' for the purposes of articles 101 and 102 TFEU (§VI). It will be argued that the adoption of a less formalistic concept of 'economic activity'—and, consequently, of

[3] A preliminary issue to be considered would be whether public procurement law rather than competition law should assume this task. However, in my view, these sets of economic regulation are not mutually exclusive and do not hold a relationship of speciality—ie, public procurement law is not competition *lex specialis* in the procurement setting (as further developed below chapter five, §II.C)—and should be seen as largely complementary. Therefore, the prevention of competitive distortions in the public procurement setting is considered a proper and desirable function for competition law and policy.

[4] As explained in further detail below §V, normative considerations will only be developed regarding those areas of EU competition law that seem to offer larger potential results, that is, the direct and indirect application of 'core' competition rules contained in arts 101 and 102 TFEU—since developments in the application of arts 106 and 107 TFEU would always be constrained by restrictions on their scope that make them hardly adjustable to the public procurement setting.

'undertaking'—which did not exclude procurement activities *as such* would improve the current situation.

Then, the research will turn towards the indirect application of 'core' competition rules to the public buyer, and will focus on the refinement and further development of the state action doctrine (§VII). In search of guidance, a study will be made to determine whether the equivalent construction under US law is better designed to capture unilateral non-regulatory public competition-distorting behaviour (§VII.A). The inquiry will, however, indicate that the *status quaestionis* in the US is substantially equivalent to the situation in the EU—and, consequently, that there is reduced scope for legal transplants in this area. A proposal for the development of the state action doctrine will then be based on a fundamental distinction of regulatory (ie, sovereign) and non-regulatory (ie, commercial or market) activities of public authorities—which should lead to the development of a 'market participant exception' to the state action doctrine (§VII.B). Emphasis will also be put on the need to bring non-regulatory activities (and seemingly sovereign activities that actually lack sufficient material legitimacy) under the scope of competition rules, in search of a proper balance between economic and non-economic legislative and regulatory objectives (§VII.C).

Finally, as a conclusion to this chapter, it will be submitted that the proposed developments of current EU competition rules are particularly well-suited to addressing publicly generated competitive distortions in the public procurement field and, consequently, should become the prime regulatory response under EU competition law to ensure the development of more competition-oriented public procurement (§VIII).

II. The Inability of Rules on the Grant of State Aid and Special or Exclusive Rights to Tackle Anti-Competitive Public Procurement

The scope of the EU competition rules *specifically* applicable to public sector activities is very narrow and focuses on certain types of public intervention that can distort market dynamics by placing certain undertakings at an advantage vis-à-vis their competitors who do not receive the same favourable treatment from public authorities. Indeed, only two particular types of public anti-competitive behaviour are expressly covered by the rules contained in the TFEU: the granting of 'state aid' (arts 107 to 109 TFEU) and the granting of 'exclusive or special rights' to undertakings—particularly to those providing services of general economic interest (art 106 TFEU).[5] However, as will be seen in what follows, given their focus on particular types of public intervention in the markets, their scope is limited to narrow and relatively well-defined types of public activity that do not

[5] The study of rules regulating state aid and the rules applicable to undertakings holding exclusive or special rights is generally undertaken separately, as they are arguably two distinct blocks of EU competition law. However, for the analytical purposes of this study, they will be grouped together as the EU competition rules that, in my view, are tailored to specific instances of public intervention in the market. As mentioned in the text, being specific, both sets of rules will prove largely incapable of tackling other types of publicly-generated distortions of competition. Consequently, their analysis will be more limited than that of more 'general' competition rules and, particularly, of the direct and indirect application of 'core' EU competition prohibitions.

easily accommodate public procurement activities conducted under most common circumstances—with the result that their application is restricted to somewhat *abnormal* or *residual* instances of public procurement activity. Hence, from a general perspective, none of these rules seems fit for the purpose of controlling the competition-distorting exercise of the state's regulatory powers or the anti-competitive behaviour of public authorities in the public procurement arena.

A. The Proper Award of a Public Contract Establishes a Presumption against the Existence of State Aid

Article 107(1) TFEU proscribes as incompatible with the common market 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 it affects trade between Member States. The exception to this general prohibition of state aid is contained in paragraphs 107(2) and 107(3) TFEU—which respectively establish automatic exemptions to certain types of state aid[6] and possible justifications to state aid[7]—subject to the authorisation procedure before the Commission set up by article 108 TFEU and its implementing regulations.[8] It follows that, in order to qualify as state aid and be subject to the general prohibition and to the authorisation procedure, four cumulative conditions have to be met:[9] (i) the measure has to be granted out of state resources, (ii) it has to confer an economic advantage on undertakings, (iii)

[6] The automatic exemption contained in art 107(2) TFEU applies to (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 natural disasters or exceptional occurrences; and (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as it is required to compensate for the economic disadvantages caused by that division. See P Craig and G de Búrca, *EU Law: Texts, Cases and Materials*, 4th edn (Oxford, Oxford University Press, 2007) 1092–93.

[7] According to art 107(3) TFEU, certain types of aid may be considered compatible with the common market: (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment; (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; and (e) such other categories of aid as may be specified by decision of the Council acting by a qualified majority on a proposal from the Commission. See Craig and de Búrca, *EU Law* (2007) 1093–98.

[8] Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [1999] OJ L83/1, as amended by Council Regulation (EU) No 734/2013 of 22 July 2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L204/15; and Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2004] L140/1, as amended by Commission Regulation (EU) No 372/2014 of 9 April 2014 amending Regulation (EC) No 794/2004 as regards the calculation of certain time limits, the handling of complaints, and the identification and protection of confidential information [2014] OJ L 109/14.

[9] For updated guidance, see Communication from the Commission, *Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU* (2014), available at ec.europa.eu/competition/consultations/2014_state_aid_notion/draft_guidance_en.pdf.

the advantage has to be selective and distort or threaten to distort competition, and (iv) the measure has to affect intra-EU trade.[10]

The possibility of treating the award of public contracts as state aid has been intensely debated,[11] as most of the conditions laid down in article 107(1) TFEU for the prohibition of anti-competitive aid are easily met by certain public procurement activities.[12] Public contracts are generally financed, either completely or partially, out of state resources,[13] and most public contracts are directly or indirectly attributable to public bodies included in the broad definition of 'state' for the purpose of article 107(1) TFEU.[14] Also, the award of public contracts is necessarily selective,[15] as it only favours a given tenderer or grouping of tenderers at a time, and might generate competitive distortions (as analysed in detail above chapter two). Moreover, given the value of certain public contracts—particularly those covered by EU public procurement directives (ie, above-threshold public procurement), the effect on intra-EU trade will also usually be appreciable.[16] Consequently, in general terms, the most controversial condition will be to determine whether the award of a public contract confers an *economic advantage* which the public contractor would not receive under normal market conditions.[17] In other words, it is to be analysed whether

[10] For a summary of the case law (with numerous references), see Case T-442/03 *SIC v Commission* [2008] ECR II-1161. See also Craig and de Búrca (n 6) 1090–92; E Szyszczak, *The Regulation of the State in Competitive Markets in the EU* (Oxford, Hart Publishing, 2007) 179–84; R Plender, 'Definition of Aid' in Andrea Biondi et al (eds), *The Law of State Aid in the European Union* (Oxford, Oxford University Press, 2004) 3, 3–39. Also L Hancher et al, *EC State Aids*, 3rd edn (London, Sweet & Maxwell, 2006) 30–101; J-D Braun and J Kühling, 'Article 87 EC and the Community Courts: From Revolution to Evolution' (2008) 45 *Common Market Law Review* 465. See also JL Buendía Sierra and B Smulders, 'The Limited Role of the "Refined Economic Approach" ' in GC Rodríguez Iglesias et al (eds), *EC State Aid Law. Liber Amicorum Francisco Santaolalla Gadea*, International Competition Law Series (Alphen aan den Rijn, Kluwer Law International, 2008) 1, 11–14. See also W Sauter and H Schepel, *State and Market in European Union Law. The Public and Private Spheres of the Internal Market before the EU Courts* (Cambridge, Cambridge University Press, 2009) 193–210; and K Bacon (ed), *European Union Law of State Aid*, 2nd edn (Oxford, Oxford University Press, 2013) 19–90. For a critical assessment of the *status quaestionis*, see A Biondi, 'State Aid Is Falling Down, Falling Down: An Analysis of the Case Law on the Notion of Aid' (2013) 50(6) *Common Market Law Review* 1719–43.

[11] Generally, for an update on the discussions, see the contributions to S Schoenmaekers, W Devroe and N Philipsen (eds), *State Aid and Public Procurement in the European Union*, 131 Ius Commune: European and Comparative Law Series (Groeningen, Intersentia, 2014).

[12] S Arrowsmith, *The Law of Public and Utilities Procurement. Regulation in the EU and the UK*, vol 1, 3rd edn (London, Sweet & Maxwell, 2014) 302–24.

[13] In fact, the proportion of public finance is one of the reasons to extend the applicability of EU public procurement rules to private agents, at least in relation to certain types of works and services contracts—where the subsidisation of more than 50% of the contract value triggers compliance with the EU rules on public procurement; see art 13 Dir 2014/24. See PA Trepte, *Public Procurement in the EU: A Practitioner's Guide*, 2nd edn (Oxford, Oxford University Press, 2007) 221–22.

[14] However, the situation might be different in the case of public undertakings autonomously managed; see Case C-482/99 *Stardust Marine* [2002] ECR I-4397 52ff; and J Hillger, 'The Award of a Public Contract as State Aid within the Meaning of Article 87(1) EC' (2003) 12 *Public Procurement Law Review* 109, 121–25.

[15] *Contra*: M Dischendorfer and M Stempowski, 'The Interplay between the EC Rules on Public Procurement and State Aid' (2002) 11 *Public Procurement Law Review* NA47, NA51. More generally, see B Kurcz and D Vallindas, 'Can General Measures Be … Selective? Some Thoughts on the Interpretation of a State Aid Definition' (2008) 45 *Common Market Law Review* 159.

[16] See: T Prosser, *The Limits of Competition Law. Markets and Public Services* (Oxford, Oxford University Press, 2005) 130; and R Burnley, 'Interstate Trade Revisited—The Jurisdictional Criterion for Articles 81 and 82 EC' (2002) 23 *European Competition Law Review* 217.

[17] JM Fernández Martín and O Stehmann, 'Product Market Integration versus Regional Cohesion in the Community' (1990) 15 *European Law Review* 216, 239–43; S Arrowsmith, 'Public Procurement as an Instrument of Policy and the Impact of Market Liberalisation' (1995) 111 *Law Quarterly Review* 235, 256–68; A Bartosch, 'The Relationship between Public Procurement and State Aid Surveillance—The Toughest Standard Applies?'

the procurement activities of the state result in normal commercial transactions—that is, whether the same decision would have been made by a 'disinterested buyer' or a 'market economy buyer'.[18]

In this sense, it is noteworthy that, based on the case law of the EU judicature, the practice of the Commission[19] has established a presumption that no state aid incompatible with the EU Treaty exists where the award of the contract: (i) is a pure procurement transaction, and (ii) the procurement procedure is compliant with the EU public procurement directives and suitable for achieving best value for money—inasmuch as no economic advantage which would go beyond normal market conditions will usually arise under these circumstances.[20] In the case of contracts not covered by the EU public procurement

(2002) 39 *Common Market Law Review* 551, 570–74; PA Baistrocchi, 'Can the Award of a Public Contract be Deemed to Constitute State Aid?' (2003) 24 *European Competition Law Review* 510, 514–16; Hillger (n 14) 110–15; R Kovar, 'Les achats publics et l'interdiction des aides d'État' (2004) 8 *Contrats et marchés publics* 8; A Doern, 'The Interaction between EC Rules on Public Procurement and State Aid' (2004) 13 *Public Procurement Law Review* 97, 121–28; B Heuninckx, 'Defence Procurement: The Most Effective Way to Grant Illegal State Aid and Get Away With It … Or Is It?' (2009) 46 *Common Market Law Review* 191, 198–200 and 202–09; C Bovis, 'Recent Case-Law Relating to Public Procurement: A Beacon for the Integration of Public Markets' (2002) 39 *Common Market Law Review* 1025, 1030–32; id, 'Financing Services of General Interest, Public Procurement and State Aid: The Delineation between Market Forces and Protection' (2003–04) 10 *Columbia Journal of European Law* 419, 430–40; id, 'Public Procurement in the European Union: Lessons from the Past and Insights to the Future' (2005–06) 12 *Columbia Journal of European Law* 53, 62–67; id, 'Financing Services of General Interest in the EU: How do Public Procurement and State Aids Interact to Demarcate between Market Forces and Protection?' (2005) 11 *European Law Journal* 79, 94–106; id, *EC Public Procurement: Case Law and Regulation* (Oxford, Oxford University Press, 2006) 33–42 and 341–58; PA Trepte, *Regulating Procurement. Understanding the Ends and Means of Public Procurement Regulation* (Oxford, Oxford University Press, 2004) 159–66; and, in further detail, id, *Public Procurement in the EU* (2007) 54–63. Recently, see GS Ølykke, 'The Legal Basis Which Will (Probably) Never Be Used—Enforcement of State Aid Law in a Public Procurement Context' (2011) 3 *European State Aid Law Quarterly* 457; and A Sánchez Graells, 'Public Procurement and State Aid: Reopening the Debate?' (2012) 21(6) *Public Procurement Law Review* 205.

[18] Case T-14/96 *BAI v Commission* [1999] ECR II-139 71–76. See Hancher et al (n 10) 84 and Bartosch (n 17) 574–76. See also Doern (n 17) 111–16. See also, Szyszczak (n 10) 191. With very comprehensive arguments, see GS Ølykke, *Abnormally Low Tenders—With an Emphasis on Public Tenderers* (Copenhagen, Djøf Forlag, 2010). For further discussion, chapter seven, §I.C.

[19] Even if the Commission's decisions are, in general, not considered as a source of law in this study (see above chapter one, §VII.B) the situation is different as regards state aid, as the Commission is the only institution empowered to enforce arts 108 and 109 TFEU. Hence, if the law as it stands is to be properly described, the Commission's decisions in this specific field of competition law must be taken into account.

[20] This approach is consistent with the *Altmark* case law on compensation for the conduct of services of general economic interest, which attributes a key role to the tendering of the contract in the determination of the adequacy of the compensation to the services provider; see Case C-280/00 *Altmark* [2003] ECR I-7747 93 and 95; U Schnelle, 'Unconditional and Non-Discriminatory Bidding Procedures in EC State Aid Surveillance over Public Services' (2002) 2 *European State Aid Law Quarterly* 195; J-Y Chérot, *Droit public économique*, 2nd edn (Paris, Economica, 2007) 196–202; P Dethlefsen, 'Public Services in the EU—Between State Aid and Public Procurement' (2007) 16 *Public Procurement Law Review* NA53, 57 and 61–62; Szyszczak (n 10) 193–94. See also Arrowsmith, *Law of Public and Utilities Procurement* (2014) 307–12; and JL Buendía Sierra, 'Finding the Right Balance: State Aid and Services of General Economic Interest' in GC Rodríguez Iglesias et al (eds), *EC State Aid Law. Liber Amicorum Francisco Santaolalla Gadea*, International Competition Law Series (Alphen aan den Rijn, Kluwer Law International, 2008) 191, 210–14. For recent critical assessments, see N Fiedziuk, *Services of General Economic Interest in EU Law* (Oisterwijk, Wolf Legal Publishers, 2013); and A Sánchez Graells, 'The Commission's Modernization Agenda for Procurement and SGEI', in E Szyszczak and J van de Gronden (eds), *Financing SGEIs: State Aid. Reform and Modernisation, Legal Issues of Services of General Interest Series* (The Hague, TMC Asser Press/Springer, 2012) 161–81. However, it is to be stressed that the absence of a tendering procedure does not preclude a finding that state aid and other competition rules have not been violated; see Case T-17/02 *Olsen v Commission* [2005] ECR II-2031 237–39, confirmed on appeal by the ECJ, Case C-320/05 P *Olsen v Commission and Spain* [2007] ECR I-131. As regards the Commission's practice, see Assessment of the Commission of 30 May 2007, in Case N 46/2007 *Welsh Public Sector Network Scheme* (COM(2007) 2212 final)

rules, the second condition would probably need to be rephrased to mandate compliance with the applicable domestic public procurement regulations in a way suitable to achieving best value for money, or at least to following objective, transparent and non-discriminatory rules.[21] Hence, according to the Commission's practice, compliance with the EU public procurement directives in the tendering of a contract that would otherwise raise prima facie concerns about its compatibility with the state aid rules establishes a rebuttable presumption of compliance with the state aid regime (*rectius*, of the inexistence of illegal state aid).[22] To rebut such a presumption, it would be necessary to determine that, despite having complied with procurement rules, the public contractor actually received an economic advantage because the terms of the contract did not reflect normal market conditions.[23] As was properly stressed by Advocate General Jacobs,

> bilateral arrangements or more complex transactions involving mutual rights and obligations are to be analysed as a whole. Where for example the State purchases goods or services from an undertaking, there will be aid only if and to the extent that the price paid exceeds the market price.[24]

It follows that, in the absence of a clear disproportion between the obligations imposed on the public contractor and the consideration paid by the public buyer (which needs to be assessed in light of such complex criteria as the risks assumed by the contractor, technical difficulty, delay for implementation, prevailing market conditions, etc),[25] state aid rules impose a very limited constraint on the development of anti-competitive public procurement.[26] Recent statements by the ECJ indicate that an alternative test of creation of 'unequal conditions of competition' through the granting of public contracts could be emerging,[27] but this remains in the very initial stages and the position just discussed is still the orthodoxy. That is, determining whether an award was properly made according to the public procurement rules will generally be the acid test to decide whether state aid has been granted, which results in a circular test to establish in the first place whether the award of the public contract constitutes state aid in and by itself.

18. See also N Tosics and N Gaál, 'Public Procurement and State Aid Control—The Issue of Economic Advantage' (2008) 2007(3) *EC Competition Policy Newsletter* 15, 19; in similar terms, Hillger (n 13) 115–21; Baistrocchi (n 17) 517; Dischendorfer and Stempowski (n 15) NA50; Bovis (n 17, 2003) 443; and C Giolito, 'La procédure de contrôle des aides d'État peut-elle être utilisée pour controller la bonne application d'autres dispositions de Droit communautaire?' in GC Rodríguez Iglesias et al (eds), *EC State Aid Law. Liber Amicorum Francisco Santaolalla Gadea*, International Competition Law Series (Alphen aan den Rijn, Kluwer Law International, 2008) 145, 159–60.

[21] Heuninckx (n 17) 199; but see Doern (n 17) 124.

[22] Such an approach is consistent with the understanding that these rules hold a common control device, ie, that competition for a public contract is an indication of fair and equal market access in accordance with the procurement rules and, likewise, as regards state aid, of a fair balance of the obligations imposed and the economic advantages granted to the public contractor; see Dethlefsen (n 20) NA 54. However, a less formalistic approach to the analysis of procurement is desirable; see Buendía Sierra (n 20) 211.

[23] As regards the importance of the analysis of '*consideration*' in public contracts to exclude the existence of a gratuitous advantage to the government contractor, see JA Winter, 'Re(de)fining the Notion of State Aid in Article 87(1) of the EC Treaty' (2004) 41 *Common Market Law Review* 475, 487–501.

[24] Opinion of AG Jacobs in Case C-126/01 *GEMO* 122. See also Opinion of AG Fennelly in Case C-251/97 *France v Commission* 19.

[25] In similar terms, Doern (n 17) 117; and Arrowsmith (n 12) 307–12.

[26] See P Nicolaides and IE Rusu, 'Competitive Selection of Undertakings and State Aid: Why and When Does It Not Eliminate Advantage' (2012) *European Procurement & Public Private Partnership Law Review* 5–29.

[27] See by analogy Case C-553/12 P *Commission v DEI* [2014] pub electr EU:C:2014:2083 46.

Therefore, the restriction of the scope of TFEU rules on state aid to cases where public contractors obtain an undue economic advantage significantly restricts its ability to serve as an effective instrument to tackle publicly generated restrictions of competition—since, in most cases, distortions of competition can arise without the public contractor receiving such undue economic advantage—unless the conduct of competition-distorting public procurement is considered to generate a situation that excludes 'normal market conditions' and, as a result, the award of the public contract under those circumstances is to be considered an undue economic advantage (which, in my view, is a highly unforeseeable development of EU state aid law).[28]

B. The Award of Most Public Contracts Does Not Constitute a Grant of a Special or Exclusive Right to the Government Contractor, except for Concessions

i. In General: Article 106(1) TFEU

As was the case with the state aid regime in the sphere of public procurement, it is important to stress that the award of a public contract will seldom meet the conditions for the application of article 106(1) TFEU,[29] since it will be considered as the granting of a 'special or exclusive right'[30] for the purposes of that provision only under very specific circumstances.[31] According to the case law of the ECJ, special or exclusive rights within

[28] Future developments in the area of state aid control are particularly difficult to anticipate due to the very substantial loosening of control procedures that the Commission has been adopting since 2008, as a result of the current economic crisis. See generally, D Gerard, 'EC Competition law Enforcement at Grips with the Financial Crisis: Flexibility on the Means, Consistency in the Principles' (2009) 1 *Concurrences* 46; and B Lyons, *Competition Policy, Bailouts and the Economic Crisis* (University of East Anglia, CCP, Working Paper No 09-4, 2009), available at www.uea.ac.uk/polopoly_fs/1.112187!CCP09–4.pdf. However, the general trend does not seem to point to a fiercer enforcement of art 107 TFEU in the near future, even if this is one of the aims of the recent State Aid Modernisation (SAM); see Communication from the Commission, *EU State Aid Modernisation (SAM)* (COM(2012) 0209 final). Therefore, this will not be the legal basis chosen for the development of my proposals.

[29] Art 106(1) TFEU covers both the cases of public undertakings and of undertakings to which Member States grant special or exclusive rights. The analysis in this section will be restricted to the second group of cases, since the analysis of how competition rules apply to the procurement activities of public undertakings will be conducted in further detail later (see below §III, dealing with the direct application of 'core' competition prohibitions to undertakings). It might be worth clarifying that, given that public undertakings are fully subject to the competition rules of the TFEU—unless they are covered by the 'public mission exception' regulated in art 106(2) TFEU (on which see below §II.B.iii)—their procurement activities will be covered by the 'core' competition rules contained in arts 101 and 102 TFEU and, consequently, for the analytical purposes of this study (centred on the procurement activities conducted by public authorities) do not seem to merit specific treatment. In general, on the relevance of art 106 TEU in the context of public procurement, see Arrowsmith (n 12) 317–24.

[30] On the concept of exclusive or special rights, JL Buendía Sierra, *Exclusive Rights and State Monopolies under EC Law* (Oxford, Oxford University Press, 1999) 3–71; id, 'Derechos especiales y exclusivos, servicios públicos y servicios de interés económico general' in JM Beneyto and J Maillo (eds), *Tratado de Derecho de la competencia. Unión Europea y España* (Barcelona, Bosch, 2005) 1055–154; and id, 'Article 86—Exclusive Rights and Other Anti-Competitive State Measures' in J Faull and A Nikpay (eds), *The EC Law of Competition*, 2nd edn (Oxford, Oxford University Press, 2007) 593.

[31] For discussion on the obligation to tender the award of 'special or exclusive rights' see BJ Drijber and HM Stergiou, 'Public Procurement Law and Internal Market Law' (2009) 46 *Common Market Law Review* 805, 822–831. See also GS Ølykke, 'Is the Granting of Special and Exclusive Rights Subject to the Principles Applicable to the Award of Concessions? Recent Developments in Case Law and Their Implications for one of the Last Sanctuaries for Protectionism' (2014) 23 *Public Procurement Law Review* 1–20.

the meaning of article 106(1) TFEU are rights (i) granted by the authorities of a Member State, (ii) to one undertaking or to a limited number of undertakings, (iii) which substantially affect the ability of other undertakings to exercise the economic activity in question in the same geographical area under substantially equivalent conditions.[32] Public contracts (for works, services, supplies, etc) will have difficulty in meeting the third of these conditions, as tenderers that do not receive a particular public contract will generally be able to continue competing with the government contractor for private and public business in the same geographical area and under substantially equivalent conditions.[33] Therefore, article 106(1) TFEU will have a very limited role in the assessment of the conduct of the public buyer, unless very particular and infrequent circumstances concur—under which the award of the public contract constitutes the only option for companies active in a given sector to remain in business or, otherwise, the award of the contract significantly restricts the ability of the rest of the firms to compete with the public contractor.[34] This will not be the case in most common public procurement circumstances and, consequently, the suitability of article 106(1) TFEU to discipline public procurement activities will remain substantially *marginal*.

The only relatively clear exception to this general premise is to be found in the case of the award of *concessions*,[35] as their inherent exclusivity and quasi-monopolistic features will have a negative impact on (if not completely exclude) the ability of other tenderers to compete with the concessionaire in the same geographical area under substantially equivalent conditions during the lifespan of the concession contract; thus, resulting in a 'special or exclusive right' for the purposes of article 106(1) TFEU.[36] It is worth stressing that the award of *concessions* has now been regulated in Directive 2014/23, which sets up a light-touch regime of procurement rules applicable to this type of arrangements. However, in my view, this set of rules does not alter the general analysis on the applicability of article 106(1) TFEU (see below).

Indeed, even under the very specific circumstances in which the award of a public

[32] See: Opinion of AG Jacobs in Case C-475/99 *Ambulanz Glöckner* 88–89; and Case C-475/99 *Ambulanz Glöckner* [ECR] 2001 I-8089 24. On the possibility of using a different concept of exclusive or special rights and, particularly, disapplying this third condition (on the restriction of competition ensuing the granting of that right) when assessing awards under the regime of Dir 2014/25, see below §II.B.ii.

[33] The difficulties in meeting the jurisdictional requirements of art 106 TFEU might have influenced the abandonment of an early project to build the EU public procurement system—at least in the so-called 'excluded sectors'—on the basis of this provision; see *IInd Commission Report on competition policy* (1972) 129, available at ec.europa.eu/competition/publications/annual_report/index.html. As discussed below (chapter five, §II.A) procurement directives do not have competition rules as their legal basis.

[34] An even more stringent approach towards the application of art 106(1) TFEU in the public procurement setting would be to exclude its applicability absolutely to the award of public contracts, on the basis that it is not a discretionary activity of the state; see R Whish, *Competition Law*, 5th edn (New York, Lexis Nexis-Elsevier, 2003) 223. However, such approach seems to raise significant doubts as to the consideration of contract award as a non-discretionary activity of the public buyer, particularly because the public buyer retains almost absolute discretion in the design of the contract and the restrictions to participation in the tender; see Buendía Sierra (n 30, 2005) 1066.

[35] The term 'concession' is used broadly, to identify the award of a public contract that guarantees the exclusivity of a given activity to the public contractor. On the concept of concession and its different treatment in EU and Member States' law, see UB Neergaard, 'The Concept of Concession in EU Public Procurement Law versus EU Competition Law and National Law' in R Nielsen and S Treumer (eds), *New EU Public Procurement Directives* (Copenhagen, Djøf Forlag, 2005) 149, 163–74. On the interpretation of the term "service concession" within the meaning of Directive 2004/17, see Case C-206/08 *Eurawasser* [2009] ECR I-8377. All these considerations are in line with the definitions provided in Dir 2014/23 on the award of concession contracts, below.

[36] Although in succinct and obscure terms, see Case C-458/03 *Parking Brixen* [2005] ECR I-8585 51.

contract triggers the application of article 106(1) TFEU (given that, by its restrictive effects on competition, it must be considered a 'special or exclusive right' granted to the public contractor), it will still have a very limited role in disciplining anti-competitive public procurement, particularly *during* the public procurement phase or the previous decisions regarding its *design*. According to article 106(1) TFEU, the state that has concluded the public contract that involves a special or exclusive right will have to refrain from enacting or maintaining in force any measure that runs contrary to the rules contained in the TFEU and, particularly, competition rules—that is, the state will not be able to exempt the public contractor from complying with competition law mandates.[37] Consequently, article 106(1) TFEU will usually be triggered by the award of the public contract itself and will mostly discipline the behaviour of the state *pro futuro*—in an attempt to avoid future distortions of the competitive environment in which the execution of the public contract will take place.[38] Hence, it can hardly be operative to discipline the procurement activities of the public buyer, at least in the early (and most crucial) stages of the process of award of special or exclusive rights—insofar as article 106(1) TFEU is an inadequate legal basis on which to impose specific and positive obligations on Member States as regards the award of these rights.

Therefore, it is submitted that, in view of its restricted applicability to the award of public contracts that do not generate significant exclusionary effects on market competition (such as, under strict circumstances, the award of *concessions*), and its forward-looking nature, the practical relevance of article 106(1) TFEU as a tool to avoid publicly generated distortions in the public procurement setting is very limited.

ii. Different Treatment under Directive 2014/25?

It could be argued that the conclusions reached in the previous sub-section merit a different and more lenient treatment in the case of public contracts awarded in compliance with Directive 2014/25—which is based on a more flexible and restrictive definition of 'special or exclusive rights' that further restricts the role of article 106(1) TFEU in the water, energy, transport and postal services sectors.[39] In this regard, it is important to

[37] Generally, on the scope and implications of art 106(1) TEU, see J Temple Lang, 'Community Antitrust Law and Government Measures Relating to Public and Privileged Enterprises: Article 90 EEC Treaty' in B Hawk (ed), *Antitrust and Trade Policies in International Trade*, Annual Proceedings of the Fordham Corporate Law Institute 1984 (New York, M Bender, 1985) 543, 551; C Bright, 'Article 90, Economic Policy and the Duties of Member States' (1993) 14 *European Competition Law Review* 263, 264; DG Goyder, *EC Competition Law,* 4th edn (Oxford, Oxford University Press, 2003) 482–85; R Wainwright and A Bouquet, 'State Intervention and Action in EC Competition Law' in B Hawk (ed), *International Antitrust Law and Policy*, Annual Proceedings of the Fordham Corporate Law Institute 2003 (Huntington, Juris Publishing, 2004) 539, 562–68; Whish (n 34) 220–42; V Korah, *An Introductory Guide to EC Competition Law and Practice*, 9th edn (Oxford, Hart Publishing, 2007) 225–31; P Roth and V Rose (eds), *Bellamy and Child European Community Law of Competition*, 6th edn (Oxford, Oxford University Press, 2008) 1038–47; Chérot, *Droit public économique* (2007) 147–65; Craig and de Búrca (n 6) 1073–79; Buendía, *Exclusive Rights* (1999) 129–256; and J Maillo, 'Article 86—Services of General Interest and Competition Law' in G Amato and CD Ehlermann (eds), *Competition Law. A Critical Assessment* (Oxford, Hart Publishing, 2007) 591, 596–603. See also L Dubois and C Blumann, *Droit matériel de l'Union Européenne*, 4th edn (Paris, Montchrestien, 2006) 544–50; and Sauter and Schepel (n 10) 142–63. See also A Ezrachi, *EC Competition Law. Analytical Guide to the Leading Cases* (Oxford, Hart Publishing, 2008) 259–69.

[38] See by analogy Case C-553/12 P *Commission v DEI* [2014] pub electr EU:C:2014:2083 46.

[39] Doubts have been harboured as to whether the concept of 'special or exclusive rights' is the same for both purposes. In relation to Dir 2004/17, see S Arrowsmith, *The Law of Public and Utilities Procurement*, 2nd edn (London, Sweet & Maxwell, 2005) 848.

stress that article 4(3) of Directive 2014/25 specifies the definition of special or exclusive rights in the 'excluded sectors' and determines that 'special or exclusive rights' mean rights (i) granted by a competent authority of a Member State by way of any legislative, regulatory or administrative provision, (ii) the effect of which is to limit the exercise of the activities covered by the directive to one or more entities, and (iii) which substantially affects the ability of other entities to carry out this activity. So far, the definition of article 4(3) of Directive 2014/25 is perfectly coincident with the definition adopted by the case law interpreting article 106(1) TFEU.

However, a second paragraph in article 4(3) of Directive 2014/25 establishes that 'rights which have been granted by means of a procedure in which adequate publicity has been ensured and where the granting of those rights was based on objective criteria shall not constitute special or exclusive rights' for the purpose of that directive. Moreover, article 4(3) *in fine* of Directive 2014/25 further clarifies that such procedures include procurement procedures with a prior call for competition in conformity with Directive 2014/24, Directive 2009/81, Directive 2014/23 or Directive 2014/25 itself, as well as procedures pursuant to other EU legal acts listed in Annex II of Directive 2014/25. This supersedes the interpretative difficulties that existed in relation to article 2(3) of Directive 2004/17,[40] and now makes it clear that the role of article 106(1) TFEU in the 'excluded sectors' may be rather limited, as the award of concessions in the 'excluded sectors' is removed from the scope. However, the effect of such removal would now be tempered by the existence of Directive 2014/23 on concession contracts, which could capture the award of such sort of exclusive rights (see below).

iii. The Coverage of All Concessions Contracts in Directive 2014/23

Indeed, one of the significant changes in this area in the 2014 review of the EU public procurement rules is that the award of *concessions* is now regulated by Directive 2014/23, which includes a definition of 'concession', and definitions of exclusive and special rights that are aligned with the definitions developed for the purposes of the application of article 106(1) TFEU (see arts 5(1)(5), 5(1)(10) and 5(1)(11) Dir 2014/23). More importantly, Directive 2014/23 sets up very limited requirements and grants Member States very significant discretion in the setting up of their rules for the award of concessions, subject only to compliance with the principles of equal treatment, non-discrimination and transparency (art 3 Dir 2014/23). If at all, this is relevant because the consolidation of general principles applicable to the award of concessions does not mention the principle of competition, which is a significant departure from the equivalent provisions in article 18(1) of Directive 2014/24 (and in art 36(1) Dir 2014/25). Consequently, Directive 2014/23 does not offer a better platform for the integration of competition considerations and, in particular, for the joint enforcement of article 106(1) TFEU than the more general rules of Directive 2014/24.[41] Hence, it is submitted that the analysis conducted above is unaltered by the approval of Directive 2014/23 and, consequently, given its restricted applicability to

[40] Ibid. That discussion, with references to other works, is covered in A Sánchez Graells, *Public Procurement and the EU Competition Rules*, 1st edn (Oxford, Hart Publishing, 2011) 124–26.

[41] It should be stressed that, in my view, it does not offer a *worse* basis for the integration of competition considerations either, given that the principle of competition remains a general principle under the applicable interpretative case law of the ECJ. See chapter five for discussion.

the award of concessions and its forward-looking nature, the practical relevance of article 106(1) TFEU as a tool to avoid publicly generated distortions in the public procurement setting remains very limited.

iv. Services of General Economic Interest: Article 106(2) TFEU

As an exception to the general rule of article 106(1) TFEU, in the event that the public contractor is considered to be entrusted with the operation of 'services of general economic interest'[42] (and particularly if it is the holder of a services concession), articles 14 and 106(2) TFEU (ex arts 16 and 86(2) TEC) will empower the state to relax the regulation of its activities and to allow for certain competition-restricting behaviour (ie, to enact regulation that departs from general EU law and, notably, from the competition rules of the TFEU), as long as it is necessary for the performance, in law or in fact, of the particular tasks assigned to the public contractor.[43] Along these lines, in cases where the narrow conditions that trigger the application of article 106(1) TFEU are met by the award of a public contract, article 106(2) TFEU could arguably be used as the legal basis to disapply the EU rules on public procurement by using the argument that compliance with their procedures or basic principles would jeopardise the task of carrying out services of general interest by the awardee of the contract. So, article 106(2) TFEU would exclude the application of public procurement rules and could justify the conduct of competition-distorting public procurement by the Member States—which is completely opposite to the approach adopted in the present study.[44] It is now important to emphasise that the 2014 procurement Directives stress the fact that their existence and enforcement do

> not affect the freedom of Member States to define, in conformity with Union law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should

[42] On the concept of services of general economic interest, Communication from the Commission—Services of general interest, including social services of general interest: a new European commitment (COM(2007) 725 final). Also E Szyszczak, 'Public Service Provision in Competitive Markets' (2001) 20 *Yearbook of European Law* 35; id (n 10) 211–53; and UB Neergaard, 'Services of General (Economic) Interest: What Aims and Values Count?' in id et al (eds), *Integrating Welfare Functions into EU Law—From Rome to Lisbon* (Copenhagen, Djøf Forlag, 2009) 191, 211ff.

[43] On the scope of the so-called 'public mission exception', see Buendía Sierra (n 34) 271–360; Goyder (n 37) 485–87; Korah (n 37) 231–32; Whish (n 34) 233–39; Roth and Rose (n 37) 1061–69; Craig and de Búrca (n 6) 1079–81; Wainwright and Bouquet (n 37) 569–72; C Cabanes and B Neveu, *Droit de la concurrence dans les contrats publics. Pratiques anticoncurrentielles, abus de position dominante, controls et sanctions* (Paris, Le Moniteur, 2008) 96–98; Szyszczak (n 10) 119–21; Maillo (n 37) 604–12; Prosser (n 16) 132–41. See also Dubois and Blumann (n 37) 550–61; Sauter and Schepel (n 10) 164–92; L Hou, *Uncovering the Veil of Article 86(2) EC* (ICRI-KULeuven–IBBT Working Paper, 2007), available at http://ssrn.com/abstract=1025407; and M Marques Mendes, 'State Intervention/State Action—A US and EC Perspective from *Cassis de Dijon* to *Altmark Trans* and Beyond: Trends in the Assessment of State Intervention by the European Courts' in B Hawk (ed), *International Antitrust Law and Policy*, Annual Proceedings of the Fordham Corporate Law Institute 2003 (Huntington, Juris Publishing, 2004) 495, 495–501. See also L Moral Soriano, 'How Proportionate Should Anti-Competitive State Intervention Be?' (2003) 28 *European Law Review* 112, 122; *contra* see J Baquero Cruz, 'Beyond Competition: Services of General Interest and European Community Law' in G de Búrca (ed), *EU Law and the Welfare State: In Search of Solidarity* (Oxford, Oxford University Press, 2005) 169, 209 and 212. The applicability of art 106(2) TFEU can also alter the assessment under the state aid rules. See W Sauter, *The Criterion of Advantage in State Aid: Altmark and Services of General Economic Interest* (TILEC Discussion Paper No 2014-015), available at http://ssrn.com/abstract=2426230.

[44] For a critical view, see N Fiedziuk, 'Putting Services of General Economic Interest Up for Tender: Reflections on Applicable EU Rules' (2013) 50(1) *Common Market Law Review* 87–114.

> be subject to. Equally [they do] not affect the decision of public authorities whether, how and to what extent they wish to perform public functions themselves pursuant to Article 14 TFEU and Protocol No 26. (art 1(4) Dir 2014/24 and art 4 Dir 2014/23)

However, in my view, the proper interpretation of these provisions must rely on a sound understanding of the applicable case law. In this respect, and interestingly, the case law of the EU judicature has set the conditions required to avoid the use of the 'public mission exception' in article 106(2) TFEU to subvert the basic principles that inspire the EU public procurement rules in relation to the activities that Member States conduct in preparation for the granting of the special or exclusive rights. The basis for such an interpretation is straightforward. The proper performance of the tasks entrusted to the public contractor generally does not require a departure from the basic principles of the TFEU and public procurement rules in the *award* of special or exclusive rights by the Member States. Since compliance with public procurement rules and principles concerns the contracting authority (not the public contractor) and must take place *before* the undertaking starts rendering the services of general interest, it does not affect in any material way the ability of the public contractor or concessionaire to discharge effectively an obligation that (as regards the time of conducting the procurement process) still does not exist.[45] Hence, the award of the special or exclusive right to provide services of general economic interest in breach of public procurement rules will hardly ever fulfil the conditions of article 106(2) TFEU. Consequently, a complete exclusion of competition in the award of special or exclusive rights could constitute a breach of EU law not covered by the 'public mission exception' of article 106(2) TFEU.[46]

However, where the EU public procurement rules do not apply (ie, under the relevant thresholds, or in the case of contracts not covered by the directives[47]) this exclusion of the applicability of article 106(2) TFEU in the granting of exclusive or special rights is basically restricted to a Member State's obligation to award the contract through a process that

[45] This reasoning would not apply automatically to the procurement practices conducted later on by the undertaking entrusted with the operation of 'services of general economic interest' (be it a private contractor or a public undertaking, see above n 29). However, in those cases, the possibilities to apply the exemption of art 106(2) TFEU to exclude the applicability of EU public procurement directives are restricted (and partially excluded) by the rules on their subjective scope of application. Also, in the cases not covered by those rules, the need to conduct procurement activities without subjection to competition requirements (below chapter five) would still need to be proven to be required for the performance, in law or in fact, of the particular tasks assigned to the public contractor—which sets a high burden of proof. Therefore, it is submitted that the ability of art 106(2) TFEU to exempt the conduct by undertakings entrusted with the operation of 'services of general economic interest' of procurement activities not subject to competition requirements is largely *marginal* and, consequently, does not deserve further analysis. *Cf* Fiedziuk (n 20) 71–101.

[46] Indeed, applying the public procurement rules to putting the task of conducting the services of general economic interest up for competition has not been considered an obstruction to the development of those services and cannot be the object of an automatic exemption under art 106(2) TFEU; see Opinion of AG Stix-Hackl in Case C-532/03 *Commission v Ireland* 98–108. Along the same lines, see Opinion of AG Mazák in Case C-480/06 *Commission v Germany* 56–63. *Cf* HM Stergiou, 'The Increasing Influence of Primary EU Law and EU Public Procurement Law: Must a Concession to Provide Services of General Economic Interest be Tendered?' in JW van de Gronden (ed), *The EU and WTO Law on Services: Limits to the Realisation of General Interest Policies within the Services Markets?*, European Monograph Series (Alphen aan den Rijn, Kluwer Law International, 2009) 159, 184.

[47] For a detailed analysis of the case of concessions, see Neergaard (n 35) 149–57; and, more specifically, id, 'Public Service Concessions and Related Concepts—The Increased Pressure from Community Law on Member States' Use of Concessions' (2007) 16 *Public Procurement Law Review* 387, 387 and 394–95. See also C Risvig Hansen, *Contracts Not Covered or Not Fully Covered by the Public Sector Directive* (Copenhagen, Djøf Forlag, 2012).

ensures that the principles of non-discrimination and transparency are respected. That, however, does not imply an obligation to hold a tender,[48] much less to do so according to the rules and procedures set out in the EU public procurement directives[49] (see below chapter five, §III.D).

v. Overall, Article 106 TFEU is Largely Irrelevant for the Purposes of Reigning in Anti-Competitive Public Procurement Activities

Hence, article 106 TFEU constitutes a very limited instrument to fight against anticompetitive public procurement practices. From a positive perspective, due to the general prohibition of article 106(1) TFEU, it does not offer a solid legal basis to 'transplant' or 'import' the pro-competitive requirements embedded in the EU public procurement directives regarding the design and development of the tendering procedures applicable to the award of special or exclusive rights—as it imposes negative obligations on Member States, but cannot be used as the basis to build additional obligations, much less prior to the award of the special or exclusive rights. From a negative perspective, article 106(2) TFEU cannot be used to exclude compliance with public procurement rules and principles (particularly the duty to avoid breaches of the principles of transparency and non-discrimination in granting special or exclusive rights, even outside the blueprint of the directives). Therefore, article 106 TFEU is a largely neutral provision as regards ensuring competition for public contracts.

To sum up, article 106 TFEU will only be relevant where very specific circumstances affecting the object of the tendered contract trigger its consideration as a 'special or exclusive right' granted to the public contractor (particularly in the case of *concessions*); which seems to constitute a rare case if compared to the aggregate of the public procurement contracts awarded by Member States. Even in those instances, their ability to discipline the behaviour of the public buyer prior to the award of the contract will be limited to flagrant violations of the principles that derive from the TFEU and secondary legislation and that result in a breach of the principles of transparency and non-discrimination—ie, mainly in cases of a complete exclusion of competition between potential tenderers for the 'special or exclusive right'. From a general perspective, therefore, article 106 TFEU is a very limited instrument to rein in anti-competitive public procurement practices by Member States.

[48] Indeed the case law related to the award of special or exclusive rights, even if not directly related to the scope and application of art 106 TFEU, is relevant in this respect. See Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745 60–62; Case C-231/03 *Coname* [2005] ECR I-7287 17–28; Case C-458/03 *Parking Brixen* [2005] ECR I-8585 52; Case C-410/04 *ANAV* [2006] ECR I-3303 23; and Case C-220/06 *Correos* [2007] ECR I-12175 70–88. See also Stergiou, Must a Concession to Provide Services of General Economic Interest be Tendered? (2009) 173–84; Prosser (n 16) 149–51 and 241–44; and, similarly, Buendía Sierra (n 20) 212–13.

[49] As regards the scope of this transparency obligation, see Opinion of AG Ruiz-Jarabo Colomer in Case C-412/04 *Commission v Italy* 48–65, and Case C-412/04 *Commission v Italy* [2008] ECR I-619 66 and 94. See also A Brown, 'Transparency Obligations Under the EC Treaty in Relation to Public Contracts that Fall Outside the Procurement Directives: A Note on C-231/03, Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti' (2005) 14 *Public Procurement Law Review* NA153, NA156–58; id, 'Seeing Through Transparency: The Requirement to Advertise Public Contracts and Concessions Under the EC Treaty' (2007) 16 *Public Procurement Law Review* 1, 3; and S Treumer, 'The Discretionary Powers of Contracting Entities—Towards a Flexible Approach in the Recent Case Law of the Court of Justice?' (2006) 15 *Public Procurement Law Review* 71, 82–84; all of them critical with the lack of clarity on the extension of transparency obligations.

III. The Inapplicability of 'Core' EU Antitrust Rules to Public Procurement: A Jurisprudentially Created Gap in EU Competition Law

After having seen how the TFEU rules specifically applicable to Member States and to undertakings with which they maintain close relationships can only discipline public purchasing activities under very specific and exceptional circumstances (above §II), this section focuses on how and to what extent 'core' competition or 'antitrust' rules (ie, arts 101 and 102 TFEU)[50] can be used to address publicly generated competitive distortions with a larger degree of generality and in ordinary circumstances.

A. In General, the Concept of 'Undertaking' as the Key Element of Analysis

Whereas the EU 'core' competition rules aimed at undertakings are based on open-ended standards that cover almost every kind of private anti-competitive behaviour, those same rules have been applied in a restrictive manner to curbing public behaviour that can have a negative impact on market dynamics—which therefore yields more limited results. In general terms, EU 'antitrust' rules are addressed to 'undertakings'[51] and do not apply directly to Member State activities.[52] However, in order to generate a level playing field between public and private competitors,[53] and as a matter of principle, EU competition rules aimed at undertakings apply *equally* to private and to public undertakings that carry on activities of an industrial or commercial nature.[54]

[50] Reference to arts 101 and 102 TFEU through the expression 'antitrust' rules will be made to avoid excessive repetition of the term competition rules. The expression is borrowed from US law, where the equivalents of these arts (ie, Sections §1 and §2 of the Sherman Act) are generally referred to as antitrust law—even if, *stricto sensu*, US antitrust law includes a broader set of acts; see, eg, PE Areeda and H Hovenkamp, *Antitrust Law. An Analysis of Antitrust Principles and Their Application,* 3rd edn plus 2007 2nd Cumulative Supplement (New York, Aspen Law and Business, 2006–08).

[51] See: WPJ Wils, 'The Undertaking as Subject of EC Competition Law and the Imputation of Infringements to Natural or Legal Persons' (2000) 25 *European Law Review* 99; and V Louri, '"Undertaking" as a Jurisdictional Element for the Application of EC Competition Rules' (2002) 29 *Legal Issues of Economic Integration* 143. See also O Odudu, 'The Meaning of Undertaking within Article 81' (2005) 7 *Cambridge Yearbook of European Legal Studies* 211; A Nikpay and J Faull, 'Article 81' in id (eds), *The EC Law of Competition*, 2nd edn (Oxford, Oxford University Press, 2007) 181, 188–95; AG Toth, 'Undertaking' in id (ed), *Oxford Encyclopaedia of European Community Law*, vol 3: *Competition Law and Policy* (Oxford, Oxford University Press, 2008) 757, 757–67; and Sauter and Schepel (n 10) 75–78.

[52] On their *indirect* application through the so-called state action doctrine; see below §IV.

[53] In general, on the different distortions that can arise in situations of competition between private and public undertakings (ie, state-owned enterprises), particularly when the latter enjoy antitrust immunity, see RR Geddes (ed), *Competing with the Government: Anticompetitive Behavior and Public Enterprises* (Stanford, Hoover Institution, 2004) 34; and DEM Sappington and JG Sidak, 'Competition Law for State-Owned Enterprises' (2003–04) 71 *Antitrust Law Journal* 479. See also J-Y Chérot, 'Nouvelles observations sur la régulation par le Conseil d'État de la concurrence entre personnes publiques et personnes privées' in P Devolvé (ed), *Mouvement du Droit public: du Droit administratif au Droit constitutionnel, du Droit français aux autres Droits. Mélanges en l'honneur de Franck Moderne* (Paris, LGDJ, 2004) 87.

[54] The emergence of the general principle of competition on equal terms between public and private undertakings in EU law has been emphasised; G Eckert, 'L'égalité de concurrence entre opérateurs publics et privés sur le marché' in *Gouverner, Administrer, Juger. Liber Amicorum Jean Waline* (Paris, Dalloz, 2002) 207,

Indeed, the ECJ has declared that competition rules apply equally to private and to public undertakings,[55] but it has restricted their scope to the cases where the public undertaking develops an economic activity,[56] consequently excluding the application of 'antitrust' rules in cases of exercise of *public powers*. According to the relevant case law, the distinction between conducting an economic activity and the exercise of public powers cannot be made in general terms, but needs to take into account the particular circumstances of the case.[57] Where, according to such specific circumstances, the state is found to be carrying on economic activities of an industrial or commercial nature by offering goods or services in the market,[58] the instrumental entity (be it comprised in the public administration, be it a publicly held corporation, or otherwise) will be considered an 'undertaking' for the purposes of articles 101 and 102 TFEU.[59]

On the contrary, where the activities of the state imply the exercise of public powers—that is, where the activities in question are connected by their nature, their aims and the rules to which they are subject with the exercise of powers which are typically those of a public authority,[60] the state unit or entity will not be considered an 'undertaking' for the purposes of EU competition law,[61] and it will not be subject to the 'antitrust' rules.[62] In

210–11; also G Clamour, *Intérêt général et concurrence. Essai sur la pérennité du droit public en économie de marché* (Paris, Dalloz, 2006) 504–53.

[55] This principle has been consistently applied by the ECJ and never raised substantial interpretation difficulties; see A Pappalardo, 'Measures of the States and Rules of Competition of the EEC Treaty' in B Hawk (ed), *Antitrust and Trade Policies in International Trade*, Annual Proceedings of the Fordham Corporate Law Institute 1984 (New York, M Bender, 1985) 515, 517–19.

[56] See, among others, Case 41/83 *Italy v Commission* [1985] ECR 873; Case C-41/90 *Höfner and Elser* [1991] ECR I-1979; and Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637. Recent case law on the concept of undertaking as applied to public bodies can be found in Case T-319/99 *FENIN v Commission* [2003] ECR II-357, confirmed on appeal by the ECJ, Case C-205/03 P *FENIN v Commission* [2006] ECR I-6295; Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband and others* [2004] ECR I-2493; and Case T-155/04 *Selex v Commission* [2006] ECR II-4797, confirmed on appeal by the ECJ, Case C-113/07 P *Selex v Commission* [2009] ECR I-2207. The most recent findings are in Case C-138/11 *Compass-Datenbank* [2012] pub electr EU:C:2012:449, where the basic criteria remain fundamentally unaltered.

[57] Indeed, the differentiation is far from clear-cut in the majority of cases, and most activities can be conceived of as lying in a continuum between pure 'market services' and pure 'exercises of public authority'—with a relatively large spectrum of activities in the 'grey area' to be found in between them; see Neergaard (n 42) 17.

[58] Case 118/85 *Commission v Italy* [1987] ECR 2599 7; and Case C-343/95 *Porto Genova II* [1997] ECR I-1547 16.

[59] However, the distinction may be becoming increasingly blurred, particularly as a result of certain reasonings of the ECJ. See Case C-138/11 *Compass-Datenbank* [2012] pub electr EU:C:2012:449 51, where it surprisingly held that: 'The fact that [the relevant activities] are carried out in consideration for remuneration provided for by law and not determined, directly or indirectly, by the entity concerned, is not such as to alter the legal classification of that activity.' In my view, this can potentially lead to very significant limitations to the application of the antitrust rules to public undertakings and, consequently, should be corrected. See M Kling and C Dally, 'Staatliches Handeln und Kartellrecht' (2014) 12(1) *Zeitschrift für Wettbewerbsrecht* 3–31.

[60] See: Case 30/87 *Bodson* [1988] ECR 2479 17–18, where the ECJ held that art 101 TFEU does not apply to acts conducted by bodies 'acting in their capacity as public authorities'; also Case C-364/92 *Eurocontrol* [1994] ECR I-43 30; Case C-387/93 *Banchero* [1995] ECR I-4663 43; and Case C-343/95 *Porto di Genova II* [1997] ECR I-1547 23. See L Ritter and WD Braun, *European Competition Law: A Practitioner's Guide*, 3rd edn (The Hague, Kluwer Law International, 2004) 50–51 and 951; and Whish (n 34) 87–88.

[61] Case T-309/12 *Zweckverband Tierkörperbeseitigung v Commission* [2014] pub electr EU:T:2014:676 51–53. For related discussion, see A Bartosch, 'Clarification or Confusion? How to Reconcile the ECJ's Rulings in Altmark and Chronopost' (2003) 3 *European State Aid Law Quarterly* 375, 380.

[62] Case C-309/99 *Wouters* [2002] ECR I-1577 57. See Louri (n 51) 146–47 and 159–69. Also Van Bael and Bellis, *Competition Law of the European Community*, 4th edn (The Hague, Kluwer Law International, 2005) 980; D Brault, *Politique et pratique du Droit de la concurrence en France* (Paris, LGDJ, 2004) 274–79; Roth and Rose (n 37) 91–102; and Whish (n 34) 82–88.

this regard, the fact that private entities (also) develop a given activity will be considered an important indication that it does not imply the exercise of public powers and, consequently, that it can be described as a business or economic activity.[63] It is most important to note that all the activities carried out by a given entity do not need to be analysed together, and the EU competition rules 'are applicable to the [economic] activities of an entity which can be severed from those in which it engages as a public authority'.[64]

As a general criterion, the differentiation between commercial or economic activity and the exercise of public powers seems fit for the purpose of identifying the type of public conduct that should be subjected to EU competition rules, as it excludes their application in the case of *sovereign* activities of the state, but subjects all other activities to the basic rules governing market activities and competition amongst undertakings. At this point, it should seem possible to subject public procurement activities to the 'core' competition rules of the TFEU, since it can be argued that they are of a clear commercial or economic nature—or, at least, are hard to conceptualise as the exercise of public powers (for further details, see below §VII.B). However, as shall be seen, the specific interpretation of the concept of 'undertaking'—and, more specifically, of the requirement to conduct an 'economic activity', significantly condition the consistency of the case law of the ECJ with this general criterion, and restrain the ability of articles 101 and 102 TFEU to address directly publicly generated distortions of competition in the public procurement field.[65]

B. The Carrying Out of an Economic Activity as the Distinctive Criterion: The General Functional Approach to the Concept of 'Economic Activity'

In general terms, EU case law has adopted a *functional or anti-formalistic approach* to the concept of 'undertaking',[66] and has developed criteria that have broadened the scope of this concept in order to cover any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed.[67] The concept of undertaking, therefore, has been developed and further refined around its two basic elements: 'entity' and 'economic activity'. Both have been developed in very general terms.[68] The concept of 'entity' has been interpreted broadly, so as to include both natural and legal persons, as

[63] Case C-41/90 *Höfner and Elser* [1991] ECR I-1979 22; Case T-128/98 *Aéroports de Paris* [2000] ECR II-3929 124; and Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089 20.

[64] Case 107/84 *Commission v Germany* [1985] ECR 2655 14–15; Case T-128/98 *Aéroports de Paris* [2000] ECR II-3929 108 and 112; and Case T-155/04 *Selex v Commission* [2006] ECR II-4797 54.

[65] N Charbit, *Le Droit de la concurrence et le secteur public* (Paris, Logiques Juridiques, 2002) 11 and 21–27. See also Szyszczak (n 10) 8–9.

[66] For a recent review of the settled case law in this regard, see Opinion of AG Mazák in Case C-350/07 *Kattner Stahlbau* 39ff. See also O Odudu, *The Boundaries of EC Competition Law: The Scope of Article 81* (Oxford, Oxford University Press, 2006) 23–45.

[67] The principle was formulated in Case C-41/90 *Höfner and Elser* [1991] ECR I-1979 21; and has been applied consistently ever since. For recent references, see Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and others v Commission* [2005] ECR I-5425 112; Case C-222/04 *Cassa di Risparmio di Firenze* [2006] ECR I-289 107; Case C-205/03 P *FENIN v Commission* [2006] ECR I-6295 25; Case C-280/06 *ETI and others* [2007] ECR I-10893 38; and Case C-350/07 *Kattner Stahlbau* [2009] ECR I-1513 34.

[68] Roth and Rose (n 37); Whish (n 34); A Jones and B Sufrin, *EC Competition Law: Text, Cases, and Materials*, 3rd edn (Oxford, Oxford University Press, 2008) 128–47; Louri (n 53); and CM von Quitzow, *State Measures Distorting Free Competition in the EC. A Study of the Need for a New Community Policy towards Anti-Competitive State Measures in the EMU Perspective* (The Hague, Kluwer, 2002) 90.

well as state bodies and other public entities.[69] The inclusion of public bodies, public enterprises and other state units in the concept of 'entity'—and, consequently, in the concept of 'undertaking' for the purposes of EU competition law, is not controversial. Therefore, it is important to underline that, for the analytical purposes of this study, the concept of 'undertaking' is largely dependent on the prerequisite of the carrying out of an economic activity; or, to put it more clearly, the concept of 'undertaking' is dependent on the twin concept of 'economic activity'.[70]

Over the years, the EGC and the ECJ have developed case law that determines that an 'economic activity' *involves the participation of the undertaking in a market or the development of the activity in a market context*—ie, an activity will be considered 'economic' when it is developed under market conditions.[71] According to this case law,[72] the pursuit of profit by a public body, or the existence of (sufficient) competition between the public body and private undertakings,[73] will exclude the consideration that the activity is developed in the general interest or otherwise as the result of the exercise of public powers *as such* (above §III.A).[74] In turn, this will determine that, for the purposes of articles 101 and 102 TFEU,

[69] For a detailed analysis of the case law developing the 'entity' element of the concept of undertaking, see C Townley, 'The Concept of an "Undertaking": The Boundaries of the Corporation—A Discussion of Agency, Employees and Subsidiaries' in G Amato and CD Ehlermann (eds), *Competition Law. A Critical Assessment* (Oxford, Hart Publishing, 2007) 3, 8–16.

[70] As has been clearly described, 'in defining this Community concept [of undertaking,] the Community Courts look at what the entity does, as opposed to its legal status'; see Townley (n 69) 3; and that EU competition law, particularly art 101(1) TFEU is 'not addressed to *entities* at all; it addresses *activities*' (emphasis in the original); Odudu (n 66) 25. For an interesting discussion on the concept of 'economic activity' and its treatment in the case law, see Baquero Cruz (n 33) 179–85; O Odudu, 'Economic Activity as a Limit to Community Law' in C Barnard and O Odudu (eds), *The Outer Limits of European Union Law* (Oxford, Hart Publishing, 2009) 225; and Sauter and Schepel (n 10) 79–85.

[71] See: Opinion of AG Poiares Maduro in Case C-205/03 P *FENIN v Commission* 13, who stresses that market conditions are distinguished by conduct which is undertaken with the objective of capitalisation, which is incompatible with the principle of solidarity. Therefore, when a given activity is developed with the objective of capitalisation (ie, for profit), it is to be considered that it is developed in market conditions, even if the legislation in force prevents genuine competition emerging on that market. By contrast, where the state allows partial competition to arise, the activity in question necessarily implies participation in a market—even if it is not for profit. However, as shall be seen, the criterion of development of the activity for profit or based on solidarity or other social principles is tricky when it is used to determine the economic nature of an activity; see below §VI. As indicated by AG Jacobs, 'the non-profit-making character of an entity or the fact that it pursues non-economic objectives is in principle immaterial' to the question whether the entity is to be regarded as an undertaking; see Opinion of AG Jacobs in Case C-67/96 *Albany* 312.

[72] Odudu (n 66) 26.

[73] In this regard, it could be argued that the case law of the ECJ has generated a *de minimis* requirement as regards the existence of competitive relations; see Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband and others* [2004] ECR I-2493 56, where the ECJ held that 'freedom to engage in *some competition* with one another ... does not in any way change the nature of the sickness funds' activity' (emphasis added). See also S Belhaj and JW van de Gronden, 'Some Room for Competition Does Not Make a Sickness Fund an Undertaking. Is EC Competition Law Applicable to the Health Care Sector? (Joined Cases C-264/01, C-306/01, C-453/01 and C-355/01 AOK)' (2004) 25 *European Competition Law Review* 682, 684–85; M Krajewski and M Farley, 'Limited Competition in National Health Systems and the Application of Competition Law: The AOK Bundesverband Case' (2004) 29 *European Law Review* 842, 850–51; and J Skilbeck, 'The EC Judgment in AOK: Can a Major Public Sector Purchaser Control the Prices it Pays or is it Subject to the Competition Act? Cases C-264/01, C-306/01, C-354/01 and C-355/01: *AOK Bundesverband v Ichthyol (AOK)* ECJ, March 16, 2004' (2004) 13 *Public Procurement Law Review* NA95.

[74] Remarkably, such an approach is consistent with the case law regarding the subjective scope of public procurement directives, where the ECJ has held that the existence of significant competition (and in particular the fact that the entity concerned is faced with competition in the market place) may be indicative of the absence of a 'need in the general interest, not having an industrial or commercial character'. In that case, the body developing such an activity will not qualify as a 'body governed by public law' for the purposes of EU public

the activity being developed is of an 'economic' nature and, hence, the public body will be considered an 'undertaking' and will be subject to the requirements and restrictions of 'antitrust' rules.[75]

As an exception or a restriction to this functional approach, if a prima facie economic activity is developed on the basis of the principle of *solidarity*[76] and subject to supervision by the state[77]—ie, isolated from the discipline of the market[78]—it will not qualify as an 'economic activity' for the purposes of articles 101 and 102 TFEU.[79] However, it is important to stress that, according to settled EU case law, the mere pursuit of social aims is not in itself sufficient to preclude the activity in question from being classified as an 'economic activity'; with the result that the isolation of the entity from the market (ie, substituting market discipline with state supervision) and the adoption of a principle of solidarity as the (exclusive) basis for the development of its activities have to be closely scrutinised.[80]

However, it should also be stressed that, given that judgments as regards the relevance of the principle of solidarity have been adopted in relation with the organisation of social security systems by Member States, EU case law has systematically put a strong emphasis on the social aims pursued by the entities integrated in those systems—and so the distinction between such 'social aims' and the 'principle of solidarity' is often hard to draw,[81] and the distinction between economic and social activities becomes increasingly

procurement directives and will not be obliged to apply them. See Case C-360/96 *BFI* [1998] ECR I-6821 48–49. See E Papangeli, 'The Application of the EU's Works, Supplies and Services Directives to Commercial Entities' (2000) 9 *Public Procurement Law Review* 201, 210–11; Trepte (n 13) 107–13; Bovis (n 17) 76–78; and id (n 17) 369–71. See also Joined Cases C-223/99 and C-260/99 *Agorà* and *Excelsior* [2001] ECR I-3605 38–42; Case C-373/00 *Adolf Truley* [2003] ECR I-1931 58–61; Case C-18/01 *Korhonen and others* [2003] ECR I-5321 49; and Case C-283/00 *Commission v Spain* [2003] ECR I-11697 81. Implicitly, then, such a body should be considered an 'undertaking' for the purposes of EU competition law and, consequently, be subject to its requirements. However, an excessive formalism in both strings of case law can result in an overlap in the application of competition and public procurement law to one and the same body; see S Arrowsmith, 'The Past and Future Evolution of EC Public Procurement Law: From Framework to Common Code?' (2005–06) 35 *Public Contract Law Journal* 337, 373–74. Arguably, however, the formalism of the case law can also result in the exemption from both sets of economic regulation.

[75] To be sure, there is an element of 'policy' in this determination, as some decisions of the ECJ show (such as, it is submitted, the *FENIN–Selex* doctrine discussed below in §III.C and §VI). This has been clearly stressed by Sauter and Schepel (n 10) 83. Suffice it to anticipate here that, in my opinion, this is an essentially objectionable *method* of construction and enforcement of EU competition law—particularly for its disregard of the deep (future) implications that it usually has. In similar terms, see J Holmes, 'Fixing the Limits of EC Competition Law: State Action and the Accommodation of the Public Services' (2004) 57 *Current Legal Problems* 149, 150–51 and 172–73; and Szyszczak (n 10) 8–9. For further discussion, see below note 186 and §VI.B.v.

[76] See: Case C-218/00 *Cisal* [2002] ECR I-691 38–42; Case C-350/07 *Kattner Stahlbau* [2009] ECR I-1513 44–59. On the principle of solidarity, see N Boeger, 'Solidarity and EC Competition Law' (2007) 32 *European Law Review* 319; MG Ross, 'Promoting Solidarity: From Public Services to a European Model of Competition?' (2007) 44 *Common Market Law Review* 1057; and id, 'The Value of Solidarity in European Public Services Law' in M Krajewski et al (eds) *The Changing Legal Framework for Services of General Interest in Europe—Between Competition and Solidarity* (The Hague, TMC Asser Press, 2009) 81.

[77] Case C-218/00 *Cisal* [2002] ECR I-691 43–44; and Case C-350/07 *Kattner Stahlbau* [2009] ECR I-1513 60–68.

[78] See: Baquero (n 45) 182.

[79] See: Sauter and Schepel (n 10) 85–90.

[80] Case C-67/96 *Albany* [1999] ECR I-5751 86; Joined Cases C-180/98 to C-184/98 *Pavlov and others* [2000] ECR I-6451 118; Case C-218/00 *Cisal* [2002] ECR I-691 37; and Case C-350/07 *Kattner Stahlbau* [2009] ECR I-1513 42.

[81] See, for instance, the blurred distinction in Case C-350/07 *Kattner Stahlbau* [2009] ECR I-1513 66. See also Case C-218/00 *Cisal* [2002] ECR I-691 45.

blurry.[82] Therefore, the limits between economic activities and the types of social activities excluded from the application of competition law remain obscure, particularly when the activities of public entities lie in a relatively *grey zone* in between economic and social activities[83]—or, probably more often, when public entities develop *both* economic and social activities simultaneously. In these instances, the case law of the EU judicature is less straightforward,[84] and generates some interpretative difficulties.

Notwithstanding those interpretative difficulties, it can be deduced from the case law that the applicability of EU competition rules to (public) 'undertakings' could seem to be granted in all cases where a body governed by public law develops an 'economic activity' in market conditions or, put otherwise, when the public entity *participates or interacts in the market*.[85] It is submitted that public procurement activities should be covered by this broad conception of economic activity, since they are activities developed in the market—or, put differently, through which the public buyer *interacts* with other agents in the market. However, as will now be seen, procurement activities constitute a particular instance where the case law has departed from the functional approach just described.

C. The Approach to Purchasing Activities As Such: A Departure from the General Functional Approach to the Concept of 'Economic Activity'

As briefly mentioned, notwithstanding the general functional approach to the concepts of undertaking and economic activity systematically applied in EU case law and in a rather surprising *formalistic twist*, the EGC and the ECJ have recently developed a string of case law that excludes the direct applicability of competition rules to procurement or purchasing activities by adopting what, in my opinion, can be seen as an *exceedingly narrow and non-functional (sub-)concept of 'economic activity'*.

According to the latest EGC and ECJ case law, procurement activities are not to be considered 'economic' activities in and by themselves—even if they are developed under market conditions and clearly represent an instance of participation in the market or market interaction by the public buyer. Rather, according to this case law, the nature of these purchasing activities must be determined according to whether or not the *subsequent use* of the purchased goods amounts to an 'economic' activity.[86] In other terms, procurement that is *ancillary* to a non-economic activity does not by itself qualify as 'economic activity' for the purposes of articles 101 and 102 TFEU.[87] Hence, all procurement activities

[82] Along the same lines, Baquero (n 45) 182. *Cf* Maillo (n 37) 594.

[83] See: Neergaard, Services of General Economic Interest (2009) 19; and Baquero (n 45) 184.

[84] Baquero (n 45) 182.

[85] In this regard, it is important to stress that any activity developed in market conditions or that implies the participation or economic interaction with other undertakings in the market will qualify as 'economic' activity and will trigger the consideration of the state as an 'undertaking' for the purposes of EU competition law. See Case T-128/98 *Aéroports de Paris* [2000] ECR II-3929 120–21, where the rental of aeroportuary premises was considered an economic activity, given that it 'contributes to the performance, on publicly-owned property, of a range of services of an economic nature and so forms part of its economic activity'.

[86] Case T-319/99 *FENIN v Commission* [2003] ECR II-357 36, confirmed on appeal, Case C-205/03 P *FENIN v Commission* [2006] ECR I-6295 26; and Case T-155/04 *Selex v Commission* [2006] ECR II-4797 65, confirmed on appeal, Case C-113/07 P *Selex v Commission* [2009] ECR I-2207 102 and 114.

[87] This finding of the EU judicature with which I take issue (see below §VI) has been accepted by some relevant commentators as a *praetorian* exclusion of certain public activities from competition scrutiny; see

conducted by public buyers that do not develop a subsequent or 'downstream' economic activity (but carry on an activity of a social nature or otherwise in the public interest) are deemed insufficient to qualify as economic activities for the purposes of EU competition law—and, consequently, the public buyer will not be considered an 'undertaking' and will not be subject to the prohibitions of articles 101(1) and 102 TFEU. It is submitted that this finding deserves additional scrutiny; particularly because it departs substantially from the previous general criteria related to the *functional* definition of economic activity for the purposes of articles 101 and 102 TFEU (above §III.B).

D. The Gap Generated by the Adoption of Too Narrow a Concept of Economic Activity—Which Excludes Procurement Activities As Such

It is hereby submitted that, while generally holding that EU competition rules apply equally to private and to public undertakings (above §III.A), in the particular case of purchasing activities, the ECJ has departed from its general *functional approach* (above §III.B), has significantly eroded and reduced the scope of antitrust rules as regards public sector activities, and has generated an important difference in the scope of the 'antitrust' rules applicable to public and private undertakings—as *only the activities of public undertakings as offerors of goods or services in the market are subject to competition rules*. All other commercial activities of the public sector that do not qualify per se as 'economic activities' (notably, public procurement) are off-bounds for 'antitrust' rules—unless they are 'attracted' to its scope of application by the subsequent development of economic activities by the same undertaking. It is submitted that this excessively formalistic approach (hardly compatible with most basic economic considerations, below §VI) generates an important gap in the EU competition law system.

This jurisprudence of the ECJ has exclusively focused on one side of the commercial activities exercised by the state: that of the state acting as an *offeror* of goods or services in the market. To be sure, this is an activity where subjection of the state's commercial activities to competition rules is essential to guaranteeing that competition in the market is not distorted and that public and private undertakings compete on an equal footing. However, in a departure from the general functional approach to the concept of undertaking, *commercial activities of the* state *as buyer have not only received significantly less attention, but have been automatically left outside the scope of EU competition rules—apparently for no good, substantial reason.* As has been already shown (above chapter two), this type of public commercial activity has significant potential for distorting competition in the market—but has nonetheless been set free from the constraints of competition rules by a formalistic twist in the case law of the EU judicature (above §III.C). Consequently, the current jurisprudential approach to the economic activities of the public sector from a competition standpoint neglects an important sector of activity (that of the market

Whish (n 34) 88; and, more clearly, Buendía Sierra (n 30) 1062; and O Guézou, 'Droit communautaire de la concurrence et achats: Certains demandeurs sont des offreurs comme les autres. Note sous TPICE 4 mars 2003 FENIN' (2003) *Contrats publics—Actualité de la commande et des contrats publics* 59; and id, 'Champ d'action du Droit de la concurrence et marchés publics' in C Bréchon-Moulènes (ed), *Droit des marchés publics* (Paris, Le Moniteur, 2006) III-133, 6–7. Similarly, but not referring to the *FENIN–Selex* case law; Von Quitzow, *State Measures Distorting Free Competition* (2002) 92.

behaviour of the public buyer) and gives way to undeterred competition-distorting public procurement practices.

In view of this perceived short-coming (further explored and criticised below §VI), which prevents the direct application of the 'core' competition rules to the public buyer in those instances in which the latter does not carry on subsequent or downstream 'economic' activities, the focus of inquiry should now turn to their potential *indirect* application through the so-called state action doctrine, which has expanded the scope and applicability of EU 'antitrust' rules to certain activities of the state that (as such) do not qualify as 'economic' activities for the purposes of articles 101 and 102 TFEU.

IV. The Insufficiency of State Action Doctrine to Capture Most of the Anti-Competitive Public Procurement Regulations and Practices

A. The Potential for Publicly Created Distortions of Competition as the Rationale behind the Development of the State Action Doctrine

Regardless of the specific interpretation of articles 101 and 102 TFEU and the limits of their applicability to public entities (above §III), it is manifest that some (or most) cases of anti-competitive state action do not directly or exclusively imply economic or commercial activities, but derive from the passing of legislation or administrative regulations that restrict competition or, even more often, from governmental action that may distort or negatively affect the competitive dynamics of the market.[88] Therefore, competition rules applying to undertakings (even if applied to public undertakings more strictly than is at present permitted by the interpreting case law) might be insufficient, and additional rules seem to be required to rein in anti-competitive or competition-distorting governmental activity.[89] With this purpose, the so-called *state action doctrine* has been developed by the EU judicature to capture those cases in which the exercise of public powers by the state distorts competition. Given the ample potential for public distortions of competition and the absence of specific rules in the TFEU, the need to expand the applicability of the EU rules on competition to the activities of the state was soon felt, and the ECJ case law undertook the mission of building basic piece-meal competition rules applicable to public intervention in the market through the so-called state action doctrine.[90]

[88] J Baquero Cruz, 'The State Action Doctrine' in G Amato and CD Ehlermann (eds), *Competition Law. A Critical Assessment* (Oxford, Hart Publishing, 2007) 551, 554. See also the various OECD reports, particularly the *Report on Regulatory Reform: Synthesis* (1997) 33, which stressed the fact that 'economic regulations that reduce competition and distort prices are pervasive'.

[89] To be sure, indirect limits on anti-competitive governmental activity can be found in the rules on free movement and on the rules on state aid; see L Gyselen, 'State Action and the Effectiveness of the EEC Treaty's Competition Provisions' (1989) 26 *Common Market Law Review* 33, 34. However, even with the complement of such rules, competition law still seems to lack specific rules against anti-competitive or competition-distorting governmental activity—at least if it is to constitute a complete system.

[90] See: R Joliet, 'National Anti-Competitive Legislation and Community Law' (1989) 12 *Fordham International Law Journal* 163; UB Henriksen, *Anti-Competitive State Measures in the European Community: An Analysis of*

B. A Quick Overview on the Development of the State Action Doctrine

The process of developing the state action doctrine has been progressive and incremental, and a relatively large number of ECJ decisions were required to achieve the current level of development.[91] Indeed, state action that restricts or distorts competition has only gradually been subjected to the EU competition rules.[92] Arguably, however, it is still incomplete—at least as regards its boundaries (below §VII.B).[93]

In the beginning, the absence of specific competition provisions in the TFEU aimed at the behaviour of the public sector (other than the rules regarding state aid and the granting of exclusive or special rights; see above §II) led the ECJ to develop too lenient an initial approach towards state anti-competitive action. Indeed, the first cases where allegedly anti-competitive behaviour of a Member State or competition-distorting domestic regulations were brought before the ECJ were dismissed on formal grounds and based on a literal interpretation of the TFEU—where the 'core' competition rules are located under the heading 'rules applying to undertakings' and so, in the first opinions of the ECJ, were inapplicable to the Member States.[94]

However, this approach yielded unsatisfactory results and exempted all types of state anti-competitive regulation and intervention in the markets from competition-oriented scrutiny. This potentially jeopardised the effectiveness of EU competition law, as Member States were in principle free to adopt legislation or otherwise interfere in the market in ways that run contrary to its objectives—and, potentially, free to protect certain

Decisions of the European Court of Justice (Copenhagen, Handelshøjskolens Forlag, 1994) 13–15; M Waelbroeck and A Frignani, *Commentaire Mégret—Droit communautaire de la concurrence*, 2nd edn (Paris, LGDJ, 1997) (the Spanish translation by I Sáenz-Cortabarría Fernández and M Morales Isasi, *Derecho europeo de la competencia* (Barcelona, Bosch, 1998) is used) 193–205; UB Neergaard, *Competition and Competences: The Tensions between European Competition Law and Anti-Competitive Measures by the Member States* (Copenhagen, Djøf Forlag, 1998) 29–121; J Viciano Pastor, 'Les responsabilités assumées par les États Membres par rapport au système de concurrence non faussée' in M Waelbroeck and M Doni (eds), *Études de Droit européen et international. Mélanges en hommage à Michel Waelbroeck* (Brussels, Bruylant, 1999) 1675, 1695–96; Baquero, State Action Doctrine (2007) 552; and Szyszczak (n 10) 14–15.

[91] For a review of the early decisions of the ECJ in this field, see Henriksen, *Anti-Competitive State Measures* (1994) 21–135; DJ Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford, Oxford University Press, 1998) 382–84; M López Escudero, 'Intervencionismo estatal y Derecho comunitario de la competencia en la jurisprudencia del TJCE' (1989) 16 *Revista de instituciones europeas* 725; and J Viciano Pastor, *Libre competencia e intervención pública en la economía* (Valencia, Tirant lo Blanch, 1995) 303–424.

[92] Most of the significant developments at the EU level have taken place in the last two decades; see Van Bael and Bellis (n 62) 980.

[93] Indeed, the state action doctrine remains largely undeveloped at its bottom boundary; see below §IV.D.

[94] This 'minimalist' approach was followed by the ECJ in Case 5/79 *Buys* [1979] ECR 3203 29–31, on the basis that Member States' rules and regulations do not (and cannot) constitute an 'agreement between undertakings'; and also in Case 238/82 *Duphar* [1984] ECR 523 30, and Joined Cases 177 and 178/82 *Van de Haar* [1984] ECR 1797 24 where, following a narrow literal interpretation, the ECJ held that the provisions of the rules on competition 'applying to undertakings' were irrelevant to the question whether legislation is compatible with EU law or not. For an assessment of the earlier developments of this doctrine, see PJ Slot, 'The Application of Articles 3(f), 5 and 85 to 94 EEC' (1987) 12 *European Law Review* 179; Henriksen (n 92) 43–49; and Neergaard (n 90) 29–33 and 38–41. See also Gyselen (n 89) 42; and AF Gagliardi, 'United States and European Union Antitrust versus State Regulation of the Economy: Is There a Better Test?' (2000) 25 *European Law Review* 353, 360. This minimalist approach has been reiterated by the ECJ in Case C-22/98 *Becu and others* [1999] ECR I-5665 31. For a recent revision of his critical remarks concerning the EU situation, see PJ Slot, 'Public Distortions of Competition: The Importance of Article 106 TFEU and the State Action Doctrine', in U Neergaard et al (eds), *Social Services of General Interest in the EU*, Legal Issues of Services of General Interest Series (The Hague, TMC Asser Press/Springer, 2013) 245.

undertakings (*national champions*) or shield them from effective competition.[95] So this initial, too formal, approach was soon to be abandoned by the ECJ in favour of a more materially oriented interpretation of the basic tenets of the competition rules.[96]

Progressively, the ECJ developed a new string of case law (ie, the state action doctrine) that attributes key interpretative value to the general goals and policies set by the TFEU and, particularly, to the objective of building up *a system ensuring that competition in the internal market is not distorted* (arts 3(3) TEU, 3(1)(b) TFEU and Protocol (No 27) TFEU, ex art 3(1)(g) TEC), as well as to the general requirement that the activities of the Member States and the EU be conducted 'in accordance with the principle of an open economy with free competition' (art 119 TFEU, ex art 4 TEC).[97] In relation to the principle of sincere cooperation—which imposes the general obligation of Member States to 'facilitate the achievement of the Union's tasks and *refrain from any measure which could jeopardise the attainment of the Union's objectives*' (emphasis added) (art 4(3) TEU, ex art 10(2) TEC);[98]

[95] Along these lines, DP Majoras, 'State Intervention: A State of Displaced Competition' (2006) 13 *George Mason Law Review* 1175, 1177.

[96] Before the ECJ undertook this process, some legal commentators—notably, German scholars Koch and Froschmaier, had already defended that the principle of undistorted competition underpinning the TFEU should give way to a broad interpretation of competition rules and their extension to the Member States; M Waelbroeck, 'Les rapports entre les règles sur la libre circulation des marchandises et les règles de concurrence applicables aux entreprises dans la CEE' in F Capoporti et al (eds), *Du Droit international au Droit de l'intégration. Liber Amicorum Pierre Pescatore* (Baden–Baden, Nomos, 1987) 781, 786.

[97] As noted by Whish (n 34) 213, the ECJ stressed the importance of art 119 TFEU (ex art 4 TEC) in Case C-198/01 *CIF* [2003] ECR I-8055 47.

[98] It is worth noting that recourse to art 4(3) TEU (ex art 10(2) TEC and, formerly, art 5 TEEC) has been a constant feature in the ECJ jurisprudence as a mechanism to reinforce Member States' obligations, since its first expression in Case 78/70 *Deutsche Grammophon* [1971] ECR 487 5. On the scope of art 4(3) TEU, and the possibility of deriving a general principle of pro-competitive state behaviour, see the early controversy between Pescatore and Marenco. See P Pescatore, *Le Droit de l'integration. Émergence d'un phénomène nouveau dans les rélations internationales selon l'expérience des Communautés Européennes* (Geneva, AW Sijthoff, 1972) 41–42, and id, 'Public and Private Aspects of Community Competition Law' (1986–87) 10 *Fordham International Law Journal* 373. *Contra*, G Marenco, 'Mésures étatiques et liberté de concurrence' (1984) 20 *Révue trimestrielle de Droit européen* 527, 534, id, 'Competition between National Economies and Competition between Business—A Response to Judge Pescatore' (1986–87) 10 *Fordham International Law Journal* 420, and id, 'Government Action and Antitrust in the United States: What Lessons for Community Law?' (1987) 14 *Legal Issues of Economic Integration* 1, 72–74. See also B van der Esch, 'The System of Undistorted Competition of Article 3(f) of the EEC Treaty and the Duty of Member States to Respect the Central Parameters Thereof' (1988) 11 *Fordham International Law Journal* 409; and J-F Verstrynge, 'The Obligation of Member States as Regards Competition in the EEC Treaty' in B Hawk (ed), *Competition Policy in OECD Countries*, Annual Proceedings of the Fordham Corporate Law Institute 1988 (Deventer, Kluwer Law, 1989) 17–1. In more general terms, as regards the principle of sincere cooperation established by art 4(3) TEU, see V Constantinesco, 'L'article 5 CEE, de la bonne foi à la loyauté communautaire' in F Capoporti et al (eds), *Du Droit international au Droit de l'intégration. Liber Amicorum Pierre Pescatore* (Baden–Baden, Nomos, 1987) 97, 109–14; M Blanquet, *L'article 5 du Traité CEE—Recherche sur les obligations de fidélité des États Membres de la Communauté* (Paris, LGDJ, 1994) 171–221 and 241–321; HG Schermers and DF Waelbroeck, *Judicial Protection in the European Union*, 6th edn (The Hague, Kluwer, 2001) 112–15; K Lenaerts and P van Nuffel, *Constitutional Law of the European Union*, 2nd edn (London, Thomson/Sweet & Maxwell, 2005) 115–23; A von Bogdandy, 'Constitutional Principles' in id and J Bast (eds), *Principles of European Constitutional Law* (Oxford, Hart Publishing, 2006) 3,49–51; and the various works by J Temple Lang, particularly 'The Core of the Constitutional Law of the Community—Article 5 EC' in LW Gormley (ed), *Current and Future Perspectives on EC Competition Law. A Tribute to Professor M R Mok* (The Hague, Kluwer Law International, 1997) 41, 44; and, recently, J Temple Lang, 'State Measures Restricting Competition under European Union Law' in ABA, *Issues in Competition Law and Policy* (Chicago, ABA Section of Antitrust Law, 2008) 221, 231; and id, 'Article 10 EC—The Most Important "*General Principle*" of Community Law' in U Bernitz et al (eds), *General Principles of EC Law in a Process of Development* (The Hague, Kluwer Law International, 2008) 75. See also A Hyde-Price and M Finlay, 'The Duties of Co-Operation of National Authorities and Courts and the Community Institutions under Article 10 EC' (2000) 9 *Irish Journal European*

the ECJ extended the applicability of EU competition rules contained in articles 101 and 102 TFEU (ie, the 'core' of the competition rules applicable to undertakings) to certain public non-commercial activities.[99] Indeed, by adopting such a teleological approach,[100] the ECJ developed case law that limits the ability of the state to adopt anti-competitive legislation that jeopardises the effectiveness of the application of articles 101 and 102 TFEU to the conduct of undertakings.[101]

Therefore, the state action doctrine has been developed as a mechanism to resolve a conflict between two bodies of regulation: EU competition rules and state anticompetitive legislation,[102] or put differently, as a mechanism to establish a coherent nexus between these two levels of governance[103]—whose ultimate rationale lies in the fact that Member States cannot adopt regulatory measures that generate distortions of competition in the internal market and, consequently, hamper the attainment of the basic objectives of the TFEU.

In general terms, the approach followed by the ECJ seems to give leeway, potentially, to significant restrictions on Member States' ability to impair the effectiveness of competition rules or otherwise generate anti-competitive effects.[104] It is submitted that the joint reading of articles 3(3) TEU, 4(3) TEU, 3(1)(b) TFEU, 119 TFEU and Protocol (No 27) TFEU gives way to a *broad principle imposing on Member States the obligation to abstain from restricting or distorting competition*[105] *in any manner that would adversely affect the*

Law 267; LW Gormley, 'The Development of General Principles of Law within Article 10 (ex Article 5) EC' in U Bernitz and J Nergelius (eds), *General Principles of European Community Law* (The Hague, Kluwer Law International, 2000) 113, 115; and id, 'Some Further Reflections on the Development of General Principles of Law within Article 10 EC' in U Bernitz et al (eds), *General Principles of EC Law in a Process of Development* (The Hague, Kluwer Law International, 2008) 303, 308.

[99] U Ehricke, 'State Intervention and EEC Competition Law: Opportunities and Limits of European Court of Justice's Approach—A Critical Analysis of Four Key-Cases' (1990) 14 *World Competition* 79, 80.

[100] Szyszczak (n 10) 46–48.

[101] See: Gyselen (n 89) 36; G Marenco, 'Le Traité CEE interdit-il aux États Membres de restreindre la concurrence?' (1986) 22 *Cahiers de Droit européen* 285, 287–307; Waelbroeck (n 96) 787–93; Wainwright and Bouquet (n 37) 541–51; Roth and Rose (n 37) 1031–37 and 1051–56; Chérot (n 20) 134–46. However, even if the case law of the ECJ refers almost indistinctly to arts 101 and 102 TFEU, the analysis might present certain differences in the extension of art 101 and art 102 to state anti–competitive action (particularly if the latter is applied *juncto* art 106 TFEU). See K Bacon, 'State Regulation of the Market and EC Competition Rules: Articles 85 and 86 Compared' (1997) 18 *European Competition Law Review* 283. See also Neergaard (n 90) 96–100 and 114–15; Waelbroeck and Frignani (n 90) 366–71; and Szyszczak (n 10) 93–101. Nonetheless, it is submitted that, for the purposes of this study, it will suffice to identify the state action doctrine primarily with the developments achieved regarding art 101 TFEU.

[102] F Castillo de la Torre, 'State Action Defence in EC Competition Law' (2005) 28 *World Competition* 407; and id, 'Reglamentaciones públicas anticompetitivas' in JM Beneyto and J Maillo (eds), *Tratado de Derecho de la competencia. Unión Europea y España* (Barcelona, Bosch, 2005) 1301, 1303–04.

[103] Neergaard (n 90) 111. See also M Poiares Maduro, *We the Court. The European Court of Justice and the European Economic Constitution. A Critical Reading of Article 30 of the EC Treaty* (Oxford, Hart Publishing, 1998, repr 2002) 104–10.

[104] See the broad terms used in Case 229/83 *Leclerc v Au blé vert* [1985] ECR 1 14: 'Member States are … obliged … not to detract, by means of national legislation, from the full and uniform application of Community law or from the effectiveness of its implementing measures; nor may they introduce or maintain in force measures, even of a legislative nature, which may render ineffective the competition rules applicable to undertakings.'

[105] See: Baquero (n 90) 559; Charbit (n 65) 55–65 and 75; and Clamour (n 54) 261–84. See also Craig and de Búrca (n 6) 1083–84; D Triantafyllou, 'Les règles de concurrence et l'activité étatique y compris les marchés publics' (1996) 32 *Revue trimestrielle de Droit européen* 57, 59–60; Van Bael and Bellis (n 62) 981; Whish (n 34) 213–20; Ritter and Braun (n 60) 951–58; and Temple Lang (n 98, 2008) 223. In very strong terms, see Szyszczak (n 10) 14.

functioning of the internal market.[106] However, the specific developments of the state action doctrine and, particularly, the development of a strict and largely formalistic test for the evaluation of Member States' activities (below §IV.C) have significantly departed from this general approach—and, somehow, limited it.

Indeed, it is hereby submitted that the case law of the ECJ has still not gone far enough in bringing such a general principle to life,[107] and has restricted its scope excessively by linking the obligations imposed by articles 3(3) TEU, 4(3) TEU, 3(1)(b) TFEU, 119 TFEU and Protocol (No 27) TFEU on Member States to the particular policies contained in other specific articles and parts of the TFEU. Rather than interpreting the principle as prohibiting publicly generated distortions of competition in broad terms, the case law has narrowed down its scope by pegging it to an analysis of the effectiveness of articles 101 and 102 TFEU—on the basis that the general objectives of the Treaty (now in art 3(3) TEU, 3(1)(b) TFEU and Protocol (No 27) TFEU, and previously detailed in arts 2 to 4 TEC) are made specific through the Treaty's particular provisions; and, in the case of the objective established by articles 3(3) TEU, 4(3) TEU, 3(1)(b) TFEU, 119 TFEU and Protocol (No 27) TFEU, through the competition provisions of articles 101 and 102 TFEU. An independent application of these provisions (*rectius*, of arts 3(1)(g), 4 and 10(2) TEC) by themselves never took place—and it was a debatable possibility, since these articles might fall short of complying with the requirements of *direct effect*[108]—and, currently, the independent application of articles 3(3) TEU, 4(3) TEU, 3(1)(b) TFEU, 119 TFEU and Protocol (No 27) TFEU seems rather unlikely.[109] However, it is submitted that, as it is currently formulated (below §IV.C), the state action doctrine is insufficient to overcome the shortages in EU competition rules that gave rise to its development in the first place (above §IV.A)—or, put otherwise, this doctrine is still underdeveloped (see below §VII).

[106] A related, although separate, issue regards the restriction of competition that Member States can undertake by means of anti-competitive legislation when EU competition rules are not applicable (ie, when there is no effect on intra-EU trade). However, that is an issue to be addressed under domestic law and, consequently, will not be further explored in this study. Suffice it to indicate, however, that in my view the flexible approach undertaken by the EU judicature to the identification of effects on intra-EU trade (above n 14) severely limits Member States' possibilities of adopting any kind of anti-competitive legislation, subject to the tests, checks and balances proposed below §VII.C.

[107] Waelbroeck and Frignani (n 90) 203.

[108] UB Neergaard, 'State Action and European Competition Rules: A New Path?' (1999) 6 *Maastricht Journal of European and Comparative Law* 380, 381 and 390–92. In more general terms, advocating a limited role in shaping Member States' competences in the field of economic regulation, see Neergaard (n 90) 21–28 and 253; and id, 'The Duties of Co-operation of National Authorities and Courts and the Community Institutions under Article 5 of the Treaty of Rome' in FIDE, *The Duties of Co-operation of National Authorities and Courts and the Community Institutions under Article 10 EC* (The Hague, TMC Asser Press, 2000) 63, 66. See also HG Schermers et al, 'Some Comments on Article 5 of the EEC Treaty' in JF Baur et al (eds), *Festschrift für Ernst Steindorf zum 70. Geburtstag am 13 März 1990* (Berlin, Walter de Gruyter and Co, 1990) 1359, 1373. Similarly, Von Quitzow (n 70) 11 and 49–51; and M López Escudero, 'Las reglamentaciones nacionales anticompetitivas. Comentario a las sentencias del TJCE de 17 de noviembre de 1993, asuntos *Meng, Ohra y Reiff*' (1994) 21 *Revista de instituciones europeas* 917, 933–42.

[109] It should be acknowledged that, to some extent, the state action doctrine might seem to have become a paper tiger; see J-B Blaise and L Idot, 'Chroniques—Concurrence—Articles 81 et 82 CE (1er Janvier 2008–30 Juin 2009)' (2009) 45(3) *Révue trimestrielle de Droit Européen* 473, 481. However, in my opinion, it is a tool with enormous potential and that could make significant contributions to the further strengthening of the internal market and, ultimately, of social welfare in the EU.

C. The Current Formulation and Boundaries of the State Action Doctrine

According to the settled case law of the EU judicature, where a Member State's legislation or regulation (i) *requires* undertakings to conduct anti-competitive behaviour, (ii) *reinforces* the effects of previous anti-competitive behaviour adopted by the undertakings, or (iii) *delegates* responsibility for decisions affecting the economic activity to undertakings,[110] the ECJ will analyse whether it frustrates the *effet utile*[111] of the EU competition rules applicable to undertakings—which take preference over anti-competitive state regulation by virtue of the principle of *supremacy* of EU law.[112] If so, it will declare the incompatibility of the state regulation[113] and, eventually, an infringement of the TFEU by the Member State.[114] Therefore, the basic criterion to determine that certain state anti-competitive regulation is in breach of EU law is not the more general principle that arguably could be extracted from the joint reading of articles 3(3) TEU, 4(3) TEU, 3(1)(b) TFEU, 119 TFEU and Protocol (No 27) TFEU (ie, that Member States shall abstain from restricting or distorting competition in any manner that would adversely affect the functioning of the internal market; above §IV.B). Instead, the assessment of state regulation is conducted according to the narrower criteria focused on whether it imposes, or strengthens anticompetitive practices of private undertakings, or whether it deprives legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere and, in so doing, jeopardises the effectiveness of the EU competition rules applicable to undertakings.[115]

[110] Case 267/86 *Van Eycke* [1988] ECR 4769 16. Given that the state action doctrine reached its most complete formulation in this decision of the ECJ, the doctrine is usually also referred to as the *Van Eycke test*. This test was consistently applied shortly after its formulation in Case C-339/89 *Alsthom Atlantique* [1991] ECR I-107; Case C-332/89 *Marchandise* [1991] ECR I-1027; Case C-260/89 *ERT* [1991] ECR I-2925; and Case C-60/91 *Batista Morais* [1992] ECR I-2085. See Henriksen (n 92) 109–34; Neergaard (n 90) 73–77; and Szyszczak (n 10) 63–65.

[111] Building on more general statements made in Case 14/68 *Walt Wilhelm* [1969] ECR 1, the doctrine of the *effet utile* was extended to the competition field in Case 13/77 *INNO v ATAB* [1977] ECR 2115 31 and 33. See Waelbroeck (n 98) 787; Henriksen (n 92) 31–39; Neergaard (n 90) 33–35; Szyszczak (n 10) 49–59; and Sauter and Schepel (n 10) 104–24.

[112] Castillo de la Torre, 'State Action Defence' (n 102) 410. *Contra*, adopting a more cautious approach as regards the applicability of the principle of supremacy, see Henriksen (n 92) 15–16. For additional references and discussion on the principle of supremacy, see below n 271 and accompanying text. In general, on the relevance of taking into due account the general principles of EU law in the construction of EU competition law, see B van der Esch, 'The Principles of Interpretation Applied by the Court of Justice of the European Communities and Their Relevance for the Scope of EEC Competition Rules' (1991–92) 15 *Fordham International Law Journal* 366.

[113] See: Van Bael and Bellis (n 62) 981ff. Declarations of incompatibility of Member States' anticompetitive regulation can be found in Case 311/85 *Vlaamse Reisbureaus* [1987] ECR 3801; Case 136/86 *BNIC v Aubert* [1987] ECR 4789; Case 66/86 *Ahmed Saeed* [1989] ECR 803; and Case C-198/01 *CIF* [2003] ECR I-8055. On the contrary, in early cases the ECJ found that the underdevelopment of EU competition rules in specific sectors (eg, book publishing, whose market dynamics and applicable competition criteria were the object of inquiry by the Commission, still incomplete at that time) excluded the incompatibility of Member States' regulations with EU competition rules (as they were arguably still unclear or underdeveloped); see Case 229/83 *Leclerc v Au blé vert* [1985] ECR 1 or Joined Cases 209 to 213/84 *Asjes* [1986] ECR 1425. Currently, in my view, such an exception to the general doctrine is unlikely to take place, given the substantial maturity of EU competition rules.

[114] So far, given that most of the decisions of the ECJ have been adopted in the framework of a pre-judicial ruling, the only case where such an infringement has been declared is Case C-35/96 *Commission v Italy* [1998] ECR I-3851.

[115] This formulation has recently been reiterated by the ECJ in Case C-327/12 *Soa Nazionale Costruttori* [2013] pub electr EU:C:2013:827 37–38. Previously, it had been recast in Joined Cases C-94/04 and C-202/04 *Cipolla* [2006] ECR I-11421 46–47; and Case C-446/05 *Doulamis* [2008] ECR I-1377 19–20. Generally, see Goyder (n 37) 475–78; Korah (n 37) 218–25 and LF Pace, *European Antitrust Law. Prohibitions, Merger Control and Procedures* (Cheltenham, Edward Elgar, 2007) 157–61.

The broadest possible reading of this case law is that it will consider that Member States infringe their obligations when they impose or endorse previous anti-competitive behaviour of undertakings,[116] or when they delegate or assign public powers of economic regulation to undertakings which can use them to pursue private goals rather than the public interest[117]—and, hence, can significantly alter the competitive dynamics of the market for their own benefit.[118] However, this case law does not capture unilateral competition-distorting behaviour by Member States when it does not result in anti-competitive behaviour of undertakings or strengthens its effects.[119] In some sense, state liability for the breach of EU competition law is *derivative*, in that it can only arise where the competition rules that apply to undertakings are relevant—ie, when undertakings are involved or the state behaviour is not purely unilateral.[120] In the end, the doctrine results in a *purely formal*

[116] In these cases, the imposition of the behaviour or its endorsement by the state will only have limited effects in exempting the undertakings involved from their liability. See Goyder (n 37) 478–81. Indeed, the ECJ declared the obligation of Member States' competition authorities to disapply national legislation in breach of art 4(3) TEU and any of the rules on competition of the TFEU, and to abolish any immunity from future penalties which the undertakings concerned would otherwise be able to enjoy on the basis of the state action defence (as declared in Joined Cases C-359/95 P and C-379/95 P *Commission and France v Ladbroke Racing* [1997] ECR I-6265 33–35). Moreover, the undertakings will be liable if the national anti-competitive regulation left sufficient room for autonomous anti-competitive behaviour (Case C-198/01 *CIF* [2003] ECR I-8055 51ff). See D Waelbroeck, 'Application des règles de concurrence du Traité de Rome à l'autorité publique' (1987) 30 *Révue du marché commun* 25, 32–34; Neergaard (n 108) 388–90; id (n 92) 106–08; S Martínez-Lage and H Brokelmann, 'The Application of Articles 85 and 86 EC to the Conduct of Undertakings that Are Complying with National Legislation' in M Waelbroeck and M Doni (eds), *Études de Droit Européen et International. Mélanges en Hommage à Michel Waelbroeck* (Bruxelles, Bruylant, 1999) 1247; Szyszczak (n 10) 81–82; Korah (n 37) 232–35; Roth and Rose (n 37) 1033–37; C Rizza, 'The Duty of National Competition Authorities to Disapply Anti-Competitive Domestic Legislation and the Resulting Limitations on the Availability of the State Action Defence (Case C-198/01 CIF)' (2004) 25 *European Competition Law Review* 126; Wainwright and Bouquet (n 37) 552–57; J Temple Lang, 'National Measures Restricting Competition and National Authorities under Article 10 EC' (2004) 29 *European Law Review* 397, 399–404; id (n 98, 'State Measures') 228–30 and 243–46; and Castillo de la Torre, 'State Action Defence' (n 102) 415–19.

[117] For a recent review of this issue, see Case C-184/13 *API and Others* [2014] pub electr EU:C:2014:2147. See also Case C-393/08 *Sbarigia* [2010] ECR I-6337; and Joined Cases C-94/04 and C-202/04 *Cipolla* [2006] ECR I-11421.

[118] This excludes state liability where the undertakings to which decision-making powers are delegated are independent experts that act in the public interest, as held by the ECJ in leading cases such as Case C-185/91 *Reiff* [1993] ECR I-5801, and Case C-35/99 *Arduino* [2002] ECR I-1529. Other cases along the same lines include Joined Cases C-180/98 to C-184/98 *Pavlov and others* [2000] ECR I-6451; Case C-67/96 *Albany* [1999] ECR I-5751; Joined Cases C-115/97 to C-117/97 *Brentjens* [1999] ECR I-6025; Case C-219/97 *Drijvende Bokken* [1999] ECR I-6121; Case C-38/97 *Librandi* [1998] ECR I-5955; Case C-35/96 *Commission v Italy* [1998] ECR I-3851; Case C-96/94 *Spediporto* [1995] ECR I-2883; and Case C-153/93 *Delta* [1994] ECR I-2517. See N Fenger and MP Broberg, 'National Organisation of Regulatory Powers and Community Competition Law' (1995) 16 *European Competition Law Review* 364, 365–68; H Schepel, 'Delegation of Regulatory Powers to Private Parties under EC Competition Law: Towards a Procedural Public Interest Test' (2002) 39 *Common Market Law Review* 31, 33–44; Neergaard (n 108) 384–86 and 394–95; id (n 90) 117–21; and Goyder (n 37) 481–82.

[119] Although an initial approach by the ECJ seemed to point in the other direction (Case 229/83 *Leclerc v Au blé vert* [1985] ECR 1), the ECJ case law requires that private undertakings be involved in the anti-competitive practices, so no Member State liability will be found in the absence of any such involvement. See Case 231/83 *Cullet v Leclerc* [1985] ECR 305 17–18; Case C-332/89 *Marchandise* [1991] ECR I-1027 23; Case C-2/91 *Meng* [1993] ECR I-5751 22; and Case C-245/91 *Ohra* [1993] ECR I-5851. See also Joined Cases C-140 to C-142/94 *DIP* [1995] ECR I-3257 14–16; and Case C-266/96 *Corsica Ferries* [1998] ECR I-3949 50–54. See W Sauter, *Competition Law and Industrial Policy in the EU* (Oxford, Clarendon Press, 1997) 146–47; Pappalardo (n 55) 528–29; Wainwright and Bouquet (n 37) 543–45; and Castillo de la Torre, 'Reglamentaciones públicas anticompetitivas' (n 102) 1301 and 1330–39.

[120] See: B van der Esch, 'Loyauté fédérale et subsidiarité: à propos des arrêts du 17 novembre 1993 dans les affaires C-2/91 (Meng), C-245/91 (Ohra) et C-185/91 (Reiff)' (1994) 30 *Cahiers de Droit europèen* 523; Van Bael and Bellis (n 64) 984 and 987; M Thunström et al, 'State Liability under the EC Treaty Arising from Anti-Competitive State Measures' (2002) 25 *World Competition* 515, 518–19 and 527; and Szyszczak (n 10) 102–03.

test[121] that neither scrutinises the policy objectives of the anti-competitive regulation, nor balances the intended benefits or policy goals of the restrictive regulation at stake with its anti-competitive effects.[122]

D. Assessment of the State Action Doctrine under its Current Formulation

Under its current formulation, the state action doctrine restricts its scope to determining whether a given state regulation reduces the effectiveness of, or renders superficial, the EU rules addressed to undertakings. Inasmuch as no negative effect on the application of articles 101 and 102 TFEU is identified under the circumstances of the case (which arguably will always occur in the absence of direct involvement by undertakings) the regulatory activities of the state will not be further scrutinised under the state action doctrine, regardless of their potential or actual effects on competition. Hence, it is hereby submitted that the state action doctrine falls short of instituting a fully fledged competition rule applicable to public action because it only proscribes anti-competitive *regulation* but not other forms of anti-competitive market *intervention*,[123] and because it limits its scope to a formal argument based on the impact of such regulation on the effectiveness of the competition rules applicable to undertakings—disregarding the potential competition-distorting effects that independent and unilateral public behaviour can generate on the competitive dynamics of the market.

Given that the state action doctrine is not of a general scope and nor is it designed

[121] The formalism of the approach followed by the ECJ was stressed by N Reich, 'The "November Revolution" of the European Court of Justice: *Keck*, *Meng* and *Audi* Revisited' (1994) 31 *Common Market Law Review* 459. See the criticism of Baquero (n 90) 580; and Castillo de la Torre, 'State Action Defence' (n 102) 429–30. The formalist approach to this issue has also been criticised by Temple Lang (n 98, 1997) 59; Neergaard (n 92) 78–89; Van der Esch (n 120) 536; and Schepel (n 118) 33. See also Szyszczak (n 10) 71–73; in very strong terms, Buendía (n 34) 265; and F Marcos, 'Los precios de abogados y procuradores frente al Derecho de la competencia: ¿Un formalismo excesivo? Comentario de la STJCE Arduino (C-35/99) y de la RTDC Procuradores (477/1999)' in Ll Cases (ed), *Anuario de la Competencia 2002* (Madrid, Marcial Pons, 2003) 525–28.

[122] A situation criticised by almost all commentators; see Verstrynge (n 98) 21–26; Gyselen (n 89) 55 and J Baquero Cruz, *Between Competition and Free Movement: The Economic Constitutional Law of the European Community* (Oxford, Hart Publishing, 2002) 144 and 153–54. But see AB Hoffman, 'Anti-Competitive State Legislation Condemned Under Articles 5, 85 and 86 of the EEC Treaty: How Far Should the Court Go after *Van Eycke*?' (1990) 11 *European Competition Law Review* 11. The unsuitability of arts 3(3) TEU, 4(3) TEU, 3(1)(b) TFEU, 119 TFEU and Protocol (No 27) TFEU (ex arts 3(1)(g), 4, 10(2) and 81 TEC) to evaluate the compatibility of state measures unrelated to anti-competitive behaviour of private undertakings with EU law (even if the state measure generates equivalent effects to a private restriction of competition) was strongly argued for in the Joined Opinions of AG Tesauro in cases C-2/91 *Wolf W Meng* and C-245/91 *Ohra* 25–33. However, the test proposed by Tesauro was not fully adopted by the ECJ, who instead has retained a narrow interpretation of the reinforcement of effects' criterion in the *Van Eycke* test; see Baquero Cruz, *Between Competition and Free Movement*, 145–47; and Neergaard (n 90) 83–89.

[123] Even if it was convincingly shown that case law could support not only legislative or regulatory activities of Member States, but also any other '*national policies, even unwritten, are likely to be included in the concept of national measures to be evaluated according to* [the] *general principle* [governing the interaction of arts 3(1)(g), 10(2) and 81 TEC]' (see Neergaard (n 90) 54–56, with reference to Case 174/84 *Bulk Oil* [1986] ECR 559; and Szyszczak (n 10) 58) it seems clear from later developments of the state action doctrine that this broad approach to the scrutiny of Member States' intervention in economic activity has unfortunately been largely unexplored by the ECJ. Indeed, the approach of the ECJ to the development of the state action doctrine has been rather cautious; see Triantafyllou (n 105) 68; and Poiares Maduro (n 103) 75–76.

to review all public activity outside the scope of specific EU competition rules,[124] it is submitted that this jurisprudentially created theory still leaves a relatively large amount of room for state anti-competitive or competition-distorting activity. In other terms, the state action doctrine, as it currently stands, has the rather limited purpose of guaranteeing that Member States do not limit the effectiveness of EU antitrust rules aimed at undertakings (ie, arts 101 and 102 TFEU). In so doing, it neglects the anti-competitive effects that other types of legislation, public regulation and administrative practice (ie, unilateral state action) can generate,[125] and misses the opportunity to flesh out a fuller principle derived from articles 3(3) TEU, 4(3) TEU, 3(1)(b) TFEU, 119 TFEU and Protocol (No 27) TFEU (ex arts 3(1)(g), 4 and 10(2) TEC) that prohibited publicly generated distortions of competition in broad terms and required that Member States abstained from distorting competition in any manner that would adversely affect the functioning of the internal market.

It is furthermore advanced that this case law is incomplete and does not clearly delineate the limits of the doctrine, in that it exclusively establishes the 'upper' boundary for state action immunity (or the point at which state intervention in the market 'begins' to be exempted from competition analyses) but completely disregards its 'bottom' limits. The application of the *Van Eycke test* merely determines that state legislation or regulation will not run contrary to articles 3(3) TEU, 4(3) TEU, 3(1)(b) TFEU, 119 TFEU and Protocol (No 27) TFEU, together with articles 101 and 102 TFEU (ie, will be *shielded* from competition scrutiny) when the state adopts legislation that *independently* generates anti-competitive effects—that is, legislation that does not impose anti-competitive behaviour on undertakings, and neither reinforces such behaviour, nor delegates to undertakings the possibility of passing regulations that impose or legalise such behaviour.[126]

Therefore, the state action doctrine sets the *point of departure* (or point of '*entry*') of the antitrust immunity conferred upon Member States—which is to be found where their activity is *unilateral* and is (apparently) derived from the exercise of sovereignty or public powers. However, the doctrine remains largely under-developed as regards the equally necessary *point of exit* of the immunity provided by the exemption—ie, it does not set the proper (legitimacy) thresholds below which state intervention should 'stop' being automatically exempted from competition scrutiny, nor the thresholds below which state economic intervention through (non-)regulatory measures should be subjected to a general competition principle and proportionality requirements (below §VII.B and §VII.C). This situation generates a relatively large and fuzzy area of state economic intervention in the market where the applicability of the state action doctrine remains unclear and questionable. In the end, the state action doctrine cannot be applied uncritically to all types of state economic intervention.

[124] Baquero (n 90) 556 and 580.

[125] A situation criticised by, among others, C-M Chung, 'The Relationship between State Regulation and EC Competition Law: Two Proposals for a Coherent Approach' (1995) 16 *European Competition Law Review* 87, 90; as well as by Gagliardi (n 94) 365.

[126] Acknowledgedly, this conceptualisation of the state action doctrine is close to the US configuration as an 'antitrust exemption', and runs opposite to that held by most commentators, who view the state action doctrine as an 'extension' of competition rules to state activities. However, it is submitted that the approach undertaken in this study helps identify the shortcomings of the state action theory. The adoption of this approach will have some implications as regards the terminology used.

Consequently, it is submitted that, if competition rules are to be adapted to the reality of the markets and are to continue serving their general purpose of guaranteeing that the internal market is based on a system than ensures that competition is not distorted (arts 3(3) TEU, 4(3) TEU, 3(1)(b) TFEU and Protocol (No 27) TFEU) and that economic policy is conducted in accordance with the principle of an open market economy with free competition (art 119 TFEU), the current case law of the EU judicature needs to be further developed as regards the limits of state action immunity. It is my opinion that, under its current formulation, the state action doctrine is the result of patchy development[127] and results in an *implicit and exceedingly broad exemption from EU competition rules for state anti-competitive regulation unrelated to the anti-competitive practices of undertakings and for unilateral competition-distorting (non)regulatory state action*,[128] which falls short of constructing a complete doctrine aimed at guaranteeing that Member States fully comply with their general obligations to refrain from adopting any measures that jeopardise or run against the internal market policy, properly understood as comprising a system that ensures undistorted competition—as has been established jointly by articles 3(3) TEU, 4(3) TEU, 3(1)(b) TFEU, 119 TFEU and Protocol (No 27) TFEU. It is argued that the development of such a more general doctrine, based on a broad principle prohibiting publicly generated distortions of competition in general terms, is desirable. Therefore, it seems to deserve further consideration, particularly in the light of possible future developments in EU law.

In this regard, it is hereby also submitted that the general approach outlined above (on the basis of the developments regarding arts 3(1)(g), 4 and 10(2) TEC) remains substantially unaltered and continues to find support in a joint reading of articles 3(3) TEU, 4(3) TEU, 3(1)(b) TFEU, 119 TFEU and Protocol (No 27) TFEU. It should be noted that the recent reform of the TEC has included the substitution of article 3(1)(g) TEC with the already mentioned Protocol (No 27) TFEU (or Protocol on the Internal Market and Competition). As a result of this amendment, the effectiveness and validity of some of the jurisprudential constructions based on that provision of the TEC could seem to be jeopardised—especially the state action doctrine under discussion here.[129] However, given that the amended Treaties establish that the EU shall have exclusive competence for the establishment of the competition rules necessary for the functioning of the internal market (arts 3(3)TEU and 3(1)(b) TFEU) and that Member States have expressly declared that 'the internal market as set out in Article 3 of the Treaty on European Union includes

[127] Neergaard (n 90) 111.

[128] Although in relation to the situation in the US, a similar criticism has been expressed by PJ Hammer and WM Sage, 'Monopsony as an Agency and Regulatory Problem in Health Care' (2003–04) 71 *Antitrust Law Journal* 949, 950 and 979–86. *Contra*, see Castillo de la Torre, 'Reglamentaciones públicas anticompetitivas' (n 102) 1331–33, who considers that 'there is no gap [in the state action doctrine] if one takes into account that these community rules were never intended to regulate the use of its own powers by Member States', and that the attempts to further develop the state action doctrine in a more effects-based or non-formalistic approach are 'recalcitrant' or even 'surrealistic'.

[129] See: A Riley, 'The EU Reform Treaty and the Competition Protocol: Undermining EC Competition Law' (2007) 28 *European Competition Law Review* 703, 705–06; LC Datou, 'Protectionism: Towards a more Politicised Deal Environment in Europe?' (2008) *European Antitrust Review* 50; R Lea, 'An Economically Liberal European Union Will Not Be Delivered by the EU Reform Treaty' (2008) 28 *Economic Affairs* 70, 72; and N Petit and N Neyrinck, 'A Review of the Competition Law Implications of the Treaty on the Functioning of the European Union' (2010) 2(1) *CPI Antitrust Journal* 1, 2–4.

a system ensuring that competition is not distorted';[130] in my view, it remains highly debatable whether any significant changes to competition policy (and, particularly, to the state action doctrine) should be envisaged, and most probably none should be expected.[131] It is hereby submitted that a joint reading of articles 3(3) TEU, 4(3) TEU, 3(1)(b) TFEU, 119 TFEU and Protocol (No 27) TFEU—should allow the ECJ to keep the state action doctrine from being affected. All in all, 'freedom of competition stands as a general principle of EC Law',[132] and competition rules are fundamental provisions which are 'essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market'.[133] In my view, by recognising the key importance of undistorted competition for the internal market and, consequently, by strengthening its case law on the fundamental character of freedom of competition as a general principle of EU law, the ECJ would be in a good position to maintain (and further develop) the state action doctrine in the future. However, the likeliness of such a development remains unclear.[134] In any case, proposals will be advanced to contribute to that potential future development, particularly with the aim of adopting a more substantive (or less formal) approach that gives more room to the balancing of economic and non-economic considerations in the treatment of state action (below §VII)—which, in my view, would be highly desirable.

V. Preliminary Conclusions: The Insufficiency of Current Competition Institutions and Potential Improvements to Achieve Better Results

The analysis of current EU competition law institutions has shown that, in general terms, they are ill-equipped to address effectively publicly generated competitive distortions in

[130] See: Protocol (No 27) TFEU, whereby Member States agree that the Union shall, if necessary, take action under the provisions of the Treaties to this end, including action under art 352 TFEU—which provides for legislative initiative of the Council, based on unanimity, in case it should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers.

[131] H Schweitzer, *Competition Law and Public Policy: Reconsidering an Uneasy Relationship. The Example of Art 81* (EUI Working Papers, LAW 2007/30), available at http://ssrn.com/abstract=1092883. In similar terms, see A Kaczorowska, *European Union Law* (New York, Routledge, 2009) 50. Also, C Joerges 'A Renaissance of the European Constitution?' in UB Neergaard et al (eds), *Integrating Welfare Functions into EU Law—From Rome to Lisbon* (Copenhagen, Djøf Forlag, 2009) 29, 30. With a conservative approach, see M Dougan, 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts' (2008) 45 *Common Market Law Review* 617, 653–54; and Sauter and Schepel (n 10) 19–21.

[132] Case 240/83 *Waste oils* [1985] ECR 531 9. See also Chérot (n 20) 130; and JM Broekman, *A Philosophy of European Union Law. Positions in Legal Space and the Construction of a Juridical World Image* (Leuven, Peeters, 1999) 343ff.

[133] See: Case C-126/97 *Eco Swiss* [1999] I-3055 36; see also Szyszczak (n 10) 45–46.

[134] Indeed, reticence in the ECJ to further expand the state action doctrine has been reported; see Korah (n 37) 223–25; and L Hancher, 'Community, State, and Market' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford, Oxford University Press, 1999) 721, 734. Moreover, it has been held that 'a broad use of Article 10 would be particularly objectionable given that there are clear legal bases for proceeding against Member States under other parts of the Treaty dealing, for example, with the free movement of goods and services'; Whish (n 34) 215. Future developments are, hence, difficult to anticipate; Sauter and Schepel (n 10) 128. However, some proposals will be advanced below §VII.

the public procurement field,[135] except in very specific and rather marginal circumstances. Firstly, rules applicable to state aid (art 107 TFEU) will only play a role when the terms of the public contract result in an undue economic advantage for the public contractor—ie, if they do not reflect normal market conditions. Also, given that the case law and the practice of the Commission have generated a rebuttable presumption that excludes the existence of such undue economic advantage when the award of the contract is compliant with EU public procurement rules, recourse to state aid control to prevent competition-distorting public procurement practices seems to be doomed by a vicious circle of inquiry that will only be broken if and when there is a blatant disproportion between the obligations imposed on the public contractor and the consideration paid by the public buyer—which is not likely to occur in the majority of the cases. Therefore, state aid rules cannot be the basis for a general competition law-based solution to competition-distorting practices in public procurement (above §II.A).[136]

Secondly, rules applicable to undertakings enjoying exclusive or special rights and, more specifically, rendering services of general economic interest (art 106 TFEU) are similarly irrelevant as regards preventing competition-distorting public procurement practices. The general prohibition of article 106(1) TFEU will only be applicable in the largely unlikely cases in which the award of the contract generates a restriction of competition in the market by having exclusionary effects on the undertakings that have not been awarded the contract—which are mainly restricted to the case of *concessions*. Moreover, article 106(1) TFEU imposes obligations on Member States *pro futuro* and consequently, even in the relatively rare cases in which it is applicable, it provides an insufficient legal basis to constrain the behaviour of the granting authority prior to the award of the contract—particularly during preparatory phases of the procurement procedure (above §II.B.i). This general conclusion, which is now further qualified in the 'excluded sectors' under Directive 2014/25 (above §II.B.ii), remains however equally applicable despite the approval of Directive 2014/23 on the award of concessions (above §II.B.iii). Finally, the fact that the public contractor renders services of general economic interest is also irrelevant for public procurement processes, as the award of the contract lies outside of the 'public service' exception regulated in article 106(2) TFEU (above §II.B.iv). Overall, article 106 TFEU constitutes a very limited instrument to fight anti-competitive public procurement practices (above §II.B.iv).

Thirdly, as regards purchasing activities, the relevant case law has adopted an exceedingly narrow interpretation of the concept of 'undertaking' and, more precisely, has departed from the *functional approach* generally adopted as regards the prior requirement to carry on an 'economic activity' (above §III.B). In a rather formal twist of the concept of 'economic activity', some of the latest developments of EU case law have left public procurement 'as such' outside the scope of the prohibitions laid down in articles 101(1) and 102 TFEU (above §III.C). To be sure, public procurement conducted by public bodies that develop a subsequent or 'downstream' economic activity are the object of competition law analysis and are subject to EU 'antitrust' rules—but that is largely circumstantial and does not properly place the focus on the competition analysis of the undertaking *as*

[135] Similarly, D Katz, *Juge administratif et Droit de la concurrence* (Marseille, Faculté de Droit et de Science Politique, 2004) 112–13.

[136] Along the same lines, stressing the limited scope of state aid rules, see Winter (n 23) 484; who encompassess the views advanced in the Opinion of AG Jacobs in Case C-379/98 *PreussenElektra* 151–55.

a buyer. It is submitted that this approach results in a double insufficiency. On the one hand, the scope and results of such circumstantial analysis of procurement activities will be strongly influenced by the competitive situation of the public buyer in the 'downstream' market and, hence, no satisfactory independent test for 'pure' buying activities can be expected to be developed in that analytical framework. Even if that was irrelevant (which, in my opinion, it is not), the situation is such that a given competition-distorting public procurement practice would run contrary to EU 'antitrust' rules or not depending on considerations regarding *other* activities developed by the public purchaser—which would most probably result in a lack of consistency of interpretative criteria, in discriminatory situations and, in the end, in a loss of legal certainty as regards the application of competition rules in the public procurement arena. On the other hand, competition-restrictive public procurement practices would be relatively easy to shield from competition law scrutiny by the simple device of getting them conducted by public entities not developing *subsequent* economic activities for the purposes of articles 101 and 102 TFEU. Be this as it may, under the current case law, 'core' EU competition rules are substantially incapable of fighting anti-competitive public procurement practices *as such* (above §III.D).

Finally, the extension of such 'core' prohibitions to public intervention in the markets by recourse to articles 3(3) TEU, 4(3) TEU, 3(1)(b) TFEU, 119 TFEU and Protocol (No 27) TFEU (ie, the state action doctrine) is limited to those instances where Member States' regulation jeopardises the effectiveness of the application of the antitrust prohibitions laid down in articles 101(1) and 102 TFEU regarding the conduct of undertakings, and does not capture Member States' unilateral competition-distorting behaviour that is unrelated to competition violations by undertakings (above §IV.C). It has been submitted that a more general approach is possible (both under the rules of the prior TEC and the curent TFEU), and that current state action doctrine results in an implicit and exceedingly broad exemption from competition rules for state anti-competitive regulation unrelated to the practices of undertakings and for unilateral competition-distorting non-regulatory state action (above §IV.D). Nonetheless and unavoidably, *de lege lata*, current state action doctrine is also substantially incapable of preventing anti-competitive public procurement.

To sum up, given the various restrictions and limits of current competition instruments, there is no EU competition rule generally applicable to public procurement activities as such—which, in my view, constitutes *a gap in EU competition law*. It is further submitted that the need to develop effective, consistent and comprehensive EU competition rules applicable to the public sector is almost undeniable—particularly as regards the public procurement arena. The perceived gap shows that the *system* of competition rules in the TFEU is still incomplete, or does not go full-circle—since it is still open at its extremes as regards the market or commercial activities carried out by public entities. At the one end, 'core' competition rules are applicable to private and public undertakings indistinctly, and go a long way to disciplining and reigning in their market behaviour. However, the strict interpretation as regards the concept of 'economic activity' for their purposes leaves public procurement *as such* out of bounds. At the other end, state action doctrine has extended the material prohibitions of these 'core' competition rules to the activities of public authorities, but too strict an interpretation of the requirements for its application—and, particularly, of the need for undertakings to be involved in the anti-competitive situation, has left unilateral public action (and, most notably, public procurement) also out of bounds. Therefore, it is hereby submitted that enlarging either of these two ends

of the system of competition rules (or both of them), will close the circle and effectively bring public procurement within its scope.[137] It is submitted that such a development of EU law would result in a more competition-oriented public procurement system, which would contribute to attaining the common aims of competition and public procurement law (above chapter three)—and, in the end, greater social welfare.

In view of the above, it is submitted that a *more economically sound* (or less formalistic) approach to these issues would significantly contribute towards bridging this gap and towards developing a more consistent set of competition rules applicable to public interventions in the market and, particularly, to competition-distorting public procurement rules and practices. To be sure, such a re-interpretative task might not be easy to conduct (particularly inasmuch as it affects some trends of ECJ case law that have been consolidated for a relatively long period of time) and some obstacles in the adoption of this more pragmatic approach might be encountered in the structure of EU competition rules (and, particularly, in the limited scope of articles 101 and 102 TFEU to incorporate non-economic considerations; below §VI.B.v). However, such an approach can easily be subsumed under basic TFEU principles and mandates for the construction of the internal market and, consequently, in my view, some proposals can be advanced *de lege ferenda*.

Along these lines, it is submitted that the gap between the competition rules applicable to undertakings (public or private) and those applicable to the state has still not been sufficiently narrowed down by the case law, which can be refined in two complementary ways. On the one hand, it can be developed through a (more effects-based) revision of the concept of 'economic activity' to include 'pure' public procurement activities—whose exclusion from this concept for the purposes of EU competition rules is based on too formal an approach and lacks sufficient economic justification. Consequently, a revision of this approach to bring public procurement within the scope of those rules—at least when it is susceptible of generating the effects that competition law aims to prevent, seems a clearly desirable development (below §VI).

On the other hand, further developments of the state action doctrine based on a more elaborate distinction between sovereign activities and commercial or market activities also seem desirable. In this respect, it is submitted that constructing a 'market-participant exception' to the state action doctrine would significantly contribute to clarifying its scope (ie, to setting its 'lower bounds') and would provide competition policy with a more economically oriented instrument to tackle publicly originated restrictions of competition that, so far, have remained out of reach (§VII.B). Along the same lines, and within the *grey zone* of sovereign activities, a further revision of the doctrine also seems possible. Arguably, the blanket immunity granted to state legislation and regulation might be reduced in those cases in which its *effects* run contrary to the main objectives of the EU (and, more specifically, against the objective of guaranteeing that the internal market is based on a system that ensures undistorted competition, as one of the 'core' EU economic policies)—at least where there is a disproportion between the alternative (non-economic) goals and

[137] In contrast, it is submitted that developments related to arts 106 and 107 TFEU are harder to envisage, since these provisions will always be constrained by some of their basic elements—ie, by the concept of 'exclusive or special rights' and the requirement of 'undue economic advantage', respectively. Consequently, this study will not explore proposals that have them as their legal basis.

the ensuing restrictions to competition, or when restricting competition is unnecessary to attain conflicting policy objectives (§VII.C).[138]

In my opinion, these are the main changes and revisions that could be conducted in ECJ case law in order to allow for this more economic approach towards the subjection of competition-distorting public procurement rules and practices (and, indirectly, of other types of public market intervention) to EU competition rules. While any of those further developments of the case law would by itself contribute to improving the economic consistency and the rationale of the current competition rules, arguably none of the proposed changes would by itself suffice to achieve the desired result of reining in public anti-competitive or competition-distorting behaviour. Moreover, a piece-meal approach might result in further inconsistencies and newly created gaps in EU 'public' competition rules. Therefore, a simultaneous and consistent revision of both prongs of current case law—ie, the too stringent definition of 'economic activity' and the too formalistic approach to state action doctrine, should be conducted in a coordinated manner.

VI. A Revision of Current Doctrine to Achieve Better Results (1): A More Economic Approach to the Concept of 'Economic Activity' in the Public Procurement Field

A. The Current Approach: The Analysis of Public Procurement Activities Is Pegged to the Subsequent Use of the Purchased Goods or Services

As has already been mentioned (above §III.B), the EGC and the ECJ have recently developed an overly formalistic and restrictive approach towards the analysis of public procurement activities from a competition law perspective. The EGC initiated this case law in *FENIN*,[139] where it analysed the specific issue whether purchasing activities qualify

[138] Proposals along the same lines have been made by Pescatore (n 98, 1986–87); Van der Esch (n 98) 409–31; Verstrynge (n 100) 21–26; Gyselen (n 89) 56–58, and id, 'Anti-Competitive State Measures under the EC Treaty: Towards a Substantive Legality Standard' (1993) *European Law Review—Competition Law Checklist* 55. *Contra*, see Hoffman (n 122) 23–24. With a slightly different approach, the development of tests based on the effects of (anti-competitive) national measures, see Neergaard (n 92) 219 and 225–26; Waelbroeck (n 98) 795–97; and Von Quitzow (n 70) 15. Along the same lines, it is submitted that there is scope for the development of the state action doctrine through tests based on the effects of Member States' regulation (below §VII.C). *Contra*, see Castillo de la Torre, 'Reglamentaciones públicas anticompetitivas' (n 102) 1331–33.

[139] The procedure was initiated in appeal of the Decision of the Commission of 26 August 1999, in case IV.F.1./36.834 *Federación Española de Empresa de Tecnología Sanitaria (FENIN)*; where the Commission held the position (later adopted by the EU judicature) that procurement and the subsequent activities in which the procured goods or services are employed, are indisociable for competition law purposes. It is particularly significant that the Commission based its claim on the indissociability of procurement and subsequent activities on the basis that 'the autonomous exercise as a single market activity of the part of the activity that is allegedly dissociable must be economically viable in the short, medium, or long term' (original in Spanish, ibid 20 *in fine*). In my view, recourse to such a criterion of economic viability is at odds with (or, at least, completely foreign to) EU case law regarding the concept of undertaking (above §III.A and §III.B)—as well as being at odds with economic theory—and should have been the object of further analysis (and, probably, rejection) by the EU judicature in the process of appeal against the Decision of the Commission. *Cf* Odudu (n 68) 35–45. However, as mentioned, in my view it is more appropriate to disregard the profit criterion for these purposes (above n 73).

per se as 'economic activities' in the sense of EU competition law—and particularly as regards their instrumental role in the definition of 'undertaking' in the context of articles 101(1) and 102 TFEU. The EGC found that:

> 36. … it is the activity consisting in offering goods and services on a given market that is the characteristic feature of an economic activity … not the business of purchasing, as such. Thus … it would be incorrect, when determining the nature of that subsequent activity (sic), to dissociate the activity of purchasing goods from the subsequent use to which they are put. *The nature of the purchasing activity must therefore be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity.*
>
> 37. Consequently, an organisation which purchases goods—even in great quantity—not for the purpose of offering goods and services as part of an economic activity, but in order to use them in the context of a different activity, such as one of a purely social nature, *does not act as an undertaking simply because it is a purchaser in a given market*. Whilst an entity may wield very considerable economic power, even giving rise to a monopsony, it nevertheless remains the case that, if the activity for which that entity purchases goods is not an economic activity, it is not acting as an undertaking for the purposes of Community competition law and is therefore not subject to the prohibitions laid down in articles 81(1) EC and 82 ECT.[140]

On appeal, the ECJ upheld the main findings of the EGC (albeit no express confirmation of the broader holding in 37 of the EGC judgment was made as regards shielding public *monopsony* situations from competition law scrutiny) by determining that, as indicated by the EGC in 36 of the appealed judgment,

> there is no need to dissociate the activity of purchasing goods from the subsequent use to which they are put in order to determine the nature of that purchasing activity … *the nature of the purchasing activity must be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity*.[141]

This initial approach was confirmed by the EGC in *Selex*, where it reiterated the position advanced in *FENIN*, and has considered that:

> 65. … According to the criteria laid down in the settled case-law of the Community judicature … economic activity consists of the offer of goods and services on a given market and not the acquisition of such goods and services. In that regard, it has been held that it is not the business of purchasing, as such, which is the characteristic feature of an economic activity and that it would be incorrect, when determining whether or not a given activity is economic, to dissociate the activity of purchasing goods from the subsequent use to which they are put. *The nature of the purchasing activity must therefore be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity*.
>
> 68. … whilst an entity purchasing a product to be used for the purposes of a non-economic activity 'may wield very considerable economic power, even giving rise to a monopsony, it nevertheless remains the case that, if the activity for which that entity purchases goods is not an economic activity, it is not acting as an undertaking for the purposes of Community competition law and is therefore not subject to the prohibitions laid down in articles 81(1) EC and 82 EC'.[142]

[140] Case T-319/99 *FENIN v Commission* [2003] ECR II-357 36–37 (emphasis added).

[141] Case C-205/03 P *FENIN v Commission* [2006] ECR I-6295 26 (emphasis added). See R Lane, 'Current Developments: European Union Law—Competition Law' (2007) 56 *International and Comparative Law Quarterly* 422.

[142] Case T-155/04 *Selex v Commission* [2006] ECR II-4797 65 and 68 (emphasis added). See also J-P Kovar,

Again, on appeal, the *FENIN–Selex* approach has been upheld by the ECJ (albeit, also in this instance, not giving express confirmation of the broader holdings regarding the shielding of public *monopsony* situations from competition law scrutiny), in the following terms:

> [I]t would be incorrect, when determining whether or not a given activity is economic, to dissociate the activity of purchasing goods from the subsequent use to which they are put … *the nature of the purchasing activity must therefore be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity.*[143]

As a further clarification, the ECJ concluded that this line of reasoning 'can obviously be applied to activities other than those that are social in nature or are based on solidarity'[144]—and, consequently, has dissipated the doubts as to whether the *FENIN* case law should be restricted to that area. In view of this clarification, then, the *FENIN–Selex* approach should clearly be understood as constituting the current and general approach of the EU judicature to the treatment of purchasing activities 'as such' from a competition law perspective. As anticipated (above §III.C), and for the reasons provided in what follows, it is my opinion that this approach departs from the general *functional* approach to the concepts of 'economic activity' and 'undertaking' and that it results in a too narrow and formalistic position that seriously limits the ability of current EU competition rules to ensure undistorted competition in public procurement markets.

B. An Assessment of the Current Approach in the EU Case law

The approach adopted by the EU case law has been the object of strong criticism by scholars and practitioners for being excessively formalistic and having a weak economic justification.[145] However, rejection of the EU's judicature position is not unanimous.[146] In my view, the *FENIN–Selex* case law represents a misguided development of EU competition law,

'Scope of Competition Law: The EGC Gives Precise Details about the Notion of Economic Activity and Confirms the Case-Law FENIN about the Qualification of the Purchase Act (Selex Sistemi Integrati)' (2007) 1 *Concurrences* 168.

[143] Case C-113/07 P *Selex v Commission* [2009] ECR I-2207 102 and 114 (emphasis added).

[144] Case C-113/07 P *Selex v Commission* [2009] ECR I-2207 103. Such 'extension' of *FENIN* had been advocated by M Krajewski and M Farley, 'Non-Economic Activities in Upstream and Downstream Markets and the Scope of Competition Law after FENIN' (2007) 32 *European Law Review* 111.

[145] See: C Munro, 'Competition Law and Public Procurement: Two Sides of the Same Coin?' (2006) 15 *Public Procurement Law Review* 352, 357; V Louri, 'The FENIN Judgment: The Notion of Undertaking and Purchasing Activity. Case T-319/99, Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental v Commission' (2005) 32 *Legal Issues of Economic Integration* 87; KPE Lasok, 'When is an Undertaking Not an Undertaking?' (2004) 25 *European Competition Law Review* 383 383–85; Prosser (n 16) 129–30; and W-H Roth, 'Comment: Case C-205/03 P, *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v Commission*, Judgment of the Grand Chamber of 11 July 2006 [2006] ECR I-6295' (2007) 44 *Common Market Law Review* 1131, 1135–42.

[146] PJ Slot, 'Applying Competition Rules in the Healthcare Sector' (2003) 24 *European Competition Law Review* 580, 587–88; and, similarly, JW van de Gronden, 'Purchasing Care: Economic Activity or Service of General (Economic) Interest?' (2004) 25 *European Competition Law Review* 87, 88–92; id, 'The Internal Market, the State and Private Initiative—A Legal Assessment of National Mixed Public-Private Arrangements in the Light of European Law' (2006) 33 *Legal Issues of Economic Integration* 105, 110–12; and Krajewski and Farley (n 144) 120. Also rejecting that purchasing activities of the public buyer can be subjected to EU competition law, in very strong terms, see Triantafyllou (n 107) 70–71. In mild (supporting) terms, Sauter and Schepel (n 10) 88.

for various reasons. First, it runs contrary to previous practice in several Member States without even taking that factor into due consideration. Second, it disregards alternative approaches previously suggested to the EU judicature. Third, as already mentioned, it runs contrary to the general *functional* approach to the concept of undertaking for the purposes of articles 101 and 102 TFEU (above §III.B). Fourth, it makes poor economic sense. Finally, it seems to be ill-equipped and disproportionate to attain the apparent underlying goal of affording differential competition treatment to entities developing social and other activities in the public interest. These reasons will be discussed in what follows.

i. The FENIN–Selex Doctrine Runs Contrary to Previous Practice in Several Member States

As has been anticipated, the position adopted by the EU judicature in the *FENIN–Selex* case law runs contrary to the previous practice in various Member States—at least the United Kingdom, Germany, the Netherlands, France and Spain[147]—where a clear and largely consistent approach towards subjecting public procurement activities *as such* to competition rules seems to exist.[148]

As regards the *United Kingdom*, it has been stressed by several commentators that the *FENIN–Selex* approach runs contrary to the previous findings of the *UK Competition Appeals Tribunal* (CAT) *BetterCare* decision, that expressly dismissed the argument that 'the simple act of purchasing without resale is not an "economic" activity' on the basis that the relevant factor for the analysis was 'whether the undertaking in question was in a position to generate the effects which competition rules seek to prevent'.[149]

The *FENIN–Selex* approach also runs contrary to precedents in *Germany*, where the Federal Supreme Court (Bundesgerichtschof) has consistently ruled that activities in the 'upstream' (purchasing) market should be considered economic and, thus, within the scope of competition law since, in most cases, the effects of such activity are not insignificant.[150]

[147] This comparative review is not exhaustive, but simply aims to illustrate the existence of a significant and largely homogeneous previous body of national practices that the EU judicature could have taken into account when assessing the applicability of EU 'core' competition rules to the public buyer.

[148] This comparative review of Member States' domestic case law is relevant for the construction of the EU rule. On the importance of the comparative method for the proper development and interpretation of EU law, see K Lenaerts, 'Le droit comparé dans le travail du juge communautaire' in FR van der Mensbrugghe (ed), *L'utilisation de la méthode comparative en droit européen* (Namur, Presses Universitaires de Namur, 2004) 111; and V Constantinesco, 'Brève note sur l'utilisation de la méthode comparative en droit européen' in FR van der Mensbrugghe (ed), *L'utilisation de la méthode comparative en droit européen* (Namur, Presses Universitaires de Namur, 2004) 169.

[149] *BetterCare Group Ltd v Director General of Fair Trading* [2002] CAT 7 264. See J Skilbeck, 'The Circumstances in Which a Public Body May Be Regarded as an 'Undertaking' and thus Subject to the Competition Act 1998 Solely Because of its Function as a Purchaser of Particular Goods and Services: BetterCare Group Limited v The Director General of Fair Trading' (2003) 12 *Public Procurement Law Review* NA71; Whish (n 34) 329–31; M Bloom, 'Key Challenges in Enforcing the Competition Act' (2003) 2 *Competition Law Journal* 85; and L Montana and J Jellis, 'The Concept of Undertaking in EC Competition Law and its Application to Public Bodies: Can You Buy Your Way into Article 82?' (2003) 2 *Competition Law Journal* 110, 114–17. See also BJ Rodger, *The Competition Act 1998 and State Entities as Undertakings: Promises to Be an Interesting Debate* (CLaSF Working Paper No 1, 2003) available at www.clasf.org/assets/CLaSF%20Working%20Paper%2001.pdf; Prosser (n 16) 54–57 and 129–30; Arrowsmith, *Law of Public and Utilties Procurement* (2nd, 2005) 64–67; AM Pollock and D Price, 'The BetterCare Judgment—A Challenge to Health Care' (2003) 326 *British Medical Journal* 236; and B Allan, 'United Kingdom' in I Kokkoris (ed), *Competition Cases from the European Union—The Ultimate Guide to Leading Cases of the EU and All 27 Member States* (London, Sweet & Maxwell, 2008) 1221, 1261–63.

[150] See: A Winterstein, 'Nailing the Jellyfish: Social Security and Competition Law' (1999) 6 *European*

Similarly, the EU case law opposes precedents in the *Netherlands*, where the national competition authority (*NMa*) decided that public healthcare entities should be regarded as undertakings in relation to their purchasing policy to the extent that they had sufficient freedom to influence the activities of their providers in the healthcare sector.[151]

As regards the situation in *France*, it is notable that the Cour de cassation (overruling the prior criteria of the Conseil de la concurrence and the Paris Court of Appeals) also held that competition rules apply to public procurement, even if it is conducted by administrative bodies with no (subsequent) commercial activities—hence, expressly overruling an approach coincident with the *FENIN–Selex* case law.[152]

Finally, the *FENIN–Selex* case law also runs contrary to precedents in *Spain*, where the practice of the competition authority (Comisión Nacional de la Competencia) and the jurisprudence of the Spanish Supreme Court (Tribunal Supremo) holds that competition law is fully applicable to public procurement activities and, in more general terms, to all activities of public authorities.[153]

In general terms, an overview of these precedents seems to make it clear that national competition authorities and judicial bodies in these Member States generally tended to answer in the affirmative the question whether public procurement or purchasing activities *as such* have to be considered 'economic activities' and, hence, suffice for the entities conducting them to qualify as 'undertakings' and thus be subject to the corresponding

Competition Law Review 324, 333; Van de Gronden (n 146) 90; and Louri (n 145) 94. See also Roth, Comment: Case C-205/03 P (FENIN) (2007) 1140–41; and, stressing that the *FENIN–Selex* approach stands in contrast to the case law of the Bundesgerichtschof, BundesKartellamt, *Buyer Power in Competition Law—Status and Perspectives* 14–15 (Working Group on Competition Law, Background Paper, 2008), available at www.bundeskartellamt.de/wEnglisch/download/pdf/2008_ProfTagung_E.pdf.

[151] Van de Gronden (n 146) 91; Louri (n 147) 94.

[152] On the situation prior to the intervention by the Cour de cassation, see M Bazex, 'Le Conseil de la Concurrence et les marchés publics' (1994) no spécial *Actualité juridique—Droit administratif* 103. On the 'new' approach, Conseil de la concurrence, *Collectivités Publiques et Concurrence* (2002) 231, available at lesrapports.ladocumentationfrancaise.fr/BRP/024000128/0000.pdf. See also Charbit (n 65) 35; Prosser (n 16) 109; and O Guézou, 'Droit de la concurrence et contrats publics. Contentieux administratif et pratiques anticoncurrentielles' in G Clamour and M Ubaud-Bergeron (eds), *Contrats publics. Mélanges en l'honneur du professeur Michel Guibal* (Montpellier, Presses de la Faculté de Droit de Montpellier, 2006) 107. See also JY Chérot, 'Les méthodes du juge administratif dans le contentieux de la concurrence' (2000) 9 *Actualité juridique—Droit admnistratif* 687, 691; S Nicinski, 'Les évolutions du droit administratif de la concurrence' (2004) 14 *Actualité juridique—Droit admnistratif* 751, 751–52; and L Richer, *Droit des contrats administratifs*, 5th edn (Paris, LGDJ, 2006) 208–16.

[153] This position has been consistently held by the Spanish competition authority and has been recently stressed by the Spanish Supreme Court in its Judgment (Third Chamber, Third Section) of 19 June 2007 (ground 3), confirming a decision of the National Competition Commission of 2000. For a summary of this case law, see Comisión del Mercado de las Telecomunicaciones, *Informe al Ministerio de Ciencia y Tecnología sobre la contratación administrativa de servicios de telecomunicaciones. Relación de buenas prácticas* (2003), available at www.cmt.es; and F Uría Fernández, 'Apuntes para una reforma de la legislación sobre contratos de las administraciones públicas' (2004) 165 *Revista de administración pública* 297, 311–12. See also F Sáinz Moreno, 'Orden público económico y restricciones a la competencia' (1977) 84 *Revista de administración pública* 597, 642; F Vicent Chuliá, 'Poderes públicos y defensa de la competencia' (1993) 583 *Revista General de Derecho* 3313, 3364; S González-Varas Ibáñez, *El Derecho administrativo privado* (Madrid, Montecorvo, 1996) 275–81; id, 'La aplicación del Derecho de la competencia a los poderes públicos. Últimas tendencias' (2001) 239 *Revista de Derecho mercantil* 249, 261; F Marcos, 'El tratamiento de las restricciones públicas a la competencia. La exención legal en la Ley 15/2007, de 3 de julio, de Defensa de la Competencia' (2008) 6988 *Diario LaLey* 1, 6; id, 'Conductas exentas por ley (Art 4)' in J Massaguer et al (eds), *Comentario a la Ley de Defensa de la Competencia* (Madrid, Civitas, 2008) 222, 246–48; and id, '¿Pueden las administraciones públicas infringir la Ley de Defensa de la Competencia cuando adquieren bienes o contratan servicios en el mercado?: Comentario a la resolución de la Comisión Nacional de Competencia, de 14 de abril de 2009 (639/08, Colegio Farmacéuticos Castilla–La Mancha)' (2009) 29 *Actas de derecho industrial y derecho de autor* 839.

'core' competition rules—ie, to the prohibitions set by the domestic equivalents of articles 101 and 102 TFEU. The common rationale underlying the solutions adopted at Member State level seems to be that the potential anti-competitive effects generated by certain public procurement practices triggered the application of those rules. Therefore, it should be seen as rather surprising that Advocate General Poiares Maduro concluded that 'a study of comparative law shows that the national law of the Member States adopts criteria similar to those developed by the Court'[154]—given that the brief overview conducted here seems to point rather clearly in the opposite direction.[155]

ii. The FENIN–Selex Doctrine Runs Contrary to Alternative Approaches Previously Suggested to the EU Judicature

Interestingly, the same approach followed by the abovementioned Member States had been suggested to the ECJ by Advocate General Jacobs in *Cisal*, expressly stressing the important point that a *key consideration* when determining if an undertaking is engaged in an economic activity is to analyse whether the undertaking in question is in a position to 'generate the effects which competition rules seek to prevent'.[156] Also in very clear terms, Advocate General Jacobs held in *Cassa di Risparmio di Firenze* that

> an entity should qualify as an undertaking for the purposes of the EC competition rules not only when it offers goods and services on the market but also when it carries out other activities which are economic in nature and which could lead to distortions in a market where competition exists[157]

consequently adopting a clearly functional approach to the concept of undertaking[158]—which, in my view, would have been consistent with the previous EU case law. However, by departing from these proposals on the basis of flawed and insufficient reasoning,[159] the EGC and the ECJ have set a course that runs contrary to the general functional approach to the concept of undertaking by means of the *FENIN–Selex* case law.

iii. The FENIN–Selex Doctrine Runs Contrary to the General Functional Approach to the Concept of 'Undertaking'

On this point, the ECJ *FENIN* judgment seems implicitly to rely on the Opinion of Advocate General Poiares Maduro, who (somehow obscurely) restricts the importance of the effects criterion by stressing that it should be considered in the context of the broader analysis of whether the activities concerned are developed under market conditions (ie,

[154] Opinion of AG Poiares Maduro in Case C-205/03 P *FENIN v Commission* 23.

[155] In similar terms—but also at variance with the position advanced here that the precedents in Member States' case law homogeneously point towards a conclusion opposed to the one reached by Advocate General Poiares Maduro—see Krajewski and Farley (n 146) 121–22.

[156] See: Opinion of AG Jacobs in Case C-218/00 *Cisal* 71. On the importance of the criterion of the effects of state activity on the market for the development of competition law; Szyszczak (n 10) 10.

[157] Opinion of AG Jacobs in case 222/04 *Cassa di Risparmio di Firenze and others* 78.

[158] See: Montana and Jellis (n 149) 114; Odudu (n 68) 28–30; and R Kreisberger, '*FENIN*: Immunity from Competition Law Attack for Public Buyers?' (2006) 15 *Public Procurement Law Review* NA214, NA216.

[159] Particularly since any analysis of the sort is completely omitted in the *FENIN* judgments, and bluntly rejected in the EGC *Selex* judgment; see Case T-155/04 *Selex v Commission* [2006] ECR II-4797 68.

according to the criterion of participation in a market or the carrying out of an activity in a market context). In this regard, the Opinion stressed that:

> That is the context in which the references in case-law to the *capacity to commit infringements of competition law* can be understood, as the basis for categorising an entity as an undertaking. Even if no profit-making activity is carried on, there may be participation in the market capable of undermining the objectives of competition law. The *Court's* case-law *should not be interpreted as meaning that that criterion is sufficient to establish that an entity is to be classified as an undertaking*, but it supports a conclusion that competition law should apply.[160]

This preliminary approach already shows a significant restriction on the *functional* approach adopted by Member States' previous practice and suggested by Advocate General Jacobs in *Cisal* and *Cassa di Risparmio di Firenze*. In fiercer terms, when specifically addressing the applicability of the effects criterion, the Opinion of Advocate General Poiares Maduro adopts a formal and very restrictive theoretical approach that substantially amounts to denying any analytical relevance to the potential effects of public procurement on competition—ie, moves away from the functional approach.

> The appellant claims that, in determining whether the purchasing activity … was economic in nature, the Court of First Instance should have considered whether it was liable to have anti-competitive effects in order not to create 'unjustified areas of immunity'. However, *such a criterion cannot be accepted, since it would amount to subjecting every purchase by the State, by a State entity or by consumers to the rules of competition law*. On the contrary, as the judgment under appeal rightly pointed out, a purchase falls within the scope of competition law only in so far as it forms part of the exercise of an economic activity. Moreover, *if the appellant's argument were to be adopted, the effectiveness of the rules relating to public procurement would be reduced* (Case C-76/97 *Tögel* [1998] ECR I-5357).[161]

It is submitted that, other than substantially departing from the criteria and practice existing at national level,[162] the arguments put forward for the blunt rejection of the effects criterion in the assessment of the economic nature of an activity for the purposes of articles 101 and 102 TFEU are exclusively formal and substantially insufficient to support the exclusion of an effects-based functional analysis.

Firstly, as regards the apparently exorbitant implications of the adoption of an effects criterion—which 'would amount to subjecting every purchase by the State, by a State entity or by consumers to the rules of competition law'—serious doubts can be cast on its accuracy and relevance. On the one hand, reference to consumers (at least understood individually) is completely irrelevant and misleading, since only in extraordinarily rare circumstances will purchases conducted by consumers be able to 'generate the effects which competition rules seek to prevent'.[163] On the other hand, referring to *every* purchase also might seem disproportionate, since general rules controlling the application

[160] Opinion of AG Poiares Maduro in Case C-205/03 P *FENIN v Commission* 14 (emphasis added and footnote omitted).

[161] Ibid 65 (emphasis added and footnote omitted).

[162] Interestingly, though, the Opinion of AG Poiares Maduro *FENIN v Commission* (ibid) makes reference to the existence of such effects-based criteria at national level (with specific reference to *BetterCare*; id, 23–25) but does not subsequently take them into consideration—and, most importantly, rejects them without specific explanations for such a departure.

[163] See: Roth (n 145) 1138.

of competition law would automatically be applicable[164] (ie, *de minimis*, art 101(3) TFEU, block exemption regulations, etc).

Secondly, as regards the suggested undesirability of subjecting the purchases conducted by the state and state entities to competition law and its potentially negative impact on the effectiveness of the rules relating to public procurement, the stark formulation in the *FENIN* Opinion makes its interpretation difficult. Nonetheless, given the general need for public procurement to take place in competitive markets if it is to attain its specific objectives, and the existence of a very substantial commonality of principles between both areas of economic regulation (see above chapters two and three), the argument seems basically void of specific meaning and resembles a general remark difficult to support.[165]

Hence, it seems an '*obiter dictum*-like' consideration that should not be given excessive analytical weight.

Therefore, given that the formal reasons put forward so far to reject an effects-based analysis as regards the subjection of public procurement to 'core' competition law prohibitions do not seem convincing, it is submitted that an economically oriented analysis of the nature of public procurement as such and of its potential effects on competition is appropriate to determine whether the current EU case law should be left unchanged or, on the contrary, should be revisited and aligned to the previous national practices in several Member States and the previous Opinions of Advocate General Jacobs.

iv. The FENIN–Selex Doctrine Makes Poor Economic Sense

In furtherance of the above, it is submitted that the reasoning followed by the EGC and the ECJ in *FENIN* and *Selex* makes poor economic sense and brings about decision-making criteria that will hardly lead to economically meaningful outcomes. Considering that an 'economic activity consists of the offer of goods and services on a given market and not the acquisition of such goods and services' does not hold water.[166] A proper understanding of the 'economic' nature of the market determines that activities on either side of it (ie, *both* offer and demand) are equally economic and equally important to its analysis.[167] Purchasing activities are clearly economic in nature by themselves,[168] regardless of the type of 'downstream' activities to which the goods and services procured are dedicated.[169] Remarkably, this was acknowledged in the Opinion of Advocate General Poiares Maduro:

[164] See: Roth (n 145) 1138–39.

[165] Moreover, in my opinion, the reference to Case C-76/97 *Tögel* [1998] ECR I-5357 seems unwarranted, as no clear mention seems to be identifiable in that case to an argument pointing towards a reduction of effectiveness of the rules relating to public procurement derived from the subjection of the public buyer to competition rules. Along the same lines, Roth (n 145) 1139 fn 34.

[166] *Contra*, see Krajewski and Farley (n 144) 119–21.

[167] HW de Jong, 'On Market Theory' in B Dankbaar et al (eds), *Perspectives in Industrial Organization*, Studies in Industrial Organization no 13 (Dordrecht, Kluwer Academic Publishers, 1990) 29. Following the same logic, it has been argued that, when two activities are similar economically, '*they should be treated the same way at law*'; Townley (n 71) 7.

[168] Trepte (n 17) 5 and 64.

[169] Charbit (n 65) 38. See also Winterstein, Social Security and Competition Law (1999) 331, who traces the origin of this approach back to E Forsthoff, *Rechtsfragen der Leistenden Verwaltung; Der Staat als Auftraggeber* (1963) 29 (who reportedly argued that, in order to determine the subjection of an entity to competition law, it is irrelevant whether or not it operates regularly on both sides of the market).

> The essential characteristic of a market is that it involves exchanges between economic operators in the form of supplies and purchases. In that context, *it is impossible to see how the one can be made subject to review under competition law while the other is excluded from it*, as the two are reciprocal.[170]

However, the Opinion of Advocate General Poiares Maduro considered that this analysis does not by itself invalidate the reasoning of the EGC that led it to treat the classification of a purchase as an 'economic' activity or not depending on the subsequent use of the goods purchased; this is a questionable conclusion, as the logic of economic dependence of the activities developed on both sides of the market and their equally economic nature seems to be lost.

Furthermore, the position adopted by Advocate General Poiares Maduro can be doubted in view of some of the basic reasons that are claimed to support it. In this regard, it is significant that the *FENIN* Opinion excludes the existence of negative economic effects derived from the conduct of public procurement activities, considering that

> [if] a purchase is linked to the performance of non-economic functions, it may fall outside the scope of competition law. That conclusion is consistent with the economic theory according to which *the existence of a monopsony does not pose a serious threat to competition since it does not necessarily have any effect on the downstream market*.[171]

On this point, the Opinion relies on scholarly economic commentary.[172] However, it is submitted that it does so in a clear misunderstanding of the applicability of the reasoning to the case at stake.[173] The *FENIN* Opinion seems to overlook the fact that, under most common circumstances, *the exercise of monopsony power leads to a reduction in social welfare*.[174] Most significantly, it is submitted that the generation of such a social loss—ie, a reduction of global efficiency (which is undoubtedly acknowledged by all commentators), must be the relevant concern in the design of competition rules in a public procurement setting because in most cases there is no relevant downstream market to take into consideration (particularly in the type of cases decided in *FENIN* and *Selex* that are excluded from the scope of competition law *precisely because* the public buyer is not engaged in

[170] Opinion of AG Poiares Maduro in Case C-205/03 P *FENIN v Commission* 62 (emphasis added).

[171] Ibid 66 (emphasis added). In the same terms, albeit with a less elaborate reasoning, see Opinion of AG Verica Trstenjak in Case C-113/07 P *Selex v Commission* 126.

[172] Citing RG Noll, '"Buyer Power" and Economic Policy' (2005) 72 *Antitrust Law Journal* 589.

[173] Given that, for one reason, the exercise of monopsony power in public procurement does not necessarily occur in an intermediate market—which is the case considered by Noll in his analysis of the market of retail consumer products; see Noll (ibid). The improper reading of Noll's work has also been emphasised by Roth (n 147) 1140.

[174] As clearly demonstrated, amongst others, by GJ Stigler, *The Theory of Price*, 4th edn (New York, Macmillan, 1987) 216–18; RD Blair and JL Harrison, *Monopsony: Antitrust Law and Economics* (Princeton, Princeton University Press, 1993) 36–43; and RD Blair and CP Durrance, 'The Economics of Monopsony' in ABA, *Issues in Competition Law and Policy* (Chicago, ABA Section of Antitrust Law, 2008) 393, 397–99; and, notably, acknowledged by Noll himself in the same work quoted by AG Poiares Maduro; see Noll (n 172) where he clearly states that 'if one adopts either the "harm to consumers" standard or the "dead-weight loss" standard for evaluating monopsony, *exercise of monopsony power is likely to be harmful*' (591, emphasis added); or, even more clearly: 'The exercise of monopoly power *almost always causes inefficiency* and always harms at least some consumers; the effects of monopsony are basically the same' (ibid, 623, emphasis added). See also L Alexander, 'Monopsony and the Consumer Harm Standard' (2006–07) 95 *Georgetown Law Journal* 1611, 1614–19 and 1628–30; and I Kokkoris, 'Buyer Power Assessment in Competition Law: A Boon or a Menace?' (2006) 29 *World Competition* 139, 150–53. For further details, see above chapter two, §V.B).

subsequent commercial activity).[175] These considerations are particularly relevant if, as submitted, the goal of competition law and policy is to protect and promote economic efficiency (through protection and promotion of competition as a process) as a means to contribute to social welfare (understood as aggregate welfare)—ie, if competition policy is to focus on the avoidance of welfare losses produced by certain market failures (above chapter three, §III.E).

However, it is submitted that by establishing a direct link between the procurement activities and the subsequent activities developed by the public buyer, the EGC and the ECJ *artificially negate the economic character of most public procurement activities and isolate them from competition rules whenever they are not carried on by entities developing subsequent market activities*, adopt an overly restrictive and exceedingly formalistic view, and set up a flawed analytical framework that will hardly be operative and that will offer wide coverage to anti-economic decisions in the future.[176] An economically sound analysis should have led the EU judicature to determine that purchasing activities are by themselves 'economic or commercial' and, consequently, subject to competition scrutiny.

Indeed, the position of the EU judicature boils down to denying the economic nature of purchasing activities and to making their assessment for competition law purposes conditional on the subsequent activities that the public purchaser develops and to what purpose the goods and services procured are destined. By 'tying' the analysis of the purchasing activities to the other activities conducted by the public buyer, the EU case law blurs the distinction between the conduct of commercial activities and the exercise of public powers that has traditionally informed the analysis of public activity under the prism of articles 101(1) and 102 TFEU—and seems to depart from that generally functional approach and move towards more formalistic positions. In the end, the *FENIN–Selex* case law comes to establish a double-commercial purpose criterion for the analysis of public procurement activities—and, by so doing, it has inadvertently diverged from previous case law.[177]

According to previous jurisprudence, it was the commercial character or the public power nature *of the activity under consideration* that determined whether it should be considered an 'economic activity' for the purposes of EU competition law. Displacing the analysis from the particular activity under consideration to other (subsequent) activities developed by the same body breaks this line of reasoning and, if applied across the board, might lead to different results from those derived from previous case law. Such an approach is limited and exceedingly rigid. In general terms, in the cases where the public buyer develops *subsequent* activities that are not economic, there seems to be no good reason not to conduct a more detailed analysis that subjects the commercial activities (ie, purchases) of the public buyer to competition scrutiny, while setting the exercise of public

[175] Along the same lines, see GJ Werden, 'Monopsony and the Sherman Act: Consumer Welfare in a New Light' (2007) 74 *Antitrust Law Journal* 707, 724ff; and RO Zerbe, Jr, 'Monopsony and the Ross–Simmons Case: A Comment on Salop and Kirkwood' (2004–05) 72 *Antitrust Law Journal* 717, 718–19.

[176] Similarly, see Louri (n 145) 93–96.

[177] The position of the EGC remains more open to criticism than that of the ECJ. It is remarkable that the ECJ did not make any pronouncement as regards the most extreme aspects of the judgment of the EGC in *FENIN*—ie, in relation to the absolute exemption of anti-competitive behaviour from competition scrutiny when the monopsonist in the public procurement market does not develop a subsequent economic activity for the purposes of EU competition law. The situation was repeated in *Selex*.

powers aside—subject, nevertheless, to the application of the state action doctrine to the exercise of public powers (below §VII).[178]

As anticipated, with the *FENIN–Selex* case law, the EU judicature has come to adopt and establish a 'principle of indivisibility of analysis'[179] for public procurement and subsequent activities performed by the public buyer and to consolidate a double commercial requirement for the subjection of public procurement activities to antitrust scrutiny.[180] Put otherwise, this case law *eliminates the possibility of conducting an independent competition assessment of public procurement practices*, inasmuch as only procurement practices conducted by public buyers carrying on subsequent 'economic' activities might be the object of such a competition inquiry.[181] This approach generates the censurable situation that identical competition-restrictive procurement practices conducted by public buyers holding identical buyer power (at worst, anti-competitive purchasing conduct carried out by two monopsonistic public buyers) will receive different competition treatment depending on the subsequent or 'downstream' activities carried on by those public buyers. The EGC and the ECJ have regrettably overlooked the fact that competitive dynamics in 'upstream' markets—ie, in the markets where the public buyer sources goods and services, will be identically distorted regardless of the subsequent activity involved in the particular circumstances. In this case, such a restrictive approach gives rise to potential discrimination of public contractors depending on the irrelevant fact of whether the subsequent activities conducted by the public buyer are 'economic activities' for the purposes of articles 101 and 102 TFEU or not.[182] Also, doubts can be cast on what will be the approach to be adopted when a given public purchaser develops subsequent activities that are *both* economic *and* non-economic.[183]

v. A Possible Justification to the FENIN–Selex Doctrine: Aiming to Afford a Different Competition Treatment to Social and Other Public Interest Activities

The reason for the abovementioned overly formalistic approach might be found in the

[178] *Contra*, M Bazex, 'Le Droit public de la concurrence' 14 *Révue française de Droit administratif* (1998) 781, 785.

[179] Unfortunately, this seems to be a logical approach that the ECJ is extending beyond the confines of the *FENIN-Selex* case law on purchasing activities. See C-138/11 *Compass-Datenbank* [2012] pub electr EU:C:2012:449 40–41; and the EGC is following the same steps, as seen in Case T-309/12 *Zweckverband Tierkörperbeseitigung v Commission* [2014] pub electr EU:T:2014:676 84–86. In my view, these are flawed developments of the case law interpreting the concept of economic activity and, consequently, of undertaking for the purposes of the application of EU competition law.

[180] This approach, where the exercise of public powers and economic activities is not distinguishable for the purposes of competition law has been criticised; see Clamour (n 54) 274–84; and M Berbari, *Marchés publics: La réforme à travers la jurisprudence. Décret no 2001–210, les fondements jurisprudentiels: champs d'application, préparation, passation, exécution* (Paris, Moniteur, 2001) 48–49. In similarly general terms, see Charbit (n 65) 120–24.

[181] As already pointed out, the results of such an analysis will probably be strongly influenced by the competitive situation of the public buyer in the 'downstream' market and, hence, no satisfactory independent test for pure buying activities can be properly developed in that framework (above §V).

[182] Similarly, emphasising the discrimination of the entities in the upstream market, Roth (n 145) 1139.

[183] See: Montana and Jellis (n 149) 117; and Arrowsmith, *Law of Public and Utilties Procurement* (2nd, 2005) 67. The situation is analogous to the simultaneous development of both *in house* and *market* activities by certain public undertakings to which public contracts are awarded without recourse to tender procedures, which can in turn benefit from the advantages received from their special statute and whose activities can generate a significant threat to the preservation of undistorted competition in the non-public tranches of the market. See Opinion of AG Geelhoed in Case C-295/05 *Asemfo* 116–18; and below chapter six, §II.A.ii. See also Bovis (n 17) 371–72.

reluctance of the EU judicature to impose the strict requirements of EU competition law on public bodies developing social[184]or other types of activities in the public interest[185]—since, in those cases 'the action by the State is governed only by an objective of solidarity … [so] it bears no relation to the market'.[186] Underlying the poor reasoning that purchasing is not to be considered by itself an economic activity there lies a different approach by the EGC and the ECJ that might be stated as follows: entities developing social or other public interest activities should not be subject to the competitive requirements applicable to (profit-maximising) undertakings because the state (directly or indirectly) acts with the sole aim of attaining redistributive objectives. If one was to accept such an approach (which is, in itself, clearly open to dispute),[187] then a complex issue would potentially arise from the different structure of articles 101 and 102 TFEU, as well as their limited scope to take non-economic aspects into consideration.

It is to be recalled that article 101(1) TFEU establishes a general prohibition against collusive behaviour that negatively affects market dynamics[188]—which can be disapplied in cases of efficient restrictions to competition by virtue of the legal exemption of article

[184] On the distortions that the insulation of entities conducting social protection activities from competition law has generated in the case law of the EU judicature, particularly as regards the definition of the concept of 'undertaking' and, by extension, of an 'economic activity', see Winterstein (n 152) 325–31; L Gyselen, 'C-67/96, Albany v Stichting Bedrijfspensioenfonds Textielindustrie; Joined Cases C-115–117/97, Brentjens' Handelson–deneming v Stichting Bedrijfspensioenfonds voor de handel in bouwmaterialen; and C-219/97, Drijvende Bokken v Stichting Pensioenfonds voor de vervoer—en havenbedrijven' (2000) 37 *Common Market Law Review* 425, 439; Louri (n 53) 169–72; Charbit (n 65) 38–47; and Szyszczak (n 42) 43–44 and 67–70; id, 'State Intervention and the Internal Market' in T Tridimas and P Nebbia (eds), *European Union Law for the Twenty-First Century: Rethinking the New Legal Order* (Oxford, Hart Publishing, 2004) 217, 228–36; and id (n 10) 113–19. See also A Cygan, 'Public Healthcare in the European Union: Still a Service of General Interest?' (2008) 57 *International and Comparative Law Quarterly* 529, 532–42. This situation is similar in the US, where the courts have '*failed to develop a sophisticated framework for evaluating buyer-side market power in health care*', as a result of too broad an interpretation of Justice Breyer's Opinion in *Kartell v Blue Shield*, 749 F2d 922 (1st Cir 1984); see Hammer and Sage, Monopsony in Health Care (2003–04) 906. Of the contrary view, advocating per se legality of the exercise of monopsony power in the health care sector—because it is 'conduct that facially appears to increase economic efficiency [*sic*] and render markets more competitive'—see JA Rovner, 'Monopsony Power in Health Care Markets: Must the Big Buyer Beware Hard Bargaining?' (1986–87) 18 *Loyola University of Chicago Law Journal* 857, 878–83.

[185] As already mentioned, the ECJ has been explicit in not restricting the scope of the *FENIN–Selex* approach to the field of social activities developed on the basis of the principle of solidarity—see Case C-113/07 P *Selex v Commission* [2009] ECR I-2207 103; and above §VI.A. However, given that the exclusion of the economic nature of the procurement activities under the *FENIN–Selex* approach follows from the fact that the 'subsequent activities' are not economic, the holding can only be expanded to activities that, not being social, imply the exercise of public powers (see above §III.B). Those are, consequently, the activities to which reference is made as 'activities otherwise in the public interest'—as it is implicit that the exercise of public powers shall be in the public interest.

[186] Opinion of AG Poiares Maduro in Case C-205/03 P *FENIN v Commission* 27. On the issue of activities subjected to the principle of solidarity, see above §III.B.

[187] As indicated by AG Jacobs and already mentioned, 'the non-profit-making character of an entity or the fact that it pursues non-economic objectives is in principle immaterial' to the question whether the entity is to be regarded as an undertaking; see Opinion of AG Jacobs in Case C-67/96 *Albany* 312. In relation to public procurement and the reserve of activities to certain non-profit economic agents, see also Case C-574/12 *Centro Hospitalar de Setúbal and SUCH* [2014] pub electr EU:C:2014:2004. A different discussion could focus on whether the ECJ is exercising (quasi-)legislative powers and, consequently, is engaging in unacceptable judicial activism. Even if there seem to be good reasons to justify such a claim, such a discussion would depart too significantly from the focus of the present enquiry. Hence, this issue will not be pursued any further.

[188] See: V Cerulli Irelli, 'Article 81(1) EC: Some Remarks on the Notion of Restriction of Competition' (2009) 20 *European Business Law Review* 287.

101(3) TFEU.[189] However, the prohibition of abuse of a dominant position contained in article 102 TFEU is non-exemptible for efficiency reasons.[190] Moreover, exempting competition-restrictive activities on the basis of non-economic considerations remains largely controversial under both articles 101(3) and 102 TFEU.

Therefore, while the analysis of the market behaviour of the bodies developing activities in the public interest under article 101(1) TFEU may allow for an exemption based on efficiency considerations (ex art 101(3) TFEU) (and, it could be argued, also on the basis of alternative public interest considerations),[191] those possibilities would arguably not exist when the assessment had to be conducted under article 102 TFEU, inasmuch as it lacks an 'exemption' or 'justification' clause.[192] To be sure, the applicability of article 101(3) TFEU to this type of case is not automatic. The four conditions required for its application might not be easily satisfied when non-economic criteria are taken into consideration as, in general terms, activities in the public interest contribute to economic progress and benefit consumers only in an indirect manner—since they are generally aimed at contributing to social development and benefitting taxpayers or citizens. Therefore, it is submitted that it is doubtful that most activities pursuing social or other public interest goals could

[189] See: Odudu (n 68) 128–58.

[190] In rather clear terms, stressing the fact that '*there is no easy and clear way how*' to have an economics-based analysis under art 102 TFEU; see E Rousseva, 'Abuse of Dominant Position Defences—Objective Justification and Article 82 EC in the Era of Modernization' in G Amato and CD Ehlermann (eds), *Competition Law. A Critical Assessment* (Oxford, Hart Publishing, 2007) 377, 382; and id, 'The Concept of "Objective Justification" of an Abuse of a Dominant Position: Can it Help to Modernise the Analysis under Article 82 EC?' (2005) 2 *Competition Law Review* 27. But see Opinion of AG Ruiz-Jarabo Colomer in Joined Cases C-468/06 to C-478/06 *GlaxoSmithKline* 119 where 'the view that undertakings in a dominant position are entitled to demonstrate the economic benefits of their abuses' is expressly supported, which should then be subjected to a proportionality analysis.

[191] Support for this position could be found in Case 26/76 *Metro I* [1977] ECR 1875 21; Case 136/86 *BNIC v Aubert* [1987] ECR 4789 21; and Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93 *Metropole Télévision* [1996] ECR II-649 118. Arguably, this possibility is implicit in the Communication from the Commission, Guidelines on the application of Article 101(3) of the Treaty (formerly Article 81(3) TEC) [2004] OJ C101/97: 'Goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of article 81(3)' (42). See also Van de Gronden, The Internal Market, the State and Private Initiative (2006) 134. For a comprehensive study of the application of art 101(3) TFEU in relation to 'extra-competition' policies of the EU, see RB Bouterse, *Competition and Integration—What Goals Count? EEC Competition Law and Goals of Industrial, Monetary and Cultural Policy* (Deventer, Kluwer Law and Taxation, 1994) 22–55 and 113–31; and C Townley, *Article 81 EC and Public Policy* (Oxford, Hart Publishing, 2009). See also K Mortelmans, 'Towards Convergence in the Application of the Rules on Free Movement and on Competition?' (2001) 38 *Common Market Law Review* 613, 641–42; Henriksen (n 92) 100–01; and G Monti, 'Article 81 EC and Public Policy'(2002) 39 *Common Market Law Review* 1057, 1087–89. In general, on the possibility of taking into account non-competition considerations within art 101(3) TFEU, see Craig and de Búrca (n 6) 981–82; and, with a more cautious approach, Whish (n 34) 153–55. See also B Sufrin, 'The Evolution of Article 81(3) of the EC Treaty' (2006) 51 *Antitrust Bulletin* 915, 952–67. Contrary to the taking into consideration of non-efficiency or non-economic goals in art 101(3) TFEU, see Odudu (n 68) 159–74; P Nicolaides, 'The Balancing Myth: The Economics of Article 81(1) and (3)' (2005) 32 *Legal Issues of Economic Integration* 123, 135; and C Semmelmann, 'The Future Role of the Non-Competition Goals in the Interpretation of Article 81 EC' (2008) 1 *Global Antitrust Review* 15, 46.

[192] However, a trend can be identified in trying to develop it. In general, see P-J Loewenthal, 'The Defence of "Objective Justification" in the Application of Article 82 EC' (2005) 28 *World Competition* 455, 462; A Albors-Llorens, 'The Role of Objective Justification and Efficiencies in the Application of Article 82 EC' (2007) 44 *Common Market Law Review* 1727; and Rousseva (n 190) 381–82. Along those lines, see T Eilmansberger, 'How to Distinguish Good from Bad Competition under Article 82 EC: In Search of Clearer and More Coherent Standards for Anti-Competitive Abuses' (2005) 42 *Common Market Law Review* 129, 136. See also Communication from the Commission—Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (COM(2009) 864 final) 28–31.

be exempted from the prohibition of article 101(1) TFEU, particularly on the basis of non-economic considerations.[193] Exemption or justification for comparable reasons under article 102 TFEU seems even harder to obtain.[194] These difficulties seem to have influenced the approach of the EU judicature, particularly bearing in mind that most of the cases in which the public buyer develops such social activities involve a monopsonistic situation in the public procurement market (or, at least, that is the paradigm that informs policy and judicial decisions).[195]

This lack of flexibility within 'core' EU competition rules to allow a state's economic activity to be justified or exempted from the application of the competition prohibitions (with the only exception of art 106(2) TFEU (see above §II.B.iii)) has been considered one of the reasons why the EU judicature has been relatively hesitant to use EU competition law provisions against Member States.[196] In parallel reasoning, it is submitted that the inability to justify or exempt the economic conduct of undertakings closely linked to the Member States or developing social functions—particularly those that hold a dominant position, has chilled full application of competition rules by the EU judicature, which, in this case, has adopted a questionable concept of undertaking in *FENIN* and *Selex*. In this sense, it is submitted that—in order to attain the (implicit) objective of not subjecting procuring authorities developing social or other public interest activities to the competitive requirements applicable to profit maximising undertakings—the only option left to the EGC and the ECJ to shield them from competition prohibitions was to exclude the economic character of procurement activities 'as such' and, consequently, not to consider the public buyer an undertaking for the purposes of EU competition law. It is further submitted that this outcome is not only technically flawed (and generates major 'unwanted' consequences due to its far-reaching implications), but is also a disproportionate way of attaining the objective of insulating certain social or other activities in the public interest from competition law analysis.

Firstly, the position of the EU judicature is technically flawed and barely motivated.[197] The bold statements that '*it would be incorrect*, when determining whether or not a given activity is economic, to dissociate the activity of purchasing goods from the subsequent use to which they are put',[198] or that '*there is no need* to dissociate the activity of purchasing goods from the subsequent use to which they are put in order to determine the nature of that purchasing activity',[199] reflect pure value considerations that are not supported by

[193] Schweitzer (n 131) 5–14; and AP Komninos, *Non-Competition Concerns: Resolution of Conflicts in the Integrated Article 81 EC* (University of Oxford, Centre for Competition Law and Policy, Working Paper (L) 08/05, June 2005), available at www.competition–law.ox.ac.uk/lawvle/users/ezrachia/CCLP%20L%2008–05.pdf. In similar terms, W-H Roth, 'Strategic Competition Policy: A Comment on EU Competition Policy' in H Ullrich (ed), *The Evolution of European Competition Law. Whose Regulation, Which Competition?*, Ascola Competition Law Series (Cheltenham, Edward Elgar, 2006) 38, 52.

[194] Along the same lines, see Rousseva (n 190) 384–85 and 389–91.

[195] In this respect, see the remarks regarding the exemption of monopsonistic behaviour in Case T-319/99 *FENIN v Commission* [2003] ECR II-357 37; and Case T-155/04 *Selex v Commission* [2006] ECR II-4797 68 (above §VI.A). For further discussion, see above chapter two, §II.

[196] Szyszczak, State Intervention and Internal Market (2004) 220 and 236–38; id (n 10) 38–41, 55–56 and 82–86.

[197] See: Korah (n 37) 49 and 228, who regrets the sparsity of the *FENIN* case law.

[198] Case T-319/99 *FENIN v Commission* [2003] ECR II-357 36; and Case T-155/04 *Selex v Commission* [2006] ECR II-4797 65 (emphasis added).

[199] Case C-205/03 P *FENIN v Commission* [2006] ECR I-6295 26; and Case C-113/07 P *Selex v Commission* [2009] ECR I-2207 102 and 114 (emphasis added).

any economic rationale or other plausible justification. It is submitted that the EGC and the ECJ could have taken the opposite approach for exactly symmetrical reasons—ie, that there is a need to dissociate the purchasing and the subsequent activities for analytical purposes, or that it would be incorrect to determine the nature of the purchasing activity according to the subsequent use to which the goods or services sourced are put. If so, their approach would be equally unconvincing and insufficiently motivated. However, there are stronger economic justifications to support the latter approach than the position adopted by the EGC and the ECJ—since economic theory has shown that purchasing activities can generate negative competition effects and, consequently, merit independent appraisal.

Secondly, the position of the EU judicature is excessive to attain the relatively limited objective of insulating certain social or other activities in the public interest from competition law analysis. Conducting a unitary analysis of all the activities developed by public bodies (both economic and non-economic) exceeds the purpose of not subjecting them to the same competitive requirements applicable to profit maximising undertakings. If this objective is to be properly understood, it is the social or other types of activities in the public interest that merit insulation from competition mandates, but not the rest of the activities conducted by these same bodies. In this respect, a separate analysis of the different types of activities would make more significant contributions towards achieving the policy goal of shielding certain activities from antitrust scrutiny. If the core social activities, or other activities in the public interest, were analysed under the state action doctrine (as refined, see below §VII), it would be possible to balance their restrictive aspects and their contribution to the public interest and, consequently, eventually to insulate them from competition prohibitions when merited. At the same time, subjecting non-core (social) activities—and, particularly, public procurement—to general competition requirements would generate better results.

Somehow, the current position comes to consider procurement merely as an *ancillary* activity of these public bodies and, therefore, restrictions in the procurement activity are deemed somewhat *instrumental* to attain the main public interest goals.[200] However, it is submitted that this approach gives rise to an excessive competition-distorting potential in the conduct of public procurement activities that is not necessary to achieve the goal of granting a different competition treatment to social activities, or to pursue the public interest.[201] Arguably, subjecting public buyers to competition requirements does not jeopardise the effective achievement of social or other public interest goals. Hence, the holistic approach followed by the EGC and the ECJ is not proportional to the purpose of subjecting social and other public interest activities to 'softened' competition law requirements. On the contrary, it is submitted that splitting the analysis to differentiate core social activities (to be analysed under the state action doctrine) and self-standing public procurement activities (to be analysed under general competition law requirements) would generate better results and would allow for more efficient and coherent competition law enforcement.[202]

[200] This 'accessority approach' under which purchasing activities are assessed in dependence on an activity on the supply side has been specifically criticised; see BundesKartellamt, Buyer Power in Competition Law—Status and Perspectives (2008) 14–15.

[201] Winterstein (n 152) 331–32.

[202] This critique is similar to that proffered against another 'holistic' approach taken by the ECJ in the field of public procurement, where it has ruled that an entity that carries out *any* activity that is not of a commercial or

Moreover, the potential contradiction of considering a given public body or institution an 'undertaking' for the purposes of EU competition law when it conducts procurement activities (ie, its demand behaviour) and not to consider it an undertaking when it develops social or other activities in the public interest (ie, its activities as an offeror) is just apparent and should not generate significant practical difficulties,[203] inasmuch as both types of activities are easily discernible and allow for selective enforcement of competition rules, depending on the character of the underlying activity.

C. Sketch Proposal for the Review of the Current Case Law

As a preliminary conclusion, and in view of all the previous arguments, it is to be stressed that in my opinion, treating purchasing activities *as such* as 'economic' activities for the purposes of EU competition law would not only be meaningful from an economic perspective, but would also improve the technical quality of the legal analysis conducted by the EU case law in those instances in which the public buyer develops non-economic subsequent activities. The current holistic approach adopted in the case law gives way to excessive protection of public competition-distorting behaviour for no really good reason (since it is neither necessary, nor justified by the apparent desire to grant separate competition treatment to social and other activities in the public interest), as it completely excludes the applicability of EU competition law and unnecessarily places clearly commercial activities out of reach of competition mandates. Therefore, competition enforcement would benefit from a more economic approach towards this issue.

Implementation of this approach—which, acknowledgedly is not easy or necessarily foreseeable (given that it refers to a relatively settled string of case law) would require the addition of a caveat to the current *FENIN–Selex* approach, to acknowledge that it would be incorrect, when determining whether or not a given activity is economic, to dissociate

industrial nature is covered by EU public procurement directives in respect of *all* of its activities, even those that are of a commercial or industrial nature, and even if the commercial activities predominate; see Case C-44/96 *Mannesmann v Strohal* [1998] ECR I-73 22–25; and Case C-360/96 *BFI* [1998] ECR I-6821 54–58. This situation has been criticised by Papangeli, Application of the Directives to Commercial Entities (2000) 202 and 213–25. See also Arrowsmith (n 39) 273–74 and (n 75) 374; and Bovis (n 17) 78–79.

[203] Indeed, as the EGC held in Case T-155/04 *Selex v Commission* [2006] ECR II-479 54, 'the various activities of an entity must be considered individually and the treatment of some of them as powers of a public authority does not mean that it must be concluded that the other activities are not economic'. See also Case T-309/12 *Zweckverband Tierkörperbeseitigung v Commission* [2014] pub electr EU:T:2014:676 53 This approach had already been set by Case T-128/98 *Aéroports de Paris* [2000] ECR II-3929 108–09; confirmed on appeal, Case C-82/01 P *Aéroports de Paris v Commission* [2002] ECR I-9297 68–83. Along the same lines, see Opinion of AG Jacobs in Case C-475/99 *Ambulanz Glöckner* 72; and Opinion of AG Jacobs in Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband and others* 45, who expressly held that 'the notion of undertaking is a *relative concept* in the sense that a given entity might be regarded as an undertaking for one part of its activities while the rest fall outside the competition rules' (emphasis added). The ECJ stated that 'perhaps' this is the case, see Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband and others* [2004] ECR I-2493 58. See Arrowsmith, *Law of Public and Utilties Procurement* (2nd, 2005) 65 fn 60; and Whish (n 34) 83. Similarly, in the area of social security, see Opinion of AG Fennelly in Case C-70/95 *Sodemare* 29–30, who concluded that whereas the provision of solidarity-based social security does not *as such* constitute an economic activity, the behaviour of such bodies with persons *other* than the insured can nonetheless be economic in character. See also Winterstein (n 152) 331; Louri (n 147) 88; and Montana and Jellis (n 151) 112–13. Indeed, such an approach seemed to be favoured (not to say imposed) by the ECJ in Case 118/85 *Commission v Italy* [1987] ECR 2599 7.

the activity of purchasing goods from the subsequent use to which they are put,[204] or that there is no need to dissociate the activity of purchasing goods from the subsequent use to which they are put in order to determine the nature of that purchasing activity,[205] *unless the purchasing activity is by itself capable of reducing or distorting competition in the market, or of generating the effects which competition rules seek to prevent*. In case this caveat (or a similar one) were introduced in the EU case law as suggested, it is submitted that the conduct of a more balanced and economically oriented analysis would be possible and the *competition rules would gain substantial effectiveness in tackling publicly generated distortions of market dynamics, particularly in the case of public procurement*.

D. What Scope for a More Stringent Approach by Member States?

Regardless of the previous considerations and proposals *de lege ferenda*, a parallel issue to be considered is whether and to what extent *de lege lata* Member States can apply a more stringent approach when enforcing their domestic competition laws—or, put otherwise, whether they have to soften their previous criteria and national practices regarding the subjection of public procurement activities *as such* to competition law (above §VI.B.i). In this regard, it could be argued that, given the supremacy of EU law and the binding character of ECJ case law as regards its interpretation, the *FENIN–Selex* approach is to take precedence over rulings of Member States' courts—however better suited to (economic) reality they are.[206] Nonetheless, it is submitted that this conclusion is not automatic or unavoidable.

According to established EU case law,[207] and to article 3(2) of Regulation 1/2003, Member States must completely align with EU competition law as regards collusive behaviour, but can adopt and apply on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.[208] Arguably, the expansion of the concept of undertaking at domestic level would result in a subsequent expansion of the competition rules equivalent to articles 101 and 102 TFEU and, while the first is forbidden, the latter is tolerated by EU law. In this regard, and taking into consideration that publicly generated restrictions to competition in the public procurement setting will be *primarily of a unilateral nature*, there seems to be no impediment under EU law for Member States' competition authorities and judicial bodies to maintain their previous criteria and to continue enforcing domestic competition rules on public buyers conducting public procurement activities *as such* (at least as regards unilateral conduct developed by public buyers).

[204] Case T-319/99 *FENIN v Commission* [2003] ECR II-357 36; and Case T-155/04 *Selex v Commission* [2006] ECR II-4797 65.

[205] Case C-205/03 P *FENIN v Commission* [2006] ECR I-6295 26; and Case C-113/07 P *Selex v Commission* [2009] ECR I-2207 102 and 114.

[206] This position seems to have been adopted both by the OFT (departing from its position in *BetterCare*, see Policy Note 1/2004—*The Competition Act 1998 and Public Bodies* (2004), available at http://webarchive.nationalarchives.gov.uk/20140402142426/http:/www.oft.gov.uk/shared_oft/business_leaflets/ca98_mini_guides/oft443.pdf), and to have been endorsed by German commentators; see BundesKartellamt (n 152) 14–15. But see J Skilbeck, 'Just When is a Public Body an "Undertaking"? FENIN and BetterCare Compared' (2003) 12 *Public Procurement Law Review* NA75; Rodger, State Entities as Undertakings (2003) 15; Arrowsmith, *Law of Public and Utilties Procurement* (2nd, 2005) 66–67; and Ezrachi, *EC Competition Law Leading Cases* (2008) 8–10.

[207] Case 14/68 *Walt Wilhelm* [1969] ECR 1; and Joined Cases 253/78 and 1 to 3/79 *Guerlain* [1980] ECR 2327. See Waelbroeck and Frignani (n 90) 148–57.

[208] See: Jones and B Sufrin, *EC Competition Law* (2008) 1282–83.

VII. A Revision of Current Doctrine to Achieve Better Results (2): Setting the Proper Bounds to the State Action Doctrine

After having covered the first of the two lines of revision or development of current EU competition rules hereby proposed to achieve better results (above §V), this section turns towards the second line of proposals—ie, is dedicated to the revision and further development of the state action doctrine, with a particular focus on its impact on public procurement legislation, regulation and administrative practices.[209] It will start by comparing the EU and US constructions of this 'antitrust' exemption in search for guidance on potentially desirable improvements of EU doctrine based on its US counterpart (§VII.A). However, the exploration will show that both doctrines are substantially equivalent as regards public unilateral non-regulatory conduct. Consequently, the proposals for revision advanced in the last two sub-sections (§VII.B and §VII.C) will be developed according to other criteria, rooted in EU law.

A. The State Action Doctrine in the US as a Benchmark

Although a comparison between the US and the EU approaches to state action doctrine needs to take into account several constitutional and procedural differences between both systems that do not allow for automatic legal transplants,[210] the role that both the US SCt and the ECJ play in shaping the antitrust rules at the upper level of the corresponding legal orders (ie, at the federal level in the US and at Union level in the EU) provides a common base that justifies the comparative review.[211] Also, given the long experience in the enforcement of competition law in general under the US legal order and, more specifically, the long-lasting existence of a 'state action doctrine' under US antitrust law,[212] it is argued that it constitutes a mature system whose legislative and regulatory options are of value in performing a comparative study between this instution and the EU, which could help advance potential developments of the state action doctrine under EU law.[213]

[209] Most of the general considerations, however, will apply equally to the analysis of anti-competitive regulation or state intervention in other areas—which seems a desirable development of competition law.

[210] On these restrictions; see B van der Esch, 'EC Rules on Undistorted Competition and US Antitrust Laws: The Limits of Comparability' in B Hawk (ed), *Competition Policy in OECD Countries*, Annual Proceedings of the Fordham Corporate Law Institute 1988 (Deventer, Kluwer Law, 1989) 18–1, 18–23; and Neergaard (n 92) 10 and 125–27.

[211] The relevance of the comparison with the US has been stressed by most commentators; see Marenco, Government Action and Antitrust in the US (1987) 2; Gyselen (n 89) 50; Baquero (n 124) 127; Y Ichikawa, 'The Tension between Competition Policy and State Intervention: the EU and US Compared' (2004) 4 *European State Aid Law Quarterly* 555; Szyszczak (n 10) 77. For a critical comparison of the EC and the US approach to anti-competitive regulation, see EM Fox, 'State Action in Comparative Context: What if Parker v Brown were Italian' in B Hawk (ed), *International Antitrust Law and Policy*, Annual Proceedings of the Fordham Corporate Law Institute 2003 (Huntington, Juris Publishing, 2004) 463, 473–74; and Gagliardi (n 96) 354. For a more political and economic approach, see D Ehle, 'State Regulation under the US Antitrust State Action Doctrine and Under EC Competition Law: A Comparative Analysis' (1998) 19 *European Competition Law Review* 380, 393–95.

[212] As shall be seen (below n 215), the US state action doctrine initiated its development in the 1940s and has precedents that date back to the early years of the twentieth century and, consequently, predates the equivalent EU doctrine by over thirty years.

[213] For a broader comparative view, see EM Fox and D Healey, *When the State Harms Competition—The Role*

i. Brief Description of the US State Action Doctrine

The US state action doctrine puts a strong emphasis on the sovereignty of the state and considers that the acts of the state as sovereign are completely outside the scope of the antitrust statutes.[214] Indeed, in *Parker v Brown* the US SCt declared that

> the state, in adopting and enforcing [an allegedly anticompetitive regulation], made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly, but, *as sovereign*, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.[215]

Therefore, the analysis conducted by the US SCt centres on the activity of the state as such, and disregards the behaviour or involvement of private parties in the restrictive or anti-competitive situation. State immunity is granted whenever the state authorities, *qua sovereign*, expressly adopt and assume final responsibility for a given restriction of competition, irrespective of whether a 'contract, combination or conspiracy in restraint of trade' within the meaning of Section 1 of the Sherman Act carries that restriction through to the marketplace.[216]

The US doctrine is enforced through the so-called *Midcal* test—which imposes a double requirement for state action to be covered by the exemption.[217] First, the restraint has to

for Competition Law (NYU Law and Economics Research Paper No 13-11, 2014), available at http://ssrn.com/abstract=2248059.

[214] On the current status quo in the US, see ABA, *The State Action Practice Manual* (Chicago, ABA Section of Antitrust Law, 2000), and OPP, FTC, *Report of the State Action Task Force* (2003) 25, available at www.ftc.gov/os/2003/09/stateactionreport.pdf. Most importantly, the Task Force found that the state action doctrine has come to pose a serious impediment to achieving national competition policy goals. See Majoras, State Intervention (2006) 1179–86; and also WE Kovacic, 'US Antitrust Policy and Public Restraints on Business Rivalry' in ABA, *Issues in Competition Law and Policy* (Chicago, ABA Section of Antitrust Law, 2008) 209, 209–16.

[215] *Parker v Brown*, 317 US 341, 352 (1943) (emphasis added). A previous, albeit less clear, decision on the same lines can be found in *Olsen v Smith*, 195 US 332, 344–45 (1904); see Marenco (n 100) 3. In more clear terms, the subsequent US SCt decision of *Goldfarb v Virginia State Bar*, 421 US 773, 790 (1975) focused the debate on whether 'an anticompetitive activity … is required by the State acting as *sovereign*' (emphasis added). Along the same lines, *City of Lafayette v Louisiana Power and Light Co*, 435 US 389, 412 (1978) denied immunity to cities, since they are 'not themselves sovereign'. Stressing the focus of the *Parker* doctrine on sovereignty conditions, see TM Jorde, 'Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism' (1987) 75 *California Law Review* 227, 228–30; JF Hart, 'Sovereign State Policy and State Action Antitrust Immunity' (1987–88) 56 *Fordham Law Review* 535, 554–61; MA Perry, 'Municipal Supervision and State Action Antitrust Immunity' (1990) 57 *University of Chicago Law Review* 1416; SF Ross, *Principles of Antitrust Law* (Westbury, Foundation Press, 1993) 502–03; Neergaard (n 92) 186; and CC Havighurst, 'Contesting Anticompetitive Actions Taken in the Name of the State: State Action Immunity and Health Care Markets' (2006) 31 *Journal of Health Politics, Policy and Law* 587, 588–90. Generally, on the *Parker* doctrine, see Note, 'Governmental Action and Antitrust Immunity' (1971) 119 *University of Pennsylvania Law Review* 521; and Note, 'The Application of the Antitrust Laws to Government Contracting Activities: Questions and Answers' (1988) 57 *Antitrust Law Journal* 563. The *Parker* doctrine has been criticised for being a case of unnecessary 'judicial legislation'—see MS McMurray, 'The Perils of Judicial Legislation: The Establishment and Evolution of the *Parker v Brown* Exemption to the Sherman Antitrust Act' (1993) 20 *Northern Kentucky Law Review* 249; and, on constitutional grounds, by M Conant, 'The Supremacy Clause and State Economic Controls: The Antitrust Maze' (1982–83) 10 *Hastings Constitutional Law Quarterly* 255.

[216] Gyselen (n 91) 54; Gagliardi (n 96) 363; Neergaard (n 92) 197. But see JE Lopatka and WH Page, 'State Action and the Meaning of Agreement under the Sherman Act: An Approach to Hybrid Restraints' (2003) 20 *Yale Journal on Regulation* 269, 271 and 277–91.

[217] *California Liquor Dealers v Midcal Aluminium*, 445 US 97 (1980). This case summarised and reformulated the doctrine of previous US SCt decisions in *Goldfarb v Virginia State Bar*, 421 US 773 (1975); *Cantor v Detroit Edison Company*, 428 US 579 (1976); *Bates v Bar of Arizona*, 433 US 350 (1977); *City of Lafayette v Louisiana Power and Light Co*, 435 US 389 (1978); and *New Motor Vehicle Board of the State of California* et al v *Orrin*

be clearly articulated and affirmatively expressed as state policy.[218] Second, the state must conduct effective oversight of the measures adopted in implementing the policy.[219] If both requirements are met, the anti-competitive state regulation is upheld and the antitrust immunity is extended to the private undertakings involved, if any.[220] It follows that the state action exemption covers all kinds of legislative and regulatory policies of the states that are expressly articulated and effectively enforced or actively monitored by the state.[221]

W Fox Co et al, 439 US 96 (1978). As regards this evolution, see M Handler, 'Twenty-Fourth Annual Antitrust Review: *Parker v Brown* Revisited' (1972) 72 *Columbia Law Review* 4; id, 'The Current Attack on the *Parker v Brown* State Action Doctrine' (1976) 76 *Columbia Law Review* 1; id, 'Antitrust 1978—The Murky Parameters of the State Action Defense' (1978) 78 *Columbia Law Review* 1374; id, 'Reforming the Antitrust Laws—The State Action Doctrine Should Be Based on Preemption and not Exemption Principles' (1982) 82 *Columbia Law Review* 1330; EM Fox, 'The Supreme Court and the Confusion Surrounding the State Action Doctrine' (1979) 48 *Antitrust Law Journal* 1571; WS Campbell, 'Antitrust Immunity: The State of "State Action"' (1986) 88 *West Virginia Law Review* 783, 787; LW Jacobs, 'Antitrust and the Public Defendant: Application of the Antitrust Laws to Government Entities' (1983–84) 9 *University of Dayton Law Review* 451; Hart, Sovereign State Policy and State Action Antitrust Immunity (1987–88) 541–44; and Neergaard (n 92) 140–53. For discussion, see also Marenco (n 100) 10–24; ET Sullivan, 'Antitrust Regulation of Land Use: Federalism's Triumph over Competition, the Last Fifty Years' (2000) 3 *Washington University Journal of Law and Policy* 473, 476–78; Ehle, State Regulation: A Comparative Analysis (1998) 381–82 and 386; Areeda and Hovenkamp, *Antitrust Law* (2006–08) 358; and RA Givens, *Antitrust: An Economic Approach*, 44th rel (New York, Law Journal Press, 2007) 18–2. This doctrine presents certain peculiarities when applied to municipalities (particularly as regards delegation of sovereignty from the state and oversight of their behaviour, ie, both prongs of the *Midcal* test), which gave rise to the approval of the Local Government Antitrust Act of 1984 (15 USC §§ 34–36). However, the focus of the analysis conducted in the study remains at the state level. The application of the state action doctrine to municipalities will not be specifically analysed.

[218] This requirement has been subsequently relaxed, as the US SCt has held that a state policy that only permits, but does not compel, an anti-competitive outcome might still be 'clearly articulated'. See *Southern Motor Carriers Rate Conference v US*, 471 US 48 (1985) and WS Brewbaker III, 'Learning to Love the State Action Doctrine' (2006) 31 *Journal of Health Politics, Policy and Law* 609, 612. A situation criticised by Havighurst, Contesting Anticompetitive Actions Taken in the Name of the State (2006) 597–600. Along the same lines, opting for a less formal approach, the Court of Appeals for the Second Circuit has added substantive requirements that the defendant must act 'in furtherance of *legitimate* State policy goals' and its conduct must 'have a *plausible nexus* to those goals'; see *Freedom Holdings Inc v Spitzer* 357 F3d 205, 211 (2d Cir 2004) (*Freedom Holdings I*) and 363 F3d 149 (2d Cir 2004) (*Freedom Holdings II*) (emphasis in the respective originals); and JT Delacourt and TJ Zywicki, 'The FTC and State Action: Evolving Views on the Proper Role of Government' (2004–05) 72 *Antitrust Law Journal* 1075, 1085–86.

[219] Active supervision of the private parties' behaviour has been stressed by the US SCt in *324 Liquor Corp v Duffy*, 479 US 667 (1987); *Patrick v Burget*, 486 US 94 (1988); and in *Federal Trade Commission v Ticor Title Insurance Co*, 504 US 621 (1992). On the requirements that state supervision should meet to justify the antitrust exemption, see SP Posner, 'The Proper Relationship between State Regulation and the Federal Antitrust Laws' (1974) 49 *New York University Law Review* 693, 721–26. However, the same requirement does not apply to municipalities and state agencies; see R Quaresima, 'Antitrust Law—State Action Doctrine—State Agencies Exempt from the Active Supervision Prong of the *Midcal* Test' (1990–91) 22 *Rutgers Law Journal* 525, 526.

[220] See: *Southern Motor Carriers Rate Conference v US*, 471 US 48 (1985). Although some authors distinguish between the *state action doctrine*—as regards the finding that the state itself does not violate the federal antitrust statutes, and a *state–action exemption* for the private parties involved, it is difficult to see any relevant differences between them; *cf* J Rossi, 'Political Bargaining and Judicial Intervention in Constitutional and Antitrust Federalism' (2005) 83 *Washington University Law Quarterly* 521, 524.

[221] An approach strongly criticised by FH Easterbrook, 'Antitrust and the Economics of Federalism' (1983) 26 *Journal of Law and Economics* 23, 28. Along the same lines, RA Franklin, 'Applicability of Federal Antitrust Laws to State and Municipal Action: A Case against the Current Approach' (1978–79) 16 *Houston Law Review* 903, 933; and JW Burns, 'Embracing both Faces of Antitrust Federalism: *Parker* and *ARC America Corp*' (2000) 68 *Antitrust Law Journal* 29, 30. See also RP Inman and DL Rubinfeld, 'Making Sense of the Antitrust State Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism' (1997) 75 *Texas Law Review* 1203; and D McGowan and MA Lemley, 'Antitrust Immunity: State Action and Federalism, Petitioning and the First Amendment' (1994) 17 *Harvard Journal of Law and Public Policy* 293. *Contra*, defending the approach adopted by the US SCt, see MB Garland, 'Antitrust and State Action: Economic Efficiency and the Political Process' (1987) 96 *Yale Law Journal* 486, 508; and S Semeraro, 'Demystifying Antitrust State

It is also worth stressing that the US SCt has kept this doctrine fundamentally unchanged despite recent pressures to revisit it and expand the scope of the protected activities.[222]

ii. Scope for a 'Market Participant Exception' under US State Action Doctrine

Given its fundamental focus on state sovereignty, under the relevant US case law it is unclear (or at least debatable) whether all types of state intervention that (formally) meet the *Midcal* test are automatically immune or exempted from antitrust revision—or, on the contrary, if a *'market-participant' exception* to state action immunity is to be construed for those cases where the state does not act in the exercise of its sovereignty, but rather develops a commercial activity.[223] The fundamental distinction is based on the exercise of public powers, or otherwise, by the state.[224] It has been recognised that the legitimacy and other constitutional justifications for the state action exemption are weaker (if not non-existent) when they are not applied to the exercise of a sovereign power but to a commercial activity. Indeed, the US SCt recognised in *dictum* in *City of Columbia v Omni* that immunity 'does not necessarily obtain where the State acts not in a regulatory capacity but as a *commercial participant* in a given market'.[225]

Given that there has not been a subsequent case directly concerned with commercial activities of the state before the US SCt, the extension of such a 'market-participant' exception to the state action antitrust exemption remains unclear.[226] Subsequent case law by lower courts has generally refused to recognise the market-participant exception in the antitrust context, although there are conflicting opinions.[227] Nonetheless, recent

Action Doctrine' (2000–01) 24 *Harvard Journal of Law and Public Policy* 203. For an overview of the federalist discussion, see Neergaard (n 92) 292–300.

[222] See *FTC v Phoebe Putney Health Sys, Inc*, 133 SCt 1003, 185 LEd 2d 43 (2013), which simply stressed the requirements applicable to the way in which the anti-competitive policy needs to be articulated. It is also worth bearing in mind that some aspects of this doctrine (particularly concerning its 'active supervision' prong) are being discussed at the time of writing in the case *North Carolina State Board of Dental Examiners v FTC*, Case No 12-1172. See a commentary in (2014) 127 *Harvard Law Review* 2122–29.

[223] See: Marenco (n 100) 8–9, 52 and 55. See also Semeraro, Demystifying State Action (2000–01) 230; and Havighurst (n 217) 603. Along the same lines, see Areeda and Hovenkamp (n 52) 154 and 305–16. But see McGowan and Lemley, Antitrust Immunity (1994) 320. For a recent overview, see JM Bona and LA Wake, 'The Market-Participant Exception to State-Action Immunity from Antitrust Liability' (2014) 23(1) *Competition: The Journal of the Antitrust and Unfair Competition Law Section of the State Bar of California* 156–77.

[224] See: DS Copeland et al, 'Antitrust Immunities at the Crossroads: The Current Status of the Noerr and State Action Doctrines' (2003) *Columbia Business Law Review* 547, 571. For a proposal effectively to create such a 'market-participant' exception to the state action antitrust exemption, see TJ Muris, 'Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy' (2003) *Columbia Business Law Review* 359, 378–79; and, in more detail, id, 'Clarifying the State Action and Noerr Exemptions' (2004) 27 *Harvard Journal of Law and Public Policy* 443, 447; and id, 'State Action/State Intervention—A US Perspective' in B Hawk (ed), *International Antitrust Law and Policy*, Annual Proceedings of the Fordham Corporate Law Institute 2003 (Huntington, Juris Publishing, 2004) 517, 534. See also recommendation 5 of the State Action Task Force, proposing that clarification of the market-participant exception would contribute to improve the state action doctrine; OPP, FTC, *Report of the State Action Task Force* (2003) 57. For a critical view, see C Sagers, 'Raising the Price of Pork in Texas: A Few Thoughts on Ghosh, Bush, and the Future of the Immunities' (2008) 45 *Houston Law Review* 101, 117–24.

[225] *City of Columbia v Omni Outdoor Advertising*, 499 US 365, 374–75 (1991) (emphasis added). See ABA, *State Action Practice Manual* (2000) 77–78.

[226] Indeed, the rationale expressed by the US SCt in a clarification of *Parker v Brown*, 317 US 341 (1943) created new ambiguity about whether immunity is forfeited when the state acts as a participant in the commercial market; see Sullivan, Federalism's Triumph over Competition (2000) 481.

[227] ABA (n 216) 77–78; and Sullivan (n 219) 481. As Sullivan indicates, however, a perspective favourable to

developments in US SCt case law provide additional arguments and a stronger basis for the reading of a 'market-participant' exception to sovereign immunity from the antitrust laws—which, it is submitted, should lead to its express and more articulate formulation as a fundamental part of the state action doctrine. Indeed, in *USPS v Flamingo* the US SCt based its opinion that US Postal Services was not subject to antitrust liability on the finding that its 'characteristics and responsibilities indicate it should be treated under the antitrust laws as part of the Government of the United States, not a *market participant* separate from it'.[228] Although the 'market-participant' exception has not been expressly formulated by the US SCt and the setting of its limits might require further analysis in future opinions, in my view, enough support of the existence of a market-participant exception to the state action doctrine seems to be found in the case law of the US SCt.

iii. Comparative Assessment of the State Action Doctrine in the US and the EU

Two preliminary differences between the US and the EU approach to state action can be identified from the previous analysis. On the one hand, the US SCt's purpose in developing the state action doctrine is to limit the scope of antitrust statutes and to preserve the sovereignty of the states, while the ECJ approach has been to broaden competition rules of the TFEU to capture certain types of anti-competitive regulation and hence, to reduce to some extent the sovereignty of the Member States[229]—which indicates that, in some sense, the two doctrines might seem to move in opposite directions. On the other hand, the ECJ case law requires that there is significant involvement of private undertakings in the restrictive conduct (ie, places the focus of analysis on the behaviour of the undertakings affected by the anti-competitive state action), whereas the US SCt does not place much emphasis on private undertakings' behaviour when applying the state action doctrine (indeed, the focus of analysis lies exclusively with the state).[230] These differences have led to the adoption of divergent tests. Whereas the EU bases the analysis on the *Van Eycke* test (ie, on whether the state required the private parties to enter into anti-competitive behaviour, or endorsed and reinforced previous private collusion, or delegated economic decision-making powers to private traders; above §IV.C), the US doctrine is enforced through the *Midcal* test (focused on articulation and oversight of the anti-competitive policy; above §VII.A.i).

the construction of the 'market-participant' exception can be found in *Genentech, Inc v Eli Lilly and Co*, 998 F2d 931, 949 (FedCir 1993), cert denied, 510 US 1140 (1994) ('the anticompetitive acts must be taken in the state's "sovereign capacity", and *not as a market participant in competition with commercial enterprise*', 97, emphasis added). Moreover, according to scholar commentary, this is a possible area for development of the state action doctrine in the US; see SB Farmer, 'Balancing State Sovereignty and Competition: An Analysis of the Impact of Seminole Tribe on the Antitrust State Action Immunity Doctrine' (1997) 42 *Villanova Law Review* 111, 163–65.

[228] *US Postal Services v Flamingo Industries (USA) Ltd et al*, 540 US 736, 745 (2004) (emphasis added). This decision might need to be taken *cum grano salis*, since it refers to a regulated industry. In more general terms, regarding the application of state action doctrine in (de-)regulated industries, see E Trujillo, 'State Action Antitrust Exemption Collides with Deregulation: Rehabilitating the Foreseeability Doctrine' (2006) 11 *Fordham Journal of Corporate and Financial Law* 349, 377–409.

[229] See: Ehle (n 213) 382; and Neergaard (n 92) 196.

[230] This difference might derive from the existence of a closely-related antitrust exemption for petitioning activities to the government—the so-called *Noerr–Pennington* exemption. For a comparative review of both types of antitrust exemption from a constitutional perspective, see McGowan and Lemley (n 223). However, since petitioning covers a dimension of the state action doctrine largely unrelated to the core of this research, these arguments will not be explored further.

These primary differences between the US and the EU construction of the state action doctrine might lead to different results when faced with similar situations—particularly because of their different degrees of deference for state sovereignty and their different focus on the behaviour of undertakings in which public intervention results.[231] Indeed, both constructions of the state action doctrine are based on different premises. Somehow, this difference in approach between the EU and the US might be conceptualised as resulting from a negative approach to state action in the EU (where the activities of the state will be lawful *unless* they spur or reinforce anti-competitive practices conducted by undertakings, on their own or as delegates of the state) and a positive approach to state action in the US (where the activities of the state will be lawful *as long as* they derive from a clearly articulated policy and they are actively supervised by the state). Consequently, the EU doctrine seems to gravitate around the elements that exclude state action immunity, while the US doctrine seems to focus on the elements that guarantee immunity to state anti-competitive action. However, the core of the doctrine is coincident in both jurisdictions in the key aspects that most closely affect the potential scrutiny of public procurement regulation and practice from a competition perspective.[232]

On the one hand, under both tests, *unilateral state anti-competitive regulations and other competition-distorting interventions that do not involve participation of private parties are not caught by the antitrust rules*. In the EU, because none of the criteria in the *Van Eycke* test can be fulfilled when analysing purely unilateral state action (above §IV.C) and, in the US, because the case law of the US SCt is based on the premise that sovereign state regulations per se were never meant to be the object of the antitrust law and, consequently, unilateral state action is equally excluded from antitrust scrutiny (above §VII.A.i).[233] Therefore, as the law stands, unilateral regulatory activity and commercial activities of the states are mostly out of reach of antitrust scrutiny both in the US and the EU.

Nonetheless, there seems to be room for competition analysis of non-regulatory unilateral state action through the development of a 'market-participant' exception to the state action doctrine—which seems to fit within the general framework both in the US and the EU.[234] Such a development could subject the commercial activities of the state (and, especially, public procurement) to competition analysis (below §VII.B)—and, in the case of the EU, could bridge the gap created by the adoption of too formalist an approach to the concept of undertaking (hence, making this development relatively redundant with the adoption of a more economic approach to the concept of undertaking—above §VI—but almost exclusively in the field of public procurement).

On the other hand, even if the notion of public interest (sovereignty, or democratic legitimacy under another name) is implied by both tests in distinguishing state policy from private parties' anti-competitive behaviour, *none of the tests inquires about the reasons behind anticompetitive state regulations, nor do they balance the alternative policy objectives*

[231] See: Fox (n 211); and the comments in DJ Gerber et al, 'State Intervention/State Action—Panel' in B Hawk (ed), *International Antitrust Law and Policy*, Annual Proceedings of the Fordham Corporate Law Institute 2003 (Huntington, Juris Publishing, 2004) 581ff. See also Neergaard (n 92) 194–99.

[232] See: Majoras (n 97) 1186.

[233] *Parker v Brown*, 317 US 341, 352 (1943); Gagliardi (n 96) 365; Ehle (n 213) 382; Schepel (n 120) 44.

[234] For recent critical thoughts, see JJ Czarnezki, *States as Market Participants in the US and the EU?* (Swedish Institute for European Policy Studies 2013:2; and Vermont Law School Research Paper No 16-13), available at http://ssrn.com/abstract=2265586.

(or their results) with the restrictions of competition that they impose.[235] Put differently, both tests are purely formal in nature and omit any substantive analysis of state regulations. Consequently, it is submitted that the state action doctrine could benefit both in the EU and the US from developments as regards the analysis of the restrictive regulations and the introduction of a proportionality analysis between the objectives of the anti-competitive regulations and their effects—ie, mainly, the distortions of competition that they impose (below §VII.C).

B. Setting the Proper Bounds of the State Action Doctrine (1): Bringing Sovereignty to the Centre of the Doctrine, and Developing a 'Market Participant Exception'

i. General Approach: 'Sovereignty' and 'Legitimacy' as Ruling Criteria

As has been previously analysed, under EU state action doctrine—and, even more clearly, under its US counterpart, the *sovereign* nature and the ensuing *legitimacy* of the public action at stake is a key factor in determining its subjection to competition law requirements. In general terms, the main criterion to determine whether an act of the state is subject to or exempt from EU competition rules depends on whether or not it is the result of the exercise of its *ius imperium*;[236] which is not always easy to determine.[237] Although the exercise of the sovereign faculties of the state is limited by the joint application of competition rules and articles 3(3) TEU, 4(3) TEU, 3(1)(b) TFEU, 119 TFEU and Protocol (No 27) TFEU in those limited cases where it detracts from the effectiveness of the competition rules addressed to private undertakings (above §IV.C), in other situations the increased legitimacy of public activity (or its democratic element) has been considered a relevant factor to exempt public action from competition scrutiny.[238]

Those acts of the state that are formally covered by an appearance of legitimacy will generally be shielded from competition analysis on the basis that it is for Member States to strike the proper balance between competition and other policy goals. In general terms, such an approach is unobjectionable from a constitutional perspective. However, legitimacy is not a constant in all public interventions and, consequently, this general premise needs to be further developed and specifically adapted to different situations.

[235] Gagliardi (n 96) 365–67.

[236] Along the same lines, see Mortelmans, Towards Convergence in Free Movement and Competition (2001) 623; and Szyszczak (n 186) 225–26. See also Winterstein (n 152) 326–27; and Gyselen, Commentary to Cases C-67/96, Joined Cases C-115–117/97, and C-219/97 (2000) 440. In general terms, on the implications of the exercise of *imperium* in competition law, see Charbit (n 65) 1–218; Bazex, Droit public de la concurrence (1998) 787–88; Nicinski, Droit administratif de la concurrence (2004) 757; and Marcos, El tratamiento de las restricciones públicas a la competencia (2008) 6; id, Conductas exentas por ley (2008) 246–48. *Cf* Van de Gronden (n 146) 130.

[237] See: Szyszczak (n 10) 256. In less clear terms, see Maillo (n 37) 594–96.

[238] See: Neergaard (n 110) 396; and, in further detail, Baquero (n 124) 52–56; and id (n 90) 585. See also Van Bael and Bellis (n 62) 988; and Odudu (n 68) 46–47. *Contra*, Castillo de la Torre (n 102, 'Reglamentaciones públicas anticompetitivas') 1382. As regards the situation in the US, in similar terms, see WH Page, 'Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption after *Midcal Aluminum*', (1981) 61 *Boston University Law Review* 1099, 1115–25; *cf* JS Wiley Jr, 'A Capture Theory of Antitrust Federalism' (1985–86) 99 *Harvard Law Review* 713, 715.

While the passing of legislation by national parliaments and the approval of regulations of general applicability by the governments of the Member States can safely be considered state actions imbued with a significant degree of legitimacy—or, lacking such legitimacy, subject to intense political review and public accountability—other activities of a more limited scope and conducted at lower levels of government are in a very different situation. Administrative practice and decisions made by civil servants or other government employees per se show a different (lower) level of legitimacy and are further isolated from public oversight—and, hence, may require special regulatory devices in order to ensure their appropriateness.[239] Therefore, it is submitted that *the umbrella of sovereign powers or the* ius imperium *of the state should not be automatically and artificially extended to all types of public activity*. While legislative and regulatory activity might justify a wider antitrust exemption under the state action doctrine, other (lower) administrative decisions and practices should not be automatically shielded from competition scrutiny. Particularly in those cases where the government acts as any other agent in the market—that is, when the government carries on commercial activities or exercises its *ius commercium*, be it as an offeror (as has already been recognised by extending competition rules to public undertakings) or as a buyer, there are no good reasons to isolate it from the scrutiny of competition rules.

Even if the final conclusions in this case were contrary to the contentions put forward so far (above §VI.B), it is interesting to note the general reasoning behind the Opinion of Advocate General Poiares Maduro in *FENIN*, where a strong case for the subjection of non-sovereign state activities to competition rules is clearly made:

> [T]here is no justification, when the State is acting as an economic operator, for relieving its actions of all control. On the contrary, it must observe the same rules [imposed on economic operators acting on a market] in such cases. It is therefore essential to establish a clear criterion for *determining the point at which competition law becomes applicable* … the need for consistency means that if a State … conducts itself in practice as an economic operator, articles 81 EC to 86 EC may apply to it.[240]

In this sense, it is submitted that public procurement *legislation* or rules and public procurement *practice*—as the paramount expressions of the public buyer market activities, should be distinguished in analysing public procurement from a competition law perspective;[241] since they should not be automatically considered instances of exercise of sovereignty or public powers (at least in the case of public procurement practices or administrative decisions) and present different levels of legitimacy.[242] Therefore, a differentiated treatment

[239] Along the same lines, see Trepte (n 17) 13. See also D Linotte and R Romi, *Services publics et Droit public économique*, 4th edn (Paris, Litec, 2001) 16.

[240] Opinion of AG Poiares Maduro in Case C-205/03 P *FENIN v Commission* 26 (emphasis added).

[241] From an economic perspective, the difference between legislation, regulation and administrative practice is substantially irrelevant, since they are all equally prone to generating distortions or restrictions in the competitive dynamics of the markets concerned (see above chapter two). Therefore, a strong economic justification can be found for the common treatment of anti-competitive public procurement legislation and practices. Nonetheless, from a legal perspective, the degree of sovereignty or the democratic legitimacy of these different *sources* of potential distortions of competition is relevant and, thus, must be respected. Consequently, the adoption of purely economic criteria shall be filtered through this type of legal consideration in the analyses performed in this study.

[242] The different legitimacy of these two levels of action in the public procurement area justifies such a separate study and treatment. Our proposal is conceptually in line with the 'tiered approach' to state action proposed by Delacourt and Zywicki, Evolving Views on the Proper Role of Government (2004–05) 1089–90. On the

based on these observed divergences between public procurement legislation, or public procurement rules *stricto sensu*, and public procurement (administrative) practices will be attempted in what follows.

ii. Anti-Competitive Public Procurement Legislation and Regulation as Instances of the Exercise of Public Powers or Sovereign Activities

The design of the rules and the approval of public procurement legislation and regulations are an expression of the legislative and administrative regulatory powers of the state. Therefore, they are activities developed by institutions with a broad democratic support (ie, by the corresponding parliament and/or the government) that instils a high degree of legitimacy into the process—unless an abnormal functioning of these institutions or a clear regulatory capture situation arises. In short, they are sovereign activities that result from the exercise of *ius imperium*. At this level, competition scrutiny might be more restricted and, in principle, fall mostly within the scope of the state action exemption as it currently stands. However, a further distinction seems to be required within this general legislative and regulatory level.

The approval of competition-restricting public procurement rules and legislation can be the result of an explicit and wilfully accepted trade-off between competition requirements and the other goals of the public procurement system, such as the pursuance of 'secondary' policies in public procurement (see above chapter three, §IV.C). In these cases, the balancing between competition and other considerations properly lies within the sphere of political decision and of sovereign activity.[243] Hence, they should only in exceptional circumstances be subject to competition scrutiny,[244] and therefore may not necessarily be trumped by competition considerations. Nonetheless, the trade-off between competing economic and non-economic goals has to be properly weighed and should remain within the bounds of a strict proportionality analysis (below §VII.C).

However, the adoption of anti-competitive public procurement rules and legislation may also take place in the absence of any good justification and without an express or specific legislative intention, as a result of defects in the legislative process or regulatory capture. Also, the pursuit of alternative policy goals may result in disproportionate restrictions of competition. In these instances, when there is not an expressly assumed sacrifice of competition in the pursuit of alternative or conflicting policy goals, or when competition

importance of taking the legitimacy of decisions into account, see Baquero (n 124) 156–57 (an opinion relaxed on considering the approach too complex and intrusive, id (n 90) 589–90).

[243] Along the same lines, it has been proposed that the state action exemption should cover measures taken in pursuit of a legitimate and clearly defined public interest objective and actively supervised by the state; see Opinion of AG Jacobs in Joined Cases C-180/98 to C-184/98 *Pavlov* 163. This is almost the same test developed and applied by the US SCt (above §VII.A); but see Baquero (n 124) 150–1. Similarly, but adding a third proportionality requirement for the anti-competitive state regulation, see Opinion of AG Léger in Case C-35/99 *Arduino* 88–91; and Thunström et al, State Liability from Anti–Competitive State Measures (2002) 525. Along the same lines, Opinion of AG Poiares Maduro in Joined Cases C-94/04 and C-202/94 *Cipolla* 31–6. Also, J Szoboszlai, 'Delegation of State Regulatory Powers to Private Parties—Towards an Active Supervisory Test' (2006) 29 *World Competition* 73.

[244] Obviously, the possibilities of attacking such decisions if and when they run against EU public procurement directives or other principles of the TFEU are beyond doubt and do not alter the conclusions advanced—since this section is based on a general approach towards the evaluation of anti-competitive regulation by Member States, whereas chapter five focuses on more specific rules of EU law construction and interpretation.

restrictions are excessive and disproportionate, it is submitted that the mere fact that the restrictive procurement rules are adopted by way of legislation or regulation should not impede their scrutiny on competition policy grounds.[245] In the end, it is submitted that the legitimacy of these legislative and regulatory decisions not only needs to be formal, but also substantive (and proportional), for them to be exempted from competition scrutiny as proper sovereign acts of exercise of *ius imperium*. In this regard, there seems to be room for the adoption of more substantively oriented criteria for the revision of competition-restricting public procurement legislation on competition grounds (below §VII.C).

iii. Anti-Competitive Public Procurement Decisions and Practices as Instances of the Exercise of Economic Powers or Non-Sovereign Activities by the State

In those instances in which public procurement legislation does not generate competitive distortions per se—but leaves room for the exercise of some discretion by the public buyer, there will be more room for competition scrutiny of the practices and decisions of contracting authorities.[246] It should be stressed that the implementation and application of public procurement rules in specific public tenders by the public bodies or agencies entrusted with purchasing functions are developed at a lower level of government (or, in other terms, at a lower level of the executive branch of the state) and present reduced legitimacy if compared to the passing of legislation or general regulations. Indeed, the conduct of public procurement—ie, the administrative practice ensuing from public procurement regulations, cannot itself be considered an exercise of the *ius imperium* of the state (even if a very broad concept of 'public power' is adopted), but constitutes an exercise of *ius commercium* or *ius gestionis*.[247]

In general terms, purchasing authorities are subject to the fundamental obligation of furthering the public interest—and, hence, should promote competition (as public procurement regulations widely recognise that it runs in the best public interest in most situations, above chapter two, §IV). However, contracting authorities usually hold relatively large amounts of discretion as regards specific purchasing decisions (particularly in relation to the design of the procurement process, requirements of the goods or services to be sourced, etc) and, at the same time, are more vulnerable to capture by private interest groups.[248]

[245] In similar terms, it has been proposed that not all anticompetitive regulations should be struck down by virtue of arts 3(3) TEU, 4(3) TEU, 3(1)(b) TFEU and Protocol (No 27) TFEU, but that those regulations that aim to achieve genuine economic policy goals or other legitimate objectives should be fully exempted; see Gyselen (n 89) 56–58. His arguments are further developed in id, Anti–Competitive State Measures under the EC Treaty (1993). Similarly, Bacon, State Regulation of the Market and EC Competition Rules (1997) 288; and Gagliardi (n 96) 372–73. Interestingly, a different test for legislative action (*reasonableness test*), regulatory measures (*adequacy test*), and mere administrative or delegated activities (strict proportionality or *less restrictive option test*) has been proposed; Baquero (n 124) 160–61 [who, however, later changed his position; id (n 90) 589–90]. See also Von Quitzow (n 70) 15–16 and 262; and Viciano Pastor, *Libre competencia e intervención pública en la economía* (1995) 206–13.

[246] On the contrary, if the restriction is imposed by public procurement legislation or regulation, the relevant analysis should be that performed as regards anticompetitive legislation *as such* (below §VII.C) and, probably, would restrict the possibilities for competition scrutiny, if compared to the scrutiny of equivalently distortive administrative practices that lack legal or regulatory coverage. Admittedly, this is one of the areas where the treatment of legally imposed restrictions of competition by Member States' domestic competition law can have a major impact (see above n 105).

[247] For a clear characterisation of procurement as an activity of *iure gestionis*, see Triantafyllou (n 105) 69–70.

[248] See: Page (n 238); Wiley (n 238). These confronted positions gave rise to heated academic debate fuelled by different conceptions of the capture theory and of the appropriate role of interest groups in influencing legislative

It is submitted that, given the open-ended nature of most public procurement rules and the ensuing need for the exercise of administrative discretion, purchasing authorities can easily generate restrictions of competition in the markets where they are buying through all types of public procurement practices (below chapter six). If and when they adopt competition-distorting procurement practices not imposed by public procurement rules and legislation (above §VII.B.ii)—ie, when the restrictions or distortions of competition stem directly from the exercise of the administrative discretion involved in the adoption of a given public procurement practice or decision, it is hard to envisage any relevant legitimacy issue that should shield purchasing authorities from the application of competition rules.[249] Similarly, when the public buyer adopts certain contract compliance policies—thereby imposing on the government contractor obligations that go further than those imposed by general legislation and regulation, it is developing (*quasi*) legislative or nearly regulatory functions at a lower-than-ought level of government.[250]

Should contract compliance result in competition-distorting situations, this administrative practice of the public buyer should not be (automatically) covered by the state action exemption, as the degree of legitimacy or sovereignty involved is arguably too low to trigger protection.[251] In the end, these practices seem to be taking place at too low a level of public intervention—and, hence, under weak legitimacy conditions and substantially shielded from the checks and balances usually associated with legislative and regulatory activities, so as to merit exemption from competition laws. Put otherwise, they seem to fall below the *bottom boundary* of the state action doctrine (above §IV.D).

and regulatory outcomes; see WH Page, 'Interest Groups, Antitrust, and State Regulation: *Parker v Brown* in the Economic Theory of Legislation' (1987) 1987 *Duke Law Journal* 618; ML Spitzer, 'Antitrust Federalism and Rational Choice Political Economy: A Critique of Capture Theory' (1987–88) 61 *Southern California Law Review* 1293; JS Wiley Jr, 'A Capture Theory of Antitrust Federalism: Reply to Professors Page and Spitzer' (1987–88) 61 *Southern California Law Review* 1327; and WH Page, 'Capture, Clear Articulation, and Legitimacy: A Reply to Professor Wiley' (1987–88) 61 *Southern California Law Review* 1343. The last contribution to the debate can be found in id, 'State Action and "Active Supervision": An Antitrust Anomaly' (1990) 35 *Antitrust Bulletin* 745. For an overview of these doctrinal positions, see Neergaard (n 92) 261–74.

[249] In more moderate terms, see Baquero (n 124) 160–61. However, it is to be recalled and stressed that Baquero changed his position in id (n 90) 589–90. He currently proposes a more formal procedural test based on the financial disinterestedness of the body adopting the anti-competitive behaviour—complemented with a 'public interest' additional test, similar to the one adopted by the ECJ in Case C-309/99 *Wouters* [2002] ECR I-1577, for cases where a financially interested party has adopted the restrictive measure (which, in my view, comes to leave the current state action doctrine mostly unchanged). His new approach is in line with the proposals of other authors such as ER Elhauge, 'The Scope of Antitrust Process' (1990–91) 104 *Harvard Law Review* 667, and id, 'Making Sense of Antitrust Petitioning Immunity' (1992) 80 *California Law Review* 1177; and Schepel (n 120) 45–51. See also Neergaard (n 92) 275–91.

[250] The fact that the government uses contracts as a method of controlling behaviour and as an alternative to enacting regulations was stressed by S Arrowsmith, 'Government Contracts and Public Law' (1990) 10 *Legal Studies* 231, 233–34; see also F Weiss, 'The Law of Public Procurement in the EFTA and the EEC: The Legal Framework and its Implementation' (1987) 7 *Yearbook of European Law* 59; and JA Winter, 'Public Procurement in the EEC' (1991) 28 *Common Market Law Review* 741, 742. On contract compliance and its constitutional implications, as regards the 'legitimacy' of its use, see S Arrowsmith et al, *Regulating Public Procurement: National and International Perspectives* (London, Kluwer Law International, 2000) 287–96; Arrowsmith, *Law of Public and Utilties Procurement* (2nd, 2005) 1248; and PJ Cooper, *Governing by Contract. Challenges and Opportunities for Public Managers* (Washington, CQ Press, 2003). For a general account of these practices, see PE Morris, 'Legal Regulation of Contract Compliance: An Anglo–American Comparison' (1990) 19 *Anglo–American Law Review* 87.

[251] See: Triantafyllou (n 105) 70–74.

iv. Excluding Activities with Weak Sovereignty and Legitimacy Implications from the Scope of the State Action Doctrine: the 'Market Participant Exception'

To sum up, it is submitted that it is hard to envisage a good reason to exempt the conduct of the public sector from competition scrutiny in those cases (i) where the protection derived from the legitimacy of the public competition-distorting action is feeble because the adoption of anti-competitive public procurement rules and legislation does not respond to a real political option and is not the result of a proportional trade-off between different policies, between competing goals of the procurement systems (or even between primary and secondary policies pursued through public procurement rules) (above §VII.B.ii), or (ii) where competition-distorting buying practices and contract compliance policies are adopted as a result of 'mere' administrative discretion (above §VII.B.iii). Therefore, it is submitted that these activities should not be covered by the state action antitrust exemption—as they do not seem to comply with the sovereignty and legitimacy criteria that justify the existence of the state action doctrine of competition law immunity (above §VII.B.i). Moreover, while being imbued with a lower legitimacy level, public procurement practices and decisions—as opposed to public procurement legislation and regulation *stricto sensu*, seem to present a higher risk of generating anti-competitive effects (as they are more specific and usually complement the general criteria contained in the laws and regulations which, precisely because of that generality, will tend to be less restrictive). Consistently, they should be subjected to more intense competition scrutiny.

Whereas the first part of the development of the current state action doctrine in relation to the adoption of anti-competitive legislation and regulations merits further analysis (below §VII.C), it is submitted that developing a 'market participant exception' would suffice to effectively subject public procurement (administrative) practices to competition law scrutiny.[252] That is, 'piercing the sovereign veil' in the public procurement arena to subject to competition scrutiny all instances of market intervention related to non-regulatory public procurement activities could contribute to fostering competition in this important field of economic activity. The implementation would be rather simple (in formal terms), since it would exclusively require disregarding the fact that a public authority or other entity is conducting a given market activity (ie, excluding it from the shield of the state action doctrine), and indirectly analysing it under the general prohibitions of 'core' competition rules (ie, arts 101 and 102 TFEU) by means of arts 3(3) TEU, 4(3) TEU, 3(1)(b) TFEU, 119 TFEU and Protocol (No 27) TFEU—that is, overstepping the formal *Van Eycke* test and extending the corresponding substantive analysis of the unilateral competition distorting behaviour of the public buyer. As already mentioned, it is submitted that this development—together with the revision of the concept of 'economic activity' (above

[252] The term 'market participant exception' could be considered an improper transplant of US terminology that might not be natural to EU competition law, particularly because, under mainstream conceptions of the EU state action doctrine, this institution is not an 'exemption' from the general competition rules, but an 'extension' of those rules to state activities. Arguably, then, the EU state action doctrine should be made subject to *limits* (to the extension of competition rules) rather than *exceptions* (to the exemption from competition rules). Nonetheless, it is submitted that keeping the 'market participant exception' terminology is desirable, both for its direct reference to the US counterpart—which may render future developments on each side of the Atlantic easier to identify and, hence, to compare—and for its higher informative content than the alternative terminology of 'market participant limit or restriction'.

§VI.C) would allow the system of EU competition law to go full-circle in constraining anti-competitive public procurement behaviour.

C. Setting the Proper Bounds to the State Action Doctrine (2): The Complex Issue of Balancing EU and Member States' Conflicting Policies

i. General Framework

As a complement to the more modest development of the 'market participant exception' envisaged in the previous section, and with acknowledgedly broader implications for competition law outside the ambit of public procurement, it is hereby submitted that the development of a *substantive or balancing test* could improve the state action doctrine, as it is formulated. As the law currently stands, and under the formal test that guides the application of the state action doctrine, no analysis is conducted on the content or effects of the anti-competitive statutes and norms approved by national legislators (see above §IV.C and §VII.A). Therefore, merely subjective criteria focused on the origin of the anti-competitive regulation generally suffice to exclude a revision of its content on competition grounds. However, under the framework created by the TFEU—which strongly relies on and promotes the *principle of an open market economy with free competition* (arts 119, 120 and 127 TFEU; ex arts 4, 98 and 105(1) TEC) and hence sets the boundaries for the conduct of EU and Member States' policies[253]—and on the basis of articles 3(3) TEU, 4(3) TEU, 3(1)(b) TFEU, 119 TFEU and Protocol (No 27) TFEU and the general principle against public restrictions of competition that can be extracted therefrom (see above §IV.C), it is submitted that this formal approach should be overstepped in favour of a more substantive analysis of anti-competitive regulation that prevented those restrictions or, at least, subjected them to strict proportionality requirements.[254] As the EGC has declared, one of the main aims of the EU institutions is to guarantee

> that 'a system ensuring that competition in the internal market is not distorted' (Article 3(1)(g) EC) is established within the Community. That system enables the Community to fulfil its task which consists, by means of the establishment of a common market, in promoting throughout the Community a harmonious, balanced and sustainable development of economic activities and a high degree of competitiveness (Article 2 EC). Furthermore, the said system is necessary for the adoption, within the Community, of an economic policy conducted in accordance with the principle of an open market economy with free competition (Article 4(1) and (2) EC).[255]

Even if the broad wording of the several articles of the TFEU that (directly and indirectly) establish its goals requires substantial interpretative efforts and potentially complex economic assessments,[256] the need to conduct such interpretation and assessment, particularly in cases where the attainment of the goals pursued by economic regulation is negatively affected by the *effects* generated in pursuance of non-economic (alternative)

[253] It was expressly stressed by the ECJ in Case C-198/01 *CIF* [2003] ECR I-8055 43. See also Baquero (n 124) 65–68 and 79. On the changes generated by the Treaty of Lisbon, see above §IV.D.

[254] Along the same lines, see the various proposals for a deeper and more substantial scrutiny of state anti-competitive regulation (above n 245 and accompanying text).

[255] Case T-43/02 *Jungbunzlauer* [2006] ECR II-3435 83.

[256] Case C-9/99 *Échirolles* [2000] ECR I-8207 25.

goals, is served. It is submitted that this case law remains in very general terms and gives ample discretion to Member States to shape their domestic economic and non-economic policies according to their national needs and preferences. Therefore, Member States seem to retain substantial freedom to conduct trade-off and balancing analyses between competition and conflicting (non-economic) policy objectives and to adopt competition-distorting non-economic legislation and regulation.

Nevertheless, it is submitted that such an exercise of balancing conflicting goals and policies is not completely unrestrained, and there are certain bounds within which Member States should conduct such assessment (however complex it might be), as well as general criteria that must inform the decisions to be made—which, it is argued, shall be subjected to a strict proportionality analysis.[257] In the end, the construction of the European economic system—and, to a large extent, of the whole European project—must necessarily have its foundations in a system ensuring undistorted and free competition in an open market economy. Therefore, the balancing between economic and non-economic policies will necessarily need to respect all Treaty provisions—and particularly articles 119 and 120 TFEU, given their paramount importance.

As a point of departure, it is to be stressed that article 120 TFEU clearly imposes on Member States the duty to conduct their economic policies with a view to contributing to the achievement of the objectives of the Union, and to act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources (according to the principles laid down in article 119 TFEU).[258] Few doubts can be cast, then, on the principle that *Member States' economic regulations must be guided by allocative efficiency considerations and promote free competition in the markets*.[259] This requirement will be of special relevance in the case of competition law and public procurement rules, as they are to be considered two of the main exponents of economic regulation (see above chapter three)—or, in other words, 'core' EU economic policies.[260]

From this perspective, and in essence, the issue of concurrent and conflicting EU and Member States' non-economic policies in the competition and public procurement fields raises the question whether the efficiency and free competition requirements for all economic policies must prevail or, on the contrary, if certain inefficiencies and distortions of competition must be allowed for in pursuance of non-economic policies and, if so, under which circumstances and to what extent.[261]

[257] See: M Kohl, 'Constitutional Limits to Anticompetitive Regulation: The Principle of Proportionality' in G Amato and LL Laudati (eds), *The Anticompetitive Impact of Regulation* (Cheltenham, Edward Elgar, 2001) 419, 425–30.

[258] Case C-198/01 *CIF* [2003] ECR I-8055 47; and Szyszczak (n 10) 6–7 and 30–31. On the implications of this principle of an open market economy with free competition and the paramount importance that it imbues in EU competition policy, D Hildebrand, *The Role of Economic Analysis in the EC Competition Rules*, 2nd edn (New York, Kluwer Law International, 2002) 8–16. Also Ritter and Braun (n 62) 6.

[259] Indeed, the free market principle enshrined in art 119 TFEU is bound to dominate all policies of the EU; see Szyszczak (n 186) 227. In very clear terms, id (n 10) 12–13.

[260] The particular relevance of these policies, especially competition, can derive from constitutional principles and mandates, with the result that 'scrutiny of anticompetitive regulation is constitutionally mandated and not merely a policy option'; see Kohl (n 257) 421–25. On the constitutional status of the principle of competition, Baquero (n 124) 7–24.

[261] Defending the supremacy of economic goals and competition principles over other principles and goals of the TFEU—and, notably, social goals, see Baquero (n 124) 69–72. See also see Opinion 1/91 on the draft EEA agreement [1991] ECR I-6079 41; Case C-126/97 *Eco Swiss* [1999] I-3055 36–37; Case C-453/99 *Courage and Crehan* [2001] ECR I-6297 20–21; see also Case 240/83 *Waste oils* [1985] ECR 531 9; and Case 249/85 *Albako*

ii. Criteria for the Balancing of Conflicting Policy Goals and Effects

It is submitted that two main differences seem to be required to be drawn in order to analyse this complex issue properly—as a holistic analysis would make it difficult to strike the proper balance between conflicting goals and effects of juxtaposed and overlapping policies pursued at different levels of government. On the one hand, balancing the objectives and effects of EU policies amongst themselves needs to be differentiated from balancing the goals and effects of EU and Member States' domestic policies (ie, horizontal versus vertical compatibility test).[262] On the other hand, balancing EU 'core' economic goals against non-economic goals (either of the EU or of the Member States) needs to be distinguished from balancing the latter and 'secondary or peripheral' EU economic policies (ie, a relevance of policies test).[263]

As regards the first criterion—that is, the *horizontal or vertical consistency of policies' goals and effects*—the consistency of EU policies amongst themselves (ie, a horizontal balancing of goals) seems to impose a stricter approach towards giving prevalence to economic goals than the assessment of the consistency of EU and Member States policies (ie, a vertical analysis). Given that the TFEU aims to accomplish a broad set of objectives, there are indispensible trade-offs between competing goals that the European institutions need to assess when defining EU policies and setting regulatory goals. Therefore, it is for EU institutions to decide whether certain inefficiencies and 'instrumental' distortions of competition are desirable in the light of obtaining non-economic objectives for the ensemble of Member States and in favour of all European citizens, subject to the general principle of proportionality. Given the basic purpose and history of the EU, its policies are largely determined by economic concerns, and economic objectives dominate as decision-making criteria in most cases.[264] Nevertheless, in this horizontal perspective, it is for EU institutions to decide whether to depart or not from this fundamentally economic

[1987] ECR 2345 16. See Chérot (n 20) 129–33. In similar terms, the preponderance of the competition principle in EU law has been stressed by J Pelkmans, *European Integration. Methods and Economic Analysis*, 2nd edn (Harlow, Longman, 1997) 183; RD Anderson and A Heimler, 'What Has Competition Done for Europe? An Inter-Disciplinary Answer' (2007) 4 *Aussenwirtschaft* 419, 421–26; N Reich, *Understanding EU Law: Objectives, Principles, and Methods of Community Law*, 2nd edn (Antwerpen, Intersentia, 2005) 141–42; Gerber, *Law and Competition in Twentieth Century Europe* (1998); and Kohl (n 257) 425. Contrary to the prevalence of the principle of free competition over other principles and goals of the TFEU—which is considered to pursue simultaneously and with equal intensity a wide range of goals, see Opinion of AG Mischo in Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte* 45–46. Along the same lines, see Sauter (n 119) 225, who considers that there is no hierarchical order between the various intermediate objectives of the Treaty. Similarly, Komninos (n 193) 13–16.

[262] 'Horizontal' is used to refer exclusively to the EU level. There is a different horizontal analysis to be conducted between Member States' domestic economic and non-economic policies. However, in this setting, the ECJ has already granted Member States ample discretion to balance economic and non-economic goals by narrowing down the scope of art 120 TFEU in this 'second layer' of horizontal analysis—see Case C-9/99 *Échirolles* [2000] ECR I-8207.

[263] Given the dynamism and incrementalism of the construction of the European project, secondary economic policies can be expected to gain importance in the future. However, the 'core' of EU economic policies has remained mostly unchanged during the first fifty years of European integration and is more than likely to remain largely unaltered in the future. Therefore, given their permanence and substantiality in the process, it is submitted that special emphasis is to be placed on the balancing of non-economic and 'core' economic goals when shaping future policy.

[264] See: Joerges (n 130) 43–52.

approach when making decisions in non-economic areas of European policy—subject also to the relevance of policies test described below.

The circumstances are different when the non-economic decisions are to be made at a national level and consistency with EU economic policies determines the scope of Member States' discretion in shaping their non-economic domestic policies—ie, in the case of a vertical analysis.[265] The potential tension between the objectives and goals of EU economic regulations and the effects generated by Member States in pursuance of non-economic goals often gives way to a conflict (of competences) that needs to be resolved by means of the analytical criteria offered by two of the most important principles for the interpretation and construction of EU law: the principle of supremacy (or primacy) and the principle of subsidiarity (art 69 TFEU and the corresponding Protocol on the application of the principles of subsidiarity and proportionality), as the issue is finally one of distribution of competences between the Union and Member States.[266]

According to the principle of subsidiarity, if the decision on a given non-economic issue lies with the Member States, EU institutions either lack competence in that area or are not the best-situated decision-makers in that particular instance.[267] Therefore, non-economic aspects of decision-making should exclusively be determined by the corresponding national institutions—within the general limits imposed by the rules of the TFEU. At the same time, if the conflicting economic regulation has been designed and is enforced at the EU level (and for the same subsidiarity reasons, *a contrario*), EU institutions either have exclusive competence in the area according to the rules of the TFEU, or are the best-positioned authority to make that decision.[268] In this latter scenario, the principle of supremacy[269] necessarily becomes the deciding factor, as the principle of

[265] As indicated, a conflict could also be devised between Member States' economic and EU non-economic policies. Given the more restricted competences of the European institutions in non-economic areas, the subsidiarity principle may suffice to resolve most of the conflicts. However, in general and abstract terms, these tensions between non-economic EU goals and domestic economic policy would need to be solved according to the same principles and logic developed here.

[266] Gyselen (n 89) 304; UB Neergaard, 'Distribution of Competences and the Doctrine on the Interaction of Articles 3(g), 5(2) and 85 EC' in B Dahl and R Nielsen (eds), N*ew Directions in Business Law Research* (Copenhagen, Djøf Forlag, 1996) 189; and Neergaard (n 90) 301–27.

[267] On the principle of subsidiarity and its implications for the development of EU law, see A Goucha Soares, 'Pre-emption, Conflicts of Powers and Subsidiarity' (1998) 23 *European Law Review* 132, 133; A Estella, *The EU Principle of Subsidiarity and Its Critique* (Oxford, Oxford University Press, 2002) 74–179; Lenaerts and van Nuffel (n 98) 100–09; Craig and de Búrca (n 6) 100–05 and 155–57; and M Kumm, 'Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union' (2006) 12 *European Law Journal* 503, 508–15. For an economic approach, see S Ederveen and J Pelkmans, *Principles of Subsidiarity* (Working Paper, 2006), available at www.cpb.nl/nl/activ/subsidiarity/papers/principles_ of_subsidiarity.pdf; J Pelkmans, *Subsidiarity between Law and Economics* (College of Europe, Law Research Papers No 1, 2005), available at coleurope.eu/file/content/studyprogrammes/law/studyprog/pdf/ResearchPaper_ 1_2005_Pelkmans.pdf.

[268] As regards Member States' inferior position to fulfil the task of harmonising rights of state regulation (ie, non-economic goals) with rights of free trade and competition—which supports the finding that, according to the logic of the subsidiarity principle, those issues need to be regulated at the EU level; see Fox (n 211) 473; and Pelkmans, *European Integration. Methods and Economic Analysis* (1997) 185–86. Along the same lines, K Gatsios and P Seabright, 'Regulation in the European Community' (1989) 5 *Oxford Review of Economic Policy* 37, 59. Also, in very clear terms, see M Ballbé and C Padrós, 'Spanish Independent Authority and its Role in a New Competitive Environment' in Amato and Laudati (n 257) 364, 370.

[269] The principle of supremacy of EU law determines that wherever there is a conflict with national law, EU law takes precedence. It is a case law construction of the ECJ, that was mainly developed in Case 26/62 *Van Gend and Loos* [1962] ECR 1; Case 6/64 *Costa v ENEL* [1964] ECR 585; and Case 106/77 *Simmenthal* [1978] ECR 629. As a result of the supremacy of EU law, conflicting national laws, of whatever status, will be inapplicable insofar as they are incompatible with EU law, of whatever status. See Case C-168/95 *Arcaro* [1996]

subsidiarity cannot provide a satisfactory solution to the conflict of competences when both legal orders have exercised their powers appropriately, according to the relevant rules on division of powers.[270] Given the *effet utile* of the TFEU and of all the secondary legislation instruments implementing EU policies, economic goals pursued at the EU level are to be considered preponderant, and conflicting national non-economic regulations whose effects jeopardise the attainment of EU economic goals will in principle need to be adjusted (ie, limited) to the point where they no longer detract from the effectiveness of the relevant EU economic regulation—or, at least, subjected to a very strict proportionality test that ensures that the benefits generated by the conflicting non-economic goals are commensurate with or exceed the negative effects they generate on the attainment of EU economic goals.[271]

Therefore, *in general terms, EU economic goals will take precedence over Member States' non-economic goals when the pursuit of the latter generates negative effects on the former, unless the non-economic benefits generated overcome a strict proportionality test*.[272] Consequently, Member States shall refrain from pursuing conflicting non-economic policies that generate disproportionate negative effects or that raise unnecessary obstacles to the attainment of EU economic goals. This proportionality analysis should be developed taking into account the specific circumstances of the case and the actual effects of the conflicting domestic policies on the goals pursued at EU level—eg, the restrictions or distortions of competition that they generate.[273]

As regards the second criterion, *the relevance of the EU economic policies in conflict will also have an impact on and largely determine the outcome of the balancing test between them and non-economic policies*. The more relevant an EU economic policy—and, hence, the more fundamental to the integration process—the more difficult it should be for a competing non-economic goal to gain precedence and for the negative effects generated in its pursuit to be acceptable under EU law. Put differently, the more relevant an

ECR I-4705; and Joined Cases C-10 and 22/97 *IN CO GE '90* [1998] ECR I-6307. On the principle of supremacy, generally, see Lenaerts and van Nuffel (n 98) 16–67, 122–23, 268–71 and 665–73; R Gordon, *EC Law in Judicial Review* (Oxford, Oxford University Press, 2007) 48–53; TC Hartley, *The Foundations of European Community Law*, 6th edn (Oxford, Oxford University Press, 2007) 224–26; Craig and de Búrca (n 6) 344–78; FG Jacobs, *The Sovereignty of Law: The European Way* (Cambridge, Cambridge University Press, 2007) 40–42; and id, 'The State of International Economic Law: Re-Thinking Sovereignty in Europe' (2008) 11 *Journal of International Economic Law* 5, 8–10. See also C Joerges et al, *Rethinking European Law's Supremacy* (EUI Working Papers, LAW 2005/12), available at www.iue.it/PUB/law05–12.pdf.

[270] Similarly, the supremacy of EU competition law over national anti-competitive regulations has been pointed to as the basic criterion to disapply the latter; Castillo de la Torre, 'State Action Defence' (n 102) 408. See also Von Quitzow (n 70) 231–37.

[271] In this reading, the concept of supremacy is probably used in a *weak form*, since a strict application of the principle of primacy would lead to the blunt rejection of the conflicting non-economic goals. See Kohl (n 257) 422. However, it seems desirable to leave some room for state generated restrictions of competition that, from an aggregate perspective, generate net social gains—ie, that compensate or exceed the social losses derived from the restrictions to competition that they generate, that would then become 'instrumental'.

[272] It goes without saying that, whenever national legislation in pursuance of non-economic goals generates neutral effects as regards the attainment of EU economic goals, no such conflict will arise and, consequently, the ability of Member States to pursue the policy goals that better suit their needs will remain unaffected. However, it should also be acknowledged that it is hard to envisage non-economic policies that remain completely neutral or that generate no impact on the pursuit of economic policies.

[273] For guiding criteria on how to implement this proportionality test, albeit formulated in more general terms, see G Amato and LL Laudati, 'Recommendations for the Reform of Regulation to Promote Competition—Draft Guidelines' in id (eds), *The Anticompetitive Impact of Regulation* (Cheltenham, Edward Elgar, 2001) 475, 477–84.

EU economic policy, the higher the pressure for non-economic goals to be taken into consideration as leading decision-making criteria in resolving the conflict. In this sense, 'core' EU economic policies derive from the basic objective of creating and developing an internal market, and mainly comprise competition and free movement—and, among the latter, public procurement rules.[274] Hence, any limitation of the effectiveness of competition and public procurement rules needs to be more strongly justified by overriding non-economic considerations than a similar restriction of EU economic policies of a 'secondary or peripheral' nature.

According to the abovementioned criteria, it is submitted that, when evaluating a given domestic legislation of the Member States under the state action doctrine, *a particularly restrictive approach should be taken when the result or effect of such regulation is to detract from the effectiveness of 'core' EU economic goals*—and, particularly, from the effectiveness of the internal market policies, which include competition and free movement as their paramount expression.[275] In that case, if the restriction to competition is aimed at pursuing domestic non-economic goals, the state regulation should probably be declared incompatible with the TFEU—or, at least, a very stringent proportionality test (particularly as regards the existence of alternative solutions that generate minor competition distortions or restrictions to free movement) should be applied on the basis of the logic derived from the principles of subsidiarity and supremacy. On the other hand, even if the restriction to competition is aimed at furthering a competing EU non-economic policy (as designed by EU institutions, but to be implemented by Member States), a similarly stringent approach should be followed and the validity of the anti-competitive regulation should be strictly scrutinised on the basis of a narrow construction of the EU non-economic policy that conflicts with a 'core' EU economic policy. Therefore, the analysis should not be based on a comparison between policy objectives, but shall be restricted to those cases in which the pursuit of non-economic goals (as a matter of domestic or EU policy) generate negative effects or diminish the effectiveness of 'core' EU economic goals. It clearly follows that, whenever the pursuit of those non-economic goals does not generate a negative impact on 'core' EU economic goals (ie, does not jeopardise their attainment), no assessment under the proposed test should be triggered.

It is submitted that, at the end of the day, the logical requirements of the supremacy and subsidiarity principles impose stricter criteria to ensure the *effet utile* of 'core' EU economic goals (particularly, undistorted competition) than the state action doctrine currently establishes, and that a strict proportionality test should be developed to balance the competitive restrictions and distortions that Member States' legislation and regulation can generate against their (non-)economic alternative policy goals. Therefore, the state action doctrine should be freed from its too formal corset and a substantive test should be implemented to determine whether restrictions of competition are required as a matter of consistency of conflicting policies or, on the other hand, should be repudiated as an instance of vertical or horizontal incompatibility. It is submitted that this more substantive (or less formal) approach would be beneficial to increase the effectiveness of 'core' EU economic policies and would contribute to striking the proper balance between them

[274] Baquero (n 124) 65. Similarly, see C Bovis, *Public Procurement in the European Union* (New York, Palgrave–Macmillan, 2005) 15–16.

[275] *Cf* Van de Gronden (n 146) 117–18 and 137.

and non-economic considerations underlying Member States' regulation—when the latter detract from the effectiveness of the former. As a result, a more coherent enforcement of the 'core' EU economic policies would follow and the conflicting policies (that merit a stricter treatment when developed at Member State level than when pursued at EU level) would naturally be attracted towards the adequate *forum*—that of the EU institutions, which are arguably the best placed to balance conflicting EU (economic and non-economic) policies and to try to develop them in a consistent manner.

iii. The Impact on the Public Procurement Field

It is submitted that the application of the criteria proposed in the previous sub-section for the assessment of potentially conflicting policies would generate a stricter approach towards state action in the public procurement field and could contribute to restricting certain types of public procurement rules—particularly those aimed at the pursuit of 'secondary' policies, or at regulatory uses of public procurement (such as contract compliance), and ultimately contribute to achieving a more competition-oriented public procurement system.

Generally, the pursuit of 'secondary' policies in the public procurement field could result in distortions of competition unless such policies are framed within the strict limits set by EU public procurement rules themselves.[276] Consequently, the pursuit of such 'secondary' policies or the use of public procurement as a regulatory tool by Member States will potentially conflict with EU competition rules and with their basic goals and objectives—since they will most often generate negative effects for the attainment of the 'core' economic goals of EU public procurement and competition law. It is submitted, then, that the establishment of national legislation in pursuance of such 'secondary' policies that generate anti-competitive effects should not be automatically covered by the state action doctrine. In these circumstances, it is submitted that the analysis should be conducted according to the aforementioned criteria and the ensuing proportionality test (above §VII.C.ii)—with particular focus on the identification of potential distortions of competition—and, when possible, alternative means to pursue non-economic goals with a lower impact on 'core' economic objectives should be explored.[277]

According to the analytical framework previously outlined, it should be determined whether the secondary policies pursued are 'EU secondary policies' or 'domestic secondary policies'—ie, whether they pose a question of vertical or of horizontal consistency. In this regard, 'EU secondary policies' seem to be limited to taking into consideration social and environmental issues that are directly related to the object of the procurement process.[278]

[276] Generally, see J Arnould, 'Secondary Policies in Public Procurement: The Innovations of the New Directives' (2004) 13 *Public Procurement Law Review* 187. Indeed, a restrictive approach towards the pursuit of 'secondary' policies has been established by ECJ case law. See Arrowsmith (n 76) 353–54; id (n 12) 8 and 1256–93; Chérot (n 20) 730–34; OFT, *Assessing the Impact of Public Sector Procurement on Competition* (2004) 65–67, *available at* www.oft.gov.uk/shared_oft/reports/comp_policy/oft742c.pdf; P Quertainmont, 'Le rôle économique et social des marchés publics' in D Batselé et al (eds), *Les marchés publics à l'aube du XXIe siècle* (Brussels, Bruylant, 2000) 76, 107–11 and 114; Trepte (n 17) 168–76; and G Püttner, 'The Protection of the Public Interest in the Context of Competitive Tendering' (2003) 74 *Annals of Public and Cooperative Economics* 107, 113. *cf* Bovis (n 17) 92–97.

[277] Along the same lines, see RD Anderson and WE Kovacic, 'Competition Policy and International Trade Liberalisation: Essential Complements to Ensure Good Performance in Public Procurement Markets' (2009) 18 *Public Procurement Law Review* 67, 92–93.

[278] For a review of these policies in EU legislation and case law, see the various contributions to S Arrowsmith

Therefore, taking into consideration environmental and social issues that present loose links to the object of the contract, or any other non-economic issues, should be considered 'domestic secondary policies'—and, hence, made subject to a stricter proportionality analysis. In the first instance, domestic public procurement rules should be shielded from further scrutiny, assuming the criteria to ensure consistency (*rectius*, proportionality) of conflicting EU goals are respected—ie, that the environmental or social aspects are closely related to the object of the contract and that they do not leave full discretion to the contracting authorities to award the contract (as the prime yardsticks of the principle of proportionality in this area below chapter six, §II.B).[279] On the contrary, if the domestic legislation of the Member States goes further than allowed for by EU public procurement rules or pursues different goals—ie, pursues 'domestic secondary policies', their procurement policies should be analysed according to the abovementioned criteria of vertical consistency with EU competition goals (and, consequently, subjected to more stringent requirements).

Given the 'core' nature of competition as an EU economic policy, it is submitted that competition considerations should take precedence over national non-economic policies whose effects impair or jeopardise the goals set at the EU level (that is, policies which restrict or distort competition in the internal market). Therefore, if the pursuit of 'domestic secondary policies' generates material distortions of competition in the public procurement setting that are not proportional to the alternative goals or that are unnecessary for their attainment—and, ultimately, jeopardises the general goal of undistorted competition in the internal market—these policies should be declared in breach of EU competition law, and the state action doctrine should be no impediment to such a finding.

In more specific terms, when contracting authorities from Member States conduct procurement activities that generate restrictions or distortions of competition, the fact that their decisions are made in accordance with domestic legislation that pursues 'secondary policies' should be largely irrelevant in their assessment under EU competition law—ie, should not automatically be exempted under the state action doctrine, since national public procurement legislation which generates effects that jeopardise or impair the attainment of undistorted competition conditions in the internal market should be subjected to a strict proportionality test and, failing to pass it, be declared in breach of EU law and be deemed unfit to justify the public procurement practices—ultimately, by virtue of the requirements of the principle of supremacy.

and P Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law. New Directives and New Directions* (Cambridge, Cambridge University Press, 2009). See also Arrowsmith, *Law of Public and Utilties Procurement* (2nd, 2005) 287–96 and 1225–312; id, Public Procurement as an Instrument of Policy (1995); id, 'The Legality of Secondary Procurement Policies under the Treaty of Rome and the Works Directive' (1992) 1 *Public Procurement Law Review* 410; Trepte (n 13) 63–87; Bovis, *Public Procurement in the EU* (2005) 97–98 and 115–17; P Kunzlik, ' "Green Procurement" Under the New Regime' in R Nielsen and S Treumer (eds), *New EU Public Procurement Directives* (Copenhagen, Djøf Forlag, 2005) 117, 121–22; C Ribot, 'La commande publique éco-responsible' in G Clamour and M Ubaud-Bergeron (eds), *Contrats publics. Mélanges en l'honneur du professeur Michel Guibal* (Montpellier, Presses de la Faculté de Droit de Montpellier, 2006) 283; B Bercusson and N Bruun, 'Labour Law Aspects of Public Procurement in the EU' in R Nielsen and S Treumer (eds), *New EU Public Procurement Directives* (Copenhagen, Djøf Forlag, 2005) 97, 97–110; and V Martinez, 'Les péripéties du critère social dans l'attribution des marchés publics' in G Clamour and M Ubaud-Bergeron (eds), *Contrats publics. Mélanges en l'honneur du professeur Michel Guibal* (Montpellier, Presses de la Faculté de Droit de Montpellier, 2006) 251.

[279] See: Case 31/87 *Beentjes* [1988] ECR 4635 28–32; Case C-225/98 *Commission v France* [2000] ECR I-7445 46–54; Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7213 59–64; and Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527 66–71. More recently, Case C-368/10 *Commission v Netherlands* [2012] pub electr EU:C:2012:284.

To sum up, the proposed revision of the state action doctrine should prevent the adoption of competition-distorting public procurement legislation by Member States, unless it satisfies a very strict proportionality test (a result largely coincident with the conclusions of an analysis from a public procurement perspective; see below chapter five).

VIII. Conclusions to this Chapter

This chapter has analysed how and to what extent EU competition law addresses publicly generated competitive distortions in the public procurement field. The analysis has shown how current institutions and mechanisms are significantly limited and generally insufficient to prevent anti-competitive public procurement rules and practices, mainly because of an exceedingly formal approach by the EU case law to both the direct and the indirect application of 'core' competition rules. In view of these results, it has been submitted that a revision of two main strings of that case law could contribute to bringing EU competition law full-circle in tackling publicly generated restrictions to competition in the public procurement setting.

More specifically it has been suggested that the adoption of a more economic or anti-formalistic (or functional) approach to the concept of undertaking can contribute to bringing the bulk of public procurement activities *qua* economic activities per se directly under the scope of 'core' competition prohibitions. This development would bridge the jurisprudentially created gap between the competition rules applicable to private and to public purchasing activities—and, indirectly, between the rules applicable to public and private entities developing economic activities, loosely understood.

It has further been argued that refining the state action doctrine on the basis of a more acute distinction between sovereign and economic or commercial activities of public authorities—ie, 'piercing the sovereign veil' can further improve the results attainable by competition law in preventing and fighting publicly generated distortions of competition in public procurement. These developments have been directed towards two main objectives: on the one hand, towards developing a 'market participant exception' that excludes from the shield of the state action doctrine all instances of market intervention related to non-regulatory public procurement activities—which would then be analysed *indirectly* according to the 'core' competition rules by expedient recourse to articles 3(3) TEU, 4(3) TEU, 3(1)(b) TFEU, 119 TFEU and Protocol (No 27) TFEU; and on the other hand, towards adopting a substantive (proportionality) test to evaluate Member States' legislation that generates anti-competitive effects.

It is submitted that these proposed developments of current EU competition rules are particularly well-suited to addressing publicly generated competitive distortions in the public procurement field and, *de lege ferenda*, should become the prime regulatory response under EU competition law to ensure the development of more competition-oriented public procurement. These developments should be pursued in a coordinated manner and, to the furthest possible extent, simultaneously—since each of them would, arguably, be insufficient by itself to attain the desired improved results to address publicly generated restrictions of competition in the public procurement setting.

5

The Principle of Competition Embedded in the EU Public Procurement Directives

I. Introduction

Changing perspective and moving from the analysis of public procurement as an object for competition law (chapter four) towards the examination of the competition elements of public procurement rules, this chapter takes into consideration competition from a 'pure' public procurement perspective and examines where competition concerns fit in EU public procurement rules and how they affect (or should affect) the shaping of these rules. Hence, the present chapter will be concerned with the research sub-question: *what is the place for competition concerns in the EU public procurement regime and how do they affect its construction and interpretation?* The inquiry will build upon the already established general premise that public procurement rules have promotion of competition—or the opening up of public procurement markets to competition—as one of their main goals (above chapter three, §IV) and that, consequently, they should be designed around a pro-competitive paradigm and implemented in a pro-competitive fashion. This assumption or point of departure is becoming increasingly recognised and, indeed, it has been recently stressed that the 'starting point for achieving best value for money in government procurement is a regulatory framework that is based on the principle of competition and that submits public spending to the adherence to competitive procurement methods'.[1] Hence, this is the main consideration that drives the following analysis.

In this regard, the first part of this chapter will focus on the identification of a competition principle as one of the fundamental or general principles of the EU public procurement regime. It will be submitted that EU public procurement directives have indeed always been based on the paradigm of an open and competitive procurement process, and that competition is one of their fundamental principles. This competition principle will be interpreted as requiring that public procurement rules be designed and applied in a pro-competitive way—so that they do not hinder, limit or distort competition—and that public procurement practices which prevent, restrict or distort competition be avoided (§II). The argument is now supported by the consolidation of this principle of competition in article 18(1) of Directive 2014/24. However, the drafting of this provision

[1] UNCTAD, Intergovernmental Group of Experts on Competition Law and Policy, *Competition Policy and Public Procurement* (2012), available at unctad.org/meetings/en/SessionalDocuments/ciclpd14_en.pdf.

does not completely fit the proposal that is advanced here and, in any case, creates important interpretative difficulties. Those difficulties derive prominently from the inclusion of an element of 'intention' of restriction of competition that will be closely scrutinised and followed by a proposal to objectify its application (§III). After this analysis of the principle of competition embedded in the EU procurement directives, the research will turn towards the implications that it generates for the shaping of the EU public procurement regime—particularly as regards the transposition and implementation of EU public procurement directives by Member States and the interpretation of public procurement rules and regulations (both domestic and European) in a more pro-competitive way (§IV). The final part of the chapter will analyse in further detail the general implications of the competition principle in the public procurement setting and, in particular, will distinguish it from the principle of equal treatment or non-discrimination (§V). Preliminary conclusions in the light of previous analyses close the chapter (§VI).

II. The Competition Principle Embedded in the pre-2014 EU Public Procurement Directives

A. The Recognition of the Existence of a Competition Principle Embedded in the pre-2014 EU Public Procurement Directives and their Interpreting Case Law

The promotion of effective competition in the public procurement field—or, put otherwise, the opening up of public procurement markets to competition, has been a constant goal across the four generations of EU public procurement directives[2] (above chapter three).[3] The development of effective competition in the field of public contracts was expressly stated as an objective in the preambles to the previous generation of directives;[4] and this

[2] The expression regarding the 'fourth generation' of procurement directives to refer to Dir 2004/17 and Dir 2004/18 is borrowed from C Bovis, *EU Public Procurement Law* (Cheltenham, Edgar Elgar, 2007) 49.

[3] For a brief overview of the evolution of EU public procurement directives, see PA Trepte, *Public Procurement in the EU: A Practitioner's Guide*, 2nd edn (Oxford, Oxford University Press, 2007) 28–38. For more extensive accounts, see S Arrowsmith, *The Law of Public and Utilities Procurement*, 2nd edn (London, Sweet & Maxwell, 2005) ch 3; id, *The Law of Public and Utilities Procurement. Regulation in the EU and the UK*, vol 1, 3rd edn (London, Sweet & Maxwell, 2014) ch three; and Bovis (n 2) 17–26.

[4] See rec (14) in the preamble to Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts [1993] OJ L199/1 (with specific reference to the need 'to ensure development of effective competition in the field of public contracts'); and rec (10) in the preamble to Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts [1993] OJ L199/54 (adopting the same exact wording). See also rec (20) in the preamble to Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts [1992] OJ L209/1 (which adopted a different wording and expressed, maybe in clearer terms, that the directive was needed 'to eliminate practices that restrict competition in general and participation in contracts by other Member States' nationals in particular'). Such general considerations had a direct translation into numerous pro-competitive rules included in those directives; see G Boncompagni, 'Appalti pubblici e concorrenza' in EA Raffaelli (ed), *Antitrust fra Diritto nazionale e Diritto communitario* (Milano, Giuffrè, 1996) 189, 199–200. In my view, and as further developed in the text, the very broad terms of these recitals are a clear indication of the existence of a *general* competition objective in the public procurement directives, which should not be narrowed down or interpreted as only implying an 'operational' requirement of promotion of access to the public

led the ECJ to declare that procurement 'legislation contains fundamental rules of EU law in that it is intended to ensure the application of the principles of equal treatment of tenderers and of transparency *in order to open up undistorted competition in all the Member States*'[5] and to repeatedly stress that the purpose of the public procurement directives 'is to *develop effective competition in the field of public contracts*'.[6]

Such an express objective was also contained in the preamble to the 2004 directives—see recital (9) in the preamble to Directive 2004/17 and recitals (2) and (36) in the preamble to Directive 2004/18.[7] Moreover, the 2004 EU public procurement directives have numerous references to the preservation and promotion of undistorted competition as one of the basic goals and principles of this regulatory body.[8] Even further, many of their provisions made express reference to the fact that contracting authorities must refrain from adopting certain procedures or applying certain rules if doing so would limit or distort competition. Indeed, this constraint in the design and implementation of public procurement rules was expressly stated by the 2004 EU public procurement directives, particularly in relation to new procedures and institutions, such as the competitive dialogue, electronic tendering, dynamic purchases, or framework agreements; as expressed by articles 29(7), 32(2), 33(7) and 54(8) of Directive 2004/18 and articles 14(4), 15(7) and 56(9) of Directive 2004/17—all of which expressly prohibited contracting authorities from resorting to these types of contracts and procedures if that could result in a limitation or distortion

procurement procedure. Along the same lines, see L Fiorentino, 'Public Procurement and Competition' in KV Thai et al (eds), *International Public Procurement Conference Proceedings* (2006) 847, 851; and id, 'The Italian Public Procurement Code' (2007) 16 *Public Procurement Law Review* 352, 365. *Cf* S Arrowsmith, 'National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict?' in id and A Davies (eds), *Public Procurement: Global Revolution* (1998) 3, 15; and Arrowsmith (n 3, 2005) 69, 129–31, 431–32 and 955. Similarly, see C Bovis, *EC Public Procurement: Case Law and Regulation* (Oxford, Oxford University Press, 2006) 43–44; and id (n 2) 7.

[5] Case C-213/13 *Impresa Pizzarotti* [2014] pub electr EU:C:2014:2067 63 (emphasis added), with reference to its Judgments in Case C-70/06 *Commission v Portugal* [2008] ECR I-1 40; Case C-213/07 *Mikhaniki* [2008] ECR I-9999 55; Case C-251/09 *Commission v Cyprus* [2011] ECR I-13 37–39; and Case C-336/12 *Manova* [2013] pub electr EU:C:2013:647 28.

[6] Case C-138/08 *Hochtief and Linde-Kca-Dresden* [2009] ECR I-9889 47 (emphasis added), with references to Case C-27/98 *Fracasso and Leitschutz* [1999] ECR I-5697 26; Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233 34; Case C-470/99 *Universale-Bau* [2002] ECR I-11617 89; and Case C-247/02 *Sintesi* [2004] ECR I-9215 35.

[7] Interestingly, in very clear terms the first proposal of rec (2) of Dir 2004/18 expressly required that its 'provisions should be based … on the introduction of effective competition in public contracts'. Subsequent amendments led to the current wording—which establishes that its 'provisions … [should] guarantee the opening-up of public procurement to competition', but the phrasing 'ensure development of effective competition in the field of public contracts' is present in rec (36); see JM Hebly and N Lorenzo van Rooedij (eds), *European Public Procurement: Legislative History of the 'Classic' Directive: 2004/18/EC* (Alphen aan den Rijn, Kluwer Law International, 2007) 89–96. Similarly, rec (9) Dir 2004/17 made reference to the 'opening-up of public procurement to competition' as one of the principles that was inferable from the requirements of arts 20, 34 and 35 TFEU (ex arts 14, 28 and 39 TEC)—and that specific mention was put at the beginning of the recital as enacted, which makes clear that the directive is approved 'in order to guarantee the opening up to competition of public procurement contracts' in the 'excluded' sectors; see JM Hebly (ed), *European Public Procurement: Legislative History of the 'Utilities' Directive: 2004/17/EC* (Alphen aan den Rijn, Kluwer Law International, 2008) 157–69. It is submitted that the final wording of these recitals establishes a clear link to the case law regarding the competition objective and requirements in previous directives (below n 12), and essentially captures the *competition principle* that underlies the public procurement regime.

[8] See: recs (2), (4), (8), (12), (13), (15), (29), (31), (36), (41) and (46) in the preamble to Dir 2004/18, as well as recs (9), (11), (15), (20), (21), (23), (32), (38), (40), (41), (42) and (55) in the preamble to Dir 2004/17.

of competition.[9] Also, regarding the effect of public procurement on the development of competition between economic operators—and, arguably, with specific focus on the potential increase in the likelihood of collusion that certain procurement rules generate (specially regarding transparency, see above chapter two, §V.D)—it is worth stressing that article 35(4) *in fine* of Directive 2004/18 and article 49(2) *in fine* of Directive 2004/17 allowed for derogations on the rules of publicity and advertisement where the release of such information might prejudice fair competition between economic operators, public or private. Therefore, it is submitted that it is clear from all these provisions of the 2004 EU public procurement directives that they were already founded on the conceptual basis that contracting authorities must refrain from adopting certain procedures or applying certain rules if doing so limits or distorts competition. Along the same lines, it can be considered that the specific procedure for establishing whether a given activity is exposed to competition—and, consequently, can be excluded from the scope of Directive 2004/17 because 'the activity is directly exposed to competition on markets to which access is not restricted' (ex art 30(1) Dir 2004/17)—was a further indication of the clear link between public procurement rules and competition concerns.[10]

In view of this express recognition of the existence of a strong pro-competition rationale and orientation, no doubt should be cast on the existence of a *competition objective* embedded in the EU public procurement directives[11]—which has clearly and consistently been declared as such by the case law of the EU judicature.[12] Indeed, EU case law has repeatedly held that the directives are designed to eliminate practices that restrict competition in general and to open up the procurement market concerned to competition—ie, to ensure free access to public procurement, in particular for undertakings from other Member States. The reasons behind this pro-competitive approach to public procure-

[9] See: Arrowsmith (n 3, 2005) 432, who considered that 'competition might be developed as a general principle with the same status as transparency and equal treatment. The very broad conception of competition … was [however] criticised … the directives are merely concerned with removing restrictions on participation in competitions held in public markets. However, a general principle of competition could properly be developed to support this latter objective of removing restrictions on participation.'

[10] In this regard, see Bovis (n 2) 296–98; and id, *EC Public Procurement: Case Law and Regulation* (2006) 284–86 and 602. Similarly, W Sauter and H Schepel, *State and Market in European Union Law. The Public and Private Spheres of the Internal Market before the EU Courts* (Cambridge, Cambridge University Press, 2009) 53–58. On this general exemption, see Trepte (n 2) 173–81.

[11] See: R Drago, 'Marchés publics et concurrence' in J-M Rainaud and R Cristini (eds), *Droit public de la concurrence* (Paris, Economica, 1987) 197, 199; A Mattera, *Le marché unique européen, ses règles, son fonctionnement* (Paris, LGDJ, 1990) (the Spanish translation by C Zapico Landrove, *El mercado único europeo. Sus reglas, su funcionamiento* (Madrid, Civitas, 1991) is used) 387; SE Hjelmborg et al, *Public Procurement Law—The EU Directive on Public Contracts* (Copenhagen, Djøf Forlag, 2006) 55; and V Salvatore, *Diritto comunitario degli appalti pubblici. Incidenza nell'ordinamento italiano delle direttive sulle procedure di aggiudicazione* (Milano, Giuffrè, 2003) 75.

[12] For recent references, see Case C-538/07 *Assitur* [2009] ECR I-4219 25; Case C-213/07 *Mikhaniki* [2008] ECR I-9999 39; Case C-454/06 *Pressetext Nachrichtenagentur* [2008] ECR I-4401 31; Case C-412/04 *Commission v Italy* [2008] ECR I-619 2; Case C-337/06 *Bayerischer Rundfunk and others* [2007] ECR I-11173 39; Case C-220/05 *Auroux* [2007] ECR I-385 52; Case C-340/04 *Carbotermo* [2006] ECR I-4137 58; Joined Cases C-21/03 and C-34/03 *Fabricom* [2005] ECR I-1559 26; Case C-26/03 *Stadt Halle* [2005] ECR I-1 44; Case C-247/02 *Sintesi* [2004] ECR I-9215 35. For previous references, see also Case C-214/00 *Commission v Spain* [2003] ECR I-4667 53; Case C-470/99 *Universale–Bau* [2002] ECR I-11617 89; Case C-411/00 *Swoboda* [2002] ECR I-10567 33; Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7213 81; Case C-92/00 *HI* [2002] ECR I-5553 44; Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233 34–5; Case C-399/98 *Ordine degli Architetti* [2001] ECR I-5409 75; Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745 62; and Case C-27/98 *Fracasso and Leitschutz* [1999] ECR I-5697 26. For further previous references, see Case C-243/89 *Storebaelt* [1993] ECR I-3353 33; and Case 31/87 *Beentjes* [1988] ECR 4635 21.

ment are that effective competition is expected firstly to remove barriers that prevent new players from entering the market, secondly to benefit contracting entities which will be able to choose from among more tenderers and, thus, will be more likely to obtain value for money, and, finally, to help maintain the integrity of procurement procedures as such.[13] Consequently, it is submitted that EU public procurement rules and their interpreting case law have established with pristine clarity that this body of regulation has the promotion of effective competition as one of its fundamental goals.

In my opinion, the pursuit of this primary objective has generated or resulted in the emergence of a *competition principle* that underlies and guides (or, in my opinion, should guide)[14] the rules and regulatory options adopted by the EU public procurement system in trying to achieve the objective of effective competition in public procurement markets (on the specific contours of this principle, see below §II.B).[15] Such a principle has now been consolidated in article 18(1) of Directive 2014/24, which in my view constitutes a mere incremental step in the development of the EU system of procurement rules (for discussion, see below §III). To be sure, the distinction between the competition *goal* persistently and emphatically stressed by the EU directives and their interpreting case law, and the ensuing competition *principle* hereby identified might to some seem blurry, since they largely imply each other or, in other terms, *hold a biunivocal or interconnected relation*. The close link between the objective and the principle is acknowledged and, for the analytical purposes of this study, the principle of competition will be understood and referred to as the 'translation' or 'materialisation' of the competition goal clearly and undoubtedly pursued by the EU directives.[16]

References to the principle of competition have often been phrased using different terminology—such as *free* competition,[17] *undistorted* competition,[18] *effective* competition,[19]

[13] Opinion of AG Poiares Maduro in Case C-250/07 *Commission v Greece* 11 and 17. Similarly, C Bovis, 'Developing Public Procurement Regulation: Jurisprudence and Its Influence on Law Making' (2006) 43 *Common Market Law Review* 461, 464; and S Simone and L Zanettini, 'Appalti pubblici e concorrenza' in L Fiorentino (ed) *Lo Stato compratore. L'acquisto di beni e servizi nelle pubbliche amministrazioni* (Bologna, Il Mulino, 2007) 119.

[14] *Contra* S Arrowsmith, 'The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies' (2011–12) 14 *Cambridge Yearbook of European Legal Studies* 1-47, who considers that this position '[w]hile apparently supported by some statements in the jurisprudence these are based on misunderstanding and such a broad interpretation … represents unwarranted judicial reorientation of the directives' rules'. In my view, and despite the strong criticism adopted by Professor Arrowsmith, that is not the case. Not least, because art 18(1) Dir 2014/24 has now consolidated such a 'properly developed' principle of competition. For an expanded discussion, see below §III. See also P Kunzlik, 'Neoliberalism and the European Public Procurement Regime' (2012–13) 15 *Cambridge Yearbook of European Legal Studies* 283, esp 312–56, who claims to hold a third view on the principle of competition, but actually does not.

[15] Similarly, it has been stressed that EU public procurement rules are based on the principles of a free market economy and, most notably, that the 'opening of contracts to competition' is the link between public procurement law and competition law; M Guibal, 'Droit public des contrats et concurrence: le style européen' (1993)15 *Semaine Juridique* 161.

[16] It is submitted that reaching a more precise or clear-cut distinction between the competition goal and the competition principle embedded in the EU directives is unnecessary for the purposes of the study.

[17] Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233 76; and Joined Cases T-485/93, T-491/93, T-494/93 and T-61/98 *Dreyfus* [2000] ECR II-3659 65–67.

[18] Case C-454/06 *Pressetext Nachrichtenagentur* [2008] ECR I-4401 31 and 79; and Case C-480/06 *Commission v Germany* [2009] ECR I-4747 47.

[19] Joined Cases C-147/06 and C-148/06 *SECAP* [2008] ECR I-3565 29; and Joined Cases C-21/03 and C-34/03 *Fabricom* [2005] ECR I-1559 26.

genuine competition,[20] *healthy* competition,[21] *elimination of restrictions to* competition,[22] or competition *tout court*[23]—and cross-references to previous findings sometimes use different wordings to refer to the principle of competition,[24] which might generate a debate on the possible existence of different competition principles or concepts in EU law. However, it is submitted that this debate seems to be largely formal and potentially misleading, and it is argued that these terminological differences should not obscure the fact that these different mentions were clearly intended to stress that *the EU public procurement regime holds a direct and particularly close link with the principle of competition as a general principle of EU law*.[25] Hence, in my view, all such references directly refer to that general principle, regardless of their specific phrasing or wording.[26] Therefore, in what follows, reference will be made simply to the 'competition principle', without further ado.[27]

It should also be acknowledged that the principle of competition had remained largely implicit both in public procurement regulations and in their interpreting case law, but it seemed to be receiving an increasing degree of attention in the enforcement of the EU

[20] Case C-399/98 *Ordine degli Architetti* [2001] ECR I-5409 52; and Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233 34.

[21] Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233 57 (which, as indicated above n 17 and n 20, also makes reference to *free* and *healthy* competition, in another instance of terminological interchangeability; see below n 24).

[22] Opinion of AG Poiares Maduro in Case C-250/07 *Commission v Greece* 11 and 17.

[23] Opinion of AG Stix-Hackl in Case C-247/02 *Sintesi* 32–33.

[24] See, eg: Opinion of AG Léger in joined cases C-21/03 and C-34/03 *Fabricom* 4, where the Advocate General refers to the 'principle of *free* competition' and quotes Case 103/88 *Costanzo* [1989] ECR 1839 18, whereas the literal rendering of the finding of the ECJ in that case referred to 'the development of *effective* competition in the field of public contracts'. Some paragraphs later, AG Léger stresses that 'the directives on public contracts … aim to promote the development of *effective* competition' (*Fabricom* Opinion, 22), and returns to the initial nomenclature shortly after, by underlining 'that general principles, such as *free* competition, equal treatment and non-discrimination, are applicable to the award of public contracts' (ibid 25). Eventually, AG Léger adopts a third terminology, referring to the fact that certain provisions of the EU directives on public procurement are designed 'to prevent … harm to *fair* competition' (ibid 33; all emphases added). It is submitted that this should be taken into consideration, at least as anecdotal evidence of the fact that terminology might not have always been used very precisely in referring to the principle of competition—or has, simply, been used interchangeably as a matter of style—and that, at the same time, this is largely irrelevant from an analytical perspective, since all these terms refer to one and the same principle: *the principle of competition as a general principle of EU law*.

[25] As already mentioned, the existence of this general principle of competition in EU law has been expressly recognised by the EU judicature, see Case 240/83 *Waste oils* [1985] ECR 531 9; Case 249/85 *Albako* [1987] ECR 2345 16; Case C-126/97 *Eco Swiss* [1999] I-3055 36–37; and Case C-453/99 *Courage and Crehan* [2001] ECR I-6297 20–21. See also T Tridimas, *The General Principles of EU Law*, 2nd edn (Oxford, Oxford University Press, 2006) 5; and O Odudu, *The Boundaries of EC Competition Law: The Scope of Article 81* (Oxford, Oxford University Press, 2006) 9.

[26] Terminological differences surrounding the principle of competition seem to mirror the same issues concerning the concept of competition or the objectives of competition law (see above chapter three). Nonetheless, in my view, they are largely irrelevant, since all these terms are clearly to be understood as referring to the general principle of competition contained in the TFEU; see Case C-95/04 P *British Airways* [2007] ECR I-2331 106 and 143.

[27] This terminology is not uncommon amongst public procurement scholars, who refer to the principle of competition, without further qualification. See, eg S Arrowsmith, 'Framework Purchasing and Qualification Lists under the European Procurement Directives' (part 1) (1999) 8 *Public Procurement Law Review* 115, 142–43 and 145; PA Trepte, *Regulating Procurement. Understanding the Ends and Means of Public Procurement Regulation* (Oxford, Oxford University Press, 2004) 131; Bovis (n 13) 461 and 466; GA Benacchio and M Cozzio, 'Presentazione' in id (eds), *Appalti pubblici e concorrenza: La difficile ricerca di un equilibrio* (Trento, Universita degli studi di Trento, 2008) 2; or JM Gimeno Feliú, *El control de la contratación pública. Las normas comunitarias y su adaptación en España* (Madrid, Civitas, 1995) 46–57; and id, *La nueva contratación pública europea y su incidencia en la legislación española: La necesaria adopción de una nueva Ley de Contratos Públicos y propuestas de reforma* (Madrid, Civitas, 2006) 45–47.

public procurement regime throughout the last decade.[28] Even if, arguably, it has not yet been explicitly applied, nor fully enforced by the EU judicature—in part because some of the issues that directly concern the competition principle have been addressed by the EU judicature in the light of the more general principle of equal treatment or non-discrimination (see below §III and §IV.A)[29]—such a competition principle has informed the public procurement case law and has contributed to establishing the proper boundaries for the development of public procurement activities by Member States' contracting authorities. As the ECJ observed, 'all the requirements imposed by Community [public procurement] law must … be applied in such a manner as to *ensure compliance with the principles of free competition* and equal treatment of tenderers and the obligation of transparency'.[30] In short, I consider that the principle of competition has always formed a basic part of public procurement regulation in the EU and constituted one of its fundamentals. This point of view has been consistently shared by several opinions of Advocates General,[31] as well as by an increasing body of scholarly commentary.[32]

To be sure, the 2004 EU public procurement directives did not have EU competition rules as their legal basis—they were, instead, based on the fundamental freedoms and internal market provisions of the Treaty (arts 53(2), 62 and 114 TFEU (ex arts 47(2), 55 and 95 TEC)—and did not serve the purpose of implementing article 101 TFEU or any other competition provision of the TFEU.[33] However, EU public procurement rules are based on the same core principles as EU competition rules, promote the same type of economic competition and the same final goals, and have specific implications for competition policy.[34] It is fitting to recall here a statement by the ECJ to the effect 'that the

[28] See, eg, the fact that the principle of competition has been raised as a guiding interpretative element in recent cases before the ECJ, such as Case C-213/07 *Mikhaniki* [2008] ECR I-9999 24; or in Joined Cases C-147/06 and C-148/06 *SECAP* [2008] ECR I-3565 6 and 16. See also Case C-538/07 *Assitur* [2009] ECR I-4219; Case C-305/08 *CoNISMa* [2009] ECR I-12129; and Case C-159/11 *Ordine degli Ingegneri della Provincia di Lecce and Others* [2012] pub electr EU:C:2012:817; *cf* Case C-358/12 *Consorzio Stabile Libor Lavori Pubblici* [2014] pub electr EU:C:2014:2063, although it is submitted that the argument was faulty.

[29] This approach has been shared by the courts of Member States. For instance, the French Conseil Constitutionnel has refused to issue express opinions on the competition implications of public procurement processes and has limited the discussion to equality terms; see JF Brisson, *Les fondements juridiques du droit des marchés publics* (Paris, Imprimerie Nationale, 2004) 103–04. However, the French Conséil d'État has adopted a more competition-oriented approach and has recognised expressly that undistorted competition is an emergent principle clearly distinguished from the principle of non-discrimination (id, 190–92).

[30] Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233 76 (emphasis added).

[31] See: Opinion of AG Stix-Hackl in Case C-247/02 *Sintesi* 32–33. Along the same lines, see Opinion of AG Poiares Maduro in Case C-250/07 *Commission v Greece* 11 and 17; Opinion of AG Stix-Hackl in Case C-532/03 *Commission v Ireland* 73; Opinion of AG Kokott in Case C-220/05 *Auroux* 43, 50, 63–64, 66 and 79; Opinion of AG Poiares Maduro in Joined Cases C-226/04 and C-228/04 *La Cascina and others* 26; and Opinion of AG Cosmas in Case C-107/98 *Teckal* 48 and 65.

[32] Bovis (n 10) 461 and 466. See also J-P Colin and M Sinkondo, 'Principe de non-discrimination et protection de la concurrence en Droit international et en Droit communautaire' (1993) 364 *Révue du marché commun et de l'Union Européenne* 36, 55; Guibal, Droit public des contrats et concurrence (1993) 161; G Clamour, *Intérêt général et concurrence. Essai sur la pérennité du droit public en économie de marché* (Paris, Dalloz, 2006) 315–20 and 329–32; C Cabanes and B Neveu, *Droit de la concurrence dans les contrats publics. Pratiques anticoncurrentielles, abus de position dominante, controls et sanctions* (Paris, Le Moniteur, 2008) 69; M Garcés Sanagustin, 'Contratación en el sector público y competencia: Incidencia práctica de la entrada en vigor de la Ley 30/2007, de 30 de octubre, de Contratos del Sector Público' (2008) 3 *Revista de Derecho de la competencia y la distribución* 119, 120; Simone and Zanettini (n 13) 136; and Benacchio and Cozzio (n 27) 2.

[33] Case C-247/02 *Sintesi* [2004] ECR I-9215 28–30. *Cf* Simone and Zanettini (n 13) 128.

[34] See: Trepte (n 3) 40; RH Folsom, *Principles of European Union Law* (St Paul, Thomson-West, 2005) 285–86; and MM Razquin Lizarraga, *Contratos públicos y Derecho comunitario* (Elcano, Aranzadi, 1996) 36–38.

Community rules on public procurement were adopted in pursuance of the establishment of the internal market, in which freedom of movement is ensured and restrictions on competition are eliminated'.[35] Even further, public procurement rules seek to ensure effective competition in procurement markets and are guided by a strong pro-competitive rationale (above chapter three). Therefore, it was submitted that the principle of competition had to be expressly recognised as one of the fundamental principles of EU public procurement law (as is now the case in art 18(1) Dir 2014/24, below §III). Admittedly, the EU judicature has had several opportunities to declare in more explicit terms the existence of the competition principle[36]—but has only made direct and express reference to that principle *nominatim* in very limited occasions.[37] Nonetheless, it is submitted that the apparent reluctance of the ECJ to adopt a more emphatic or explicit approach to the existence of a competition principle embedded in the EU public procurement directives should not be granted substantial interpretative weight, for two reasons. First, there is no trace of denial or limitation of that principle in the EU case law—to the contrary, it is continually used as a strong argument by Advocates General in their opinions[38] and, in my view, the ECJ has not signalled in any significant way a departure or rejection of the general principle. Remarkably, the ECJ has not tackled such open declarations as those indicating that the EU procurement rules' objective of coordinating the procedures for the award of public contracts in the Member States 'is nothing more than an instrument for the achievement of a more important objective, namely, the *development of effective competition in the sector*, in the interests of establishing the fundamental freedoms in European integration'.[39] Second, when as hereby submitted, it is understood as the 'translation' or 'specification' of the competition objective consistently stressed by the ECJ case law, there seems to be limited need for a separate acknowledgement of the existence of the competition principle—as it is submitted that it logically follows or stems from the existence of the competition objective of public procurement directives, repeatedly emphasised in very clear terms.[40]

In light of the above and as already pointed out, it seems clear that *the principle of undistorted or free competition has always formed a basic part of EU public procurement rules, that it constitutes one of its fundamentals, and that it offers a proper legal basis upon which to build the basic elements of a more pro-competitive public procurement system*. The boundaries of the competition principle, as developed prior to the approval of Directive 2014/24 will now be explored. A critical assessment of the consolidation of the principle in article 18(1) of Directive 2014/24 against that benchmark will follow (§III).

[35] Case C-538/07 *Assitur* [2009] ECR I-4219 25; Case C-412/04 *Commission v Italy* [2008] ECR I-619 2. See also Opinion of AG Trstenjak in Case C-271/08 *Commission v Germany* 94.

[36] Notably, in the Case C-247/02 *Sintesi* [2004] ECR I-9215, after having been presented with the very elaborate construction of the Opinion of AG Stix-Hackl in Case C-247/02 *Sintesi* (below §II.B).

[37] Remarkably, see Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233 76, where express reference is made to the *principle* of free competition. See also Case C-237/99 *Commission v France* [2001] ECR I-939 49; and Case T-258/06 *Germany v Commission* [2010] ECR II-2027 131.

[38] See the multiple references above n 31.

[39] Opinion of AG Ruiz-Jarabo Colomer in Case C-393/06 *Ing Aigner* 31 (emphasis added).

[40] *Contra* Arrowsmith (n 14) 32, who considers that '[i]t seems significant that while non-discrimination, transparency and equal treatment were written into the directives as general principles, [its] 'competition' provisions are confined to specific areas'.

B. Delimiting the Competition Principle Embedded in the pre-2014 EU Public Procurement Directives

According to its most elaborated construction so far—developed by Advocate General Stix-Hackl in her Opinion in the *Sintesi* case[41]—the competition principle embedded in the EU public procurement directives might seem to be multi-faceted and could potentially fulfil at least three protective purposes. First, it would be aimed at relations between undertakings themselves and would require that there exists parallel competition between them when they participate in the tendering for public contracts. Second, it would be concerned with the relationship between the contracting authorities and the tendering undertakings, in particular in order to avoid abuses of a dominant position—both by undertakings against the contracting authorities (ie, through the exercise of market or 'selling' power) and, reversely, by contracting authorities against public contractors (through the exercise of buying power). Third, the principle of competition would be designed to protect competition as an institution.[42] Finally, as a complement to the previous functions or as an expression of the competition principle, EU public procurement directives set particular rules that operationalise the competition principle in different phases of the public procurement process—such as transparency rules, rules on technical specifications, provisions on the selection of undertakings and on the criteria for the award of contracts, information disclosure rules, etc.

Even if the approach followed by Advocate General Stix-Hackl is to be shared in general terms and the competition principle embedded in the EU public procurement directives is to be conceived of as an independent principle[43] and spelled out in broad terms, a closer examination seems to indicate that, of the three stated functions of the competition principle in the public procurement arena, only the latter is of distinguishing relevance. This is so because the other two stated functions of the competition principle are neither more nor less than the standard application of EU competition rules in the public procurement setting. On the one hand, article 101(1) TFEU requires parallel competition between undertakings not only when they respond to a call for tenders, but generally in any market situation. Moreover, the application of the general prohibition of collusive behaviour should not be any different here than in other markets—ie, the *de minimis* rule for agreements between competitors,[44] potential efficiency exemptions according to article

[41] Opinion of AG Stix-Hackl in Case C-247/02 *Sintesi* 34–40.

[42] This same concept of 'competition as an institution' has been referred to as the goal of art 102 TFEU; see Opinion of AG Kokott in Case C-95/04 P *British Airways* 125. See also Opinion of AG Ruiz-Jarabo Colomer in Joined Cases C-468/06 to C-478/06 *GlaxoSmithKline* 74 fn 49.

[43] Opinion of AG Léger in Case C-94/99 *ARGE* 95 fn 36.

[44] But see: Cabanes and Neveu (n 32) 32, who report that French domestic competition law—art L 464–6–1 of the Code du commerce—expressly excludes the applicability of the *de minimis* rule to agreements between undertakings when public contracts are affected. Arguably, this restriction of the *de minimis* regime—or, put differently, this expansion or toughening of the enforcement of the prohibition of art 101(1) TFEU in the field of public procurement could go against art 3(2) of Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 which requires that Member States completely align with EU competition law as regards collusive behavior. It is submitted that, in general terms, Member States cannot establish more demanding requirements for the enforcement of art 101(1) TFEU or their national equivalents in the field of public procurement and, consequently, all rules (including *de minimis*) need to be aligned with EU law. However, this is an issue that has been significantly blurred after the Case C-226/11 *Expedia* [2012] pub electr EU:C:2012:795. See also Communication from the

101(3) TFEU, block exemption regulations, and so forth are fully applicable to undertakings' developing activities in a public procurement context. On the other hand, and as long as the prohibitions of article 102 TFEU are applicable to tenderers or to contracting authorities,[45] the abuse of a dominant position will be proscribed and prosecuted exactly under the same circumstances in the public procurement arena as in any other type of market. Therefore, it is submitted that *only what has been termed 'protection of competition as an institution' constitutes the proper content for the competition principle embedded in EU public procurement law*—since currently there is no specific competition rule that develops that function with a general character (above chapter four, §V).

By 'protection of competition as an institution', it is submitted that direct reference is made to the general objective of the TFEU of guaranteeing a system ensuring that competition in the internal market is not distorted and, more generally, to the ensuing general principle of competition.[46] In my opinion, such a reference should currently be interpreted in relation to article 3(3) TEU, article 3(1)(b) TFEU and Protocol (27) TFEU[47]—ie, EU public procurement directives should be conceived of and configured as a body of rules developed on the basis of the principle of undistorted competition in the internal market. Or, more clearly, it is submitted that *the competition principle embedded in the EU public procurement directives is no more and no less than a particularisation, or specific enunciation, of the more general principle of competition in EU law*. In this way, the relevance of the competition principle in the field of public procurement is stressed, since its inclusion amongst the basic principles of public procurement regulation seems to imply the existence of a stronger link of this body of regulation to this general principle of EU law than in the case of other regulatory bodies. It is submitted that placing the principle of competition at the basis of the EU public procurement rules reinforces its importance. The justification for this emphasis or reinforcement of the principle of competition in the sphere of public procurement can be found in the fact that EU public procurement rules were developed right from the beginning on the basis of the clear finding that they were necessary to create competition in a setting that initially suffered from an almost complete lack of it (above chapter three). Therefore, the clear competition objective guiding public procurement rules (above §II.A) and the ensuing obligation of contracting authorities to *protect* competition as an institution—if not to *develop* competition in the public procurement

Commission, Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union [2014] OJ C291/1, and Commission Staff Working Paper, Guidance on restrictions of competition 'by object' for the purpose of defining which agreements may benefit from the De Minimis Notice (SWD(2014) 198 final).

[45] AG Stix-Hackl correctly points out that this would be particularly the case of contracting authorities who must be classified as 'undertakings' for the purposes of competition law; see Opinion of AG Stix-Hackl in Case C-247/02 *Sintesi* 35. It is hereby recalled and stressed that this could be the case for all the other contracting authorities as well (see above chapter four).

[46] The reasoning would be analogous to that maintained by the EU judicature in relation to the principle of equal treatment, which 'has likewise explained that the principle of non-discrimination in public procurement is a specific enunciation of the eponymous general principle of Community law', Opinion of AG Sharpston in Case C-199/07 *Commission v Greece* 82. In that regard, see Case C-458/03 *Parking Brixen* [2005] ECR I-8585 48; and Case 810/79 *Überschär* [1980] ECR 2747 16. Along the same logical lines, it is hereby submitted that the principle of competition in public procurement is a specific enunciation of the eponymous general principle of EU law—see Case 240/83 *Waste oils* [1985] ECR 531 9, and other references quoted above n 25.

[47] See: Case C-95/04 P *British Airways* [2007] ECR I-2331 106 and 143. For discussion on the implications of the ratification of the Treaty of Lisbon, see above chapter four, §IV.D.

field—was synthesised in the principle of competition embedded in EU public procurement directives (and now consolidated in art 18(1) Dir 2014/24, below §III).

In furtherance to the above, it is worth emphasising that the competition principle embedded in EU public procurement directives has two dimensions. In its *positive dimension*, public procurement rules are guided by a fundamental competition principle in that they are designed to abolish protectionist purchasing practices by Member States that result in a segmentation of the internal market and, consequently, to foster transnational competition for public contracts, as well as increased domestic competition for the same contracts.[48] This has been the 'classical' or 'narrow' conception of the competition requirements and goals of EU public procurement rules—which has read the requirement to open public procurement up to competition as strictly requiring an increase in the number of bidders, mainly due to increased cross-border competition. This view is intrinsically related to non-discrimination requirements (particularly as regards discrimination on the grounds of nationality), and presents a strong link with the objective of market integration that has constantly informed the design and enforcement of EU public procurement directives (above chapter three, §IV.E). However, it is submitted that this positive approach to the competition principle does not comprise all its implications in the public procurement arena, since the principle requires promotion of undistorted competition in public procurement, not merely fostering bidders' participation.

Possibly of a greater relevance—although so far less explored—is an envisageable *negative dimension* of the competition principle embedded in EU public procurement directives. From this perspective, competition requirements should be understood as determining that public procurement rules have to be designed and implemented in such a way that existing competition is not distorted.[49] In other words, it is submitted that public procurement rules cannot generate distortions in the dynamic competitive processes that would take place in the market in their absence. Or, even more clearly, public procurement rules must not distort competition between undertakings.[50] This fundamental competition principle embedded in the public procurement directives could be defined or phrased in these terms: *public procurement rules have to be interpreted and applied in a pro-competitive way, so that they do not hinder, limit, or distort competition. Contracting entities must refrain from implementing any procurement practices that prevent, restrict or distort competition.*

It is further submitted that this mandate must be considered a well-defined obligation to all Member States' contracting authorities, and not a mere programmatic declaration of the EU public procurement directives. As has been rightly stressed, the evolution of the EU directives on public procurement has progressively reduced the area of discretion left to Member States,[51] and consequently the general principles and mandates contained in the EU public procurement directives should suffice to constrain effectively Member

[48] This is the part of the competition requirement accepted both by Arrowsmith (n 14) and Kunzlik (n 14). However, both of them reject the second dimension of the principle as presented here.

[49] Again, as the ECJ has repeatedly declared, and AG Poiares Maduro stressed recently, the directives have the common aim of eliminating anti-competitive practices in public procurement; Opinion of AG Poiares Maduro in Case C-250/07 *Commission v Greece* 11 and 17, and other references above n 13.

[50] As already mentioned (above §II.A), this is clear, inter alia, from the fact that arts 29(7), 32(2), 33(7) and 54(8) Dir 2004/18/EC and arts 14(4), 15(7) and 56(9) Dir 2004/17/EC expressly prohibit contracting authorities from resorting to these types of contracts and procedures if that would result in a limitation or distortion of competition.

[51] See: S Arrowsmith, 'The Past and Future Evolution of EC Public Procurement Law: From Framework to Common Code?' (2005–06) 35 *Public Contract Law Journal* 337, 338 and 352ff.

States' purchasing behaviour, or to substantiate a declaration of their breach of EU law if they behave otherwise. Hence, from this negative perspective, public procurement rules and practices need to be measured with the yardstick of the competition principle to ensure that they do not result in restrictions of competition or, in other terms, that they do not generate the effects that competition law seeks to prevent. In the end, as was clearly stated, 'the principle of competition is designed to protect competition as an institution'.[52] This issue raises the need to clarify the relationship between 'general' EU competition law and the EU public procurement directives as a final step prior to the critical assessment of the formulation of the principle of competition in article 18(1) of Directive 2014/24.

C. The Link between the Competition Principle Embedded in the pre-2014 EU Public Procurement Directives and General EU Competition Law

It has already been mentioned that the principle of competition embedded in the EU public procurement directives makes direct reference to the basic TFEU objective of guaranteeing a system ensuring that competition in the internal market is not distorted and to the ensuing general principle of competition in EU law (above §II.B). Consequently, an apparent link between the competition considerations within the public procurement field and 'general' EU competition rules emerges—since both ultimately share the same goal and must be shaped in conformance with the same general principle. Hence, clarifying the nature of that relationship will prove helpful to gain a better understanding of the interrelationships of public procurement and competition law, as well as a better understanding of the possibilities of pursuing parallel or simultaneous developments in both areas as regards the market behaviour of the public purchaser.

Apparently, this link could be configured as a relationship of speciality, by virtue of which public procurement could be conceptualised as *lex specialis* establishing the competition rules applicable in this sector of economic activity. However, it is submitted that this is not the proper understanding of the relationship that links public procurement and competition law together. First and foremost, the enforcement of public procurement law does not preclude the enforcement of competition law, it cannot alter the content or modify the prohibitions established by competition rules—which is one of the general traits present in bodies of rules tied together by a relationship of speciality (*lex specialis derogat legi generali*). Secondly, public procurement rules are generally open-ended and can potentially give rise to both competitive and anti-competitive results (see above chapter two and below chapter six). Consequently, they will often give rise to situations in which the protection of undistorted competition will require resorting to general competition rules and criteria. Finally, EU public procurement rules are not of a general character, but focus on a number of very specific phases of the tender and award process, as well as some limited aspects of the execution and termination of public contracts, which could be insufficient to rein in competition-distorting practices related to aspects not covered by the EU public procurement directives. Therefore, public procurement rules seem insufficient to become an *alternative* to competition rules and a different type of relationship

[52] Opinion of AG Stix-Hackl in Case C-247/02 *Sintesi* 36.

seems more adequate to conceptualise properly the existing link between competition and public procurement.

In my opinion, competition and public procurement remain largely *complementary* and provide each other with useful interpretative criteria. Moreover, an adequate enforcement of each of these sets of economic regulation reinforces the effects of the other. On the one hand, a public procurement system properly based on the competition principle can complement current competition rules and tackle certain types of publicly-generated competition distortions that are not captured by current EU competition law (above chapter four). On the other hand, the criteria and tools of analysis usually applied in the enforcement of competition law can inform and guide the concrete application of the competition principle through more specific public procurement rules. Therefore, the competition principle embedded in public procurement directives should be understood as the necessary link for the approximation and consistent development of both sets of economic regulation, or as the gateway through which principles and criteria generally related to the protection of undistorted competition in 'non-public' markets (*rectius*, in relation with non-public buyers) can be brought to life in public procurement markets to discipline the purchasing behaviour of the public buyer (further details below, conclusions to part three).

III. The Principle of Competition Consolidated in Article 18(1) of Directive 2014/24: A Critical Assessment of the Interpretative Difficulties it Creates

As already mentioned, article 18(1) of Directive 2014/24 has now consolidated the *principle of competition* amongst the general 'principles of procurement' and clearly indicates that '[t]he design of the procurement shall not be made with the intention … of artificially narrowing competition' and that 'competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators'. In my view, this is an incremental step in the pro-competitive approach to the regulation of EU public procurement and it follows to a large extent the proposal advanced in the first edition of this book.[53] It is true that the wording of this provision could have been clearer and that there are significant interpretative questions that need being addressed (which will be explored shortly), but it should be acknowledged that article 18(1) of Directive 2014/24 stresses the relevance of competition considerations in the public procurement setting across the board and provides an interpretative tool that is likely to further develop the pro-competitive orientation of the system of EU public procurement rules in the coming years. In my view, this is a truly welcome development, and not only because it clearly supports the ideas and approach developed in the first edition of this book and now further refined in this second edition.

[53] It should also dispel at least part of the criticism that such a proposal received, particularly from Arrowsmith (n 14) 32.

That being said, it is quite evident that article 18(1) of Directive 2014 creates two sources of interpretative difficulty. Firstly, it promotes the conflation of competition and corruption issues related to unequal treatment by setting an irrebuttable presumption of competition distortion where discrimination has taken place (§III.A). Secondly, article 18(1) of Directive 2014/24 provides a formulation of the principle of competition that includes a subjective element by requiring that there be an *intention* to artificially narrow competition (§III.B). An excessively formal interpretation of these new elements could run the risk of deactivating and neutralising the principle of competition. At the other extreme, an excessively lenient interpretation of the principle could result in an improper test of proportionality or reasonableness of the procurement decisions taken by the contracting authorities. And, in any case, a divergent interpretation of the principle and its requirements in different Member States could result in distortions of the level playing field for the enforcement of the EU public procurement directives.

Therefore, this section tackles both of these interpretative difficulties and aims to propose an interpretation that results in an *effective* tool for the shaping of a competition-oriented procurement system around the general principle of competition. It is important to stress that, in any case, the interpretation of the principle should comply with the general requirements derived from the (pre)existence of competition as a general principle of EU law[54] and the limits imposed by article 4(3) TEU on the adoption of any sorts of state activity that may diminish the *effet utile* of the competition rules in articles 101 to 109 TFEU (see chapter four).

A. The Problematic Conflation of Competition and Corruption Issues Related to Unequal Treatment

As briefly mentioned, the first interpretative difficulty derives from the fact that, by setting a presumption that competition is 'artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators', article 18(1) of Directive 2014/24 exacerbates the potential difficulties in disentangling competition and corruption and non-discrimination considerations. Before engaging in any other considerations, it is worth remembering that this presumption of distortion of competition did not exist in the original text of the 2011 proposal of the European Commission for a new procurement directive, which clearly separated competition and discrimination issues by clearly stating that

> Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate way. *The design of the procurement shall not be made with the objective* of excluding it from the scope of this Directive or *of artificially narrowing competition*.[55]

[54] See Case 240/83 *Waste oils* [1985] ECR 531 9; Case 249/85 *Albako* [1987] ECR 2345 16; Case C-126/97 *Eco Swiss* [1999] I-3055 36–37; and Case C-453/99 *Courage and Crehan* [2001] ECR I-6297 20–21. And further references in n 25 above.

[55] See European Commission, *Proposal for a Directive of the European Parliament and of the Council on public procurement* (COM(2011) 0896 final), art 15 (emphasis added), available at eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52011PC0896.

This formulation, which would have avoided all problems derived from the conflation of different issues related to the enforcement of the principle of equal treatment and the principle of competition (as advocated here, below §V), evolved during the negotiations of what ended up being Directive 2014/24 and, in a compromise text of July 2012, was drafted in a way that suppressed the principle of competition from the equivalent provision and, instead, included provisions more clearly oriented towards the fight of corruption and the prevention of discrimination:

> Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner that *avoids or remedies conflicts of interest and prevents corrupt practices*. The design of the procurement shall not be made *with the intention of* excluding it from the scope of this Directive or of *unduly favouring or disadvantaging certain economic operators or certain works, supplies or services*.[56]

Negotiations continued and, in the end, in the compromise text of July 2013 that fundamentally crystallised the text of what is now Directive 2014/24, the general principles had been redrafted in a way that reintroduced the principle of competition, minimised the references to corrupt practices and conflicts of interest, and created the 'hybrid' presumption of distortion of competition based on unequal treatment that now remains in article 18(1) of Directive 2014/24:

> Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner. *The design of the procurement shall not be made with the intention* of excluding it from the scope of this Directive or *of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement was made with the intention of unduly favouring or disadvantaging certain economic operators*.[57]

Leaving aside the substitution of the element of 'intention' for the previous mention of the existence of an 'objective' to artificially narrow competition or unduly discriminate (below, §III.B), it is worth stressing that the presumption of competitive distortion based on 'unduly favouring or disadvantaging certain economic operators' seems to be a result of the deficient legislative technique that plagues EU legislation.[58]

Not surprisingly, this presumption raises a potential problem of (logical) 'capture' for the interpreters of this rule, as they may be tempted to consider that in the absence of (undue!) favouritism or corruption, no restrictions on competition are contrary to the precept—that is, they can be inclined to decide not to apply the 'residual' or 'general' part of the prohibition and limit it exclusively to cases covered by the presumption. Additionally, while it is true that most cases of favouritism or corruption will result in a restriction of competition, this is not always necessarily the case. For example, in cases where the beneficiary of favouritism could be awarded the contract under competitive conditions, or in cases in which corrupt practices are added to previous restrictions of competition created by the bidders active in the market; it could be argued that there is no

[56] See the Council compromise text of 24 July 2012 (2011/0438 (COD)) art 15 (emphasis added), available at register.consilium.europa.eu/doc/srv?l=EN&f=ST%2012878%202012%20INIT.

[57] See the Council compromise text of 12 July 2013, art 15 (emphasis added), available at europarl.europa.eu/document/activities/cont/201309/20130913ATT71292/20130913ATT71292EN.pdf.

[58] For a critical reflection on this not so new problem, see H Xanthaki, 'The Problem of Quality in EU Legislation: What on Earth Is Really Wrong?' (2001) 38 *Common Market Law Review* 651–76.

(independent) restriction of competition and, therefore, that the presumption is unnecessary or unjustified.

In any case, it is worth stressing that some of the instances of favouritism included in the irrebuttable presumption would (also) be covered by the new rules relating to conflicts of interest envisaged in article 24 of Directive 2014/24 (which requires Member States to 'ensure that contracting authorities take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures *so as to avoid any distortion of competition* and to ensure equal treatment of all economic operators' emphasis added), and can even fit into one of the headings of mandatory exclusion of tenderers and candidates in article 57(1)(b) for corruption, as supplemented by the obligation to terminate the contract under article 73(b) of Directive 2014/24 (see chapter six). Therefore, the establishment of the presumption of anti-competitive intent in cases of favouritism or discrimination is, in my opinion, unnecessary and may be counterproductive.

Ultimately, it will be necessary for the bodies responsible for the implementation of these provisions to clearly distinguish instances of corruption from those of (simple) restriction of competition and, in the latter scenario, apply the first part of the principle of competition in an 'objectified' manner (as advocated below §III.B). The difficulties in disentangling competition concerns from other sort of breaches of the principle of non-discrimination are also further discussed below (§V), but suffice it to indicate here that the establishment of this presumption should not affect the interpretation of the more general principle of competition, as it simply specifies one of the potential situations in which competition can be distorted.

B. The Introduction of a Subjective Element of 'Intention' and the Need to 'Objectify' It

As also mentioned in passing, the second interpretative difficulty derives from the substitution of 'objective' elements with 'intentional' requirements in the drafting of the principle of competition during the legislative process leading up to the approval of Directive 2014/24. Remarkably, and with potentially larger implications for a limited interpretation and application of the principle of competition, article 18(1) of Directive 2014 has included an *apparently subjective element of intention in the generation of an artificial reduction of competition*.

Indeed, as already mentioned, article 18(1) of Directive 2014/24 provides a formulation of the principle of competition in which the subjective or intentional element of any restriction of competition is emphasised: 'The design of the procurement shall not be made *with the intention of* … artificially narrowing competition' (emphasis added). This intentional element is common to different language versions of the Directive ('intención' in Spanish, 'intention' in French, 'intento' in Italian, 'intuito' in Portuguese or 'Absicht' in German), so cannot be justified as a deficiency in translation or an error in the wording of the provision. However, the recitals of the directive do not provide any clarification and, ultimately, this provision can open the door to complex problems of identification and attribution of intentional elements in the field of public procurement—or, more generally, in administrative (economic) law.

In my opinion, if it was to be carried out with the purpose of preserving the subjective or intentional element derived from a literal reading of the provision, this very complex task could require establishing the parameters by which a decision that often involves various individuals (and potentially several administrative bodies) is considered affected by an underpinning anti-competitive (or discriminatory) intention. In fact, this task is virtually impossible. Given that the traditional mechanisms of allocation of subjective factors in (administrative) disciplinary or criminal law are not easily (or at all) applicable to this sort of decision-making processes, this clearly requires an 'objectifying' reinterpretation of the intentional element in the provision. As has rightly been pointed out, not only in public procurement but more generally, 'important decisions within the spheres of economic and social law are taken by governments, companies or other collective or non-natural decision-makers. To speak of the 'intent' of such bodies is to run the risk of anthropomorphism'; and, consequently, 'it is more common to understand economic and social EU law in terms of effects'.[59] This is the point departure undertaken here.[60]

In short, and bearing all these issues in mind, it is submitted that the only avenue to approach the interpretation and enforcement of article 18(1) of Directive 2014/24 in a *possibilistic and pragmatic manner* is to derive the element of intention to restrict or distort competition (ie, to artificially narrow it) from a *reasonable objective assessment of the concurring circumstances, so that intention is inferred or derived from the effects or consequences of the way in which the procurement procedure is designed and carried out by the contracting authority*. In the end, the context in which the distortions or restrictions of competition take place will be a determinant of their existence and little else identifiable can give meaning to the (implicit) intention of the contracting authority to artificially narrow down competition.

Generally, it is worth stressing that the reasons for the 'objectification' of the wording of article 18(1) of Directive 2014/24 are multiple and derived mainly from the need for coordination of this new rule with some of its 'functional neighbours'. Remarkably, such coordination should take into account the objective character of the restrictions of competition derived from the TFEU and its interpretation by the ECJ. Indeed, the prohibitions in articles 101 and 102 TFEU apply in abstraction from any volitional element of the offending parties—that is, undertakings infringing competition law can be sanctioned without them having 'an intention actually to violate' the applicable rules,[61] and the EU Courts have repeatedly upheld that

> for an infringement of the competition rules to be regarded as having been committed intentionally, it is not necessary for an undertaking to have been aware that it was infringing those rules;

[59] G Davies, 'Discrimination and beyond in European Economic and Social Law' (2011) 18 *Maastricht Journal of European & Comparative Law* 7, 13–14.

[60] This discussion is somehow related to the issue of imputation of criminal liability to corporate entities or, more closely, the imputability of infringements of competition law. On the latter, see WPJ Wils, *The Optimal Enforcement of EC Antitrust Law. Essays in Law & Economics* (London, Kluwer Law International, 2002) 163–87; id, *Efficiency and Justice in European Antitrust Enforcement* (Oxford, Hart Publishing, 2008) 157; and P Whelan, *The Criminalization of European Cartel Enforcement* (Oxford, Oxford University Press, 2014) 86–9 and 108–13. On the imputation of criminal liability to corporate entities, see eg A Foerschler, 'Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct' (1990) 78(5) *California Law Review* 1287–311; and CMV Clarkson, 'Kicking Corporate Bodies and Damning Their Souls' (1996) 59(4) *Modern Law Review* 557–72.

[61] Whelan (n 60) 86.

> it is sufficient that it could not have been unaware that its conduct was aimed at restricting competition.[62]

Hence, a competitive restriction in the market (almost) automatically results in a violation of those prohibitive norms, irrespective of the *actual* intention with which market players have conducted the practice restrictive of competition.[63] The only exception will come where there was clearly no negligence in the oversight of the competition-restricting effects of the given market activity.[64] In that regard, and trying to achieve consistent enforcement standards, it is submitted that the objectification of article 18(1) of Directive 2014/24 seems the most appropriate functional solution—but, it should be acknowledged, it can be seen as lying some distance away from a literal interpretation of the provision.

However, it is submitted that such an objectification of 'intentional element' in article 18(1) of Directive 2014/24 would not be a new or radical approach in the field of public procurement or, more generally, in the enforcement of EU economic law.[65] Indeed, there have been other sorts of prohibition in the public procurement setting that included an 'intentional element', such as the traditional prohibition of calculating the value of the contract in a way that made it remain below the value thresholds that trigger the application of the EU public procurement directives and, ultimately, allowed the contracting authority to avoid them. Indeed, under the applicable rules, it is made clear that '[t]he choice of the method used to calculate the estimated value of a procurement shall not be made *with the intention* of excluding it from the scope of this Directive' (emphasis added) and, in particular, that a 'procurement shall not be subdivided with the effect of preventing it from falling within the scope of this Directive, unless justified by objective reasons' (see art 5(3) of Dir 2014/24 and, previously, art 9(7) Dir 2004/18).

In that regard, it is important to stress that the ECJ departed from the literal wording of the provision, which requires an intentional element in the same way as article 18(1) of Directive 2014/24, and clearly adopted an objective assessment based on the effects and consequences of the contracting authorities' decisions concerning the estimation of the value of contracts that should have been tendered under the applicable EU rules. In a consistent line of case law, the ECJ stressed that the analysis needs to be based on objective elements that create *indicia* of the intentional artificial split of the contract, such as 'the simultaneous issuance of invitations to tender … similarities between contract notices, the initiation of contracts within a single geographical area and the existence of a single

[62] Case T-143/89 *Ferriere Nord v Commission* [1995] ECR II-917 41. This has been repeatedly emphasised. Most recently, in Case T-11/06 *Romana Tabacchi v Commission* [2011] ECR II-6681 227.

[63] This is related to the issue of the prohibitions of restrictions of competition by object. For a recent discussion, see Commission Staff Working Paper, Guidance on restrictions of competition 'by object' for the purpose of defining which agreements may benefit from the De Minimis Notice (SWD(2014) 198 final). See also A Jones, 'Left Behind by Modernisation? Restrictions by Object Under Article 101(1)' (2010) 6(3) *European Competition Journal* 649–76; D Bailey, 'Restrictions of Competition by Object under Article 101 TFEU' (2012) 49(2) *Common Market Law Review* 559–99; and G Bushell and M Healy, 'Expedia: The De Minimis Notice and "By Object" Restrictions' (2013) 4(3) *Journal of European Competition Law & Practice* 224–26.

[64] Case C-26/75 *General Motors v Commission* [1975] ECR 1367.

[65] Indeed, in the area of indirect discrimination, the ECJ was quick to abandon the requirement of intent in order to find breaches of EU economic law. See Case 170/84 *Bilka v Weber von Hartz* [1986] ECR 1607 30, where the ECJ made it clear that the relevant test was whether 'the undertaking is able to show that its pay practice may be explained by *objectively justified factors* unrelated to any discrimination' (emphasis added). See D Schiek, 'Indirect Discrimination', in id, L Waddington and M Bell, *Non-Discrimination Law* (Oxford, Hart Publishing, 2007) 323, 356–57.

contracting authority' all of which 'provide additional evidence militating in favour of the view that, in actual fact, the separate works contracts relate to a single work',[66] which led the GC to stress that

> a finding that a contract has been split in breach of European Union procurement legislation *does not require proof of a subjective intention* to circumvent the application of the provisions contained therein. … Where such a finding has been made, as in the present case, *it is irrelevant whether the infringement is the result of intention or negligence* on the part of the Member State responsible, or of technical difficulties encountered by it.[67]

Indeed, the intentional element has been excluded where, on the basis of such analysis, there were *objective reasons* that justified the decision adopted by the contracting authority.[68] Moreover, the prohibition of artificially splitting the contract with the intention of circumventing the application of the EU procurement rules has been applied directly to determine the incompatibility of legal rules that objectively diminished the applicability of the relevant directives, without engaging in any sort of subjective assessment (which would have been impossible).[69] Therefore, it seems plain to conclude that in the assessment of an identical (apparent) subjective element of intention, the ECJ has 'objectified' the test applicable to determine the existence of an eventual infringement of the EU public procurement directives.

It is true that the ECJ has not gone as far as simply presuming the existence of the intention to avoid the applicability of the EU procurement directives in all cases. As aptly put by Advocate General Trstenjak:

> Although the Court is decidedly strict in its examination of that prohibition, such intention to circumvent cannot be presumed without more. Each individual case in which a contract was split for the purposes of an award *must be examined according to its context and specificities and, in that regard, particular attention must be given to whether there are good reasons* pointing in favour of or, on the contrary, against the split in question.[70]

Broadly speaking, in my opinion and in line with the test derived from the ECJ case law, the 'objectification' of the principle of competition consolidated in article 18(1) of Directive 2014/24 should indeed be carried out by establishing a *rebuttable presumption of restrictive intent* in cases where the tendering procedure has been designed in a manner that is in fact restrictive of competition. The disproval of this rebuttable presumption would require the contracting authority or entity to justify the existence of objective, legitimate and proportionate reasons for the adoption of the criteria restrictive of competition (ie, to provide a plausible justification on objective grounds for the imposition of restrictive conditions of

[66] As stressed very recently, see Case T-384/10 *Spain v Commission* [2013] pub electr EU:T:2013:277 65–68 (appeal pending, Case C-429/13 P), with references to Case C-16/98 *Commission v France* [2000] ECR I-8315; Joined Cases C-187/04 and C-188/04 *Commission v Italy* [2005] pub electr EU:C:2005:652; Case C-220/05 *Auroux and Others* [2007] ECR I-385; and Case C-574/10 *Commission v Germany* [2012] pub electr EU:C:2012:145.

[67] Case T-384/10 *Spain v Commission* [2013] pub electr EU:T:2013:277 95 (emphasis added); with reference to Case C-574/10 *Commission v Germany* [2012] pub electr EU:C:2012:145 49, and Case C-71/97 *Commission v Spain* [1998] ECR I-5991 15.

[68] Case C-411/00 *Swoboda* [2002] ECR I-10567 57–60.

[69] Case C-412/04 *Commission v Italy* [2008] ECR I-619 72–74.

[70] Opinion of AG Trstenjak in Case C-271/08 *Commission v Germany* 165 (emphasis added and references omitted). *Cf* Opinion of AG Jacobs in Case C-16/98 *Commission v France* 38, where the AG stressed that the intentional or subjective element cannot be eliminated, but suggested that the applicable test still lies on whether the decision under assessment can be 'justified on objective grounds'.

competition in tendering the contract, so as to exclude the plain and simple explanation that it was otherwise indeed intended to restrict competition therewith).[71] In other words, if it could be justified that a 'reasonable and disinterested contracting entity' (meaning free from any intent to restrict competition) would have taken the same decision on the design of the tender in a form restrictive of competition, the presumption of restrictive intent would not be applicable and, ultimately, the tender would be compliant with article 18(1) of Directive 2014/24. Obviously, this test requires some further development and the ECJ will most likely have the opportunity to address these issues in the future.

C. Preliminary Conclusion: Towards an Objective Interpretation of the Principle of Competition as Consolidated in Article 18(1) of Directive 2014/24

By way of preliminary conclusion, in view of all the above, it is submitted that the consolidation of the principle of competition in article 18(1) of Directive 2014/24 should be welcomed, but its wording requires two major adjustments designed to ensure its functionality. Firstly, it is necessary to objectify the interpretation and application of the provision and, in my opinion, this should be done by establishing a rebuttable presumption of competition-restrictive intent based on a *reasonable objective assessment of the concurring circumstances*, so that intention is inferred or derived from the consequences and effects of the way in which the procurement procedure is designed and carried out by the contracting authority. In other words, the test should be limited to assessing whether the restriction of competition can be *justified on objective grounds and whether the restriction of competition is proportionate* to the alternative aim pursued by the contracting authority. Moreover, the irrebuttable presumption of restriction of competition in cases of favouritism or corruption should be interpreted as not being exhaustive and should not prevent the widespread application of the (not necessarily residual) general test of competitive restraint in the absence of (clear) discrimination (as further discussed below, §V).

Ultimately, it is hereby submitted that an objective interpretation of the principle of competition consolidated in article 18(1) of Directive 2014/24 is still compatible with the broadest formulation hereby advocated, according to which *public procurement rules have to be interpreted and applied in a pro-competitive way, so that they do not hinder, limit or distort competition. Contracting entities must refrain from implementing any procurement practices that prevent, restrict or distort competition* (above §II.B), provided that the requirements of the principle of competition are combined with those of the principle of proportionality (as further discussed below §V.B). In the end, that is the only way in which distortions of competition that are not susceptible of *justification on objective grounds* can be avoided.

[71] Similarly, this was the interpretation presented by the Commission when the rule preventing the artificial split of contracts was first assessed; see European Commission, *Guide to the Community Rules on Public Works Contracts other than in the Water, Energy, Transport and Telecommunications Sectors (Directive 93/37/EEC)* (1993) 17, available at ec.europa.eu/internal_market/publicprocurement/docs/guidelines/works_en.pdf.

IV. Implications of the Competition Principle for the Shaping of Public Procurement Rules by Member States: The General Obligation to Develop a Pro-Competitive Public Procurement Framework

Once the competition principle embedded in the EU public procurement directives has been spelled out and configured as a specification of the more general principle of competition in EU law (above §II), and leaving aside for now the interpretative difficulties that the specific wording of article 18(1) of Directive 2014/24 creates (above §III), it will be useful to explore the consequences that it has in the shaping of public procurement rules and practices, both at the EU and Member State level. The main implication of the fundamental principle of competition embedded in the EU public procurement directives is that anti-competitive public procurement regulations and practices not only constitute a potential breach of EU competition law (see above chapter four), but are also in breach of the EU public procurement directives themselves. This implication of the pro-competitive mandates of the directives is of major relevance, as it will expand the enforcement possibilities and the remedies available to fight against competition-restrictive public procurement, particularly before the courts and the administrative bodies of the Member States entrusted with the review of bid protests and the appeals against the decisions made by their contracting authorities.

It is submitted that the following effects unroll from the recognition of the competition principle in the EU public procurement system: First, the competition principle becomes a rule of self-construction for the interpretation of the EU public procurement directives (§III.A). Second, the competition principle restricts the options potentially available to Member States in the transposition of EU public procurement directives (§III.B) and becomes one of the basic yardsticks and criteria for the interpretation and construction of Member States' domestic public procurement legislation (§III.C). Third, together with the principle of equality or non-discrimination and the ensuing transparency obligations, the competition principle is to be integrated in the core group of basic principles that extend their effects and impose obligations regarding public procurement not covered by the public procurement directives (§III.D). Finally, the competition principle becomes a residual criterion for construction or development of public procurement systems in cases currently not covered by either EU or domestic rules (§III.E).

This section focuses on each of these effects in turn, and places particular emphasis on the effects of the competition principle for the consistent interpretation and construction of Member States' public procurement legislation in conformity with this principle—as this effect can be of the greatest importance and can contribute the most to developing a more pro-competitive public procurement system. In this regard, it is submitted that, even if more general rules of interpretation could be applicable—such as teleological interpretation of public procurement rules in accordance with the general EU law principle of competition[72]—the existence of the more specific competition principle embedded in the

[72] In very broad terms, K Riesenhuber has held that 'all European legislative actions aim at the harmonisation of laws, the abolition of obstacles to competition and the realisation of the internal market. In addition, there are more specific objectives … in the case of conflict among the different ways of interpretation, the teleological

EU public procurement directives and the obligation of Member States to guarantee the ensuing consistent interpretation of their domestic public procurement rules seem to provide *closer* or *more specific* legal tools for the development of a more competition-oriented public procurement system.[73] Hence, recourse to more general methods of interpretation and construction will only be had where the more specific principles and rules of legal construction adapted to the purchasing activities conducted under the public procurement directives do not apply (§III.D), as a matter of *residual* interpretation (§III.E).

A. The Competition Principle as a Rule of Self-Construction for EU Public Procurement Directives

Even if the practical effects of the competition principle on the interpretation of the EU public procurement directives *themselves* can be relatively small—as litigation in this field will largely be based on the interpretation and application of domestic public procurement legislation (which fails to transpose, transposes improperly, or simply violates the mandates of the directives); it should be stressed that the recognition of the competition principle embedded in the public procurement directives expands the possibilities of challenging anti-competitive or restrictive rules contained in the directives themselves (if any), inasmuch as the general principle of competition embedded therein is to be recognised as a *rule of self-construction*.

By this, the aim is to stress that a pro-competitive construction of the EU public procurement directives is not only a mandate of its teleological interpretation in the light of the general principle of competition in EU law but, more specifically, a requirement of systematic interpretation of these legal statutes[74]—since the competition principle forms part of the EU public procurement directives themselves (ie, is a 'built-in' rather than an 'external' principle and criterion for their interpretation). Therefore, it is submitted that, should EU public procurement directives contain a competition restrictive or distortionary rule, it shall be repealed—or, in laxer terms, be (re)interpreted—according to the mandates of systematic interpretation of EU directives.

In this regard, it should be recalled that any public procurement rule contained in the EU directives on public procurement might be the object of both direct and indirect challenge procedures under articles 263 and 267 TFEU (ex arts 230 to 234 TEC)—although

approach prevails over the other methods', quoted in C Hofmann, 'Report on the Conference on European Methodology' (2005) 1 *European Review of Contract Law* 384.

[73] A similar line of reasoning led the ECJ to determine that, where a matter is regulated in a harmonised manner at EU level, any national measure relating thereto must be assessed in the light of the provisions of that harmonising measure instead of the articles of the TFEU on which the harmonising measure is founded; see Case C-37/92 *Vanacker and Lesage* [1993] ECR I-4947 9; and Case C-324/99 *DaimlerChrysler* [2001] ECR I-9897 32. Indeed, as a matter of legal technique or methodology and in general terms, a criterion of *specificity* seems desirable in the selection of the construction rules and guiding principles as to how to undertake the task of interpretation of EU law. The basic assumption behind this option is that the *more closely related* the rules and the principles for their interpretation, the greater are the possibilities of identifying useful operative criteria and potential inconsistencies.

[74] The importance of systematic interpretation—as a complement or, sometimes, as an overriding consideration to grammatical or literal interpretation—has been recently stressed in the field of public procurement by the Opinion of AG Verica Trstenjak in Case C-324/07 *Coditel Brabant* 73. See also Opinion of AG Poiares Maduro in Case C-64/05 P *Sweden v Commission* 48.

it must be acknowledged that this possibility may be of particular relevance in relation to incidental challenges under article 267 TFEU;[75] and may be more specifically in those cases where (vertical) direct effect of provisions of the EU public procurement directives is sought against Member States' contracting authorities.[76]

B. The Competition Principle and the Transposition of the EU Directives on Public Procurement by Member States

What is possibly even more relevant is that this basic principle on which the EU directives on public procurement are founded must inform the decisions that Member States make when adopting the national legislation and regulations that transpose the directives to their domestic legal order—and, as argued, this principle seems to impose a more binding obligation than the general teleological interpretation of all those rules in accordance with the general principle of competition in EU law. Therefore, where Member States have discretion to adopt one amongst several solutions for the transposition of the directives, they will be in breach of EU public procurement law if they do not opt for procompetitive solutions—or, more clearly, if they adopt solutions that restrict competition or limit access to procurement.

It is to be recalled here that, even if directives allow for a certain degree of flexibility in the design of specific legal solutions for their transposition, they are binding on Member States as regards the results to be achieved with their transposition (art 288 TFEU, ex art 249 TEC). Consequently, if one of the basic goals or expected results (and, hence, one of the fundamental principles of the EU directives on public procurement) is the promotion of pro-competitive public procurement rules and practices (as a specification or particularisation of the general principle of competition, above §II), all regulatory measures adopted by Member States that depart from this pro-competitive approach will run contrary to this basic objective and will be in breach of EU law due to the improper transposition of the EU directives on public procurement. In that case, the traditional remedies at EU level—ie, infringement proceedings against the Member State on the basis of articles 258 to 260 TFEU (ex arts 226 to 228 TEC) will be available and could be enforced by the Commission;[77] and, if the requirements established by the ECJ case law are met, this could result in the Member State being held liable for a breach of EU law.[78]

In this regard, it is important to stress that, even when legislation properly transposes EU directives, the enforcement activities of the Commission can also capture ensuing administrative practices that infringe EU law, at least in circumstances where the practice

[75] Indeed, it has been rightly held that an individual may attack, by way of incidental challenge, the validity of an EU measure before a national court on the grounds of infringement of the general principles. In this respect, see Tridimas (n 25) 35–38. More generally, on the importance of art 267 TFEU (ex art 234 TEC) in the field of competition law, see BJ Rodger (ed), *Article 234 and Competition Law: An Analysis* (Alphen aan den Rijn, Kluwer Law International, 2008) 3–9.

[76] On the issue of the direct effect of the EU public procurement directives, see Trepte (n 3) 531–40.

[77] On the enforcement of EU public procurement directives by the Commission, see Trepte (n 3) 578–90.

[78] On the subsequent state liability for breach of EU Law, see Tridimas (n 25) 498–547, esp 509–12; and N Reich, *Understanding EU Law: Objectives, Principles, and Methods of Community Law*, 2nd edn (Antwerpen, Intersentia, 2005) 321–29.

in question is persistent and general[79]—ie, systematic or general anti-competitive public procurement practices can be the object of an infringement procedure against a Member State even if the EU directives on public procurement are formally correctly transposed into the state's domestic legal order (subject to an analysis of the dimensions of scale, time and seriousness of the practice in question).[80] Therefore, the relevance of the competition principle is not limited to the *strict* transposition of the EU directives by Member States, but extends to the development of ensuing public procurement practices that could generate anti-competitive effects in the affected markets—which, it is submitted, has wider practical relevance and implications.

C. The Competition Principle and the Consistent Interpretation of Domestic Public Procurement Legislation

As has been briefly mentioned, the effects of the competition principle embedded in the EU public procurement directives can be expected to be most significant as regards the consistent interpretation and construction of Member States' domestic procurement legislation. It is submitted that this is so because the interpretation of domestic legislation according to the EU rules does not only take place shortly after the passing of those rules (as should be the case of their transposition or implementation, which is theoretically a one-shot event expected to take place shortly after the adoption of the directive and within a specified time limit) but extends for a long period of time (or, at least, throughout the validity period of the EU rules). Therefore, the interpretation and construction of domestic public procurement legislation in a manner consistent with the principle of competition embedded in the EU public procurement directives could become the *prime* enforcement mechanism for competition considerations in the public procurement field. In order properly to appraise the extent of these potential effects, the doctrine of consistent interpretation developed by the EU judicature will be summarily reviewed and, then, specifically applied to public procurement rules.

i. Consistent Interpretation as a Rule of Construction of EU Law

The EU judicature has clearly established a general obligation for Member States to interpret and to enforce national legislation (particularly if it is adopted in transposition of EU directives) according to the principles of the TFEU and other principles and basic

[79] See: Case C-494/01 *Commission v Ireland* [2005] ECR I-3331 27–28 and 129–33; Case C-278/03 *Commission v Italy* [2005] ECR I-3747 13; Case C-441/02 *Commission v Germany* [2006] ECR I-3449 47; Case C-342/05 *Commission v Finland* [2007] ECR I-4713 22; and Case C-489/06 *Commission v Greece* [2009] ECR I-1797 46. As regards the requirements applicable to the finding of the existence of an administrative practice in breach of EU law (ie, that the administrative practice must be, to some degree, of a consistent and general nature), see Case C-287/03 *Commission v Belgium* [2005] ECR I-3761 28; and Case C-156/04 *Commission v Greece* [2007] ECR I-4129 50. See also P Craig and G de Búrca, *EU Law: Texts, Cases and Materials*, 4th edn (Oxford, Oxford University Press, 2007) 447.

[80] For an analysis in the public procurement setting see Case C-489/06 *Commission v Greece* [2009] ECR I-1797 48–56; and Opinion of AG Mazák in Case C-489/06 *Commission v Greece* 37ff. See also P Wennerås, 'A New Dawn for Commission Enforcement under Articles 226 and 228 EC: General and Persistent (GAP) Infringements, Lump Sums and Penalty Payments' (2006) 43 *Common Market Law Review* 31, 47–50.

objectives of EU rules.[81] According to this *principle of consistent interpretation* (harmonious interpretation, convergent construction or *interprétation conforme*) and as a ramification of the positive duties imposed by the TFEU Member States' courts and authorities[82] are to interpret national law so as to ensure that the objectives of the directives are achieved and that national law is consistent with the relevant provisions of EU law—hence, giving it *indirect effect* through the interpretation and enforcement of domestic law.[83]

In other words, in applying national law—and, in particular, the provisions of a law specifically passed in order to transpose and implement a given directive (regardless of whether it properly or improperly transposes it into domestic legislation), national courts and authorities are required, as far as possible, to interpret the national law (whether adopted before or after the directive) in the light of the wording and the purpose of the

[81] The same obligation exists as regards public international law and its application by the domestic courts of the states that signed the different treaties; G Betlem and A Nollkaemper, 'Giving Effect to Public International Law and European Community Law before Domestic Courts. A Comparative Analysis of the Practice of Consistent Interpretation' (2003) 14 *European Journal of International Law* 569, 571.

[82] On the extension of these duties not only to national courts, but also and notably to national authorities, see J Temple Lang, 'The Duty of National Courts under Community Constitutional Law' (1997) 22 *European Law Review* 3; id, 'The Duty of National Authorities under European Constitutional Law' (1998) 23 *European Law Review* 109, 114; Tridimas (n 25) 44–47; and JH Jans et al, *Europeanisation of Public Law* (Groningen, Europa Law Publishing, 2007) 111–12. The basis of these obligations was established in Case C-80/86 *Kolpinghuis* [1987] ECR 3969 12.

[83] This is the wording of the principle of consistent interpretation, as introduced in Case 14/83 *Von Colson and Kamman* [1984] ECR 1891 26; and Case 79/83 *Harz* [1984] ECR 1921 26. The principle was crystallised in Case C-106/89 *Marleasing* [1990] ECR I-4135 8 and 13; and Case C-334/92 *Wagner Miret* [1993] ECR I-6911 20. This approach has been consistently held by the ECJ; see Case C-76/97 *Tögel* [1998] ECR I-5357 25; Case C-62/00 *Marks and Spencer* [2002] ECR I-6325 24; and Case C-371/02 *Björnekulla* [2004] ECR I-5791 13. Specifically in the field of public procurement, see Case 103/88 *Costanzo* [1989] ECR 1839 28–33; and, more recently, Case C-357/06 *Frigerio Luigi* [2007] ECR I-12311 28–29; and Joined Cases C-147/06 and C-148/06 *SECAP* [2008] ECR I-3565 22. See also S Prechal, *Directives in European Community Law. A Study of Directives and Their Enforcement in National Courts* (Oxford, Clarendon, 1995) 200–45 and 2nd completely revised edn (Oxford, Clarendon, 2005) 180–215; D Anderson, 'Inadequate Implementation of EEC Directives: A Roadblock on the Way to 1992?' (1988) 11 *Boston College International and Comparative Law Review* 91, 101–03; C Hilson and T Downes, 'Making Sense of Rights in EC Law' (1999) 24 *European Law Review* 121, 127–29; J Maillo, 'Efecto directo limitado de las Directivas: alcance y significado. ¿En qué medida los particulares pueden sufrir los perjuicios de una Directiva?' (1999) 204 *Gaceta jurídica de la UE y de la competencia* 37; T Tridimas, 'Black, White and Shades of Grey: Horizontality of Directives Revisited' (2002) 21 *Yearbook of European Law* 327, 346–53; G Betlem, 'The Doctrine of Consistent Interpretation—Managing Legal Uncertainty' (2002) 22 *Oxford Journal of Legal Studies* 397; JC Moitinho de Almeida, 'L'effet direct des directives, l'interprétation conforme du Droit national et la jurisprudence de la Cour Suprême de Justice portugaise', in N Colneric et al (eds), *Une Communauté de Droit. Festschrift für Gil Carlos Rodriguez Iglesias* (Berlin, BWV Berliner Wissenshafts, 2003) 235, 235–42; A La Pergola, 'El juez constitucional italiano ante la primacía y el efecto directo del Derecho comunitario. Notas sobre unas jornadas de estudio' in N Colneric et al (eds), *Une Communauté de Droit. Festschrift für Gil Carlos Rodriguez Iglesias* (Berlin, BWV Berliner Wissenshafts, 2003) 251, 251–59; A Arnull, *The European Union and its Court of Justice*, 2nd edn (Oxford, Oxford University Press, 2006) 209–25; Jans et al (n 82) 99–112; K Lenaerts and P van Nuffel, *Constitutional Law of the European Union*, 2nd edn (London, Thomson/Sweet & Maxwell, 2005) 119 and 775–76; TC Hartley, *The Foundations of European Community Law*, 6th edn (Oxford, Oxford University Press, 2007) 216–20; Craig and de Búrca (n 79) 287–303; Reich (n 78) 29–34. See also GC Rodríguez Iglesias and J-P Keppenne, 'L'incidence du Droit communautaire sur le Droit national' in M Waelbroeck and M Doni (eds), *Études de Droit Européen et International. Mélanges en Hommage à Michel Waelbroeck* (Bruxelles, Bruylant, 1999) 516, 520–27; K Lenaerts and T Corthaut, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law' (2006) 31 *European Law Review* 287, 292–97; and M Dougan, 'When Worlds Collide! Competing Visions of the Relationship between Direct Effect and Supremacy' (2007) 44 *Common Market Law Review* 931, 932–37 and 945–47. With a special focus on the application of this doctrine to EU public procurement directives, see DD Dingel, *Public Procurement—A Harmonization of the National Judicial Review of the Application of European Community Law* (The Hague, Kluwer, 1999) 123–31.

directive in order to achieve its intended results.[84] The principle of consistent interpretation also requires that settled domestic case law is reinterpreted in light of the directives, so that not only statutory legislation, but also judge-made law, is constructed in a convergent manner with EU law.[85]

In principle, the EU case law has held that this obligation of courts and national authorities of the Member States is not absolute, and certain limits could be found (i) in the initially restrictive approach towards horizontal direct effect of directives, (ii) in the prohibition of *contra legem* interpretation of domestic laws, and (iii) in the necessary respect of certain time limits generally applicable to the transposition of directives. However, a closer analysis of these general restrictions on the duty of consistent interpretation shows that they have been construed in very narrow terms in the case law. As a result, it is submitted that none of these apparent limits actually restricts in a significant manner the duty of Member States to ensure consistent construction of domestic legislation with EU rules.

As just mentioned, a first apparent limit to consistent interpretation might be encountered in the lack of *horizontal direct effect* of the directives' provisions, and so consistent interpretation may be restricted if it could lead to the imposition on an individual of an obligation laid down by a directive which has not been transposed into domestic law,[86] at least if such a result is unacceptable in the light of the general principles of law (particularly, the principles of legal certainty and non-retroactivity).[87] Nonetheless, the interpretation

[84] For recent references, see Case C-160/01 *Mau* [2003] ECR I-4791 34; Joined Cases C-397/01 to C-403/01 *Pfeiffer and others* [2004] ECR I-8835 113–14; Case C-212/04 *Adeneler* [2006] ECR I-6057 108–11; and Joined Cases C-187/05 to 190/05 *Agorastoudis and others* [2006] ECR I-7775 43. See also R Alonso García, 'La interpretación del Derecho de los estados conforme al Derecho comunitario: Las exigencias y los límites de un nuevo criterio hermenéutico' (2008) 28 *Revista española de Derecho europeo* 385. There is room for doubt as to whether the ECJ could be preparing a movement towards substituting the principle of consistent interpretation with a recognition of full (horizontal) direct effect to directive provisions, after its decision in cases such as Case C-144/04 *Mangold* [2005] ECR I-9981; Case C-555/07 *Kücükdeveci* [2010] ECR I-365; and Case C-425/12 *Portgás* [2013] pub electr EU:C:2013:829. See Note, 'Editorial Comments—Horizontal Direct Effect—A Law of Diminishing Coherence?' (2006) 43 *Common Market Law Review* 1, 4–8. However, such a development seems unlikely; see K Sawyer, 'The Principle of '*interprétation conforme*': How Far Can or Should National Courts Go when Interpreting National Legislation Consistently with European Community Law?' (2007) 28 *Statute Law Review* 165, 177–79.

[85] Case C-456/98 *Centrosteel* [2000] ECR I-6007 17. See Betlem (n 83) 408–09.

[86] This is clearly the situation in cases involving criminal proceedings; see Case C-168/95 *Arcaro* [1996] ECR I-4705 42; and Joined Cases C-74/95 and C-129/95 *Criminal proceedings against X* [1996] ECR I-6609 24. The extension of this limit to civil and administrative proceedings remains obscure, but is envisageable; *cf* Opinion of AG Jacobs in joined cases C-206 and 207/88 *Zanetti* 24–26, and in Case C-456/98 *Centrosteel* 35 (who adopted a restrictive interpretation of the limit in civil proceedings and argued for a broad obligation of consistent interpretation) and Opinion of AG Van Gerben in Case C-106/89 *Marleasing* 8 (who held that consistent interpretation could not result in the imposition of a civil sanction such as nullity, and favoured a limited approach to this obligation). Similarly, see Betlem (n 83) 410–11; but see Sawyer (n 84) 179.

[87] See: Case C-80/86 *Kolpinghuis* [1987] ECR 3969 13; Case 14/86 *Pretore de Salò* [1987] ECR 2545 20; and Joined Cases C-74/95 and C-129/95 *Criminal proceedings against X* [1996] ECR I-6609 25 and 31. See also Prechal, *Directives in EC Law*, 1st edn (1995) 222–29 and 2nd edn (2005) 203–08. See also Betlem and Nollkaemper (n 81) 580. Indeed, under certain circumstances, the narrowness of this restriction puts the doctrine of consistent interpretation (or indirect effect) in conflict with one of the main tenets of the doctrine of direct effect of directives—which excludes its horizontal application. On the issue of 'horizontal' direct effect of directive provisions see P Craig, 'Directives: Direct Effect, Indirect Effect and Construction of National Law' (1997) 22 *European Law Review* 519; and M Szpunar, *Direct Effect of Community Directives in National Courts—Some Remarks Concerning Recent Developments* (College of Europe Working Paper, 2003), available at www.natolin.edu.pl/pdf/zeszyty/Natolin_9–2003.pdf; and Craig and de Búrca (n 79) 282–87. In particular, on the issue of the admissibility of the 'horizontal' direct effect (or a disguised indirect horizontal effect) in so-called 'triangular relationships'—such as those generally present in the public procurement environment; see Case

conducted by the case law of the requirements that the imposition on individuals is (i) of obligations 'as such' and (ii) by the directive 'of itself' has followed a restrictive approach, with the result that this apparent restriction falls short of preventing the application of the doctrine of convergent construction in every case in which the legal position of an individual is negatively affected.[88] It follows that, in the end, consistent interpretation of national legislation with EU law can generate (indirect or ancillary) negative effects on the legal position of individuals, as long as the result is acceptable in light of the general principles of law—ie, unless it runs contrary to fundamental legal guarantees provided by these principles to individuals.

Another apparent limit could be found in that national courts and authorities are not obliged to make a *contra legem* interpretation of the relevant provisions of national legislation.[89] Nevertheless, this limit does not seem to constrict significantly the result of the convergent construction of domestic and EU law,[90] in so far as national courts and authorities are obliged to disapply the provisions of national law that frontally contradict EU law, by virtue of the principle of supremacy—and so the same final results are generally achieved.[91]

Finally, a *waiting period* is in principle also applicable to the duty of consistent interpretation—that is, the obligation of harmonious interpretation of national legislation arises only after the time-limit for the transposition of the directive has expired.[92]

However, even before the expiry of the transposition period, an obligation exists for Member States to refrain from adopting any measures which might seriously compromise, after the period of transposition has expired, attainment of the objective pursued by that directive.[93] In the end, even if the time restrictions for the application of the principle

C-201/02 *Wells* [2004] ECR I-723 and the extension of its findings by Jans et al (n 82) 100. See also K Lackhoff and H Nyssens, 'Direct Effect of Directives in Triangular Situations' (1998) 23 *European Law Review* 397, 407 and 412; A Jiménez-Blanco Carrillo de Albornoz, 'De nuevo sobre el efecto de las Directivas' (2002) 205 *Noticias de la UE* 115; D Colgan, 'Triangular Situations: The Coup de Grâce for the Denial of Horizontal Direct Effect of Community Directives' (2002) 8 *European Public Law* 545; D Edward, 'Direct Effect: Myth, Mess or Mystery?' (2003) 7 *Diritto dell'Unione Europea* 215; Prechal (n 57, 2005) 261–70; and Tridimas (n 83) 333–46 and 353–54. Along the same lines, Arnull (n 83) 204; R Gordon, *EC Law in Judicial Review* (Oxford, Oxford University Press, 2007) 20 and 156–57; and Reich (n 78) 22–23.

[88] See: Case C-177/88 *Dekker* [1990] ECR I-3941; and Case C-180/95 *Draehmpaehl* [1997] ECR I-2195, where the ECJ applied the doctrine of consistent interpretation even if the legal position of the individuals concerned was significantly altered. Along the same lines, see Case C-456/98 *Centrosteel* [2000] ECR I-6007 19 and Joined Cases C-240/98 to C-244/98 *Océano* [2000] ECR I-4491 31–32. Indeed, this limitation of the principle of convergent construction should be interpreted restrictively and, especially, should not be triggered by a mere detrimental effect on an individual's legal position; see Tridimas (n 25) 348–9; and Craig and de Búrca (n 79) 292–96.

[89] Case C-105/03 *Pupino* [2005] ECR I-5285 47. See also Opinion of AG Elmer in Case C-168/95 *Arcaro* 40. However, the limits imposed by the prohibition to conduct *contra legem* interpretation remain unclear; see Tridimas (n 25) 30–31; and J Temple Lang, 'The Core of the Constitutional Law of the Community—Article 5 EC' in LW Gormley (ed), *Current and Future Perspectives on EC Competition Law. A Tribute to Professor MR Mok* (The Hague, Kluwer Law International, 1997) 41, 60–61.

[90] MR Tinç, 'L'interprétation "*contra* legem" devant les Cours européennes des Droits de l'homme et de la Justice' (2009) 3 *Révue du Droit de l'Union Européenne* 493, 504–05.

[91] Lenaerts and van Nuffel (n 83) 775–78.

[92] Case C-212/04 *Adeneler* [2006] ECR I-6057 113–16. Arguably, this judgment clarified this important point of the doctrine of consistent interpretation and put an end to a significant academic discussion on whether anticipatory effects could be derived from the passing of a directive before the time limit for its transposition had expired; see M Klamert, 'Judicial Implementation of Directives and Anticipatory Indirect Effect: Connecting the Dots' (2006) 43 *Common Market Law Revie*W 1251, 1254.

[93] Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411 45ff; Case C-157/02 *Rieser Internationale*

of convergent construction are theoretically clear, its practical implementation still raises significant doubts.[94]

Therefore, as anticipated, given that the limits of the principle of consistent interpretation remain somewhat blurry and that the ECJ has adopted an expansive approach to the issue of the obligation of Member States to guarantee the effectiveness of directives, it is submitted that the limits of legal construction of Member States' law with conformity to EU directives should be interpreted restrictively in order to favour to the maximum extent the (indirect) effectiveness of EU law and the goals pursued by EU directives. This is all the more necessary in view of recent developments of the rules of construction developed by the ECJ that are superseding the traditional boundaries of the theory of direct effect and point towards a more general doctrine of 'legality review' of the legislative actions of Member States,[95] and towards the expansion of the boundaries of legal interpretation that conform to the TFEU and secondary rules (in what has been termed as *leveraged* development)[96]—which seem to have overcome the notorious difficulties that the early developments of the direct effect doctrine generated (although they may pose some other interpretative problems of their own).[97] The limit seems to lie where consistent interpretation requires national courts and authorities to overcome 'merely' interpretative functions (broadly defined) and to assume legislative functions.[98] Nonetheless, drawing the dividing line will usually be a difficult task and, as already mentioned, the clear prevalence of a *pro communitate* interpretative principle must be identified in the relevant case law.

To sum up, it is submitted that Member States are under an almost absolute obligation to guarantee that domestic legislation is interpreted and applied in a manner that is consistent with EU law and, in particular in the case of directives, to ensure that their goals and intended effects are attained through national legislation—regardless of whether that legislation was adopted for the sake of transposing those directives, and regardless of the proper or improper transposition of those directives.

ii. Consistent Interpretation of the EU Public Procurement Directives with the Competition Principle

It follows from the discussion above that, in general terms, *the interpretation and enforcement of Member States' public procurement rules by national courts and authorities must*

Transporte [2004] ECR I-1477 67; and Case C-212/04 *Adeneler* [2006] ECR I-6057 123. See also L Sevón, 'Inter-Environnement Wallonie—What Are the Effects of Directives and from When?' in N Colneric et al (eds), *Une Communauté de Droit. Festschrift für Gil Carlos Rodriguez Iglesias* (Berlin, BWV Berliner Wissenshafts, 2003) 245.

[94] See: Klamert (n 92) 1273–75; and T von Danwitz, 'Effets juridiques des directives selon la jurisprudence récente de la Cour de Justice. Effet anticipé, antérieur à l'expiration du délai de transposition, interprétation conforme aux directives, primauté et application "combinée" avec les principes généraux du droit' (2007) 4 *Revue trimestrielle de Droit européen* 575.

[95] See: S Prechal, 'Does Direct Effect Still Matter?' (2000) 37 *Common Market Law Review* 1047, 1051. *Cf* C Hilson, 'Legality Review of Member State Discretion under Directives' in T Tridimas and P Nebbia (eds), *European Union Law for the Twenty-First Century: Rethinking the New Legal Order* (Oxford, Hart Publishing, 2004) 223.

[96] See: S Treumer and E Werlauff, 'The Leverage Principle: Secondary Community Law as a Lever for the Development of Primary Community Law' (2003) 28 *European Law Review* 124.

[97] See: D Curtin, 'The Province of Government: Delimiting the Direct Effect of Directives in the Common Law Context' (1990) 15 *European Law Review* 195, 220–23.

[98] As suggested by Alonso García (n 84) 401, the limit to a *contra legem* interpretation is to be found where the courts are forced to develop legislative functions.

be consistent with the fundamental principle of competition of the EU public procurement directives.[99] It is submitted that this obligation has potentially far-reaching consequences on the national systems for the review of public procurement rules and practices since, in order to be aligned or consistent with EU law, they must provide room for their revision on competition grounds. Put otherwise, Member States must ensure that practices and decisions ensuing from domestic public procurement legislation do not result in breaches of the principle of competition. Otherwise, they would be jeopardising the attainment of the competition goal pursued by the public procurement directives (above §II) and, hence, would be in breach of EU rules.

As an immediate consequence, the adoption of anti-competitive public procurement practices will not only result in a breach of EU law, but will also contravene Member States' domestic legislation on public procurement as properly or consistently interpreted—inasmuch as the latter cannot provide legal coverage to anti-competitive procurement practices that would trump one of the fundamental principles of the EU directives, since that interpretation of national law would be inconsistent with their competition goal and principle.[100] Consequently, in addition to the remedies for breach of EU law already mentioned, the remedies established in national law against breaches of the tendering and award procedures shall be available to fight anti-competitive public procurement practices[101]—and, if need be, guidance on the appropriate interpretation of the general competition principle and its implications for a given domestic public procurement rule may be sought from the ECJ through preliminary questions, following article 267 TFEU (ex art 234 TEC).

D. Extension of the Competition Principle to Procurement Conducted Outside the Blueprint of the EU Directives: Competition as a General Principle

In furtherance of the general obligation of consistent interpretation—and seemingly as a specification in the field of public procurement of the general obligation of teleological interpretation according to the general principles of EU law—compliance with

[99] Arguably, as already mentioned, the same results should be attainable by establishing the obligation of Member States' courts and administrative bodies to interpret public procurement rules in a pro-competitive manner as a result of their teleological interpretation in the light of the general principle of competition (above §III). Nonetheless, the fact that the competition principle is embedded in and fundamental to EU public procurement rules seems to provide a more solid legal basis to impose pro-competitive interpretative and enforcement duties on Member States' courts and administrative bodies.

[100] In general, on the function of general principles in the EU legal order and, particularly, as regards their threefold function as aids to interpretation, as grounds for review, and as rules of law a breach of which may give rise to tortious liability, see Tridimas (n 25) 29–35. On the judicial review of Member States' actions through the use of general principles—although largely conceived of as fundamental rights (which limits in some respects the applicability of the reasoning pursued), see X Groussot, *General Principles of Community Law* (Groningen, Europa Law Publishing, 2006) 271–301. More specifically, on the role of general principles in the interpretation of EU public procurement directives, see Hjelmborg et al (n 11) 41–54; and Gimeno Feliú (n 27, 2006) 45–63.

[101] Remedies at the EU and national level are indeed complementary and not alternative, as clearly stated in Case C-508/03 *Commission v United Kingdom* [2006] ECR I-3969 71, where it was unequivocally held that the existence of remedies available through the national courts cannot prejudice the bringing of an action under art 258 TFEU (ex art 226 TEC), since the two procedures have different objectives and effects. See also Craig and de Búrca (n 79) 433–34.

the principle of competition is reinforced by the obligation of Member States to conduct all public procurement activities in compliance with the basic principles of the TFEU. According to EU case law,[102] public procurement below the thresholds of the EU directives or outside their scope of application has to be conducted according to the basic principles of the TFEU and, most importantly, must respect the mandates of the principles of non-discrimination and transparency.[103]

A system of undistorted competition, as laid down in the TFEU, can be guaranteed only if equality of opportunity between the various economic operators is secured.[104] Therefore, all public procurement conducted by the Member States needs to be in accordance with

[102] See: Case C-59/00 *Vestergaard* [2001] ECR I-9505 21–24; Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745 60–62; Case C-231/03 *Coname* [2005] ECR I-7287 16–19; Case C-458/03 *Parking Brixen* [2005] ECR I-8585 46–49; Case C-507/03 *Commission v Ireland* [2007] ECR I-9777 30–31; Case C-412/04 *Commission v Italy* [2008] ECR I-619 66 and 94; Joined Cases C-147/06 and C-148/06 *SECAP* [2008] ECR I-3565 20; and Case C-324/07 *Coditel Brabant* [2008] ECR I-8457 25. For a review of the relevant case law, A Brown, 'Seeing Through Transparency: The Requirement to Advertise Public Contracts and Concessions Under the EC Treaty' (2007) 16 *Public Procurement Law Review* 1, 1–16; and S Treumer, 'Recent Trends in the Case Law from the European Court of Justice' in R Nielsen and S Treumer (eds), *New EU Public Procurement Directives* (Copenhagen, Djøf Forlag, 2005) 17, 24–27.

[103] See: Commission interpretative Communication on the community law applicable to contract awards not or not fully subject to the provisions of the public procurement directives [2006] OJ C179/2. The Communication has been challenged by Germany before the EGC, which rejected the complaint in Case T-258/06 *Germany v Commission* [2010] ECR II-2027. For discussion, see A Brown, 'Case T-258/06: The German Challenge to the Commission's Interpretative Communication on Contracts not Subject to the Procurement Directives' (2007) 16 *Public Procurement Law Review* NA84. See also P Cassia, 'Contrats publics et principe communautaire d'égalité de traitement' (2002) 38 *Révue trimestrielle de Droit européen* 413, 424–25; J-Y Chérot, *Droit public économique*, 2nd edn (Paris, Economica, 2007) 721–34; UB Neergaard, 'The Concept of Concession in EU Public Procurement Law versus EU Competition Law and National Law' in R Nielsen and S Treumer (eds), *New EU Public Procurement Directives* (Copenhagen, Djøf Forlag, 2005) 149, 150; and HM Stergiou, 'The Increasing Influence of Primary EU Law and EU Public Procurement Law: Must a Concession to Provide Services of General Economic Interest be Tendered?' in JW van de Gronden (ed), *The EU and WTO Law on Services: Limits to the Realisation of General Interest Policies within the Services Markets?*, European Monograph Series (Alphen aan den Rijn, Kluwer Law International, 2009) 159, 168–72. This situation is strongly criticised by P Braun, 'A Matter of Principle(s)—The Treatment of Contracts Falling Outside the Scope of the European Public Procurement Directives' (2000) 9 *Public Procurement Law Review* 39. *Contra*, see M Krügner, 'The Principles of Equal Treatment and Transparency and the Commission Interpretative Communication on Concessions' (2003) 12 *Public Procurement Law Review* 181, 184 and 193–98. In moderate but still critical terms, see Brown (n 102) 16–21; and T Kotsonis, 'The Extent of the Transparency Obligation Imposed on a Contracting Authority Awarding a Contract Whose Value Falls below the Relevant Value Threshold: Case C-195/04, *Commission v Finland*, Opinion of Advocate General Sharpston, January 18, 2007' (2007) 16 *Public Procurement Law Review* NA71; and id, 'The Extent of the Transparency Obligation Imposed on a Contracting Authority Awarding a Contract Whose Value Falls below the Relevant Value Threshold: Case C-195/04, *Commission v Finland*, April 26, 2007' (2007) 16 *Public Procurement Law Review* NA119. See also S Cacace, 'Gli affidamenti dei servizi pubblici nel rispetto del principi comunitari' in GA Benacchio and D de Pretis (eds), *Appalti pubblici e servizi di interesse generale* (Trento, Universita degli studi di Trento, 2005) 217, 227–38; M Lipari, 'I principi di trasparenza e di pubblicità' in GA Benacchio and D de Pretis (eds), *Appalti pubblici e servizi di interesse generale* (Trento, Universita degli studi di Trento, 2005) 255, 256–58 and 262–65; C Maugüé, 'La portée de l'obligation de transparence dans les contrats publics' in P Devolvé (ed), *Mouvement du Droit public: du Droit administratif au Droit constitutionnel, du Droit français aux autres Droits. Mélanges en l'honneur de Franck Moderne* (Paris, LGDJ, 2004) 609, 618–24; and Hjelmborg et al (n 11) 59–63. Also critical of this strand of case law, see Trepte (n 3) 16–27. Interestingly, this controversial string of case law has been considered a case of *leveraged* development of EU public procurement law; see Treumer and Werlauff (n 96) 125–27. For a general study, see C Risvig Hansen, *Contracts Not Covered or Not Fully Covered by the Public Sector Directive* (Copenhagen, Djøf Forlag, 2012).

[104] Case C-202/88 *France v Commission* [1991] ECR I-1223 51; Case C-18/88 *GB–Inno* [1991] ECR I-5941 25; Case C-462/99 *Connect Austria* [2003] ECR I-5197 83; Case T-250/05 *Evropaïki Dynamiki (OPOCE)* [2007] ECR II-85 46; and Case T-406/06 *Evropaïki Dynamiki (CITL)* [2008] ECR II-247 84. Recently, see Case C-553/12 P *Commission v DEI* [2014] *pub electr* EU:C:2014:2083.

the requirements imposed by the TFEU and, particularly, has to respect the four freedoms and its other basic goals. In other terms, all public procurement, including that which falls below the thresholds, or otherwise lies outside the scope of the EU directives, has to contribute to—or, at least, not impede—the development of the internal market. This does not mean that it should be conducted according to the procedural rules established by the EU public procurement directives.[105] Rather, it has to comply with the substantive mandates of the EU public procurement system and be organised in a transparent and non-discriminatory manner.[106]

By the same token, and given that the competition principle is not only one of the basic principles and objectives of the TFEU itself,[107] but is also fundamental to EU public procurement law (above §II.A), the conduct of public procurement below the thresholds or otherwise outside the scope of the EU directives should be subjected to similar pro-competitive requirements.[108] In essence, all public procurement conducted by Member States' contracting authorities and procurement officials should be pro-competitive—at least in the sense of the negative dimension of the competition principle: *public procurement conducted by Member States should not distort competition in the markets where the public buyer sources goods and services*. Again, this does not mean that public procurement conducted by the Member States outside the scope of the directives has to be necessarily subject to the rules and procedures thereby envisaged. However, national public procurement legislation should be drafted in such a way that it ensures that public procurement activities are not a source of competitive distortion in the markets where the public buyer is active. In this respect, the basic principles and interpretative guidelines provided by the case law of the ECJ in relation to the provisions of the EU directives should inform and guide the interpretation of the domestic public procurement laws and regulations of the Member States to the furthest possible extent. Even if some domestic public procurement procedures might be substantially simpler or more limited in scope than those envisioned in the EU directives, they should all be designed and conducted in a non-discriminatory, transparent and pro-competitive manner. It is probably implied in the argument that simpler procurement procedures should be subject to lighter requirements, in order not to burden unnecessarily the contracting body and not to raise the administrative costs of the public procurement activities—ie, a trade-off between competition and efficiency requirements needs to be reached (see above chapter three, §IV).

However, it is submitted that, as regards the behaviour of the contracting authorities—and, more specifically, as regards compliance with the principles of equality, transparency and competition, no *de minimis* exception should be construed in the field of public procurement.[109] No matter how small (in terms of economic value) or simplified a public

[105] The effort to expand the logic and basic rules of the EU directives to the tendering of contracts that fall outside their scope has been criticised. See EP Hordijk and M Meulenbelt, 'A Bridge Too Far: Why the European Commission's Attempts to Construct an Obligation to Tender outside the Scope of the Public Procurement Directives should be Dismissed' (2005) 14 *Public Procurement Law Review* 123, 127–30.

[106] See: Arrowsmith (3rd, n 3) 252–63.

[107] See above n 42. As already mentioned, it is my view that the amendments to the TEC introduced by the Treaty of Lisbon do not alter this conclusion and, consequently, promotion of undistorted competition has to be considered a basic principle and an objective of the TEU and the TFEU (above chapter four, §IV.D).

[108] As seems suggested in Joined Cases C-147/06 and C-148/06 *SECAP* [2008] ECR I-3565 28–29.

[109] Along the same lines, the ECJ has declared that the *de minimis* rule does not apply to the provisions on free movement; see Joined Cases 177 and 178/82 *Van de Haar* [1984] ECR 1797 13. See also K Mortelmans, 'Towards Convergence in the Application of the Rules on Free Movement and on Competition?' (2001) 38 *Common*

procurement activity is, it is always susceptible to be fully accommodated to the non-discriminatory, transparent and pro-competitive mandates imposed by the fundamental principles of EU law in this field, at least from a negative perspective. That is, 'minor' public procurement activities conducted by Member States can be exempted from the 'positive' obligations to promote transparency (through formal advertisement in official journals, for instance) and to guarantee a minimum level of competition—*ad ex* through the fixing of a minimum number of tenderers to be invited to participate. However, *it seems to be impermissible to allow Member States to conduct discriminatory, opaque or competition-distorting public procurement, even when these activities lie outside the scope of the EU directives*. Consequently, the conduct of all public procurement activities (i) must guarantee the equal treatment of all participating undertakings, as well as setting up the necessary checks to avoid the exclusion of potentially interested offerors; (ii) needs to be transparent, to guarantee prompt access to the information, and to guarantee that relevant public notices are issued, if need be; and (iii) must avoid generating restrictions and distortions of competition in the markets where the public buyer is active (for a more detailed analysis, see below chapter six).[110]

E. Residual Application of the Principle of Competition

Finally, for the sake of the consistency of the rules regulating the internal market, it is submitted that, if and when EU directives and national legislation do not provide for specific rules to regulate a given procurement situation or to inform a particular procurement decision (ie, in the case of a completely *unregulated* or unforeseen new public procurement situation derived from the evolution of public procurement practices), the contracting authority will still be bound by the pro-competitive requirements of the EU public procurement system and will have to opt for the solution that best suits the mandates of the competition principle (*in dubio pro concurrentia*).[111]

In other terms, any legislative or regulatory lacunae that might be encountered by contracting authorities and public procurement officials should be constructed, to the maximum possible extent, in a pro-competitive way, even if those situations fall outside the scope of the doctrine of consistent interpretation (above §III.C). It should be noted that, as a logical limit to the doctrine of consistent interpretation, it does not provide support for the construction or creation of consistent rules *ex novo*. Put otherwise, when there is no national rule to be interpreted—ie, in the case of an effective regulatory gap

Market Law Review 613, 633. Given that EU public procurement directives have free movement provisions of the TFEU as their express legal basis (above §II.A), it is submitted that the same exclusion of the *de minimis* rule has to be adopted. The situation is different as regards the application of the *de minimis* rule excluding application of art 101(1) TFEU to the behaviour of the tenderers (see above n 44). *Cf* Risvig Hansen (n 103) 149–53.

[110] When the distortions of competition derive from the pursuit of a conflicting regulatory or policy goal, the criteria developed above chapter four, §VII should be applicable and the restrictions should be appraised under the proposed strict proportionality test—which is different from a *de minimis* exemption (that, as already indicated, should be rejected) in that the *de minimis* exemption would provide a blanket justification and exclude any analysis, whereas the proportionality test will only justify the restrictive public procurement rules or practices when their net social effects are positive.

[111] In similar terms, see CM Von Quitzow, *State Measures Distorting Free Competition in the EC. A Study of the Need for a New Community Policy towards Anti-Competitive State Measures in the EMU Perspective* (The Hague, Kluwer, 2002) 232.

or lacuna—the doctrine of convergent construction proves inadequate to generate new solutions, unless a broad view towards the consistent interpretation of the ensemble of domestic regulations (including its regulatory gaps) is adopted—which seems to require going a step too far in terms of legal technique. Similarly, the more general doctrine of teleological interpretation according to the general principles of EU law might also prove limited. Nonetheless, it is submitted that recourse to those techniques will be unnecessary, as the development of new regulatory solutions will still need to be compatible (or consistent, in lax terms) with the principle of competition, as a general principle of EU law with particular relevance in the public procurement field. Since a new rule that generated competition distortions or restrictions in the public procurement field would—once adopted or developed—be contrary to the principle of competition and, hence, would need to be repealed or amended to ensure consistency with the principle of competition, *contracting authorities and Member States are obliged to anticipate the pro-competitive requirements to the phase of design of the new rules or administrative practices* required to bridge the concerned regulatory gap. Rather obviously, the development of such pro-competitive solutions will still also have to pay due regard to the other objectives of the public procurement system (namely, efficiency and transparency; see above chapter three) and the other applicable public procurement principles (that is, non-discrimination and respect for the fundamental freedoms regulated in the TFEU), but competition should be regarded as a key consideration in their design—which warrants giving the principle of competition the mentioned *residual* role.

V. The Principle of Equal Treatment and the Principle of Competition Distinguished

A. A First Approximation: The Close Links between the Principles of Equal Treatment and Competition

As already mentioned, the competition principle presents close links with the principle of equal treatment and could even be considered a specific manifestation of the latter.[112] Some of the procurement rules and decisions that infringe pro-competitive requirements have discriminatory features and, consequently, they also infringe the mandates of the principle of equal treatment. As Advocate General Tesauro put it:

> Community legislation chiefly concerns economic situations and activities. If, in this field, different rules are laid down for similar situations, the result is not merely inequality before the law,

[112] See: A Laguerre, *Concurrence dans les marchés publics* (Paris, Berger-Levrault, 1989) 23–27; Colin and Sinkondo (n 32) 37 and 48–55; JR Dromi, *La licitación pública* (Buenos Aires, Editorial Astrea, 1975) 134–39; JM Fernández Astudillo, *Los procedimientos de adjudicación de los contratos públicos de obras, de suministros y de servicios en la Unión Europea. La nueva Directiva reguladora de los contratos públicos* (Barcelona, Bosch, 2005) 21; and JA Moreno Molina, *Los principios generales de la contratación de las administraciones públicas* (Albacete, Bomarzo, 2006) 37–42.

> but also, and inevitably, distortions of competition which are absolutely irreconcilable with the fundamental philosophy of the common market.[113]

It is submitted that this is the main reason why the principle of competition has not yet been explicitly formulated in full, nor fully enforced by the EU judicature (above §II.A); as some of the issues that directly concern the competition principle have been addressed by the ECJ in light of the more general principle of equal treatment.[114] To be sure, the conduct of non-discriminatory public procurement contributes to the protection of undistorted competition by interested tenderers[115]—as a system ensuring undistorted competition cannot be guaranteed if undertakings are the object of discriminatory practices.[116] Consequently, given these close links between both principles, there is a tendency to assimilate them and to consider that equal treatment requirements are by themselves enough to guarantee that competition is not distorted in public procurement processes. However, these principles do not impose exactly the same requirements,[117] so identifying the additional requirements that the competition principle brings to the analysis will be particularly relevant for our purposes.

B. A Closer Look: The Principles Impose Different Requirements, and Competition Concerns should Modulate the Application of the Principle of Equality

The principle of equality requires that similar situations are not treated differently unless differentiation is objectively justified;[118] consequently, it prohibits treating either similar

[113] See: Opinion of AG Tesauro in Case C-63/89 *Assurances du Crédit* (at 1829); see D Caruso, *Limits of the Classic Method: Positive Action in the European Union after the New Equality Directives* (NYU School of Law, Jean Monnet Working Papers No 10, 2002) 48 fn 183, available at www.jeanmonnetprogram.org/papers/02/021001.pdf. The same idea had been advanced, in more general terms, by D Linotte, 'Principes d'égalité, de liberté, de commerce et de l'industrie et Droit de la concurrence' in J-M Rainaud and R Cristini (eds), *Droit public de la concurrence* (Paris, Economica, 1987) 9, 17–20. See also T Tridimas, 'The Application of the Principle of Equality to Community Measures' in A Dashwood and S O'Leary (eds), *The Principle of Equal Treatment in EC Law* (London, Sweet & Maxwell, 1997) 214, 217–18.

[114] Indeed, often the ECJ refers to both principles simultaneously; see, for instance, Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233 76. Consequently, the distinction between them might appear blurry and their delimitation might be difficult to appraise in certain instances.

[115] Opinion of AG Ruiz-Jarabo Colomer in Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* 24–25. See also Colin and Sinkondo (n 32) 49; D Linotte and R Romi, *Services publics et Droit public économique*, 4th edn (Paris, Litec, 2001) 116; L Richer, *Droit des contrats administratifs*, 5th edn (Paris, LGDJ, 2006) 369; Cassia, Contrats publics et principe communautaire d'égalité (2002) 420–21; and Hjelmborg et al (n 11) 24–26 and 42–46.

[116] Case C-202/88 *France v Commission* [1991] ECR I-1223 52. Similarly, D Linotte and A Mestre, *Services publics et Droit public économique* (Paris, Litec, 1982) 119–20. Even further, the competition requirements of the first EU public procurement directives (Directive 71/305/CEE) served as the logical basis for the reading of a general principle of equal treatment of tenderers by the ECJ—which was not expressly mentioned in their text; see Case C-243/89 *Storebaelt* [1993] ECR I-3353 33 and 39; and Cassia (n 103) 430.

[117] Along the same lines, see Opinion of AG Léger in Case C-94/99 *ARGE* 95 fn 36.

[118] See: Joined Cases 117/76 and 16/77 *Ruckdeschel* [1977] ECR 1753 7; Case 810/79 *Überschär* [1980] ECR 2747 16; Case 106/83 *Sermide* [1984] ECR 4209 28. In general, on the principle of equality in EU law, see J Schwarze, *European Administrative Law* (Brussels, OPOCE, 1992) 545–74 and revised 1st edn (London, Sweet & Maxwell, 2006) 561–625; G de Búrca, 'The Role of Equality in European Community Law' in A Dashwood and S O'Leary (eds), *The Principle of Equal Treatment in EC Law* (London, Sweet & Maxwell, 1997) 13; Tridimas (n 25) 59–135; Lenaerts and van Nuffel (n 83) 123–38; Jans et al (n 82) 125–42; Gordon, *EC Law in Judicial Review*

situations differently, or different situations identically.[119] For its part, the competition principle requires that the treatment afforded to undertakings does not distort the dynamics either of the procurement process or, more generally, of the markets where the public buyer is active (above §II).

Consequently, at least in principle, undertakings could be given a clearly anti-competitive treatment in the public procurement arena (or elsewhere) and this would still not result in a discriminatory situation, inasmuch as all the undertakings that were in a similar situation were treated in an equally anti-competitive manner. Obviously, then, in extreme situations the requirements of the principle of equality are insufficient to guarantee respect of the competition principle. It follows that the competition principle has additional requirements that should be integrated and made compatible with the principle of non-discrimination. It is submitted that this means that the competition principle could be understood as a 'regulating device' for the application of the principle of equality—similarly as the proportionality principle does,[120] but with a *purposive orientation*.[121] This has now been broadly endorsed by the ECJ, when it has stressed that 'the principle of non-discrimination … in the field of public procurement, pursues … objectives including … the opening up of undistorted competition in all the Member States'.[122] That is, equality of treatment or non-discrimination is aimed at ensuring competitive results. Or, reversely, the competitive effects of a situation should be integrated in the analysis from an equality perspective in this field.

It is submitted that the analysis should be as follows. In order to apply the principle of equality to two given undertakings properly, their situations need to be analysed under

(2007) 201–25; Hartley, *Foundations of EC Law* (2007) 152–54; Groussot, *General Principles of Community Law* (2006) 160–89; and G Barrett, 'Re-Examining the Concept and Principle of Equality in EC Law' (2003) 22 *Yearbook of European Law* 117, 121ff. On the requirements imposed by the principle of non-discrimination or equal treatment (and its corollary principle of transparency) in the field of public procurement, see Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233 37; Case C-315/01 *GAT* [2003] ECR I-6351 73; and Case C-496/99 P *Succhi di Frutta* [2004] ECR I-3801 108–11. See also Cassia (n 103) 421–49; S Treumer, 'Technical Dialogue Prior to Submission of Tenders and the Principle of Equal Treatment to Tenderers' (1999) 8 *Public Procurement Law Review* 147; Krügner, The Principles of Equal Treatment and Transparency (2003) 186–92; and Arrowsmith (n 3, 2014) 264–79.

[119] Case 13/63 *Italy v Commission* [1963] ECR 165; see also Case 8/82 *Wagner v Balm* [1983] ECR 371 18. See also A-L Durviaux, *Les marchés publics dans la jurisprudence de la Cour de Justice des Communautés Européennes (1995 à 2000)* (Bruxelles, Kluwer, 2001) 5–7.

[120] In general, it should be noted that the principle of proportionality in EU law has particular connotations as regards the division of powers between the EU institutions and Member States, as well as between the former and the EU judicature. However, as used here, the principle of proportionality is not intended to refer to that particular conception of the principle of proportionality in EU law, but to discuss it in more general terms of basic legal analysis. See Moreno Molina (n 112) 66–67.

[121] By reference to 'purposive orientation' it is intended to imply that the application of the non-discrimination principle has to be complemented with the values of competition, and to aim towards developing or maximising pro-competitive solutions. That is, that recourse to and application of the principle of non-discrimination should be complemented or *instrumentalised* to attain more competition-oriented results. In this regard, it can be understood as a different approach from a classical 'teleological interpretation', in that teleological interpretation is strictly aimed at clarifying the meaning of a given provision in the light of the function or goal that was intended in its passing (and hence, teleological interpretation of the principle of non-discrimination is restricted to the requirements of 'formal equality'), while a purposive orientation would go further and be aimed at *operationalising* that provision in order to achieve that goal (ie, would orient the results of the analysis towards pro-competitive goals). Similarly, with specific reference to the purposive interpretation of the EU public procurement directive, see Hjelmborg et al (n 11) 54–56.

[122] Case C-19/13 *Fastweb* [2014] pub electr EU:C:2014:2194 65. See also Case C-91/08 *Wall* [2010] ECR I-2815 48, and Case C-336/12 *Manova* [2013] pub electr EU:C:2013:647 28.

the prism of the proportionality principle, in two respects. First, proportionality requires that separate treatment is granted only when the circumstances of both undertakings are sufficiently different—thereby, granting common treatment to undertakings in relatively different situations when granting them different treatment would be disproportionate; ie, when the differences that exist between them are small enough to render different treatment discriminatory. Therefore, proportionality informs the *comparability* prong of the equality of treatment test. Second, proportionality requires that the differences in treatment are adequate to the objective differences in the situations of both undertakings—thereby, proportionality requires adjusting the differences in treatment to the objective differences in their departing situations, providing more equal treatment for smaller differences, and more differentiated treatment for larger differences.[123]

Rather obviously, differences in treatment need to meet the three cumulative requirements imposed by the principle of proportionality in a wide sense: ie, suitability, necessity and proportionality *stricto sensu*. Therefore, proportionality modulates or regulates the application of the principle of equal treatment.[124] That will be particularly possible when non-binary situations are confronted, which allow for an escalation of the treatment offered to undertakings and for a more progressive application of the principle of equal treatment—as binary situations restrict the applicability of the requirements of strict proportionality by limiting the alternatives of the contracting authority through an 'all-or-nothing' approach. Hence, the proper application of the proportionality requirements can be facilitated by the introduction of more flexible or gradual criteria.

In a similar way, the competition principle imposes certain restrictions and conditions to the application of the principle of non-discrimination, but it goes further than the principle of proportionality in that it orients the results of the analysis towards a specific result—ie, it pursues the protection and promotion of market competition.[125] This means that, whenever it is non-discriminatory and proportionate to grant different treatment to (competing) undertakings in the public procurement setting (as a result of the first prong of the proportionality analysis, or comparability test), the difference in the treatment afforded has to be such that it guarantees that competition is not unnecessarily restricted (second prong of the analysis, which adds a *purposive* element to the test of proportionality *stricto sensu*). In clearer terms, the differences in treatment afforded to undertakings should be such that—while respecting the mandates of formal equality/inequality—they generate lesser distortions as regards competition.

This essentially means that, when designing the rules governing a given public procurement process, the public buyer must guarantee that differences in the treatment afforded to undertakings in different situations are not only proportional, but also yield procompetitive results. In most situations, this will mean that the principle of competition will be better served if the procurement system is not made binary—eg, if meeting a given

[123] Case C-29/95 *Pastoors* [1997] ECR I-285 19–26. Along the same lines, see Jans et al (n 82) 130–31.

[124] The juncture and dual function of equality and proportionality has been stressed by Tridimas (n 25) 7, 72–74, 136–39 and 175–77. Similarly, see Groussot (n 100) 20–23.

[125] Interestingly, the 'plus' that the principle of competition adds to the principle of non-discrimination in the public procurement setting was stressed (implicitly): 'The principles of transparency and non-discrimination may make the exercise of strategic buyer power more difficult, but they do not appear to protect other buyers who might be adversely affected by the exercise of public sector buyer power'; see OFT, *Assessing the Impact of Public Sector Procurement on Competition* (2004) 58, available at www.oft.gov.uk/shared_oft/reports/comp_policy/oft742c.pdf.

requirement or condition does not result in admission or exclusion of the tenderer or his offer, but mainly affects the evaluation of the offer. Consequently, in general terms, it would be desirable that the system allowed for an escalation of the different criteria in play and, as far as possible, allowed room for variations and introduced a certain degree of flexibility in the process—so that 'all-or-nothing' situations were reduced to a minimum. In this way, and subject to equality of treatment requirements, the application of the proportionality and competition principles should offer better results than a strict and rigid 'formally egalitarian' public procurement environment.

In my opinion, these 'extra' requirements that the principle of competition imposes will generally imply that the consequences attached to the observed differences between tenderers and their offers should not result in an unnecessary elimination or restriction of competition. This general objective can be achieved by minimising the number of criteria that would prevent participation from potentially interested tenderers (such as technical, financial or professional requirements), or the admissibility of certain products or services (through open-ended and performance-based technical specifications, through minimum mandatory requirements, or otherwise); as well as by shaping the main characteristics of the tendered contract (in terms of duration, volume, number of lots, associated financial guarantees, etc) in such a way that the maximum number of potential contractors can participate and compete for it. Moreover, the competition principle will impose a special duty on the contracting authority to avoid procurement decisions that could negatively affect competition in the market after the contract is awarded or as a result of the award of the contract. These general criteria will be explored in detail (below chapter six).

Reversely, the application of the competition principle will be limited by the enforcement of the principle of non-discrimination imposed by the directives as, in certain cases, implementing the (theoretically) most pro-competitive alternative would be conditional upon a degree of relaxation of the requirements of non-discrimination among tenderers—or, at least, upon some procedural flexibility—that a strict application of the principle of equal treatment might prevent. Similarly, the principle of proportionality will also set bounds that pro-competitive procurement rules should not overstep. This is to say that pro-competitive public procurement practices are not to be carried to their extreme consequences if they result in discrimination amongst tenderers or in disproportionate requirements. In the end, the EU public procurement system seeks to encourage competition only provided that it takes place in compliance with the principle of equal treatment,[126] and proportionality is an all-embracing general principle of EU law.[127]

These additional requirements should help set a limit on certain public procurement practices that could go further than required in trying to foster competition for public contracts. In the end, public procurement rules need to generate a pro-competitive procurement environment and avoid all distortions to competition. However, public procurement should not become a tool of economic intervention or economic planning, or an additional competition law remedy *stricto sensu*. Therefore, those procurement practices

[126] Opinion of AG Poiares Maduro in Joined Cases C-226/04 and C-228/04 *La Cascina and others* 26. See also Cassia (n 103) 420.

[127] Case 181/84 *Man (Sugar) v IBAP* [1985] ECR 2889; Case 222/84 *Johnston* [1986] ECR 1651; Case 352/85 V*an Adverteerders* [1988] ECR 2085; Case 5/88 *Wachauf* [1989] ECR 2609; Case 353/89 *Commission v Netherlands* [1991] ECR I-4069; Case C-320/91 *Corbeau* [1993] ECR I-2533; Case C-2/92 *Bostock* [1994] ECR I-955; Case C-22/94 *Irish Farmers* [1997] ECR I-1809; and Case C-27/95 *Woodspring* [1997] ECR I-1847.

that exceed the proportional requirements of the promotion of undistorted competition should be declared to run contrary to the requirements of the equality and proportionality principles and, consequently, should be stopped.

C. Emphasis on the Distinction of both Principles in the Area of Internal Market

It follows from the discussion above that analysing all potentially competition-distorting public procurement rules and practices from a strict equality of treatment perspective may fall short of guaranteeing the pro-competitive system envisioned in the EU directives;[128] particularly since certain practices can restrict competition while not necessarily resulting in clearly disproportionate or discriminatory results. Indeed, as has been properly stressed, in order to be of assistance, 'formal equality' (ie, equality as consistency) needs to be informed by other values.[129] Given that 'formal equality' is the conception that seems to inspire the principle of equality in the case law of the EU judicature in the public procurement arena, it seems necessary that the application of the principle of equal treatment is informed by the values underlying the principle of competition if it is to yield meaningful results. Therefore, identifying the 'extra' requirements that the principle of competition imposes seems to be particularly necessary if one takes into consideration that the interpretation of the principle of equal treatment in the public procurement arena is substantially conditioned by the case law of the EU judicature on the four fundamental freedoms and, more specifically, on the free movement of goods[130]—which, it is submitted, significantly reduces its effectiveness in tackling distortions to the functioning of the internal market.

Briefly, it is important to recall that article 34 TFEU (ex art 28 TEC) prohibits quantitative restrictions on imports and all measures having equivalent effect applicable between Member States.[131] However, according to article 36 TFEU (ex art 30 TEC), such quotas and measures of equivalent effect can be justified on the grounds of *public interest*, such as public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Nonetheless, such prohibitions or restrictions should not constitute a means of arbitrary

[128] In similar terms, see D Triantafyllou, 'Les règles de concurrence et l'activité étatique y compris les marchés publics' (1996) 32 *Revue trimestrielle de Droit européen* 57, 74–75.

[129] See: Barrett (n 118) 123.

[130] The situation might be different as regards the other freedoms (free movement of services, persons and capital), see de Búrca (n 118) 21–23. See also the various essays in M Andenas and W-H Roth (eds), *Services and Free Movement in EU Law* (Oxford, Oxford University Press, 2002). However, it has been argued that the same reasoning developed as regards arts 34 and 36 TFEU (ex arts 28 and 30 TEC) applies under arts 49 and 52, and 56 and 63 TFEU (ex arts 43 and 46, and 49 and 55 TEC); see F Neumayr, 'Value for Money v Equal Treatment: The Relationship between the Seemingly Overriding National Rationale for Regulating Public Procurement and the Fundamental EC Principle of Equal Treatment' (2002) 11 *Public Procurement Law Review* 215, 225–28 and 232. Also E Szyszczak, *The Regulation of the State in Competitive Markets in the EU* (Oxford, Hart Publishing, 2007) 65–69. Moreover, *Keck* does not apply in relation to fundamental freedoms other than free movement of goods; see W-H Roth, 'The European Court of Justice's Case Law on Freedom to Provide Services: Is *Keck* Relevant?' in M Andenas and W-H Roth (eds), *Services and Free Movement in EU Law* (Oxford, Oxford University Press, 2002) 1, 6–7; and Sauter and Schepel (n 10) 35–37. Therefore, the position that unification in the basic treatment of all fundamental freedoms makes its joint analysis possible is adopted.

[131] Art 35 TFEU (ex art 29 TEC) establishes a twin prohibition for exports between Member States.

discrimination or a disguised restriction on trade between Member States.[132] Therefore, the general system established by articles 34 and 36 TFEU can be interpreted as setting a general, broad and objective prohibition on the establishment of barriers to the functioning of the internal market that can only in a very limited set of circumstances be overcome for overriding reasons of public interest, and only as long as they do not result in discrimination or are used as a cover for effective restrictions of trade between Member States.

However, in clear contrast with the previous approach to articles 34 and 36 TFEU—which arguably impose a very strict prohibition of restrictions on trade between Member States and strongly rely on a functional criterion of *effects on the functioning of the internal market*—and according to the relevant case law (generally known as the *Keck* doctrine),

> the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States … so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.[133]

According to the *Keck* doctrine,[134] then, quotas and measures of equivalent effect can be justified on the grounds of mandatory (regulatory) requirements not included in article 36 TFEU, as long as they are *indistinctly applicable* to all undertakings and products—which, however, cannot be invoked to justify commercially or economically motivated measures, and must show a clear (alternative) regulatory goal. Therefore, in the field of free movement of goods, the *Keck* jurisprudence has come to restrict significantly the criterion of the effects of the measures on the functioning of the internal market (ie, on trade between Member States) through the establishment of a *rule of reason* that balances internal market considerations and competing regulatory goals of Member States, and has limited the scope of the analysis to non-discrimination issues—and, largely, to the analysis of potential discrimination on the basis of nationality or origin (art 18 TFEU, ex art 12 TEC).[135] Consequently, the analysis of the ECJ—based on that so-called *rule of reason*—requires adequacy and proportionality of the restriction vis-à-vis the goal of promoting

[132] In general, Case 45/87 *Dundalk* [1988] ECR 4929; Case C-21/88 *Du Pont de Nemours Italiana* [1990] ECR I-889; and Case C-359/93 *UNIX* [1995] ECR I-157. See PV van Themmat and LW Gormley, 'Prohibiting Restriction of Free Trade within the Community: Articles 30–36 of the EEC Treaty' (1981) 3 *Northwestern Journal of International Law and Business* 611; LW Gormley, *Prohibiting Restrictions on Trade within the EEC. The Theory and Application of Articles 30–36 of the EEC Treaty* (The Hague, TMC Asser, 1985); and P Oliver and M Jarvis, *Free Movement of Goods in the European Community under Articles 28 to 30 of the EC Treaty* (London, Thomson/Sweet & Maxwell, 2003) 164–69.

[133] Joined Cases C-267/91 and 268/91 *Keck and Mithouard* [1993] ECR I-6097 16. For discussion, see PJG Kapteyn et al (eds), *The Law of the European Union and the European Communities: Kapteyn-VerLoren Van Themaat*, 4th rev edn (The Hague, Kluwer Law International, 2009) 626–32, 636 and 750–52; and Sauter and Schepel (n 10) 31–37. See also A Tryfonidou, 'Was *Keck* a Half-baked Solution After All?—Comment to the Judgment of the Court of 14 September 2006, in Joined cases C-158 and 159/04 *Vassilopoulos*' (2007) 34 *Legal Issues of Economic Integration* 167, 171–82. See also P Pecho, 'Good-Bye Keck? A Comment on the Remarkable Judgment in *Commission v Italy*, C-110/05' (2009) 36 *Legal Issues of Economic Integration* 257; and D Doukas, 'Untying the Market Access Knot: Advertising Restrictions and the Free Movement of Goods and Services' (2007) 9 *Cambridge Yearbook of European Legal Studies* 177–215.

[134] See: JJ Ezquerra Ubero, *La jurisprudencia 'Cassis–Keck' y la libre circulación de mercancías. Estudio de derecho internacional privado y derecho comunitario* (Madrid, Marcial Pons, 2006). In relation specifically to public procurement, see Arrowsmith (n 3, 2014) 256–62; and Trepte (n 3) 6–9.

[135] For reasoning along these lines, see Krügner (n 103) 197–201.

trade between Member States, but does not take into account other aspects, such as its impact on competition.[136] Hence, according to the relevant case law, there might seem to be room in EU law for significant restrictions of free trade (and competition) if certain legitimate (regulatory) objectives justify them and they are designed proportionally to those objectives—which, generally, will conflict with competition requirements.[137] This is true even under the emerging 'market access test' to free movement of goods based on 'user/consumer interests',[138] applicability of which to the procurement setting seems difficult in any case.

In this regard, it could be argued that it is possible to derive from the *Keck* jurisprudence (by analogy) the conclusion that, when public procurement regulations affect all potential tenderers or contractors in the same way, there is no need for specific justification of the restrictions imposed by public procurement regulations other than their adequacy to the procurement process—since there is no 'formal discrimination' among tenderers—and, consequently, they could be treated as permissible indistinctly applicable (restrictive) measures.[139] Or that whatever restrictions to access the market the procurement rules impose, they could be saved on the basis of some sort of 'public interest'.

However, it is submitted that the analysis cannot be restricted to such 'formal equality' considerations and that its reconciliation with the competition principle embedded in the EU public procurement directives should yield different results. In this regard, it is submitted that restrictions to competition in the public procurement setting, or deviations from the EU public procurement rules, will hardly ever pass the *Keck* test or a modified market access test—either because the measures would place domestic bidders and those from other Member States in a different position (ie, they would not actually be indistinctly applicable), or because they would fall short of meeting the requirements of the *rule of reason* as properly constructed in view of the *purposive pro-competitive orientation* of the directives. Taking into account the special weight that should be assigned to

[136] In similar terms, it was stressed that a pure 'discrimination standard'—which corresponds to the principle of undistorted competition—'is not a sufficient standard to guarantee access to the market' and that, therefore, it was appropriate to combine 'the discrimination test with the "prohibition of restrictions" test'; see Roth (n 130) 14. In this regard, it is submitted that a pro-competitive oriented interpretation of the basic requirements embedded in public procurement rules can attain the same objective of ensuring (to a larger degree) that there is no restriction to market access (although not simply or only that).

[137] The analyses and arguments put forward above chapter four, §VII are of relevance here, as regards the conduct of that balancing of goals and effects in the application of the rule of reason.

[138] As developed in Case C-110/05 *Commission v Italy (Trailers for mopeds)* [2009] ECR I-519; Case C-142/05 *Åklagaren v Mickelsson and Roos* [2009] ECR I-4273; and Case C-108/09 *Ker-Optika* [2010] ECR I-12213. For discussion, see C Barnard, *The Substantive Law of the EU. The Four Freedoms*, 4th edn (Oxford, Oxford University Press, 2013) 102–08 and 140–47; Pecho (n 133) 257–72; and P Oliver, 'Of Trailers and Jet Skis: Is the Case Law on Article 34 TFEU Hurtling in a New Direction?' (2011) 33(5) *Fordham International Law Journal* art 4. Recently, this approach has been stressed in Case C-639/11 *Commission v Poland* [2014] pub electr EU:C:2014:173; and Case C-61/12 *Commission v Lithuania* [2014] pub electr EU:C:2014:172.

[139] However, it should be noted that the *Keck* jurisprudence focuses on the regulation of 'selling arrangements' by the state. Consequently, doubts could be cast on the applicability of the case law to 'buying arrangements' such as public procurement (loosely defined). Nonetheless, it is submitted that the behavior that the *Keck* jurisprudence controls (ie, non-discriminatory state action through regulation) is—for my analytical purposes—substantially comparable to procurement activities (ie, non–discriminatory state action through procurement regulation or practice) and, therefore, deserves some further consideration—particularly in view of the conceptual difficulties surrounding the notions of 'selling arrangements' and 'rules relating to the characteristics of products'; see Opinion of AG Poiares Maduro in Joined Cases C-158/04 and C-159/04 *Vassilopoulos* 31, who stressed that in some cases 'it is impossible to include a measure within one or other of these categories because the variety of rules which may be called into question does not fit easily into such a restricted framework'.

the competition objective in the public procurement field (above §II), a very stringent and demanding proportionality test should be applicable to formally non-discriminatory public procurement rules and practices that generate negative impacts on competition. In this regard, for a competition-restrictive rule or practice to be objectively justified under the principles of equal treatment and competition in the field of public procurement, it should successfully meet the substantive criteria for restrictions on 'core' EU economic objectives to be acceptable (above chapter four, §VII.C)—or, put otherwise, meet a very restrictive proportionality test that balanced its alternative regulatory (non-economic) objectives and the distortions or restrictions of competition that it generates. It is further submitted that, in general terms, most restrictive public procurement rules and practices that generate competition distortions are likely to lack sufficient justification to pass legal muster under the competition principle and the ensuing rule of reason or proportionality test, since they will probably pursue objectives of lower or secondary relevance and, hence, will be insufficient to trump competition.

VI. Conclusions to this Chapter

The analyses conducted in the previous sections have shown that the market behaviour of the public buyer and its impact on competition are not unregulated, since *public procurement rules establish a framework for evaluating the behaviour of the government as a buyer from a competition perspective*. Given that EU public procurement directives have a clear competition goal and are based on an embedded competition principle, competition concerns are not alien to public procurement. The principle of competition has always been fundamental to the regulation of public procurement in the EU and constitutes one of its basic tenets. In this regard, according to this principle of competition, EU public procurement rules have to be interpreted and applied in a pro-competitive way, so that they do not hinder, limit, or distort competition, and that contracting entities must refrain from implementing any procurement practices that prevent, restrict or distort competition. This general principle of competition should serve the function of being the fundamental link between competition law and public procurement law.

This function of the principle of competition is now recognised in article 18(1) of Directive 2014/24, which consolidates it amongst the general principles governing the EU system. However, its drafting requires significant interpretative efforts in order to overcome the inclusion of an apparently subjective element and a presumption that conflates competition and corruption considerations. However, as argued above, an 'objectification' of the principle is not only necessary but also possible and the ECJ is likely to continue using the principle as an important tool in the shaping of EU public procurement rules under Directive 2014/24 (which will be analysed in detail in chapter six).

The legal implications of the abovementioned competition principle are manifold and particularly condition the way in which EU public procurement directives should be interpreted or *self-constructed*, and the real alternatives that Member States have for their transposition—which has to ensure the existence of a pro-competitive public procurement system and should not jeopardise the achievement of the basic competition objective.

What is possibly still more relevant is the fact that the existence of the competition principle deeply conditions the way in which domestic public procurement legislation has to be interpreted. According to the doctrine of consistent interpretation developed by the ECJ, Member States are under an almost absolute obligation to guarantee that domestic legislation is interpreted and applied in a manner that is consistent with EU law, and to ensure that the EU goals and intended effects of directives are attained through national legislation. More specifically, then, the interpretation and enforcement of Member States' public procurement rules by national courts and authorities must be consistent with the fundamental principle of competition embedded in the EU public procurement directives, and so Member States must ensure that practices and decisions ensuing from domestic public procurement legislation do not result in restrictions of market competition. Hence, *domestic anti-competitive procurement rules and practice run contrary to EU public procurement law*—that is, anti-competitive public procurement is specifically proscribed by EU public procurement law. Moreover, given that the principles that derive from the TFEU must be respected by the Member States in the conduct of procurement activities not covered by the directives, the pro-competitive requirements imposed by EU public procurement law are automatically extended to all public procurement rules and practice of the Member States, including procurement activities not or not fully covered by the EU directives. Finally, for the sake of completeness, a residual role for the principle of competition has also been envisaged in cases of new or totally unregulated public procurement practices.

Lastly, the legal implications derived from the competition principle have been delineated by exploring its content and, particularly, by distinguishing it from the close principle of equality or non-discrimination. Even if they are closely related these principles do not impose exactly the same requirements and compliance with formal equality requirements must be complemented by a pro-competitive purposive interpretation of public procurement rules. In turn, the principles of equality and proportionality will serve to check and counter-balance the more pro-competitive approach advocated here, since compliance with these fundamental principles must always be ensured. Finally it is necessary to stress the need to differentiate both principles and to include competition considerations in the area of public procurement—as a part of internal market regulation, where the interpretation of the principle of equality seems to be deeply entrenched with 'formal equality' considerations.

The general conclusion that can be extracted from this chapter is that public procurement rules are based on the paradigm of a pro-competitive system and, as one of their primary functions, pursue a competition goal—which materialises in a competition principle that constitutes the legal basis for the development of a more competition-oriented set of public procurement rules (or, at least, for a more competition-oriented interpretation and construction of current procurement rules, both at the EU and Member States level). It can also be concluded that the objective of developing a more competition-oriented set of public procurement rules should be attainable by recourse to well-known and consolidated rules of legal interpretation and construction, which only seem to require increased awareness of competition issues in the enforcement of public procurement legislation and practices, and in the revision of public procurement decisions.

It must be admitted that the exploitation of the potential pro-competitive instruments discussed in this chapter is dependent on the proper development of more specific rules

and criteria that can guide the appraisal of the several public procurement regulations and purchasing practices that can potentially distort competition in the market. An effort in that direction will be undertaken (below chapter six). Nonetheless, *the fundamental guiding criterion lies in the competition principle itself and making it fully effective is already possible*—particularly through the construction of public procurement legislation according to the doctrine of consistent interpretation and, where this legal technique is inappropriate, by recourse to a more general obligation of purposive interpretation of EU law in the light of its general principle of competition.

Conclusions to Part III: Sketching a Legal Framework to Discipline the Market Behaviour of the Public Buyer and to Guarantee Undistorted Competition in Public Procurement

As stated in chapter one, the main aim of this part of the study was to analyse EU competition and public procurement rules and to appraise to what extent they can be considered the building blocks of a framework properly designed to discipline the market behaviour of the public purchaser and to guarantee undistorted competition in the public procurement setting. To this end, the inquiry began by looking at public procurement from a competition perspective, focusing on how competition law addresses publicly-generated restrictions of competition in the public procurement arena. The intuition behind that approach was that competition law—understood as a (complete) system of rules oriented to the protection of undistorted competition in the market as a means to promote economic efficiency and social welfare (chapter three)—should be prepared to tackle distortions generated by the purchasing behaviour of the public buyer. The research agenda then moved on to adopt the opposite perspective and looked at competition concerns from a public procurement standpoint. The intuition in this instance was that—competition being a basic goal of public procurement rules (chapter three), the latter should give some room to the discipline of the purchasing behaviour of the public buyer. It is submitted that both perspectives have provided complementary insights into the relationship between competition and public procurement that should at least be useful to gain a better understanding of each of these branches of EU economic law, as well as of their interaction. It is further submitted that the results of the investigation conducted so far show that, indeed, competition and public procurement rules constitute the building blocks of a framework designed to discipline the market behaviour of the public purchaser and to guarantee undistorted competition in the public procurement setting. However, the current importance and effectiveness of each of these two blocks diverges—and, probably, in a way that might seem unexpected.

The analysis from a strict *competition law perspective* has shown that the rules of competition law are relatively unprepared to provide instruments to tackle anticompetitive effects derived from public intervention in procurement markets in most situations or with a sufficient degree of generality. To be sure, existing EU competition rules can remedy

those distortions of competition under specific (and relatively extreme) circumstances but, as the law currently stands, it falls short of providing an effective instrument to address publicly-generated distortions of competition in the public procurement setting *as such*. In my opinion, the logic and criteria that inspire general competition law enforcement are clearly adequate to conduct such an important task. However, a restrictive and too formal approach towards the interpretation and delimitation of the competition institutions that could undertake that mission most easily (especially the concept of *undertaking* for the purposes of direct application of 'core' competition prohibitions, and the state action doctrine that regulates their indirect application) prevents them from effectively constraining the market activities of the public buyer and from ensuring undistorted competition in the market under most common circumstances. From a normative standpoint and *de lege ferenda*, the research has also advanced possible developments that could contribute to overcoming those perceived limitations of current EU competition law and effectively to extending its institutions and remedies to cover competition-distorting public procurement with the desired degree of generality—ie, to discipline purchasing behaviour *as such*. Therefore, this first overview of the framework for the discipline of the market behaviour of the public buyer from a competition perspective has resulted in the partial conclusion that the main substantive elements or criteria are there, but that there are also formal restrictions that still require further advances and (materially-oriented) revisions if competition law is to contribute effectively to develop a more competition-oriented public procurement system.

For its part, the analysis from a *public procurement perspective* has shed a different and complementary light on the issue. In this part of the inquiry, public procurement law has emerged as a set of regulations particularly well suited to incorporate competition logic and criteria to the procurement field through the competition principle that is embedded in EU public procurement directives and has finally been consolidated in article 18(1) of Directive 2014/24. This principle is a specification or particularisation of the general principle of competition in EU law and one of the fundaments of the EU public procurement system. In my opinion, it should significantly condition the interpretation, construction, transposition and enforcement of EU and domestic procurement legislation. By requiring that public procurement rules are interpreted and applied in a pro-competitive way, so that they do not hinder, limit, or distort competition, and that contracting entities refrain from any procurement practices that prevent, restrict or distort competition, the principle of competition embedded in the directives opens a gateway for the transfer of competition law criteria to the public procurement setting—and crucially establishes a strong link between both sets of economic regulation. Therefore, this second look at the framework for the discipline of the market behaviour of the public buyer from the public procurement perspective has shown that the shortcomings identified in the competition area can be supplemented through 'pure' procurement rules and institutions, as the competition principle embedded in the EU directives establishes the required link between them and offers a sufficient legal basis for the development of a more competition-oriented set of public procurement rules.

The competition principle is, indeed, the key element or the touchstone of the framework for the discipline of the market behaviour of the public buyer under EU law, and it constitutes the gateway through which competition standards should be enforced in the public procurement setting. To be sure, the development and enforcement of this principle

is still in its infancy and requires a substantial amount of interpretative effort before it can be considered as a fully-effective tool to prevent public distortions of competition in the market. This interpretative effort has not been facilitated by the specific wording of the principle of competition in article 18(1) of Directive 2014/24 but, rather, the contrary. However, there are no insurmountable difficulties in adopting an objective interpretation of its requirements. In this respect, it is submitted that the development of the competition principle *within* the field of public procurement law must take into account and build upon the more general theories and doctrines of competition law—that is, that competition law criteria and principles should be transferred to public procurement law through the competition principle embedded in EU public procurement directives. In a certain way, the competition principle offers the *formal legal basis* for the introduction and full enforcement of competition considerations in the public procurement setting, but the *substance or content* of that principle (ie, its requirements and implications) need to be determined according to the general principles and criteria of EU competition law. In this sense, the complementariness of both sets of EU economic law is clearly apparent and offers the proper legal and conceptual basis for the development of a more procompetitive public procurement system.

From a *broader or systemic perspective*, it should be acknowledged that the general framework for the discipline of the market behaviour of the public buyer just sketched is still not complete (and may be far from being complete), and that further developments in each of its building blocks would yield better results. As regards competition law, overcoming the restrictions imposed by the current formal approximations to the direct and indirect application of EU competition rules to the public buyer—through the revision of the concept of undertaking, or the development of a set of competition rules applicable to the public sector with more teeth (in this instance, through the development of the 'market participant exception' to the state action doctrine)—would allow for its increased relevance and effectiveness in tackling publicly-generated distortions of competition in public procurement markets. As regards public procurement law, the development and further elaboration of the competition principle and its effective enforcement on Member States' legislatures and contracting authorities would significantly increase the chances of attaining the goals of the public procurement system and, more specifically, its competition goal (and the ensuing value for money).

It could be argued that pursuing both strings of development simultaneously or in parallel could seem unnecessary or counterproductive, since full development of either of the two blocks would render developments in the other largely unnecessary and, hence, irrelevant. At first glance, a public procurement system fully controlled by the competition principle might make the proposed developments of competition law unnecessary (as they relate to public procurement, but not as regards other types of state economic intervention). For its part, the adoption of the proposed developments in competition law could reduce the need to explore and expand the virtuality and effectiveness of the competition principle embedded in public procurement regulations, since competition law mechanisms would suffice to ensure that competition remained undistorted in public procurement markets. However, it is submitted that none of the proposed changes should be automatically envisaged as easily or completely attainable (due to their major political, social and economic implications) and, consequently, partial developments in both areas seem adequate to contribute to completing the general framework for the appraisal of

market activities of the public buyer and to rein in publicly-generated restrictions of competition in the public procurement setting. Indeed, the coordinated and incremental development of both blocks of the framework for the discipline of the market behaviour of the public buyer seems a more desirable strategy—and one capable of offering better results in the long run.

From a *practical perspective*, however, the line of development that seems easier to pursue and that can provide effective results more quickly lies with 'pure' public procurement considerations. Developing the competition principle and ensuring that it effectively shapes all public procurement rules and practices does not require an (express) amendment of current legal doctrines and case law, is better suited to yield incremental results and, arguably, should raise less opposition or resistance—as it has fewer implications for the general distribution of competences between the EU and Member States than the revision and further development of the competition rules applicable to public authorities—and it affects their sovereignty only marginally and within an area already substantially harmonised, such as public procurement.

Therefore, the remainder of the study (part four) will be dedicated to the critical appraisal of the public procurement rules incorporated in Directive 2014/24 (as well as their contrast with the previous rules under the 2004 EU public procurement Directives) in the light of the competition principle embedded in EU public procurement directives—and the competition law principles and doctrines that it brings or carries forward to the procurement arena—with the main purpose of contributing to those incremental changes towards the development of a more competition-oriented public procurement system (chapter six). Also, further developments or additional rules that, in my view, could complement and strengthen the competition principle within public procurement regulations will be explored and proposed (chapter seven). It should be stressed that this approach does not imply an abandonment of the analyses and views held in the competition part of the current inquiry (chapter four), and that it should rather be viewed as a practical and functional approach to legal research (above chapter one) with the objective of providing readily-available solutions for the achievement of more pro-competitive results in public procurement.

Part Four

Analysis of Competition Distortions Caused by Public Procurement

As seen in previous parts of this study, public procurement regulations and administrative practices are a potential source of competition distortions of different types (above chapter two). Promoting more pro-competitive public procurement rules and practice can contribute to fostering competition in those markets and, consequently, can lead to the attainment of one of its main goals (above chapters three and five), and can result in the achievement of more efficient results. To be sure, restrictions of competition in the public procurement arena can be caused by the public buyer, by the tenderers participating in procurement processes or by public contractors that have already been awarded the corresponding contracts. Although these restrictions can take place concurrently in a given procurement process—and perhaps some of them are the ultimate cause of the appearance of other restrictions of competition in the markets concerned, a relatively clear division between *buyer-generated* and *tenderer-generated* restrictions of competition can be established. Such buyer and seller restrictions have a different origin, generate different results—although all of them reduce the efficiency of the system and, in the end, have a negative impact on social welfare, require different remedies and solutions, and deserve separate analyses. Whereas restrictions of competition created by undertakings that participate in the tendering of public contracts—ie, collusion in public procurement or *bid rigging*—have been the object of recommendations from international organisations and a significant amount of scholarly work, and have given rise to a substantial volume of case law, both at the EU level and in the Member States; the analysis of other types of restrictions to competition has raised much less interest (above chapter one). Anticompetitive public procurement rules and practices have so far received limited attention—probably as a result of the relative underdevelopment of the legal doctrines that, as argued in this study, could discipline the market behaviour of the public buyer (above chapters four and five). Therefore, it remains a relatively unexplored field of competition policy and law enforcement.

In part four, this study focuses on restrictions and distortions of competition in the public procurement setting that are generated by the public buyer,[1] with the purpose of highlighting those phases of the tendering process and those criteria used in public procurement that are more prone to generating anti-competitive effects and/or distorting market dynamics, and proposes guiding criteria to interpret and apply them in a more

[1] Reference to the purchasing behaviour of the public buyer is used as shorthand to refer to the aggregate economic effects generated by the enactment and enforcement of public procurement laws and the development of the ensuing administrative practices.

pro-competitive fashion (chapter six). Furthermore, it explores amendments and developments of public procurement legislation that, in my view, would contribute to developing a more competition-oriented system (chapter seven).

6

A Critical Assessment of the 2014 EU Public Procurement Directives and the Existing Case Law from a Competition Perspective: Preventing Competitive Distortions by the Public Buyer

I. Introduction

Following the general criteria set out in previous parts of this study and, particularly, with the aim of developing rules and guidance that comply with and maximise the effectiveness of the competition principle embedded in the EU public procurement directives (chapter five), this chapter focuses on the following research sub-question: *how can a more competition-oriented approach towards public procurement be operationalised to result in a functional set of rules and practice*? The inquiry will focus on the rules contained in the EU public procurement directives and their interpreting case law, and should contribute to the development of a more competition-oriented public procurement system and practice across the EU at Member State level (since the authorities of the Member States apply EU rules, and domestic legislation should be applied consistently with EU rules and their interpretation; see above chapter five). In this second edition, the focus will be on the rules of Directive 2014/24 (and, to a limited extent, of Directives 2014/23 and 2014/25, where relevant), but discussion on the rules under the previous set of directives (mainly, 2004/18) may be retained as a guide for the interpretation of the new provisions. This will allow us to identify trends of pro- or anti-competitive development of EU public procurement rules over time, which may provide some additional insights to those reached in the first edition of this book.

To those ends, the still current and the new public procurement rules and their interpretative case law will be analysed from a competition perspective—putting special emphasis on identifying instances of potential distortions of competition derived from such rules and/or their interpretation—and, where required, the analysis will rely on economic considerations as a complement to legal analysis. Where it seems appropriate in light of the legal and economic analysis performed, an alternative more competition-oriented

interpretation of current rules and case law will be advanced.[2] Therefore, this chapter can be seen as a critical assessment of current EU procurement law through pro-competitive glasses. As mentioned, this interpretation should apply across EU and domestic regulatory levels—hence, the approach can be considered *universal* or all-encompassing. In some instances, the adoption of a more competition-oriented approach to public procurement will not require legislative changes, but 'simply' a change in legal culture. In other instances, legal reform will be necessary and proposals for the amendment of public procurement rules will be advanced.

As has been mentioned in previous chapters and pointed out by several scholars and commentators, public procurement regulations and administrative practices can generate significant distortions of market dynamics and alter the level of competition between undertakings—both among those directly and those indirectly related to specific public procurement procedures. To mention but a few of these restrictions, the emphasis is usually put on protectionist measures of a general scope that restrict cross-border competition and promote national champions or certain domestic industries, as well as on more specific tender-related measures, such as the role of purchasers in drafting technical specifications, the structure of purchasing systems, contract conditions and preference schemes, or the problems of creating an effective enforcement mechanism to remedy abuses of the system.[3]

In principle, the analysis of the competitive distortions generated by the public buyer can be organised according to several different criteria—such as their likeliness or the severity of the restriction to competition. However, most of the restrictions of competition generated by public procurement regulations and administrative practice will be strongly dependent on the specific facts and circumstances of any given case and, consequently, some of those criteria are hard to apply uniformly. For systematic reasons, the analysis of the distortions of competition susceptible to being generated by public procurement regulations and administrative practices will be hereby divided in two main categories: restrictions of competition derived from or directly linked to public procurement processes (ie, associated with the several steps or the criteria used in tendering procedures, or *specific tender-related measures*) (§II), and restrictions of competition derived from the market power of the public buyer (ie, potential abuses of *public buyer power*) (§III).

Within the first group, restrictions of access to the procurement process (§II.A), restrictions in the evaluation of bids and the award of public contracts (§II.B), and restrictions that take place after the contracts have been awarded (§II.C) will be analysed. Given that this is the focus of the EU public procurement directives and that most instances of potential distortions of competition are clearly process-related, this group of cases will be the main object of this chapter.

[2] For a similar analysis, although briefer and based on the respective domestic public procurement rules, see ME Greenberg, 'Tricks, Devices, and Restrictive Requirements Resulting in Illegal Contracts' (1974–75) 7 *Public Contract Law Journal* 245; A Laguerre, *Concurrence dans les marchés publics* (Paris, Berger-Levrault, 1989); S Simone and L Zanettini, 'Appalti pubblici e concorrenza' in L Fiorentino (ed) *Lo Stato compratore. L'acquisto di beni e servizi nelle pubbliche amministrazioni* (Bologna, Il Mulino, 2007) 119, 143–54; F Uría Fernández, 'Contratos de las administraciones públicas y defensa de la competencia' in Ll Cases (ed), *Anuario de la Competencia 2002* (Madrid, Marcial Pons, 2003) 131, 139–51; and id, 'Apuntes para una reforma de la legislación sobre contratos de las administraciones públicas' (2004) 165 *Revista de administración pública* 297, 310–22.

[3] For a particularly clear position in this regard, listing at least eight different categories of public restrictions to competition generated by public procurement regulations and administrative practices, see A Cox, 'Implementing 1992 Public Procurement Policy: Public and Private Obstacles to the Creation of the Single European Market' (1992) 1 *Public Procurement Law Review* 139, 149–50.

Next, the study will focus on issues related to the generation of competition distortions in the procurement setting that do not have a clear link with the tendering procedure—or, put otherwise, that resemble to a larger extent the potential distortions of competition generated by non-public power buyers. The scope of this inquiry will be more limited, since it is substantially complementary to the previous analyses of process-related restrictions (which constitute the bulk of the potential restrictions of competition derived from public procurement rules and practices). Amongst all possible cases for analysis, the study will only cover two examples of potential *naked* exercise of buyer power by the public buyer: the '*squeeze*' of public contractors (§III.A), and the effects of certain rules regulating the transfer of *intellectual property rights* to the public buyer in procurement procedures (§III.B), which are selected as two of the most remarkable instances of exercise (and potential abuse) of public buyer power that are not clearly (or not specifically) related to a particular phase of the procurement process.

Preliminary conclusions will try to extract some common principles—at least related to each of the procurement phases analysed, if not directly concerned with more specific groups of rules—that could be used as guidance in the design and running of more pro-competitive public procurement procedures (§IV). These concluding remarks will also reflect on the overall trend of development of the EU public procurement rules by comparing the 2004 and 2014 'generations' of directives. It is anticipated that significant pro-competitive developments can be identified and that some of the proposals advanced in the first edition of this book have been incorporated in the 2014 Directive, although some of the new rules create further challenges for a truly competition-oriented procurement system—such as the increased scope for the public–public and in-house exceptions to its application.

II. A Competition Appraisal of Potential Distortions Derived from Public Procurement Processes

Most of the distortions generated by public procurement regulations and administrative practices are directly related to a given phase of tender procedures. Even if some public procurement regulations can be restrictive per se and, when applied, can automatically generate competitive distortions across the board, it is submitted that these instances will be rare—particularly because of the open-ended nature of most public procurement rules, which need to be specified and tailored to each and every tender procedure. On the contrary, *most of the restrictions will take place as a result of the decisions that public purchasers make within the discretionary limits set up by public procurement regulations*. In other words, even if it might seem that there are very few restrictions derived from public procurement regulations *in books*, it is submitted that there is wide scope for the generation of competition distortions by public procurement regulations *in practice*. Therefore, the analysis of public procurement regulations and administrative practices from a competition perspective will need to focus on the several options that contracting authorities might want to pursue in each of the main steps and decisions to be adopted in the design and running of the specific tender procedure and, where possible, will aim at providing

pro-competitive criteria on which purchasing agents can seek guidance when exercising such administrative discretion.

Public procurement procedures are highly regulated and detailed—arguably increasingly so—and they have as their general aim the provision of a comprehensive description (and restriction) of the phases and decisions that the procurement agency should follow from contract preparation to contract award (and, in some instances, include post-award aspects of procurement activity, such as the new rules on contract modification and contract termination introduced by the 2014 Directive). These procedures, however, cannot be automatically set in motion and (in some significant aspects) they remain largely dependent on the discretion and good judgment of the contracting agent—who faces a relatively large number of options and has to opt for a *mix* of decisions that shapes the procurement process to the specific needs to be covered and, ideally, to the market environment with which the public buyer is due to interact. Therefore, a proper understanding and application of public procurement regulations (at least in their procedural aspects) requires paying attention to a relatively large number of minute details, and the adoption of too broad an approach to the design and implementation of the procurement procedure could generate undesired results.

However, scholarly commentary has generally focused on some, but not most of the tender phases and decisions that will be covered in this chapter and has mostly provided relatively general recommendations for the development of a more pro-competitive public procurement system.[4] Such general or broad approach has its limitations—derived from the loss of detail that it implies.[5] On close examination and in view of the specificities of certain decisions (as shall be developed below), some of the general recommendations might require exceptions for specific cases. Others can result in contradictions of the system, since modifying a given rule or criterion for the sake of increasing competition in a specific aspect of the tender might generate unintended restrictive results as regards other dimensions of the competitive dynamics of public procurement. Still other recommendations could result in inconsistencies within the system of public procurement and would generate rules that would be difficult to implement and enforce. Consequently, the aim of this part of the study will be to try to identify the competitive distortions that can result from a given decision at a specific point of the tender procedure (regardless of whether they are based on rules, case law or practices) and to explore possible alternatives and remedies. Therefore, it will

[4] See, eg, W Adams and HM Gray, *Monopoly in America. The Government as Promoter* (New York, Macmillan Publishing, 1955) 115, where the authors adopted a fairly general approach and answered the question 'what can be done to increase competition in public procurement?' by putting forward the following broad and general recommendations: '(1) Contracts should be let whenever possible on the basis of "competitive" bids with "negotiated" bids being held to an absolute minimum. (2) Notification of contracts to be let should be promptly issued and distributed as widely as possible to all businesses—large and small. (3) Contracts should be broken down whenever possible into small lots. (4) Specifications whenever possible should be simplified, standardised and, particularly, should not be drawn in such a way as to favour any particular firm. (5) A premium should be placed on subcontracting; all other factors being equal, [the] prime contract should go to the bidder who should pass along a greater share of the business in the form of subcontracts.' It is hereby submitted that these recommendations are likely to contribute to the improvement of competition in the public procurement setting (although there are some exceptions, for instance, as regards subcontracting; see below §II.A.xix). Moreover, they remain in such general terms that they provide relatively poor and vague guidance to public purchasers. The attempt in this chapter will be to come up with more specific recommendations.

[5] To be sure, such a general analysis can be necessary to trace the basic lines along which more specific decisions should be adopted. That is the function that, in my view, general principles should develop; and this is the purpose of the development of the competition principle (above chapter five).

conduct a highly detailed analysis of the still current and the new EU public procurement rules, with a clear focus on the rules included in Directive 2014/24.

As mentioned, this more detailed competition analysis of procedure-related potential distortions of competition will focus on each of the main phases of public tenders: ie, restrictions of *access* to the procurement process (§II.A), restrictions in the *evaluation* of bids and the *award* of public contracts (§II.B), restrictions that take place during the *implementation* of the contracts (including the new rules on their modification and termination) (§II.C), and restrictions derived from the setting-up of inefficient *bid protest* mechanisms (§II.C.v).

A. Assessment of Unnecessary Restrictions of Access to the Procurement Process

It almost goes without saying that some of the clearest restrictions of competition in the public procurement process derive from restrictions of access to tender procedures. Inasmuch as the procurement process is designed in restrictive or too narrow terms, competition gets immediately and unavoidably restricted—*both in the market*, since some competitors are excluded from a tranche of demand that is usually significant (above chapter two, §II.B.ii), *and within the tender procedure*, ie, in the procurement process.[6] To be sure, regardless of their specific design, all procurement procedures imply a certain degree of restriction of the (theoretical) maximum potential competition between interested tenderers. But, to a certain extent, those restrictions are required in order to avoid significant information and administrative costs that would jeopardise the efficiency (and even manageability) of the system.[7] Therefore, the analysis and criteria to be applied in the following sections will primarily focus on *avoiding unnecessary, disproportionate or excessive restrictions of access to public procurement*, rather than on the preservation of a theoretical maximum level of potential competition. As mentioned earlier, the avoidance of such restrictions of access to the procurement process should not only result in increased competition in publicly dominated markets, but also in better value for money for the public buyer.[8]

[6] As already mentioned in chapter five, competition should be analysed from both internal and external perspectives—since focusing exclusively on internal considerations can provide a partial and often distorted view of the real effects of public procurement on market dynamics.

[7] See above chapter three as regards the unavoidable trade-off between competition and efficiency objectives in the design of public procurement regulations and administrative practices.

[8] Indeed, the design of the procurement process should be such that the number of bidders remains large, since a relatively large number of bidders has been found to yield the best economic conditions in public procurement tenders. See RI Carr, 'Impact of Number of Bidders on Competition' (1983) 109(1) *Journal of Construction Engineering and Management* 61–73; S Gupta, 'Competition and Collusion in a Government Procurement Auction Market' (2002) 30 *Atlantic Economic Journal* 13, 20–22; A Estache and A Iimi, *Procurement Efficiency for Infrastructure Development and Financial Needs Reassessed* (World Bank Policy Research Paper No 4662, 2008), available at http://ssrn.com/abstract=1157130; S Li et al, 'Analysis of the Impacts of the Number of Bidders upon Bid Values' (2008) 12 *Public Works Management and Policy* 503, 509–10; and M Amaral, S Saussier and A Yvrande-Billon, 'Expected Number of Bidders and Winning Bids: Evidence from the London Bus Tendering Model' (2013) 47(1) *Journal of Transport and Economic Policy* 17–34. The indication that the preferable number of bidders is relatively large should be taken into due account. Therefore, a policy that unnecessarily restricts the number of potential bidders not only limits competition but can also have negative effects in the fringe market and for the public buyer.

In general terms, unnecessary or disproportionate restrictions of access to the procurement process can derive from a relatively large number of factors, and they seem to be specially likely in conjunction with aspects such as: the determination of which of the public buyer's needs should be satisfied by accessing the market, including a discussion on public–public cooperation to avoid market interaction (§II.A.i); the election of the type of procurement process itself and the publicity to which it is subjected, including a discussion on the exceptions applicable to the award of contracts to *in-house* entities (§II.A.ii);[9] the way tender documents are made available to interested tenderers, particularly as regards their cost (§II.A.iii) and the timing of their disclosure (§II.A.iv); the setting of grounds for the exclusion of tenderers (§II.A.v) (particularly for previous breaches of competition law, §II.A.vi); or in relation to the adoption of qualitative selection criteria (§II.A.vii) (particularly as regards past performance, §II.A.viii), as regards invitations to participate and the short-listing or selection of bidders (§II.A.ix), potential restrictions of the possibility to rely on the capacities of third parties for qualitative selection purposes (§II.A.x), the imposition of excessive documentary requests and its avoidance through the European Single Procurement Document (ESPD) (§II.A.xi), the imposition of duties to seek clarifications and additional information when contracting authorities are not satisfied with the initial submission (§II.A.xii), or the elaboration of registers of qualified contactors or the setting up of contractor certification systems (§II.A.xiii) and also regarding the requirement of bid sureties (§II.A.xiv); the setting of technical specifications (§II.A.xv); restrictions on joint bidding, teaming (§II.A.xvi) and multiple bidding (§II.A.xvii) by otherwise independent or individually interested tenderers; as well as in relation to the decisions on contract aggregation and bundling of requirements (§II.A.xviii); induced or mandatory subcontracting (§II.A.xix); or the use of framework agreements (§II.A.xx), dynamic purchasing systems (§II.A.xxi); and the use of electronic auctions (§II.A.xxii) and electronic catalogues (§II.A.xxiii)—to name but the most salient aspects related to the shaping or design of the public procurement process, which will be analysed in turn in this section.

To be sure, the degree of pro-competitiveness of a given tender procedure will be determined by the *cumulative effect* of the decisions made in relation to each and every one of these aspects, which will need to be evaluated on a case by case basis and with a view to the ensemble of the rules and criteria applied by the contracting authority. However, in order to gain a better understanding of the potential restrictions of competition that can derive from each of them and of the criteria that, in my view, should be followed to try to build a more pro-competitive public procurement environment, they will be the object of separate analysis.

i. Make-or-Buy Decisions and Public–Public Cooperation Mechanisms (or Cooperate-or-Buy Decisions)

Public procurement has often been seen as a valuable tool to (re)define the role and dimension of the public sector.[10] Arguably, public authorities should focus on those activities that

[9] The problems associated with the design of the procurement process and its publicity, and its implications in the level of competition for the contract have been studied for a long time: eg, AG Thomas, *Principles of Government Purchasing* (New York, D Appleton and Co, 1919) 171–84.

[10] For further discussion, see A Sánchez Graells and E Szyszczak 'Modernising Social Services in the Single Market: Putting the Market into the Social', in JM Beneyto and J Maillo (eds) *Fostering Growth: Reinforcing the*

they can perform more efficiently and resort to public procurement for those activities that are more efficiently undertaken by the private sector. Contracting out might not be a viable strategy for all public activities,[11] but it has been argued that, wherever possible, it should be the preferred strategy inasmuch as the private sector has generally been found to be more efficient than the public sector in carrying on most productive activities.[12] Along the same lines, it has been pointed out that such re-dimensioning of the public sector could have positive effects on competition in the market—through enlargement—since self-supply or in-house provision of goods and services by public authorities reduces total demand from non-public sources and can lower the level of effective competition in a given market.[13] Therefore, both general public sector economics and competition economics—or, at least, certain currents within them—support the adoption of a restrictive approach towards public make-or-buy decisions that might favour extensive recourse to the market.[14]

From a legal standpoint, the situation is far from being aligned with the abovementioned trend of economic theory and under EU law *there are no grounds to substantiate a general principle or a general obligation for Member States to resort to the market*. These decisions remain largely political and dependent on the model of state defined by each constitutional system. Indeed, article 345 TFEU (ex art 295 TEC) establishes the *principle of neutrality of ownership*.[15] According to the case law of the ECJ, this principle implies that Member States are free to develop any economic activities they wish to pursue under public ownership (ie, recognises the system of mixed economy that rules in most of the

Internal Market (Madrid, CEU Ediciones, 2014) 61–88. See also A Morton, 'European Union Public Procurement Law, the Public Sector and Public Service Provision' (2012) 4 *European Public Services Briefings*, available at www.european-services-strategy.org.uk/news/2012/european-public-services-briefing-4-european-u/eu-public-procurement.pdf.

[11] See: RP McAfee and J McMillan, *Incentives in Government Contracting* (Toronto, Toronto University Press, 1987) 142–44; and OE Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications: A Study in the Economics of Internal Organization* (New York, Free Press, 1975) 117–26.

[12] RG Holcombe, *Public Sector Economics* (Belmont, Wadsworth, 1988) 391–94. See also S Tadelis, 'Complexity, Flexibility, and the Make-or-Buy Decision' (2002) 92 *American Economic Review* 433; and T Bovaird, 'Developing New Forms of Partnership with the "Market" in the Procurement of Public Services' (2006) 84(1) *Public Administration* 81–102.

[13] As the argument has been phrased: 'Self-supply may also impact on competition in the supply of other buyers to the extent that the decision by the public sector not to procure goods and services externally limits the size of the market, and reduces the number of suppliers that the market can sustain. If the public sector engaged in extensive self-supply, this might imply that other buyers face less competition than if the public sector decided to source a significant part of its requirements from third parties'; see OFT, *Assessing the Impact of Public Sector Procurement on Competition* (2004) 20 and 128–33, available at webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft742c.pdf.

[14] For general discussion, see A Heimler, 'Local Public Services in Italy: Make, Buy or Leave It to the Market?' in G Amato and LL Laudati (eds), *The Anticompetitive Impact of Regulation* (Cheltenham, Edward Elgar, 2001) 262, 263–68 and 270–76.

[15] Generally, on this provision, see B Akkermans and E Ramaekers, 'Article 345 TFEU (ex Article 295 EC), its Meanings and Interpretations' (2010) 16(3) *European Law Journal* 292–314; and F Losada Fraga, T Juutilainen, K Havu and J Vesala, 'Property and European Integration: Dimensions of Article 345 TFEU' (2012) 148(3) *Tidskrift utgiven av Juridiska föreningen i Finland* 203–24. For a recent discussion on the provision and its implications, in the context of a ban on privatisations, see Joined Cases C-105/12 to C-107/12 *Essent and Others* [2013] pub electr EU:C:2013:677. The case is commented by P Van Cleynenbreugel, 'No Privatisation in the Service of Fair Competition? Article 345 TFEU and the EU Market–State Balance after Essent' (2014) 2 *European Law Review* 264–75. See also E Szyszczak, 'Services of General Economic Interest and State Measures Affecting Competition' (2014) 5(7) *Journal of European Competition Law & Practice* 508, 511.

Member States).[16] Therefore, public authorities can develop all kinds of economic activities, albeit with subjection to the rules of competition—as the fundamental principles of EU law require (see above chapter four)[17] and, more generally, all fundamental rules in the Treaties. As the ECJ has recently stressed,

> Article 345 TFEU does not mean that rules governing the system of property ownership current in the Member States are not subject to the fundamental rules of the FEU Treaty, which rules include, inter alia, the prohibition of discrimination, freedom of establishment and the free movement of capital.[18]

Such a requirement does not adversely affect the system of public ownership, and merely ensures that public and private ownership are treated equally.[19] As a matter of EU law, and as long as competition in the market is not distorted, public initiative in the carrying on of economic activities is not limited by the rules of the TFEU.[20]

Indeed, the case law of the EU judicature is clear as regards the *inexistence of an obligation for public authorities to call on undertakings in order to carry on public interest activities*. Therefore, the public administration can always carry out public interest activities on its own.[21] And, if deemed appropriate or convenient, public authorities can exercise the public interest tasks conferred on them in cooperation with other public authorities,[22]

[16] But see: A Jones and B Sufrin, *EC Competition Law: Text, Cases, and Materials*, 3rd edn (Oxford, Oxford University Press, 2008) 615, who point out that 'it is arguable that the insertion by the Treaty of European Union of what is now article 4 of the EC Treaty, represents a shift in policy which favours private over public ownership'. However, it is submitted that the reasons stated to justify such a claim—ie, that art 119 TFEU (ex art 4 TEC) says that the activities of the Member States and the EU shall be conducted 'in accordance with the principle of an open market economy with free competition'—remain insufficient to support that the principle of *neutrality of ownership* established in art 345 TFEU (ex art 295 TEC) is altered in any respect, since free competition in an open market economy does not preclude (or is not precluded by) the existence of public undertakings, as long as competition rules apply indistinctly to private and public economic agents (on this, see above chapter four). Generally, on the enforcement of competition law to public bodies, see OFT, *Public bodies and competition law. A guide to the application of the Competition Act 1998* (2011) OFT1389, available at www.gov.uk/government/publications/public-bodies-and-competition-law.

[17] The basic foundations were already set by the ECJ in Case 6/64 *Costa v ENEL* [1964] ECR 585. See also W Sauter, *Competition Law and Industrial Policy in the EU* (Oxford, Clarendon Press, 1997) 40.

[18] Joined Cases C-105/12 to C-107/12 *Essent and Others* [2013] pub electr EU:C:2013:677 34. See also Case 182/83 *Fearon* [1984] ECR 3677 7; Case C-302/97 *Konle* [1999] ECR I-3099 38; Case C-452/01 *Ospelt and Schlössle Weissenberg* [2003] ECR I-9743 24; Case C-171/08 *Commission v Portugal* [2010] ECR I-6817 64; Case C-271/09 *Commission v Poland* [2011] I-13613 44; and Case C-244/11 *Commission v Greece* [2012] pub electr EU:C:2012:694 16.

[19] See the reasoning in Case T-613/97 *Ufex* [2000] ECR II-4055 77. By analogy, see Joined Cases T-116/01 and T-118/01 *P&O European Ferries* [2003] ECR II-2957 151; Case C-367/98 *Commission v Portugal* [2002] ECR I-4731 48; Case C-503/99 *Commission v Belgium* [2002] ECR I-4809 44.

[20] See: A Verhoeven, 'Privatisation and EC Law: Is the European Commission "Neutral" with Respect to Public versus Private Ownership of Companies?' (1996) 45 *International and Comparative Law Quarterly* 861, 862–65.

[21] Case C-26/03 *Stadt Halle* [2005] ECR I-1 48; Case C-324/07 *Coditel Brabant* [2008] ECR I-8457 48; Case C-480/06 *Commission v Germany* [2009] ECR I-4747 45; and Case C-215/09 *Mehiläinen and Terveystalo Healthcare* [2010] ECR I-13749 31. See also the Commission Staff Working Paper concerning the application of EU public procurement law to relations between contracting authorities ('public–public cooperation') 5–6 (SEC(2011) 1169 final), available at ec.europa.eu/internal_market/publicprocurement/docs/public_public_cooperation/sec2011_1169_en.pdf; and J Wiggen, 'Public Procurement Law and Public–Public Co-operation: Reduced Flexibility but Greater Legal Certainty Ahead? The Commission's Staff Working Paper on the Application of EU Public Procurement Law to Relations between Contracting Authorities and the 2011 Proposal for a New Directive' (2012) 21 *Public Procurement Law Review* NA225–233.

[22] Case C-295/05 *Asemfo* [2007] ECR I-2999 65; Case C-324/07 *Coditel Brabant* [2008] ECR I-8457 49; C-182/11 *Econord* [2012] pub electr EU:C:2012:758; C-574/12 *Centro Hospitalar de Setúbal and SUCH* [2014] pub electr EU:C:2014:2004. Nonetheless, there are limits to the structures that can be adopted and the limits

without being obliged to use any particular legal form in order to carry out jointly their public service tasks.[23] Therefore, under EU law, there is no obligation to favour the outsourcing or the contracting-out of activities in the public interest and, consequently, public authorities have full discretion when considering make-or-buy decisions. Consequently, regardless of its economic or political desirability and feasibility,[24] the fact that a public authority develops a given economic activity with its own means instead of calling upon undertakings for the performance of such a task in the public interest *does not constitute a restriction of competition contrary to EU law*.[25]

In this regard, as a matter of EU law, there are no legal criteria that public authorities need to comply with when determining whether to pursue a given task in the public interest with their own means or with recourse to undertakings through public procurement procedures.[26] Therefore, in general, make-or-buy decisions or decisions opting for the in-house provision of goods or services remain outside the bounds of the EU public procurement rules—subject to general compliance with the principles of the TFEU and, particularly, with its competition rules and principles.[27] Similarly, under EU law, *there is no obligation to hold competitions between the public and private sector* in order to determine whether a given activity should be kept in-house or contracted-out.[28]

between in-house provision and public–public cooperation are not always easily determined, see C-15/13 *Datenlotsen Informationssysteme* [2014] pub electr EU:C:2014:303 and below in this same section.

[23] Case C-480/06 *Commission v Germany* [2009] ECR I-4747 47; but there are increasingly clear restrictions to this possibility, as discussed in C-159/11 *Ordine degli Ingegneri della Provincia di Lecce and Others* [2012] pub electr EU:C:2012:817; C-386/11 *Piepenbrock* [2013] pub electr EU:C:2013:385. For a comment on the initial stages of the public–public exemption, see MT Karayigit, 'A New Type of Exemption from the EU Rules on Public Procurement established: "In thy Neighbour's House" Provision of Public Interest Tasks' (2010) 19 *Public Procurement Law Review* 183–97. On the issue of inter-administrative agreements and the limits to the admissible legal forms, see C Bovis, *EC Public Procurement: Case Law and Regulation* (Oxford, Oxford University Press, 2006) 361–62; and PA Trepte, *Public Procurement in the EU: A Practitioner's Guide*, 2nd edn (Oxford, Oxford University Press, 2007) 199–200.

[24] For interesting critical thoughts, see E Rubin, 'The Possibilities and Limitations of Privatization (Book Review of J Freeman and M Minow, *Government by Contract: Outsourcing and American Democracy*)' (2010) 123(4) *Harvard Law Review* 890–935.

[25] Obviously, it does not preclude the possibility that Member States' domestic legislation restricts or even prevents public authorities from developing some or all economic activities in the market (as is the case in many Member States). However, this is a matter of national constitutional law that lies outside the scope of this study.

[26] A different, albeit related issue, is whether the assignment of the tasks to certain entities within the public sector or dominated by the public sector (*in-house* provision by consortia, public undertakings, etc) should be made through a formal call for tenders under the procedures set up in the EU directives on public procurement. Given that this issue is more closely connected to the unnecessary use of non-competitive procedures, it will be examined in some detail in the following section (below §II.A.ii).

[27] Case C-107/98 *Teckal* [1999] ECR I-8121.

[28] That was the case for the well-known compulsory competitive tendering (CCT) scheme regulated in the UK by the Local Government Planning and Land Act 1980 and the Local Government Act 1988, which forced municipalities to hold tenders between their units and undertakings in order to determine whether certain activities should be kept in-house or contracted out. That legislation was amended in 1999 and the CCT regime was substituted with a new and more flexible approach under the *Best Value* initiative in 2000. For an overview, see C Harlow and R Rawlings, *Law and Administration*, 2nd edn (Charlottesville, Butterworths, 1997) 252–69; S Arrowsmith, *The Law of Public and Utilities Procurement. Regulation in the EU and the UK*, vol 1, 3rd edn (London, Sweet & Maxwell, 2014) 17–32; and P Badcoe, 'Best Value—A New Approach in the UK' in S Arrowsmith and M Trybus (eds), *Public Procurement: The Continuing Revolution* (The Hague, Kluwer Law International, 2003) 197. CCT was thought to result in cost savings and to increase the opportunities to achieve value for money through competitive mechanisms; see M Uttley and N Hooper, 'The Political Economy of Competitive Tendering' in T Clarke and C Pitelis (eds), *The Political Economy of Privatization* (London, Routledge, 1993) 145, 151; but see M Paddon, 'EC Public Procurement Directives and the Competition from European Contractors for Local

Increasing Focus on Public–Public Cooperation.[29] Beyond the general principles just discussed, and given the increasing importance of public–public cooperation mechanisms in the public sector reform projects that followed the recent economic crisis in most Member States, Directive 2014/24 has consolidated and refined the case law of the ECJ as far as public–public cooperation is concerned.[30] Indeed, going beyond the general findings of the ECJ in seminal and recent cases,[31] Article 12(4) of Directive 2014/24 builds upon the criteria previously laid down by the Court and establishes that a contract concluded exclusively between two or more contracting authorities is covered by the public–public cooperation exception (ie will not be covered by the Directive and, consequently, not trigger a tender for the award of the contract) where all of three cumulative conditions are fulfilled: (a) the contract establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that the public services they have to perform are provided with a view to achieving common objectives; (b) the implementation of that cooperation is governed solely by considerations relating to the public interest; and (c) the participating contracting authorities perform on the open market less than 20 per cent of the activities concerned under this cooperation. As indicated in recital 33 of Directive 2014/24:

> In order to fulfil those conditions, the cooperation should be based on a cooperative concept. Such cooperation does not require all participating authorities to assume the performance of main contractual obligations, as long as there are commitments to contribute towards the cooperative performance of the public service in question. In addition, the implementation of the cooperation, including any financial transfers between the participating contracting authorities, should be governed solely by considerations relating to the public interest.

Such a cooperative concept/requirement and the potential restrictions derived from the

Authority Contracts in the UK' in T Clarke and C Pitelis (eds), *The Political Economy of Privatization* (London, Routledge, 1993) 159, 166. See also J Bennett and S Cirrell, 'Compulsory Competitive Tendering for White Collar Services' (1996) 5 *Public Procurement Law Review* 67. Indeed, the economic results of these experiences are mixed, and the desirability of creating a similar obligation of compulsory competitive tendering as a matter of EU law is strongly opposed; see G Obermann and T Kostal, 'Public Procurement at the Local Level in Austria: The Economic Consequences of Compulsory Competitive Tendering for Public Services' (2003) 74 *Annals of Public and Cooperative Economics* 139, 158. In similar terms, K Oettle, 'Long-Term Impacts of Competitive Tendering of Public Services on Market Structures' (2003) 74 *Annals of Public and Cooperative Economics* 87, 102; and P Bance, 'Opening Up Public Services to Competition by Putting Them Out to Tender' (2003) 74 *Annals of Public and Cooperative Economics* 33, 42. Along the same lines, H Cox, 'Questions About the Initiative of the European Commission Concerning the Awarding and Compulsory Competitive Tendering of Public Service Concessions' (2003) 74 *Annals of Public and Cooperative Economics* 7, 18–20 and 23–24. For discussion of a similar policy in the US, see SL Schooner, 'Competitive Sourcing Policy: More Sail than Rudder' (2003–04) 33 *Public Contract Law Journal* 263; and DM Walker, 'The Future of Competitive Sourcing' (2003–04) 33 *Public Contract Law Journal* 299.

[29] Arrowsmith (n 28, 2014) 521–35.

[30] See D Casalini, 'Beyond EU Law: the New "Public House"' in C Tvarnø, GS Ølykke and C Risvig Hansen (eds), *EU Public Procurement: Modernisation, Growth and Innovation* (Copenhagen, Djøf Forlag, 2012) 151–78; FL Hausmann and G Queisner, 'In-House Contracts and Inter-Municipal Cooperation—Exceptions from the European Union Procurement Law Should Be Applied with Caution' (2013) *European Procurement & Public Private Partnership Law Review* 231; and J Wiggen, 'Directive 2014/24/EU: The New Provision on Co-operation in the Public Sector' (2014) 23 *Public Procurement Law Review* 83–93.

[31] Case C-480/06 *Commission v Germany* [2009] ECR I-4747; C-159/11 *Ordine degli Ingegneri della Provincia di Lecce and Others* [2012] pub electr EU:C:2012:817; C-182/11 *Econord* [2012] pub electr EU:C:2012:758; C-386/11 *Piepenbrock* [2013] pub electr EU:C:2013:385; C-15/13 *Datenlotsen Informationssysteme* [2014] pub electr EU:C:2014:303; and C-574/12 *Centro Hospitalar de Setúbal and SUCH* [2014] pub electr EU:C:2014:2004.

exclusively public interest to be promoted through public–public cooperation can help to keep the scope of application of the public–public exception very limited. However, it is important to stress that the rules in Article 12(4) of Directive 2014/24 deviate from the previous case law of the ECJ in a way that may trigger significant litigation, not least because it blurs its distinction with the *in-house* exception (discussed below §II.A.ii, where attention is paid to the relaxation of the elements involving private participation in the excluded schemes) and brings the excluded activities dangerously close to the market.

Indeed, under the relevant formulation of the public–public cooperation exception by the ECJ,[32] there was no mention of the development of market activities by the contracting authorities involved in the cooperation. Arguably, it was implicitly assumed that such market activities should not exist in this framework, given that public authorities must be complying with the cumulative requirements of carrying out public services and being solely guided by public interest (which may easily be interpreted as requiring that they do not engage in economic activities, but only cooperate in order to discharge their obligations as emanations of the state, *lato sensu*). As stated by the ECJ, the public–public cooperation exception would only apply to

> contracts … which establish cooperation between public entities *with the aim of ensuring that a public task that they all have to perform is carried out* … in so far as, in addition, such contracts are concluded *exclusively by public entities*, without the participation of a private party, no private provider of services is placed in a position of advantage vis-à-vis competitors and implementation of that cooperation is *governed solely by considerations and requirements relating to the pursuit of objectives in the public interest*.[33]

The wording and the rationale of the ECJ case law was easily summarised as allowing for the public–public exception exclusively where the cooperation was conducted *outside the market* and was led by exclusive public interest criteria (ie, was not a market transaction justified by economic reasons). In those conditions, it was very clear that the public–public cooperation exception was limited to cases in which there was no direct distortion of competition derived from the decision by some or all of the participating contracting authorities to avoid resorting to the market through procurement procedures. It was also clear that the exception was limited to instances where no private interest was involved and where no private provider was advantaged as a result of its indirect participation in the public–public cooperation scheme by being the contractor of the 'grouping' of contracting authorities. Under those strict conditions, the restricted exclusion from public procurement rules of 'cooperate-or-buy' decisions of contracting authorities did not seem to significantly jeopardise the development of a pro-competitive public procurement system (at least, given that under EU law a strict rule imposing access to the market was in any case excluded, as discussed above).

However, that is no longer necessarily the case, given that Article 12(4) of Directive 2014/24 creates a significant margin of tolerance and allows the contracting authorities to carry out up to one-fifth[34] of their activities in the open market in parallel to the

[32] Case C-480/06 *Commission v Germany* [2009] ECR I-4747 44 and 47.

[33] C-159/11 *Ordine degli Ingegneri della Provincia di Lecce and Others* [2012] pub electr EU:C:2012:817 34 and 35 (emphasis added). See also C-197/11 *Libert and Others* [2013] pub electr EU:C:2013:288 118.

[34] Calculated as per art 12(5) Dir 2014/24, which allows for criteria other than turnover to be used.

public–public cooperation mechanism.[35] This is prone to create a significant difficulty for the joint application of public procurement and competition rules in this setting and, more generally, to maintain a pro-competitive public procurement system. In the case that public–public cooperation is instrumented for the provision of services of general economic interest (SGEIs) and 'top-up' (private) services by the public providers, it will be particularly difficult to avoid breaches of competition rules due to the cross-subsidisation of the market activies (state aid)[36] or the potential abuse of the dominant position in which the contracting authorities can (collectively) find themselves. It also comes to question the continued relevance and viability of the *FENIN-Selex* case law and may reopen the discussion on the treatment of contracting authorities as undertakings (above chapter four), particularly when they engage in both economic and non-economic activities as a result of 'mixed' public–public cooperation schemes.

Given the very significant risks that this creates, the public–public cooperation exception should be interpreted and applied in a very restrictive manner and it is submitted that the ECJ should be particularly restrictive on the basis of a joint application of Articles 18 and 12(4) of Directive 2014/24—which, in my view, requires giving special interpretative weight to the 'traditional' requirements of the case law and, functionally, to the requirement that as a result of the public–public cooperation implementation 'no private [or public!] provider of services is placed in a position of advantage vis-à-vis competitors',[37] or in simple terms, there is no restriction or distortion of competition in the relevant markets.[38] A broad interpretation of the public–public exception should indeed be avoided, not only because under the applicable interpretative rules exceptions to general rules need to be constructed narrowly,[39] but also because of the functional requirement of avoiding publicly created distortions of competition in the public procurement setting.

[35] It is important to stress that this is not considered in the relevant recitals of Dir 2014/24, which makes it particularly difficult to understand the justification (and interpretation) of this carve-out that deviates from prior ECJ case law; see recs (31) to (33) of Dir 2014/24. This was criticised by EL Weisbeek, *Teckal Revisited. An Examination of the Intended Codification of the Exceptions of Quasi In-house Procurement and Inter-municipal Cooperation* (2013) Department of European and International Public Law, Tilburg Law School 48, available at www.aanbestedingsrecht.org/project/userfiles/scriptie_Ellen_Weisbeek.pdf, with reference to the poor explanations found in the Commission's proposal.

[36] For a recent case where these issues are particularly relevant and the state aid implications are extensively discussed, see Case T-309/12 *Zweckverband Tierkörperbeseitigung v Commission* [2014] pub electr EU:T:2014:676.

[37] Case C-480/06 *Commission v Germany* [2009] ECR I-4747 44 and 47; C-159/11 *Ordine degli Ingegneri della Provincia di Lecce and Others* [2012] pub electr EU:C:2012:817 34 and 35. See also C-197/11 *Libert and Others* [2013] pub electr EU:C:2013:288 118. See also rec (32) of Dir 2014/24, which is concerned with the potential advantages that 'mixed' undertakings could have if excessive recourse to *in-house* (and public–public) cooperation exceptions was had, (indirectly) putting the private investors at an advantage to get public contracts (for further discussion, see below §2.A.ii). Along the same lines, Weisbeek (n 35) 43.

[38] Along the same lines, it has been clearly argued that 'the State as well as the municipalities should not be put in a position where they can create their own procurement "market" beyond the control of procurement law and the strict framework set by the Court of Justice regarding public-public cooperation, and, at the same time, exclude private service providers protected by procurement law': Hausmann and Queisner (n 30) 237. See also T Kaarresalo, 'Procuring In-house: The Impact of the EC Procurement Regime' (2008) 17 *Public Procurement Law Review* 242–54, 254. *Cf* Wiggen (n 30) 91, who considers that the rules in art 12(4) Dir 2014/24 and, in particular, the 20/80% restriction 'provides an important safeguard against possible negative effects the provision might otherwise have on competition'.

[39] Case C-394/02 *Commission v Greece* [2005] ECR I-4713 33; Case C-337/05 *Commission v Italy* [2008] ECR I-2173 57; C-250/07 *Commission v Greece* [2009] ECR I-4369 17.

Centralised and Collaborative Procurement as a 'Soft System' of Public–Public Cooperation (or 'Cooperation to Buy').[40] Along the same lines of facilitating public–public cooperation, but in relation to 'cooperate-to-buy' decisions instrumented through either centralised procurement or occasional joint procurement,[41] Directive 2014/24 regulates certain possibilities that go beyond the primitive rules on centralisation of purchases and the creation of central purchasing bodies contained in article 11 of Directive 2004/18.[42] The justification for the increased detail in the regulation of centralised and collaborative procurement,[43] including cross-border cooperation, can be found in recitals (69) to (71) of Directive 2014/24, where the increasing relevance of these procurement techniques is echoed,[44] and an interesting direct reference is made to the potential increase in competition that can derive from the use of these techniques. However, it must be borne in mind that generally (and as pointed out in chapter two), the centralisation of procurement activities creates significant risks of distortions of competition, which is also acknowledged in recital (59): '[T]he aggregation and centralisation of purchases should be carefully monitored in order to avoid excessive concentration of purchasing power and collusion, and to preserve transparency and competition, as well as market access opportunities for SMEs.'[45] Hence, this is an area where particular care should be exercised to avoid distortions of competition.

In that regard, it is important to stress that the rules of Directive 2014/24 deviate in significant ways from what would be desirable from a competition perspective. Central purchasing bodies are now clearly assigned two alternative roles under Directive 2014/24. On the one hand, they can act in support or on behalf of contracting authorities (ie, 'act as intermediaries by awarding contracts, operating dynamic purchasing systems or concluding framework agreements to be used by contracting authorities') and, on the other hand, they can act as the actual providers of other contracting authorities (ie, 'act as wholesalers by buying, stocking and reselling'). This second role should make them fall completely under the umbrella of competition law (see chapter four), but the first one has more diffuse competition law implications. It is now clear that both of these roles are expressly regulated in article 37(1) of Directive 2014/24 (which suppresses any

[40] Generally, on the functional alternatives, GL Albano and M Sparro, 'Flexible Strategies for Centralized Public Procurement' (2010) 1(2) *Review of Economics and Institutions* art 4. For a general overview of the rules, see Arrowsmith (n 28, 2014) 373–77 and 535–40.

[41] On the situations in which recourse to this type of cooperation is desirable, see E Bakker et al, 'Choosing an Organisational Form: The Case of Collaborative Procurement Initiatives' (2008) 1(3) *International Journal of Procurement Management* 297–317.

[42] This provision received very limited attention from the ECJ, given that it was not applicable *ratione temporis* to the facts in Case C-220/05 *Auroux* [2007] ECR I-385, and it was not the object of the dispute in Case C-368/10 *Commission v Netherlands* [2012] pub electr EU:C:2012:284. For discussion of certain practical difficulties, see G Racca, 'Collaborative Procurement and Contract Performance in the Italian Healthcare Sector: Illustration of a Common Problem in European Procurement' (2010) 19 *Public Procurement Law Review* 119–33.

[43] Generally, see C Risvig Hamer, 'Regular Purchases and Aggregated Procurement: The Changes in the New Public Procurement Directive Regarding Framework Agreements, Dynamic Purchasing Systems and Central Purchasing Bodies' (2014) 23 *Public Procurement Law Review* 201, 207–10; and A Sánchez Graells, 'Novedades en materia de compra colaborativa y adjudicación de concesiones de servicios en las nuevas Directivas de febrero de 2014' (2014) 7 *Anuario de Derecho Municipal* 121–44.

[44] See Commission Staff Working Document, *Annual Public Procurement Implementation Review 2012* (SWD(2012) 342 final) 25–26, where it is clearly indicated that most Member States have implemented this option in their national legislation, with the exception of Estonia, Germany and Luxembourg.

[45] For discussion, see GL Albano, 'Demand Aggregation and Collusion Prevention in Public Procurement', in GM Racca and CR Yukins (eds), *Integrity and Efficiency in Sustainable Public Contracts* (Brussels, Bruylant, 2014) 155–70.

legal uncertainty derived from the silence of Dir 2004/18). It is also worth stressing that Member States can make the recourse to the central purchasing body mandatory (art 37(1) *in fine* Dir 2014/24). This latter possibility creates very difficult to anticipate competition effects, as it makes the supply of the goods, works or services to the public sector depend on the running of a 'two-sided' platform by the central purchasing body. In that case, depending on the way in which demand is aggregated or bundled (see below §II.A.xviii), the exclusionary effects on (particularly smaller) suppliers can be very relevant. Moreover, generally, there seems to be no good reason to impose recourse to the central purchasing body if a given contracting authority can obtain better conditions (ie, better value for money) from an alternative provider. In that case, the principle of competition would require carving out an exception to the rule of obligatory recourse to the central body when it is not the one offering the most economically advantageous tender (although, admittedly, this would create practical difficulties if the contracting authority just decides to rely on the central body without carrying out any independent market consultation, under art 40 Dir 2014/24 or otherwise).

According to the rules in article 37 of Directive 2014/24, recourse to a central purchasing body exempts the contracting authority from complying separately with public procurement rules (on the assumption, obviously and unavoidably, that the central purchasing body is the one bound by them in its market interactions), unless it directly carries out one or more of the phases involved in the procurement process (as indicated in art 37(2) Dir 2014/24). Moreover, contracting authorities can award a public service contract for the provision of centralised purchasing activities to a central purchasing body without applying the procedures foreseen in Directive 2014/24. Such public service contracts may also include the provision of ancillary purchasing activities, which implies that there can be an element of remuneration of the service provided by the central purchasing body.

Therefore, recourse to central purchasing bodies is fundamentally excluded from the scope of application of Directive 2014/24 in a sort of special case allowing for the use of the negotiated procedure without publication (or by analogy with art 32 Dir 2014/24), which has a dubious justification, particularly if the centralised purchasing body is a body governed by public law with private capital participation (see criticism on this point in relation to in-house entities, below §II.A.ii). Under the rules of Directive 2014/24, centralisation of procurement is seen as a clear device to allow (small) contracting authorities to achieve savings,[46] as well as higher standards of professionalisation,[47] and to reduce the administrative burden of running procurement procedures by having recourse to the services of the central purchasing body—in a sort of intermediate solution between a public–public cooperation scheme (for which there would clearly not be a sufficient cooperative element, see above) and an *in-house* arrangement (for which the control criterion would probably

[46] See K Karjalainen, 'Estimating the Cost Effects of Purchasing Centralization—Empirical Evidence from Framework Agreements in the Public Sector' (2011) 17(2) *Journal of Purchasing and Supply Management* 87–97.

[47] However, recourse to centralised procurement does not eliminate the need for proper (decentralised) contract management. See GL Albano and R Zampino, *Strengthening the Level of Integrity of Public Procurement at the Execution Phase: Evidence from the Italian National Frame Contracts* (Working Paper, 2012), available at http://ssrn.com/abstract=1989434; and G Racca, R Cavallo Perin and GL Albano, *The Safeguard of Competition in the Execution Phase of Public Procurement: Framework Agreements as Flexible Competitive Tools* (paper presented at the Seminar on 'The New Public Law in a Global (Dis)order. A Perspective from Italy', Istituto di Ricerche Sulla Pubblica Amministrazione (IRPA) and Jean Monnet Center of NYU School of Law, 2010), available at http://ssrn.com/abstract=2180856.

be absent, see below §II.A.ii). From the competition perspective, this possibility basically moves the focus of the competition concerns to the market activities of the central purchasing body and increases the likelihood of distortions of competition (chapter two), and it may as well result in the central purchasing body engaging in a sort of 'market regulation' activity that is difficult to align with the general requirements of the principle of competition. Consequently, it is a development that causes significant concern in terms of the development of a pro-competitive public procurement system (which could justify the creation of dedicated position of competition advocate within the central purchasing bodies, as argued in chapter seven).

Along the same lines, article 38 of Directive 2014/24 sets rules for the carrying out of occasional joint procurement, and article 39 of Directive 2014/24 extends the possibility to have recourse to centralised or occasional joint procurement involving contracting authorities from different Member States. These rules aim at settling important legal issues concerning the applicable law and, from a competition perspective, the only provision that is worth mentioning is that article 39(2) establishes that Member States 'shall not prohibit its contracting authorities from using centralised purchasing activities offered by central purchasing bodies located in another Member State'. This could create a certain level of competition between centralised purchasing bodies that could in turn reduce the likelihood of distortions of competition even if their use was made compulsory. However, in a difficult-to-understand restriction, this same provision allows Member States to limit the possibility of having access to 'foreign' central purchasing bodies that act as wholesalers or as intermediaries. That is, a given Member State can decide to allow its contracting authorities to use the services of 'foreign' central purchasing bodies acting as wholesalers, but not of those acting as intermediaries—or vice versa. This is a provision that is difficult to understand if not on the basis of the (likely) constitutional restrictions that some Member States may want to impose on the first possibility (ie, on the possibility of central purchasing bodies acting as wholesalers in competition with private undertakings or, even more, on the basis of a reserve of activity amounting to a monopoly), which they would also be keen on extending beyond their borders. In any case, however, from a competition law perspective, it seems desirable to subject all decisions based on articles 37 to 39 of Directive 2014/24, and 37 especially, to a proportionality test that balances out the expected benefits in terms of reduction in administrative costs and exploitation of economies of scale against the likely distortions of competition in the market where the central purchasing bodies are active. It is further submitted that, in that assessment, the relevance of the latter distortions should be highlighted as a way of providing effectiveness to the principle of competition embedded in article 18 of Directive 2014/24. Moreover, depending on the circumstances, the reservation of the activity to the central purchasing body could amount to state aid, which could be difficult to justify on the basis of a potentially non-existing SGEI (see chapter four for discussion). Therefore, from a competition perspective, the implementation of article 37 of Directive 2014/24 creates significant risks that will deserve careful consideration by the ECJ in the future.

ii. Unnecessary Use of Closed or Non-Competitive Procedures, Particularly In-House Schemes, and the Associated Restrictions on the Publicity of the Procurement Processes

As has just been discussed, there is no general obligation for public authorities to resort to the market in the development of their tasks in the public interest and there is significant scope for public–public (ie, non-market) cooperation in the provision of public services or the discharge of public tasks, including softer forms of joint and centralised procurement. However, once public authorities decide to resort to the market for the procurement of works, goods or services, the application of the EU directives on public procurement is triggered.[48] Under these rules, the public procurement process should be run in a way that ensures effective or sufficient competition—and, for that purpose, EU public procurement rules establish diverse types of procedures among which public authorities can choose, depending on the concurring circumstances.[49] The selection of a given type of public procurement procedure[50] over the others has major implications as regards the competition for that specific contract[51] and, potentially, the competition in the market where the interested tenderers compete.[52] The election of a given procurement procedure will generally have implications as regards the degree of publicity to which it is submitted,[53] and consequently on the degree of expected competition.[54]

[48] Similarly, though in more general terms, PA Trepte, *Regulating Procurement. Understanding the Ends and Means of Public Procurement Regulation* (Oxford, Oxford University Press, 2004) 212.

[49] To be sure, process selection is far from being completely discretional for public authorities, since strict limits apply on recourse to less competitive procedures (ie, the negotiated procedure and, arguably, the new competitive dialogue procedure). Case C-323/96 *Commission v Belgium* [1998] ECR I-5063 21–39. See Arrowsmith (n 28) 605–13. For a critical discussion based on the 2014 rules, see P Telles and L Butler, 'Public Procurement Award Procedures in Directive 2014/24/EU', in F Lichere, R Caranta and S Treumer (eds) *Novelties in the 2014 Directive on Public Procurement*, European Procurement Law Series, vol 6 (Copenhagen, Djøf Forlag, 2014) available at http://ssrn.com/abstract=2443438.

[50] In general, on the types of procurement procedures, or methods of procurement—covering formal tendering procedures (both open and restricted), two-stage tendering, requests for proposals, competitive negotiation, single source procurement and requests for quotations or shopping—see S Arrowsmith et al, *Regulating Public Procurement: National and International Perspectives* (London, Kluwer Law International, 2000) 459–552; and Trepte (n 48) 272–88. Not all theoretical possibilities are envisaged in the EU public procurement directives, which consequently restricts the contracting authorities' options from the outset. On the procedures currently available under the directives, see Trepte (n 23) 374–426. For recent discussion on the new use of procedures in the 2014 Directive, see J Davey, 'Procedures Involving Negotiation in the New Public Procurement Directive: Key Reforms to the Grounds for Use and the Procedural Rules' (2014) 23 *Public Procurement Law Review* 103–11; Risvig Hamer (n 43) 201–10; and P Cerqueira Gomes, 'The Innovative Innovation Partnerships under the 2014 Public Procurement Directive' 2014) 23 *Public Procurement Law Review* 211–18.

[51] See: Bovis (n 24) 155–59; and G Heijboer and J Telgen, 'Choosing the Open or the Restricted Procedure: A Big Deal or a Big Deal?' (2002) 2 *Journal of Public Procurement* 187. In general, economists have been largely concerned about the election between traditional sealed bid tendering and dynamic auctions. Many different factors affect such a decision, which is not straightforward at all. On this issue, see GL Albano et al, 'Preventing Collusion in Public Procurement' in N Dimitri et al (eds), *Handbook of Procurement* (Cambridge, Cambridge University Press, 2006) 347, 358–59; and WE Kovacic et al, 'Bidding Rings and the Design of Anti-Collusive Measures for Auctions and Procurements' in Dimitri et al, 381, 387. From a different perspective, GL Albano et al, 'Fostering Participation' in Dimitri et al, 267, 270. These authors also establish the existence of common uncertainty as regards the object of the contract as the main criterion to inform the choice between sealed bid and dynamic processes—favouring dynamic auctions in the case of uncertainty and sealed bids in low uncertainty scenarios; see id, 'Information and Competitive Tendering' in Dimitri et al, 143. See also LM Ausubel and P Cramton, 'Dynamic Auctions in Procurement' in Dimitri et al, 220.

[52] GL Albano et al, 'Procurement Contracting Strategies' in Dimitri et al (n 51) 82, 105.

[53] In general, on the publicity of contract opportunities, see Arrowsmith et al (n 50) 553–84.

[54] Restrictions on publicity have been clearly singled out as one of the main restrictions to competitive

Broadly speaking, the directives set up open procurement procedures aimed at guaranteeing the maximum possible degree of competition,[55] while allowing contracting authorities to establish limits or to resort to less competitive procedures if the specific circumstances of the case so require. Along these lines, Directive 2014/24 establishes, on a descending scale of *openness*, the six procurement procedures that can be used by public authorities: open procedure, restricted procedure, competitive procedure with negotiation, competitive dialogue, innovation partnership, and negotiated procedure without prior publication.[56] As the *general rule*, in awarding their public contracts, authorities are free to apply the *open* or *restricted procedure* (art 26(2) Dir 2014/24). Election between these two types of procedure is discretionary for contracting authorities, which can resort to either of them depending on their needs, their knowledge of the market prior to the tender, their administrative capacity, etc. The *innovation partnership* seems also to be part of the fundamentally free and discretionary choice of procedure that contracting authorities have (art 26(3) Dir 2014/24), but its particular set-up and the need for certain grounds or conditions to be met (rec 49 and art 31 Dir 2014/24) determines to a large extent the occasions in which it can be carried out.[57] Subject to the provisions of Member States' domestic laws,[58] in the case of *particularly complex contracts* where contracting authorities consider that the use of the open or restricted procedure will not allow the award of the contract, or where *the needs of the contracting authority cannot be met without adaptation of readily available solutions*, they may make use of the *competitive dialogue* or the *competitive procedure with negotiation* (art 26(4) Dir 2014/24). It is important to stress that the conditions for the use of these two procedures have been merged in the 2014 rules—which creates more scope for negotiations than their 2004 equivalents,[59] but also contradicts the

procurement. ES Savas, *Privatization and Public-Private Partnerships* (New York, Chatham House, 2000) 199–200. Similarly, McAfee and McMillan (n 11) 60. For recent empirical evidence supporting the fact that increases in publicity reduces the costs of procurement and rationalizes public spending, see D Coviello and M Mariniello, 'Publicity Requirements in Public Procurement: Evidence from a Regression Discontinuity Design' (2014) 109 *Journal of Public Economics* 76–100.

[55] C Bovis, *EC Public Procurement Law* (London, Longman, 1997) 65; and id, 'Public Procurement in the European Union: Lessons from the Past and Insights to the Future' (2005–06) 12 *Columbia Journal of European Law* 53, 68. In general terms, such an approach is largely consistent with economic theory; see P Bajari and S Tadelis, 'Incentives and Award Procedures: Competitive Tendering versus Negotiations in Procurement' in Dimitri et al (n 51) 121.

[56] On the procedural complexity that has been created in the 2014 revision of the rules and the lost opportunity for a real simplification of the system, see S Arrowsmith, 'Modernising the European Union's Public Procurement Regime: a Blueprint for Real Simplicity and Flexibility' (2012) 21 *Public Procurement Law Review* 71–82.

[57] Indeed, even if the wording of art 26.3 Dir 2014/24 follows that of art 26.2 and, consequently, does not impose particular requirements for the use of innovation partnerships, their special nature and scope make their expected use rather marginal. For a similar view, considering innovation partnerships within the category of *special procedures* that contracting authorities cannot use freely, see Telles and Butler (n 49) 10.

[58] It should be noted that the adoption of the competitive dialogue as a procurement procedure has been optional for Member States since the approval of Dir 2004/18. However, it was expected that most of them would adopt that new procedure; S Treumer, 'The Field of Application of Competitive Dialogue' (2006) 15 *Public Procurement Law Review* 307, 310 fn 20, and it has fundamentally been the case, as shown in the contributions to S Arrowsmith and S Treumer (eds), *Competitive Dialogue in EU Procurement* (Cambridge, Cambridge University Press, 2012). In that regard, new procedures such as the innovation partnership can also be expected to be adopted by most Member States in the transposition of the 2014 rules.

[59] Which, as clearly indicated in rec (42) of Dir 2014/24, was one of the objectives of the recent reform: 'There is a great need for contracting authorities to have additional flexibility to choose a procurement procedure, which provides for negotiations.' See also Davey (n 50) 104. For a critical assessment of the need for flexibility and further scope for negotiations than allowed under the 2004 rules, see S Treumer, 'Flexible Procedures or

traditional view that contracting authorities had limited opportunities to resort to other than open and restricted procedures. Indeed, as the European Commission put it, 'the new Directives follow a "tool box approach" which gives contracting authorities more flexibility, greater options and new routes to procurement'.[60] All in all, however, the multiplication of procedures implying negotiations in the 2014 Directive raises important questions as to the need (and future use) of non-negotiated procedures, as well as to the need and effectiveness of (some of) the several negotiated procedures (or procedures involving some sort of negotiations, to avoid terminological ambiguities) foreseen in Directive 2014/24 (for further discussion, see below).[61] Finally, in the *specific cases* and circumstances referred to expressly in article 32 of Directive 2014/24, the contracting authorities may apply a *negotiated procedure without a prior publication* (art 26.6 Dir 2014/24).[62] Article 32 of Directive 2014/24 establishes a relatively large number of specific circumstances under which recourse to a negotiated procedure without previous publication is justified. Therefore, contracting authorities need to justify such a decision under one of those specific exceptions to the general rule of recourse to open or restricted procedures, or at least to competitive procedures with negotiation.[63] Although all circumstances under which contracting authorities can resort to procedures other than open and restricted ones are subject to interpretation, some of them allow for a relatively large degree of discretion on the part of the contracting authority in the assessment of the facts and circumstances that justify such a decision. It is hereby submitted that these will be the cases where a pro-competitive interpretation (ie, an interpretation aimed at preserving the maximum degree of competition in the procurement process) will acquire significant relevance. Therefore, the inquiry will now focus on several of these criteria, with a particular concentration on the resort to contracts that allow for extensive negotiations.

'Unregulated' Procurement or 'Strategic' Procurement below Thresholds. A first group of cases where the exercise of administrative discretion might have a major impact on competition in the market is that of public procurement below the jurisdictional thresholds set by the EU public procurement directives.[64] These cases refer to two particular and

Ban on Negotiations? Will More Negotiation Limit the Access to the Procurement Market', in Tvarnø, Ølykke and Risvig Hansen (n 30) 135–50.

[60] European Commission, *Public Procurement Reform Factsheet No 3: Simplifying the Rules for Contracting Authorities* (2014), available at http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/reform/fact-sheets/fact-sheet-03-simplification-public-purchasers_en.pdf.

[61] Arrowsmith (n 56) *in totum*, and Telles and Butler (n 49) 10–11, who stress that 'the underlying rationale for providing two or three very similar procedures with similar grounds for use might be questioned'.

[62] The increased availability of procedures that involve negotiation has reduced the differences between the general regime and that applicable in the 'excluded sectors', now under Dir 2014/25. In this regard, with a focus on the previous differences between Dir 2004/18 and Dir 2004/17, see Trepte (n 23) 373 and 426–62.

[63] Case C-323/96 *Commission v Belgium* [1998] ECR I-5063 31–35. See also Arrowsmith (n 28) 959–77 and 1061–95.

[64] In general, on the contracts covered by the directives—with special reference to the jurisdictional thresholds and the ensuing aggregation rules, see Arrowsmith (n 28) 385–496; and Trepte (n 23) 257–70. For a discussion on the relevance and rationale of having kept the rules on thresholds fundamentally unaltered in the 2014 reform of the rules, see C Risvig Hansen, *Contracts Not Covered or Not Fully Covered by the Public Sector Directive* (Copenhagen, Djøf Forlag, 2012) 103–10; and P Telles and SL Schooner, 'The Good, the Bad and the Ugly: EU's Internal Market, Public Procurement Thresholds and Cross-Border Interest (with Editor's Note)' (2013) 43 *Public Contract Law Journal* 3-25, available at http://ssrn.com/abstract=2308503. For a critical assessment of the tensions that the extension of obligations to the tendering of contracts below those thresholds creates in the domestic systems of the Member States, see S de Mars, 'The Limits of General Principles: A Procurement Case Study' (2013) 38(3) *European Law Review* 316–34.

closely related situations. On the one hand, they cover the decisions that the public buyer adopts as regards the aggregation of its needs of a given product or service, with the result that tender procedures for a given proportion of its needs fall within or below the thresholds set by EU public procurement directives (see art 4, 5 and 67 Dir 2014/24). On the other, they refer to the different, but related, situation of the conduct of what could be termed *micro-purchases*, which usually fall below the thresholds set by domestic public procurement regulations of the Member States, and usually allow for the direct award of a contract—or the direct purchase in the market of those goods or services—without recourse to *any* kind of procurement procedure.[65]

In both cases, the setting up of minimum thresholds below which the public buyer does not need to comply with public procurement rules—although the general principles of the TFEU always apply[66] (see above chapter five)—generates incentives for the public buyer to structure its needs *strategically*—or, more clearly, artificially to disaggregate its requirements in order to avoid compliance with EU or national public procurement rules. This is one of the cases where the conflict of aims within public procurement regulations is more apparent, since the efficiency of the system—which, in general, recommends the exclusion of public procurement rules where the associated administrative costs exceed the expected benefits (or savings)—might run contrary to the preservation of competition in the market.

The potential anti-competitive effects of a strategic use of procurement thresholds should be readily apparent, since it completely excludes the applicability of public procurement rules. To be sure, if the public buyer disregarded the application of public procurement rules by the conduct of systematic below thresholds purchases but, in so doing, acted in the market as any other customer, the net impact of this practice as regards competitive dynamics would be unclear—since, by freeing itself of the straightjacket of procurement regulations, the public buyer might be adopting *'normal' market behaviour*. However, the risk of favouritism and of the abuse of discretion in these cases raises significant doubts as regards the neutrality of the purchasing activities of a public purchaser that systematically avoids the application of the public procurement rules by artificially splitting its requirements. Different strategies could underlie such behaviour, such as the direct assignment of most contracts to one and the same supplier or, on the contrary, the spread of contracts more or less equally among a group of suppliers—although random behaviour cannot be

[65] For an overview of the rules applicable to contracts below thresholds in selected EU jurisdictions, see the national reports included in D Dragos and R Caranta (eds), *Outside the EU Procurement Directives—Inside the Treaty?*, European Procurement Law Series, vol 4 (Copenhagen, Djøf Forlag, 2012). In setting up relatively high thresholds for micro-purchases, domestic regulations could be allowing for an excessive amount of public procurement activities to be conducted without resorting to formal competition. A situation criticised by SL Schooner, 'Fear of Oversight: The Fundamental Failure of Businesslike Government' (2001) 50 *American University Law Review* 627, 660–63, in relation to the US FAR—where *micro-purchases* conducted through a system of *purchase cards* accumulate a significant amount of public procurement expenditure. For further details, see SL Schooner and NS Whiteman, 'Purchase Cards and Micro-Purchases: Sacrificing Traditional United States Procurement Policies at the Altar of Efficiency' (2000) 9 *Public Procurement Law Review* 148; NS Whiteman, 'Charging Ahead: Has the Government Purchase Card Exceeded Its Limit?' (2000–01) 30 *Public Contract Law Journal* 403; and J Tillipman, 'The Breakdown of the United States Government Purchase Card Program and Proposals for Reform' (2003) 12 *Public Procurement Law Review* 229. For discussion, see also JP MacHarg, 'Doing More with Less—Continued Expansion of the Government Purchase Card Program by Increasing the Micropurchase Threshold: A Response to Recent Articles Criticizing the Government Purchase Card Program' (2001–02) 31 *Public Contract Law Journal* 293.

[66] For an extensive discussion, see Risvig Hansen (n 64) 161–250.

ruled out. In any case, the adoption of these types of behaviour can clearly have a negative competitive impact. Therefore, the strategic use of below-thresholds procurement should be prevented.

Specific rules have been developed to deter such strategic use of public procurement thresholds, or the unjustified resort to 'unregulated' public procurement activities. As regards the strategic conduct of public procurement below the thresholds set by the EU directives on public procurement, article 5(3) of Directive 2014/24 expressly states that the object of public contracts may not be subdivided to prevent its coming within the scope of the directive. More specifically, it establishes that the choice of the method used to calculate the estimated value of a procurement shall not be made with the intention of excluding it from the scope of this Directive,[67] and that a procurement shall not be subdivided with the effect of preventing it from falling within the scope of this Directive, *unless justified by objective reasons*.

The latter caveat allowing for the objective justification of a subdivision of a contract that makes it fall below the relevant thresholds was not present in the equivalent rule of article 9(3) of Directive 2004/18 ('No works project or proposed purchase of a certain quantity of supplies and/or services may be subdivided to prevent its coming within the scope of this Directive'). It is submitted that this new caveat is prone to create significant litigation, particularly if the European Commission identifies numerous instances of recourse to 'objective reasons' on the part of the Member States and the latter argue for a broad interpretation of the exception—which should be rejected.[68] However, given the additional explanation provided in recital (20) of Directive 2014/24, it is submitted that the addition of the caveat is largely irrelevant and only aimed at a further prevention of the artificial split of contracts in the framework of centralised procurement. In that regard, it is important to take into account that, according to the recital, the rationale for the 'objective reasons' caveat is that:

> For the purposes of estimating the value of a given procurement, it should be clarified that it should be allowed to base the estimation of the value on a subdivision of the procurement *only where justified by objective reasons*. For instance, it could be justified to estimate contract values at the level of a separate operational unit of the contracting authority, such as for instance schools or kindergartens, provided that the unit in question is independently responsible for its procurement. This can be assumed where the separate operational unit independently runs the procurement procedures and makes the buying decisions, has a separate budget line at its disposal for the procurements concerned, concludes the contract independently and finances it from a budget which it has at its disposal. *A subdivision is not justified where the contracting authority merely organises a procurement in a decentralised way*. (emphasis added)

In my view, then, the caveat should be interpreted as creating a strengthened requirement for a justification that intends to escape the rule on prohibited division of contracts on the basis of (allegedly) objective reasons and, particularly, aims to anticipate and prevent potential infringements of the EU rules by contracting authorities that manage (de) centralised procurement systems. Generally speaking, however, the discussion seems to

[67] For a discussion on the very problematic use of intentional elements in the 2014 Directives and, in particular, in the context of the principle of competition embedded in art 18 Dir 2014/24, see above chapter five, §III.

[68] Case C-394/02 *Commission v Greece* [2005] ECR I-4713 33; Case C-337/05 *Commission v Italy* [2008] ECR I-2173 57; C-250/07 *Commission v Greece* [2009] ECR I-4369 17.

need being re-oriented towards the definition of contracting authority and the recourse to collaborative procurement (below).

Generally, though, the anti-split or anti-circumvention rule is clear and establishes a prohibition of strategic use of public procurement thresholds. To be sure, these rules do not prevent contracting authorities from splitting or dividing the contracts into as many lots as they deem fit or objectively justified (on issues regarding the division of contracts in lots and the aggregation of lots, see below §II.A.xviii), but rather focus on their obligation to take the aggregate value of those lots into consideration when determining whether the relevant thresholds are met—and, hence, whether their award should be conducted pursuant to the rules of the EU directives on public procurement (see art 5(8) and 5(9) Dir 2014/24).[69] Consequently, the prohibition on circumventing the application of the directives is not violated per se by dividing the contracts in lots, but only by failing to treat those lots as a single economic and technical unit and, consequently, by failing to award them in compliance with public procurement rules.[70]

This prohibition has also been clearly interpreted by the EU judicature, which has provided guidance as to what constitutes an 'artificial' division of the object of a contract to circumvent public procurement rules—by putting emphasis on the criterion of the *economic and technical unity of the object of the various contracts* whose award should have been conducted jointly.[71] Therefore, a public buyer that artificially divided into separate contracts or purchases certain of its requirements that should objectively be considered to constitute a single economic and technical unit would be found in breach of the EU directives on public procurement. A different dimension is that of the temporal compatibility between the spread of the needs and the periodicity of the contracts or purchases conducted by the public buyer.[72] Where a significant mismatch can be identified—ie, when purchases below the thresholds occur too often—the public buyer should equally be found

[69] It is important to stress that the system allows for certain flexibility and that, despite the rules preventing the artificial split into lots in art 5(8) and 5(9) Dir 2014/24, contracting authorities may award contracts for individual lots without applying the procedures provided for under the Directive, provided that the estimated value net of VAT of the lot concerned is less than €80,000 for supplies or services or €1 million for works. However, the aggregate value of the lots thus awarded without applying the Directive shall not exceed 20% of the aggregate value of all the lots into which the proposed work, the proposed acquisition of similar supplies or the proposed provision of services has been divided (art 5(10) Dir 2014/24).

[70] Along the same lines, although with reference to the equivalent provisions in Dir 93/38, see Opinion of AG Jacobs in Case C-16/98 *Commission v France* 34–37. From the opposite perspective, analysing whether the improper or artificial aggregation of contracts that do not constitute a single economic and technical unity could result in a breach of the same provisions, see Opinion of AG Mischo in Case C-411/00 *Swoboda* 53–64. In very clear terms, the ECJ concluded that the purpose that inspires these provisions '(the concern to avoid any risk of manipulation) also precludes a contracting authority from artificially grouping different services in the same contract solely in order to avoid the application in full of the directive to that contract'; see Case C-411/00 *Swoboda* [2002] ECR I-10567 58.

[71] Case C-16/98 *Commission v France* [2000] ECR I-675; and Case C-412/04 *Commission v Italy* [2008] ECR I-619 72. See also Opinion of AG Jacobs in Case C-16/98 *Commission v France*. Similarly, albeit in less elaborated terms, see Opinion of AG Kokott in Case C-220/05 *Auroux* 65 fn 58; Opinion of AG Ruiz-Jarabo Colomer in Case C-412/04 *Commission v Italy* 85–88; and Opinion of AG Mengozzi in Case C-237/05 *Commission v Greece* 76–79. See also Opinion of AG Trstenjak in Case C-271/08 *European Commission v Federal Republic of Germany* 165. For recent cases discussing the splitting of contracts, see T-384/10 *Spain v Commission* [2013] pub electr EU:T:2013:277 and T-358/08 *Spain v Commission* [2013] pub electr EU:T:2013:371. Both of them respectively appealed as C-429/13 and C-513/13, which will give the ECJ an opportunity to update its doctrine on the artificial split of contracts.

[72] The temporal dimension was also analysed, although in a limited way, in the Opinion of AG Jacobs in Case C-16/98 *Commission v France* 71.

in breach of the EU public procurement rules, since the conduct of an excessive number of purchases or the conclusion of an excessive number of contracts should equally be considered an artificial split of the object of the contract in circumvention of the EU rules.

From a competition perspective, the rule against the artificial division of the contract to exclude it from public procurement rules seems to be sound and, in general, should prevent the exercise of strategic public procurement below the thresholds. Nonetheless, it is suggested that, when exercising their discretion as regards the need to group their requirements into a single or few contracts—*rectius*, when assessing the extent of the obligation not to split them—contracting authorities should not only bear in mind a criterion of strict proportionality (between the inconveniencies and costs of running a procurement process and the unity or separability of its requirements), but also the principle of competition. In cases where the application of the proportionality principle might be neutral towards the aggregation or not of contracts, competition considerations might become relevant. In those cases, if recourse to public procurement rules can generate increased competition for the contract—or, put otherwise, if the conduct of 'unregulated' procurement activities might generate a negative impact on market dynamics—the contracting authority should opt for the aggregation of its requirements and the conduct of the corresponding tender. The same criteria apply to both the conduct of procurement below EU and national thresholds, since the competition element is equally important in both cases. In the end, it is submitted that public buyers should not divide their requirements to avoid compliance with public procurement rules not only when it is unwarranted or disproportionate, but also when it could result in a negative impact on market competitive dynamics.

'Unregulated' Procurement or 'Strategic' Procurement through Entities other than 'Contracting Authorities'. Another way in which public procurement regulations could be (and have often been) circumvented is by conducting procurement activities through instrumental entities not formally belonging to the traditional concept of the state and 'contracting entity' or authority.[73] The definition of the *subjective element* or entity coverage that determines the field of application of the EU public procurement rules currently contained in Directive 2014/24[74] has been the object of a significant amount of case law of

[73] For a discussion of the entity coverage of the pre-2004 Directives, see S Arrowsmith, 'The Entity Coverage of the EC Procurement Directives and UK Regulations: A Review' (2004) 13 *Public Procurement Law Review* 59–86. In general, on the concept of 'contracting entity' under the 2004 EU public procurement directives, see Trepte (n 23) 89–134 (in general) and 135–81 (regarding the utilities sector). The current list of contracting authorities and entities can be found in the Annexes to Commission Decision 2008/963/EC (COM(2008) 7871) [2008] OJ L349/1. For an update of the discussion on the subjective coverage rules in Dir 2014/24, see Arrowsmith (n 28) 339–83.

[74] Some commentators indicated that a revision of the concept of contracting authority was a challenge in the latest revision of the procurement rules; eg, without a clear indication of where the challenge lied, see CH Bovis, 'The Challenges of Public Procurement Reform in the Single Market of the European Union' (2013) 14(1) *ERA Forum* 35, 40–3. However, it is worth stressing that the scope of application of the 2004 and 2014 Directives is the same. Therefore, all analysis of the subjective coverage of the 2004 Directives remains fully relevant and immediately applicable to the 2014 Directives. For instance, see Support for Improvement in Governance and Management (SIGMA), *What Is a Contracting Authority?* (2011), available at www.sigmaweb.org/publications/47449736.pdf. For a critical assessment of the implications that 'acquiring' the status of contracting authority entails, see A Tvaronaviciene and V Visinskis, 'The Concept of Contracting Authority under Public Procurement Law and Problems of Acquisition of Such Status in National Law of the Republic of Lithuania' (2014) 10(14) *European Scientific Journal* 48–62.

the EU judicature,[75] which has adopted a *functional* approach to this issue.[76] That body of case law was codified in the definition of 'contracting authority' contained in article 1(9) of Directive 2004/18 and has been retained in article 2(1)(1) of Directive 2014/24, which clearly states that it 'means the State, regional or local authorities, bodies governed by public law or associations formed by one or several of such authorities or one or several of such bodies governed by public law'. And, for further clarification, under article 2(1)(4) of Directive 2014/24 'bodies governed by public law' means bodies that have all of the following characteristics:

> (a) they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; (b) they have legal personality; and (c) they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law; or are subject to management supervision by those bodies; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.

As shall be apparent from this broad and functional definition, the aim of Directive 2014/24 is to extend the EU public procurement rules to all cases in which the public buyer resorts to the market to procure goods, services or works—regardless of the particular entity through which those procurement activities are developed, as long as it complies with the basic requirements to consider it an instrument of the state (broadly defined). It is submitted that this anti-formalist or functional approach is consistent with the principle of competition and that its proper application will contribute to preventing the generation of distortions or restrictions of competition by means of 'strategic unregulated' procurement. Therefore, no further analysis seems required from a competition standpoint.

In-House Providing Exception. It is also worth reviewing another preliminary issue regarding the conditions under which contracting authorities assign public contracts without resorting to any kind of competitive procedure, ie, the case of the so called *in-house providing exception*,[77] which has now been codified in article 12(1) and 12(2) of Directive 2014/24. In order to analyse the limits of this exception appropriately, the assess-

[75] See: Case C-323/96 *Commission v Belgium* [1998] ECR I-5063 25–29; Case C-360/96 *BFI* [1998] ECR I-6821 48–49; Case C-353/96 *Commission v Ireland* [1998] ECR I-8565 36–40; Case C-380/98 *University of Cambridge* [2000] ECR I-8035 16ff; and Case C-237/99 *Commission v France* [2001] ECR I-939 39ff. See also Joined Cases C-223/99 and C-260/99 *Agorà and Excelsior* [2001] ECR I-3605 38–42; Case C-373/00 *Adolf Truley* [2003] ECR I-1931 58–61; Case C-18/01 *Korhonen and others* [2003] ECR I-5321 49; Case C-283/00 *Commission v Spain* [2003] ECR I-11697 81; Case C-337/06 *Bayerischer Rundfunk and others* [2007] ECR I-11173; and Case C-393/06 *Aigner* [2008] ECR I-2339. For more recent cases, see C-300/07 *Hans & Christophorus Oymanns* [2009] ECR I-4779; and C-526/11 *IVD* [2013] pub electr EU:C:2013:543.

[76] See: S Arrowsmith, 'The Past and Future Evolution of EC Public Procurement Law: From Framework to Common Code?' (2005–06) 35 *Public Contract Law Journal* 337; C Bovis, 'Recent Case-Law Relating to Public Procurement: A Beacon for the Integration of Public Markets' (2002) 39 *Common Market Law Review* 1025, 1038–50; id, Lessons from the Past and Insights to the Future (2005–06) 76–78.

[77] See: Arrowsmith (n 28) 497–520; and Trepte (n 23) 196–205. The issue is functionally close to the granting of contracts to affiliated undertakings under Directive 2014/24—which, however, will not be analysed in detail, due to the relative straightforwardness of the regime set up in its art 29 (which follows the one in art 23 Dir 2004/14). On the latter exemption from Dir 2004/17, Trepte (n 23) 252–56. However, it is important to stress that the ECJ had rejected the analogous application of the utilities rules in the *in-house* setting under the classical directive because the need to interpret exceptions strictly made it inappropriate. See Case C-340/04 *Carbotermo* [2006] ECR I-4137 55, and Weisbeek (n 35) 32. For a general appraisal of the limits of the doctrine of *in-house* provision as formulated in the case law, see J Wiggen, 'Public Procurement Rules and Cooperation between Public Sector Entities: The Limits of the In-house Doctrine under EU Procurement Law' (2011) 20 *Public Procurement Law Review* 157–72.

ment will first focus on its development and will later move on to the appraisal of the rules now 'codified' in the 2014 Directive.[78] This analysis will be important to highlight how the evolution of the exception is gradually loosing justification and creating more and more threats to undistorted competition in the market.

(a) The origins: the pre-2014 'vertical' in-house providing exception.[79] According to the relevant case law, when the contracting authority decides not to opt for strict self-supply of goods or services (ie, decides not to carry on those tasks itself) but to contract for or assign that activity to another entity within the public sector (ie, in cases of self-supply or in-house provision,[80] *largo sensu* or loosely defined[81]), public procurement procedures can be avoided if the contracting authority exercises over the undertaking or other entity concerned a *control* which is similar to that which it exercises over its own departments,[82] and, at the same time, the undertaking or other entity concerned carries out the *essential part of its activities* with the controlling authority or authorities.[83] These criteria are

[78] On the latter, see generally the analysis of Weisbeek (n 35) *in totum*; and M Burgi and F Koch, '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' (2012) *European Procurement & Public Private Partnership Law Review* 86.

[79] For an in-depth discussion, with references to the reception of the doctrine by several Member States, see the contributions to M Comba and S Treumer (eds), *The In-House Providing in European Law*, European Procurement Law Series, vol 1 (Copenhagen, Djøf Forlag, 2010) and particularly R Caranta, 'The In-House Providing: The Law as it Stands in the EU', 13–52. See also F Avarkioti, 'The Application of EU Public Procurement rules to "In House" Arrangements' (2007) 16 *Public Procurement Law Review* 22–35. For an overview of the level of compliance with the *in-house* exception at Member State level, see Commission Staff Working Document, *Annual Public Procurement Implementation Review 2012* (SWD(2012) 342 final) 29, available at http://ec.europa.eu/internal_market/publicprocurement/docs/implementation/20121011-staff-working-document_en.pdf.

[80] In case no contract or assignment is involved in a given administrative decision—because, eg, it constitutes a preliminary or framework agreement amongst public authorities, which will later result in public contracts being tendered together—public procurement rules will not be applicable. See Case C-480/06 *Commission v Germany* [2009] ECR I-4747 44, where an agreement (or contract) for the joint construction and operation of waste processing facilities was considered 'the legal framework for the future construction and operation of a facility intended to perform a public service … [which] does not provide for or prejudice the award of any contracts that may be necessary in respect of the construction and operation of the … facility'—therefore deferring the application of public procurement rules to that subsequent phase. Along the same lines, see Opinion of AG Verica Trstenjak in Case C-324/07 *Coditel Brabant* 75; and Case C-451/08 *Müller* [2010] ECR I-2673. See also K Pedersen and E Olsson, 'Commission v Germany—A New Approach to In-House Providing?' (2010) 19 *Public Procurement Law Review* 33–45. For further discussion on strict public–public cooperation mechanisms and their consolidation in art 12(3) Dir 2014/24, see above §II.A.i.

[81] Along the same lines, see Opinion of AG Kokott in Case C-458/03 *Parking Brixen* 2. A different instance of *quasi self-supply* might be found in the exemption regulated in art 18 of Directive 2004/18 and now in art 11 Dir 2014/24. This situation is generally not considered within the *in-house providing exception* and, consequently, will not be further analysed.

[82] R Cavallo Perin and D Casalini, 'Control Over In-House Providing Organisations' (2009) 18 *Public Procurement Law Review* 227–40.

[83] Case C-107/98 *Teckal* [1999] ECR I-8121 50; Case C-94/99 *ARGE* [2000] ECR I-11037 40; Case C-26/03 *Stadt Halle* [2005] ECR I-1 49; Case C-84/03 *Commission v Spain* [2005] ECR I-139 38; Case C-458/03 *Parking Brixen* [2005] ECR I-8585 62; Case C-29/04 *Commission v Austria* [2005] ECR I-9705 34; Case C-264/03 *Commission v France* [2005] ECR I-8831 50; Case C-410/04 *ANAV* [2006] ECR I-3303 24; Case C-340/04 *Carbotermo* [2006] ECR I-4137 33; Case C-220/05 *Auroux* [2007] ECR I-385 63; Case C-295/05 *Asemfo* [2007] ECR I-2999 55; Case C-337/05 *Commission v Italy* [2008] ECR I-2173 36; Case C-371/05 *Commission v Italy* [2008] ECR I-110 22; Case C-324/07 *Coditel Brabant* [2008] ECR I-8457 26; and Case C-480/06 *Commission v Germany* [2009] ECR I-4747 34–35. Also, Opinion of AG Mazák in Case C-480/06 *Commission v Germany* 29 and 40. See also D Castro-Villacañas Pérez, 'La Doctrina *in house providing* y el derecho de defensa de la competencia. Algunos comentarios sobre el caso TRAGSA' in Ll Cases (ed), *Anuario de la Competencia 2006* (Madrid, Marcial Pons, 2007) 351, 352–57; JJ Pernás García, *Las operaciones in house y el derecho comunitario de contratos públicos. Análisis de la jurisprudencia del TJCE* (Madrid, Iustel, 2008); K Weltzien, 'Avoiding the

cumulative,[84] and they are *aimed precisely at preventing distortions of competition*.[85] In the cases of in-house providing, the criteria of *similarity of control* and the *intensity of 'non-public' activities* developed by the undertaking or entity entrusted with the carrying on of the activity in question are decisive to determine the applicability of EU public procurement rules or, where the contracts fall below the thresholds or outside the scope of the directives (eg, until 2014, in the case of concessions[86]), the general principles derived from the TFEU—that is, the general obligations of equality of treatment, non-discrimination and transparency, and open competition.[87] In all cases, the effect on competition of not resorting to public procurement procedures should also be taken into account.

The criterion of *similarity of control* has been the object of further interpretation by recent case law. The ECJ has ruled that, in the case of entities fully owned by the public authority, the latter has to be able to influence the undertaking's decisions and that it must bear a power of decisive influence over both strategic objectives and significant decisions of the public undertaking.[88] If more than one public authority owns the entity, control can be exercised jointly by the public entities,[89] provided that all of them play an active and effective part in the control of the entity and that the control exercised by each contracting authority is genuine, structural and functional (ie, not a purely formal affiliation that does not provide the contracting authority with the slightest possibility of participating in the control).[90] Finally, the control exercised by one or several public authorities has to be direct, or of a vertical nature, given that 'the reason which justifies recognition of the exception for in-house awards, that is to say, the existence a specific internal link between the contracting authority and the contractor, is absent in a situation' where the contracting authority 'holds no share in the capital of that entity and has no legal representative in [the] management bodies' of the contractor.[91] The ECJ has also determined that, in those

Procurement Rules by Awarding Contracts to an *In-House* Entity: The Scope of the Procurement Rules in the Classical Sector' (2005) 14 *Public Procurement Law Review* 237; and C Lacava and G Mazzantini, 'Affidamenti *in house* e regole di concorrenza' in L Fiorentino (ed) *Lo Stato compratore. Lacquisto di beni e servizi nelle pubbliche amministrazioni* (Bologna, Il Mulino, 2007) 161.

[84] Opinion of AG Stix-Hackl in Case C-26/03 *Stadt Halle* 52; Opinion of AG Kokott in Case C-458/03 *Parking Brixen* 44; and Opinion of AG Geelhoed in Case C-29/04 *Commission v Austria* 42.

[85] Case C-340/04 *Carbotermo* [2006] ECR I-4137 58–59.

[86] Trepte (n 23).

[87] Case C-196/08 *Acoset* [2009] ECR I-9913, which is an important case because it allows for the participation of private capital, provided 'the private participant in the company [is] selected by means of a public and open procedure after verification of the financial, technical, operational and management requirements specific to the service to be performed and of the characteristics of the tender with regard to the service to be delivered, provided that the tendering procedure in question is consistent with the principles of free competition, transparency and equal treatment laid down by the EC Treaty with regard to concessions'. However, this is an issue that will no longer be relevant due to the replication of the *in-house* provisions in art 17 Dir 2014/23 on concessions.

[88] Case C-458/03 *Parking Brixen* [2005] ECR I-8585 65; Case C-340/04 *Carbotermo* [2006] ECR I-4137 36; and Case C-371/05 *Commission v Italy* [2008] ECR I-110 24.

[89] Case C-324/07 *Coditel Brabant* [2008] ECR I-8457 28.

[90] Case C-573/07 *Sea* [2009] ECR I-8127 46; Case C-196/08 *Acoset* [2009] ECR I-9913 53; and Case C-215/09 *Mehiläinen and Terveystalo Healthcare* [2010] ECR I-13749 32. As recently further clarified in Case C-182/11 *Econord* [2012] pub electr EU:C:2012:758 31. For discussion, see S Smith, 'In-House Awards to Jointly Controlled Companies—Satisfying the Control Test: Econord SpA Cases C-182/11 and C-183/11' (2013) 22 *Public Procurement Law Review* NA32–NA34; and Hausmann and Queisner (n 30).

[91] Case C-15/13 *Datenlotsen Informationssysteme* [2014] pub electr EU:C:2014:303 26–33. It is also important to stress that, in the circumstances of the case, the ECJ considered that 'there is no need to examine whether the exception concerning in-house awards is capable of applying to so-called "horizontal in-house transactions", that is to say, a situation in which the same contracting authority or authorities exercise "similar control" over two

cases where the public authority assigns a contract to an entity distinct from itself, in whose capital it has a holding together with one or more *private* undertakings,[92] and even if the private partners are social solidarity institutions carrying out non-profit activities,[93] the public award procedures laid down by the EU directives on public procurement must always be applied[94]—irrespective, therefore, of the actual ability to exert a decisive influence on the entity. In these cases of semi-public entities, consequently, the ECJ seems to have established a more stringent standard than is customary in competition law.[95]

As regards the criterion of the *intensity of 'non-public' activities*, it is important to note that the consensus is that (i) the focus should be on the *actual* activities carried on by the entities or undertakings, and not on those (theoretically or generally) permitted by law or under the relevant statutes regulating the activities of the undertaking; (ii) the essential part of the activities *both quantitatively and qualitatively* have to be pursued for the controlling contracting authority or authorities;[96] and (iii) any activity pursued for *third parties* is *innocuous*, provided it is of *secondary importance*.[97] The consensus was also that a threshold of 90 per cent or more of the activities seemed appropriate to guarantee that the essential part of the activities were effectively limited to the in-house relationship, while the remainder (if any) were secondary and innocuous,[98] and this was particularly relevant because an excessive 'market-orientation' of the contractor would render the control by the contracting entity tenuous.[99]

Therefore, the criteria established by the case law of the EU judicature prior to the

distinct economic operators, one of which awards a contract to the other'. For a case comment, see D 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' (2014) 23 *Public Procurement Law Review* NA120–NA122.

[92] It had been argued that 'it is the mere possibility of private participation which precludes the company from being considered as being in-house. There does not need to be any actual private participation'; see Trepte (n 23) 201–03. However, it seems defendable that at least a certain likelihood of openness to private participation—eg, through future privatisation plans—should be required before excluding the possibility of considering a given entity as being in-house. In this regard, see Opinion of AG Kokott in Case C-458/03 *Parking Brixen* 55–74; and A Brown, 'The Application of the EC Treaty to a Services Concession Awarded by a Public Authority to a Wholly Owned Subsidiary: Case C-458/03, Parking Brixen' (2006) 15 *Public Procurement Law Review* NA40. Indeed, that is the interpretation of the ECJ position in Case C-573/07 *Sea* [2009] ECR I-8127 49 and 50, where the mere possibility was not deemed sufficient and, a real prospect of private participation was required for the *in-house* exception not to apply.

[93] As recently clarified in C-574/12 *Centro Hospitalar de Setúbal and SUCH* [2014] pub electr EU:C:2014:2004 35–40. See comments in A Brown, 'In-House Exemption not Available Due to the Presence of Private Members in the Supplier Entity: Case C-574/12 Centro Hospitalar de Setubal' (2014) 23 *Public Procurement Law Review* NA133–NA137.

[94] Case C-26/03 *Stadt Halle* [2005] ECR I-1 52; Case C-29/04 *Commission v Austria* [2005] ECR I-9705 46; Case C-220/05 *Auroux* [2007] ECR I-385 64; Case C-337/05 *Commission v Italy* [2008] ECR I-2173 38. See also, by analogy, Case C-480/06 *Commission v Germany* [2009] ECR I-4747 44. Along the same lines, see Arrowsmith (n 28) 504–09.

[95] See: Castro-Villacañas (n 83) 356. For interpretative guidance on this criterion, or the first prong of the *Teckal test*, see Opinion of AG Kokott in Case C-458/03 *Parking Brixen* 49–76; and Opinion of AG Geelhoed in Case C-29/04 *Commission v Austria* 43–48.

[96] Case C-340/04 *Carbotermo* [2006] ECR I-4137 70–71; Case C-295/05 *Asemfo* [2007] ECR I-2999 62; and Case C-324/07 *Coditel Brabant* [2008] ECR I-8457 44.

[97] Opinion of AG Stix-Hackl in Case C-26/03 *Stadt Halle* 79–95; and Opinion of AG Kokott in Case C-458/03 *Parking Brixen* 77–85.

[98] The percentage of 90% was relevant in Case C-295/05 *Asemfo* [2007] ECR I-2999 63, although it was not expressly adopted by the ECJ. See the analysis of Weisbeek (n 35) 32.

[99] Case C-458/03 *Parking Brixen* [2005] ECR I-8585 67.

approval of Directive 2014/24 seemed to limit the ability of contracting authorities to disregard the public procurement regime (loosely defined) under the *in-house providing exception* to cases where (i) there was *no recourse to the market whatsoever* when entrusting the activity in the public interest to be carried on by the public contractor or concessionaire, and (ii) the public contractor or concessionaire did not develop subsequent market activities, or they were marginal (ie, of secondary importance). Therefore, the *in-house providing exception* could only be applied in those cases where the *insulation from the market* of the public contractor or concessionaire,[100] both as regards its shareholding structure and its operations, was such that *competition in the market was highly unlikely to be affected*.[101]

Consequently, when interpreting the criteria that allow for the application of the *in-house providing exception* under the EU public procurement regime—both under the relevant directives and under the principles of the TFEU—one of the prime underlying concerns was its *impact on competition in the market*. It follows that in those cases where competition in the market is or can be altered or distorted by the award of a public contract or a concession in a *quasi in-house scenario*, the *in-house exception* should not be available to the contracting authority and, consequently, compliance with the EU directives or the corresponding principles of the TFEU (ie, equality, non-discrimination and transparency, and competition) should be triggered. However, as we shall see immediately, the 2014 codification of this exception creates significant interpretative doubts, as it deviates from its original logic and tight limits.

(b) The 2014 'codification': the creation of the 'public-house'[102] *providing exception and new threats to keeping competition undistorted.* Superficially, it may seem that Directive 2014/24 simply codifies the *in-house* exception as found in the ECJ case law as it declares not covered by its rules contracts awarded by a contracting authority to a legal person governed by private or public law where the contracting authority (independently, or jointly with other contracting authorities) exercises over the legal person concerned a *control which is similar* to that which it exercises over its own departments (arts 12(1)(a) and 12(3)(a) Dir 2014/24), always provided it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person (art 12(1) *in fine* Dir 2014/24). The Directive also includes rules restricting the volume of the activities that can be carried out with third parties (arts 12(1)(b) and 12(3)(b) Dir 2014/24) and in principle banning private participation in the capital of the contractor (arts 12(1)(c) and

[100] In the end, the logic was that those *in-house* activities 'may be exempted from the scope of application of the procurement rules because they do not infringe the free movement provisions or distort competition, thereby eliminating the "raison d'être" of the procurement rules'; Weisbeek (n 35) 18; with reference to C-340/04 *Carbotermo* [2006] ECR I-4137 62.

[101] In this regard, this doctrine seems to be largely consistent with the approach undertaken by the ECJ as regards the exclusion of *social activities* from the domain of competition law, as in those cases the consideration of the entity as an 'undertaking' for the purposes of the application of competition law provisions is based on whether (i) the entity is ruled by the principle of solidarity, and (ii) is insulated from the market, so that the discipline of the market is substituted with supervision by the State (above chapter four, §III.B). Along the same lines, see VG Hatzopoulos, 'Killing National Health and Insurance Systems but Healing Patients? The European Market for Health Care Services after the Judgments of the ECJ in *Vanbraekel* and *Peerbooms*' (2002) 39 *Common Market Law Review* 683, 717; also Arrowsmith (n 28) 330 fn 534. Therefore, under both strings of case law, *insulation from the market* is taken as a relevant criterion to exclude the application of both competition law and public procurement law in such instances so that, in certain cases, the conduct of specific activities could be isolated from both sets of regulation.

[102] The expression is borrowed from Casalini (n 30) 155.

12(3)(c) Dir 2014/24). However, the Directive waters-down the requirements of the ECJ *Teckal* doctrine in very important aspects—which makes it clear that it does not merely codify the *in-house* exeption, but develops it in very significant ways.

Firstly, as far the *intensity of 'non-public' activities* are concerned, articles 12(1)(b) and 12(3)(b) of Directive 2014/24 set an excessively tolerant threshold by indicating that it is sufficient that '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 by other legal persons controlled by that contracting authority'.[103] It is important to stress that the 80 per cent threshold had been implicitly rejected by the ECJ in previous case law,[104] and that a 90 per cent threshold had been expressly accepted (even if not made a rigid condition, given the possibility to assess the intensity of non-public activities in qualitative terms as well).[105] Hence, the adoption of this threshold clearly deviates from the *de minimis* approach previously followed by the Court.[106]

Secondly, as far the *ban on private participation* is concerned, articles 12(1)(c), 12(2) and 12(3)(c) now allow for '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'. According to recital (32) of Directive 2014/24,

> in view of the particular characteristics of public bodies with compulsory membership, such as organisations responsible for the management or exercise of certain public services, [the ban on private participation] should not apply in cases where the participation of specific private economic operators in the capital of the controlled legal person is made compulsory by a national legislative provision 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 legal person. It should further be clarified that the decisive element is only the direct private participation in the controlled legal person. Therefore, where there is private capital participation in the controlling contracting authority or in the controlling contracting authorities, this does not preclude the award of public contracts to the controlled legal person, without applying the procedures provided for by this Directive as such participations do not adversely affect competition between private economic operators [*sic*].

These two justifications for the relaxation of the *Teckal* absolute prohibition of private participation are likely to prove controversial, given that they can give rise to situations where an effective market advantage is derived from the (apparent) in-house award. Indeed, the drafting of the condition in articles 12(1)(c), 12(2) and 12(3)(c) of Directive 2014/24 seems quite open and it is possible to anticipate the need to conduct an assessment of proportionality between the objectives pursued by the national law imposing private participation and the carve-out that it creates in the application of the EU procurement rules. It will then be for the ECJ either to stick to its functional, competition-based approach to the 'pre-2014' in-house doctrine, or to defer to the quite express will of the EU legislator (fundamentally, in this case, the Member States). Given the very express (even if

[103] Calculated as per art 12(5) Dir 2014/24, which allows for criteria other than turnover to be used.

[104] Case C-340/04 *Carbotermo* [2006] ECR I-4137 51-55 although, admittedly, the discussion was not on the 80% threshold itself, but the possibility of applying it by analogy. See references in n 77 above.

[105] Case C-295/05 *Asemfo* [2007] ECR I-2999 63.

[106] *Cf* Weisbeek (n 35) 41–2.

incorrect) justification provided in the recital, the ECJ may have difficulty keeping the *in-house* exception within strict limits.

Thirdly, article 12(3)II of Directive 2014/24 consolidates the requirements for the existence of legitimate *joint control* in a way that introduces significant rigidity when compared with the functional approach followed by the ECJ until now, which simply required that contracting authorities could jointly exercise control and that none of their participations was merely formal.[107] According to the specific rules of the Directive, though, joint control will (only?) exist where all of the following conditions are fulfilled: (i) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities (but individual representatives may represent several or all of the participating contracting authorities); (ii) those contracting authorities are able jointly to exert decisive influence over the strategic objectives and significant 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. This crystallises some of the circumstances the ECJ had taken into account in the past,[108] but may well impinge on the freedom of the contracting authorities to structure their cooperation whichever way they see fit,[109] and may consequently trigger litigation due to its excessive prescriptiveness—unless it is interpreted as setting a mere presumption that does not exclude other types of substantive appraisal of the effective existence of joint control despite some of the conditions in article 12(3)II of Directive 2014/24 not being met.

Finally, along the same lines of expansion but without a very clear rationale for the introduction of different conditions for the application of the *in-house* exception to public procurement procedures, article 12(1) and 12(2) of Directive 2014/24 significantly expand the subjective scope of the *in-house* exception in two significant respects that reduce the *requirements of verticality and immediacy of the 'similar control'*. On the one hand, article 12(1) allows for the interposition of entities between the contracting authority and the contractor, so that the 'similar control' over the contractor does not need to be directly exercised by the contracting authority but 'may also be exercised by another legal person, which is itself controlled in the same way by the contracting authority'. On the other hand, article 12(2) extends the in-house exception to 'inverted' and 'horizontal' situations, so that it 'also applies where a controlled legal person which is a contracting authority awards a contract to its controlling contracting authority ['inverted' or 'bottom-up' in-house award], or to another legal person controlled by the same contracting authority ['horizontal' or 'lateral' in-house award]'.

In my opinion, all these deviations from the 'pre-2014' *in-house* case law go astray and create very significant risks of distortions of competition in the public procurement setting—which were precisely the ones that the original formulation of the case law tried to avoid: 'The conditions laid down in Teckal … are aimed precisely at preventing distortions of competition.'[110] In a diametrically opposed direction, the flexibilisation and expansion of the *in-house* exception in Directive 2014/24 has completely destroyed the rationale of the initial exception (ie, no market interaction and, consequently, no distortion of competition by advantaging a competitor over others) and is unwarranted. What is more,

[107] Above nn 89 and 90 and accompanying text.
[108] Particularly in Case C-324/07 *Coditel Brabant* [2008] ECR I-8457.
[109] Weisbeek (n 35) 45, with reference to Case C-480/06 *Commission v Germany* [2009] ECR I-4747 47.
[110] Case C-340/04 *Carbotermo* [2006] ECR I-4137 59.

it will in many instances result in market behaviour by the contracting authorities that would run contrary to the principle of competition embedded in the Directive itself (art 18, above chapter five, §III) and, potentially, limit other important fundamental freedoms. All of this should be sufficient to allow the ECJ to declare the new parts of the *in-house* provision exception contrary to the principles of the TFEU and, more specifically, to the principle of competition as a fundamental principle of EU law. It should be acknowledged that this may be an unlikely development of EU public procurement law, but it would not be unwarranted. If nothing else, from the perspective of the design of a competition-oriented public procurement system, the interpretation of article 12 of Directive 2014/24 should be clearly restrictive.[111] Moreover, this is another development that puts pressure on the reclassification of *in-house* entities as *undertakings* for the purposes of the application of EU competition law. Otherwise, the resort to *in-house* (and public–public cooperation) schemes may result in a very significant gap in the enforcement of EU competition law, particularly as state aid control and the prevention of abuses of a dominant position are concerned. Hence, it is submitted that the ECJ needs to revisit its existing case law (particularly the *FENIN-Selex* doctrine, above chapter four) in order to compensate for the expansion of the *in-house* exception and, ultimately, to ensure the effectiveness of the principles of neutrality of ownership and effective competition.

Recourse to Competitive Dialogue and Competitive Procedure with Negotiation. Directive 2014/24 establishes common grounds for the contracting authorities to resort to either of these two procedures and, consequently, to engage in significant negotiations with candidates.[112] The European Commission has clarified that 'the competitive dialogue has been simplified and made more practicable. It is now accessible under the same conditions as the competitive procedure with negotiation giving the contracting authority full choice.'[113] According to article 26(4) of Directive 2014/24, there is a *numerus clausus* of situations that justify recourse to these procedures. However, in view of the lack of precision of some of the grounds, it is hard to argue that contracting authorities are actually constrained not to resort to them.

Indeed, on the one hand, article 26(4)(a) sets out grounds based on *project complexity* or the existence of *special needs* of the contracting authority, and makes both procedures available if (i) the needs of the contracting authority cannot be met without adaptation of readily available solutions; (ii) they include design or innovative solutions; (iii) the contract cannot be awarded without prior negotiations because of specific circumstances related to the nature, the complexity or the legal and financial make-up or because of the risks attaching to them; or (iv) the technical specifications cannot be established with sufficient precision by the contracting authority.[114] These grounds absorb the justification for the use

[111] As always stressed when it comes to the interpretation of the *in-house* exception, see Case C-26/03 *Stadt Halle* [2005] ECR I-1 46; and Case C-458/03 *Parking Brixen* [2005] ECR I-8585 63. And, generally, Case C-394/02 *Commission v Greece* [2005] ECR I-4713 33; Case C-337/05 *Commission v Italy* [2008] ECR I-2173 57; C-250/07 *Commission v Greece* [2009] ECR I-4369 17.

[112] For a critical view of this development and the underlying rationale, see L Chever and J Moore, 'Negotiated Procedures Overrated? Evidence from France Questions the Commission's Approach in the Latest Procurement Reforms' (2012) *European Procurement & Public Private Partnership Law Review* 228.

[113] European Commission, *Public Procurement Reform Factsheet No 3: Simplifying the Rules for Contracting Authorities* (2014) 1.

[114] Such impossibility of drafting precise technical specifications should be assessed with reference to a standard, European technical assessment, common technical specification or technical reference within the meaning of points 2–5 of Annex VII of Directive 2014/24.

of the competitive dialogue in article 29 of Directive 2004/18, but expand it significantly (partially, in line with the interpretative case law) and, more importantly, extend it to the use of a competitive procedure with negotiation that under its form of 'negotiated procedure with prior publication' was much more limited in article 30 of Directive 2004/18. Such an expansion in the availability of procedures involving negotiation can potentially give rise to significant restrictions of competition and will be assessed in detail below.

On the other hand, article 26(4)(b) makes these procedures available where, in response to an open or a restricted procedure, *only irregular or unacceptable tenders* are submitted. The Directive further clarifies both concepts, indicating that irregular tenders will, in particular, be those that do not comply with the procurement documents, which were received late, where there is evidence of collusion or corruption, or which have been found by the contracting authority to be abnormally low. On its part, unacceptable tenders will in particular cover those submitted by tenderers that do not have the required qualifications, and tenders whose price exceeds the contracting authority's budget as determined and documented prior to the launching of the procurement procedure. This possibility was already present in article 30(1) of Directive 2004/18 and it seems fundamentally in line with the interpreting case law.[115]

Consequently, from a competition perspective, the analysis needs to focus fundamentally on the potential expansion in the use of competitive dialogue and competitive procedure with negotiation in situations justified on the basis of *project complexity* or the existence of *special needs* of the contracting authority (art 26(1)(a) Dir 2014/24).

(a) Consolidation and expansion of the criteria authorising the use of competitive dialogue. As mentioned in passing, the aim of the competitive dialogue procedure introduced by Directive 2004/18 and now regulated in article 30 of Directive 2014/24 is to allow for a close cooperation between undertakings and public agencies in the definition of particularly complex projects and serves the primary objective of guaranteeing that the undertakings involved in the phase of project definition will not be excluded from the subsequent tender for the implementation or construction of the same on grounds of equal treatment.[116]

It is important to note that this objective was warranted by recent developments in the case law of the EU judicature, which prevented the automatic exclusion of undertakings that had been instructed to carry out research, experiments, studies or development in connection with public works, supplies or services from the subsequent tender procedure for those works, supplies or services; and limited the cases for exclusion from the subsequent tender to those in which, under the specific circumstances, the experience acquired by those undertakings is *capable of distorting competition*[117] (which is now regulated in

[115] Indeed, the definitions are fully in line with the European Commission's long-standing interpretation, see eg the *Guide to the Community Rules on Public Supply Contracts other than in the Water, Energy, Transport and Telecommunications Sectors, Directive 93/36/EEC* (1997) 23ff.

[116] See: A Rubach-Larsen, 'Competitive Dialogue' in R Nielsen and S Treumer (eds), *New EU Public Procurement Directives* (Copenhagen, Djøf Forlag, 2005) 67, 68; S Treumer, 'Competitive Dialogue' (2004) 13 *Public Procurement Law Review* 178, 179; and Bovis (n 23) 171 and 239–43. The basis for this finding can be found in the positions of the Green Paper of the Commission, *Public Procurement in the European Union: 'Exploring the Way Forward'* (COM(96) 583) 5.23); and Communication from the Commission, Public Procurement in the European Union (COM(98) 143) 2.1.2.2. For a fuller discussion of the justification, see S Arrowsmith and S Treumer, 'Competitive Dialogue in EU Law: A Critical Review' in id (eds) (n 58) 3, 16–25.

[117] Joined Cases C-21/03 and C-34/03 *Fabricom* [2005] ECR I-1559 36. However, an alternative and broader reading of this finding has been conducted by the EGC, that has considered that the ECJ 'held that a candidate

art 41 Dir 2014/24, see below §II.B.ii). In this regard, and taking the argument further, the EGC held that if the exceptional knowledge acquired by a tenderer as a result of work directly connected with the preparation of a tendering procedure by the contracting authority itself could not lead to its automatic exclusion from that procedure, there is even less ground for excluding that tenderer from participating where such exceptional knowledge derives solely from the fact that it participated in the preparation of the call for tenders in collaboration with the contracting authority.[118]

Therefore, in hindsight, the need for the competitive dialogue procedure in order to allow for pre-tender involvement of undertakings that are potentially interested in participating in the subsequent procedure can be put in doubt.[119] Nevertheless, the procedure was adopted in Directive 2004/18 and probably constitutes one of the fields where the main developments in public procurement practice and jurisprudence are taking place.[120] It is indeed one of the procedures that has attracted significant discussions during the recent reform of the rules leading to the approval of the 2014 Directives.

It is worth recalling that the circumstances and conditions under which a contracting authority could use the competitive dialogue procedure remained largely unclear, both as a result of the broad (and to a certain point, inconsistent) terms used in Directive 2004/18 and of the complete lack of case law on this issue.[121] In a preliminary approach, recourse to competitive dialogue might have seemed to be relatively straightforward. Article 29 of Directive 2004/18 expressly established that Member States could allow their contracting authorities to resort to this procedure when dealing with particularly complex contracts, but only if they considered that the use of the open or restricted procedure would not allow the (proper) award of the contract (which has now been suppressed as a requirement under art 26(1)(4) Dir 2014/24). According to article 1(11)(c) of Directive 2004/18, *particularly complex contracts* were those where the contracting authorities were not objectively able to define according to the relevant rules (arts 23(3)(b), (c) or (d) Dir 2004/18) the technical means capable of satisfying their needs or objectives, and/or were not objectively able to specify the legal and/or financial make-up of a project. Further interpretative criteria could be found in recital (31) of Directive 2004/18.[122] However, the

or tenderer cannot automatically be excluded from a tendering procedure without having the opportunity to comment on the reasons justifying such exclusion'; Joined Cases T-376/05 and T-383/05 *TEA–CEGOS* [2006] ECR II-205 65. Along the same lines, using the findings at *Fabricom* to ban general clauses that impose the automatic exclusion of potential tenderers on the basis of their shareholding structure or their affiliation with other undertakings, see Case C-213/07 *Mikhaniki* [2008] ECR I-9999 45–48 and 62.

[118] Case T-345/03 *Evropaïki Dynamiki v Commission (CORDIS)* [2008] ECR II-341 72.

[119] *Contra*: Rubach-Larsen (n 116) 71–72. See also A Brown, 'The Impact of the New Procurement Directive on Large Public Infrastructure Projects: Competitive Dialogue or Better the Devil you Know?' (2004) 13 *Public Procurement Law Review* 160, 161.

[120] Arrowsmith and Treumer (n 116) 3–143.

[121] The scope of the provisions regulating competitive dialogue in Dir 2004/18 was unclear and future guidance from the EU judicature was thought to be required to delimit more precisely the field of application of this procedure; see generally S Arrowsmith, *The Law of Public and Utilities Procurement*, 2nd edn (London, Sweet & Maxwell, 2005) 629–67. On the scope of this new procedure, see Treumer (n 58) 310–15; *contra* Arrowsmith, *Law of Public and Utilities Procurement*, 634. See also MCJ Nagelkerke et al, 'Competitive Dialogue Abyss or Opportunity?' in G Piga and KV Thai (eds), *International Public Procurement Conference Proceedings—Enhancing Best Practices in Public Procurement* (2008) 275. For an update of the discussion, see Arrowsmith (n 28) 859–82.

[122] However, some of the criteria included in rec (31) and not in arts 1(11)(c) and 29 might have reduced value as a legal source when analysed according to relevant ECJ case law (Case 215/88 *Casa Fleischhandels v BALM* [1989] ECR 2789 31); see Treumer (n 58) 308 and Arrowsmith and Treumer (n 116) 38.

joint reading of these provisions generated significant doubts as regards the threshold of *technical, legal or economic complexity* (or *complexity test*)[123] that had to be met to justify recourse to this procedure under the 2004 rules, as well as the degree of discretion that the contracting authority enjoyed to assess these circumstances in the context of a specific tender.[124] Unfortunately, these issues are not fully resolved by the drafting of article 26(1)(a) of Directive 2014/24, indents (iii) and (iv) of which basically replicate and consolidate the scant guidance available under the previous rules. The fact that the use of the competitive dialogue is now a free alternative to the use of a competitive procedure with negotiation also serves to undermine the need for the maintenance of the competitive dialogue as a separate procedure—given that the creation of this special process was strongly reliant on the prevention of abusive resort to negotiated procedures[125] (as well as to overcome the issue of the exclusion of undertakings involved in the design stages of the procurement cycle).

Regardless of the specific bounds that practice and future developments in the case law of the EU judicature[126] impose on the exercise of discretion related to recourse to competitive dialogue procedures, the decision should be informed by the likely effect that recourse to this procedure could generate on competition (even if that means limiting the flexibility generally provided to the contracting authorities, as they continue to be bound to respect the general principles of the TFEU, as well as the principle of competition embedded in article 18 of Directive 2014/24, also in relation with this special procedure). Directive 2014/24 seems to provide a clear interpretative argument along these lines, given that article 65(3) requires that the number of candidates invited to participate in the competitive dialogue (with a minimum of three) be sufficient to *ensure genuine competition*. Therefore, recourse to competitive dialogue might be banned when, under the circumstances of the case, the public authority finds itself in a situation where competition cannot be preserved or is likely to be altered or distorted. An analogical argument can be found in article 30(6) *in fine* and 30(7) *in fine* of Directive 2014/24 as regards the prohibition of *running* the competitive dialogue in a such a manner that competition is likely to be distorted. It is hereby submitted that *contracting authorities must refrain from having recourse to any of the procedures or other instruments and institutions regulated in the Directive—and, particularly, the competitive dialogue procedure—if doing so would prevent, restrict or distort competition*.[127] In those instances, alternative arrangements could be required in order to pursue the specific project. As regards the case of competitive dialogue, breaking down the project into smaller parts, or the internalisation of certain functions or phases by the contracting authority, could sometimes dissipate the potential distortions of competition likely to arise from the conduct of a competitive dialogue.

[123] M Burnett, 'Developing a Complexity Test for the Use of Competitive Dialogue for PPP Contracts' (2010) *European Public Private Partnership Law Review* 215.

[124] Arrowsmith and Treumer (n 116) 36–50. It is important to stress their second proposition that 'competitive dialogue can be used when contracting authorities cannot define the best technical means for meeting their needs or the best legal or financial make-up for the project' (ibid, 43).

[125] Arrowsmith and Treumer (n 116) 37.

[126] So far, the ECJ has considered the nature of the competitive dialogue in several cases, but it has not issued significant guidance as regards its scope of application. See Case C-299/08 *Commission v France* [2009] ECR I-11587.

[127] See: chapter five, §II (*public procurement must not distort competition between undertakings*) and, specifically, the proposed interpretation of the principle of competition in art 18 Dir 2014/24.

(b) Flexibilisation in the scope and availability of the competitive procedure with negotiation (former negotiated procedure with prior publication of a notice). It is important to stress that the 2014 rules have transformed the nature and availability of procedures traditionally labelled as negotiated, now termed competitive procedures with negotiation. Under the applicable rules in Directive 2004/18 (art 30), this was clearly a special procedure that could only be used in the *numerus clausus* of situations expressly foreseen (ie, had exactly the same treatment as negotiated procedures without prior publication, discussed below). Remarkably, the ECJ had repeatedly stressed that the derogations from the rules intended to ensure the effectiveness of the rights conferred by the TFEU in relation to public contracts are exhaustive[128] and must be interpreted strictly.[129] Indeed,

> awarding contracts without a prior call for tenders may harm not only potential tenderers but also the public, which pays for procurement projects through taxation, and *may distort the competitive nature of the public procurement market*, undermining the effectiveness of the Treaty rules on fundamental Community freedoms. For this reason, *a provision which allows a contracting authority to dispense with a call for tenders should be narrowly construed*.[130]

Therefore, the list of circumstances contained in article 30 of Directive 2004/18 constituted a *numerus clausus* of exceptions to the general rule of recourse to open or restricted procedures (see above), which must be interpreted strictly in order to prevent competitive distortions. However, as mentioned in passing, this is no longer necessarily the case. Despite the fact that article 26(4) of Directive 2014/24 presents the rules in a similar manner and tries to set up a revised *numerus clausus* of grounds determining the availability of the procedure, a cursory look at them clearly indicates that their drafting is too open-ended to achieve such a goal. Indeed, this competitive procedure with negotiation will be available for *complex* projects (as discussed for the competitive dialogue) but, most importantly, also where 'the needs of the contracting authority cannot be met without adaptation of readily available solutions' (art 26(4)(a)(i)) or 'they include design or innovative solutions' (art 26(4)(a)(ii)). Recital (43) of the Directive provides some limited additional guidance, indicating that:

> For works contracts, such situations include works that are not standard buildings or where [the] works includes [*sic*] design or innovative solutions. For services or supplies that require adaptation or design efforts, the use of a competitive procedure with negotiation or competitive dialogue is likely to be of value. *Such adaptation or design efforts are particularly necessary in the case of complex purchases such as sophisticated products, intellectual services, for example some consultancy services, architectural services or engineering services, or major information and communications technology (ICT) projects*. In those cases, negotiations may be necessary to guarantee that the supply or service in question corresponds to the needs of the contracting authority. *In respect of off-the-shelf services or supplies that can be provided by many different operators on the*

[128] Case C-399/98 *Ordine degli Architetti* [2001] ECR I-5409 101.

[129] Case 199/85 *Commission v Italy* [1987] ECR 1039 14; Case C-57/94 *Commission v Italy* [1995] ECR I-1249 23; Case C-318/94 *Commission v Germany* [1996] ECR I-1949 13; Joined Cases C-20/01 and C-28/01 *Commission v Germany* [2003] ECR I-3609 58; Case C-26/03 *Stadt Halle* [2005] ECR I-1 46; and Case C-480/06 *Commission v Germany* [2009] ECR I-4747 34–35. See also Opinion of AG Mazák in Case C-480/06 *Commission v Germany* 51. See also SE Hjelmborg et al, *Public Procurement Law—The EU Directive on Public Contracts* (Copenhagen, Djøf Forlag, 2006) 58.

[130] Opinion of AG Poiares Maduro in Case C-250/07 *Commission v Greece* 12 and 16 (emphasis added). See also Case C-394/02 *Commission v Greece* [2005] ECR I-4713 33.

> *market, the competitive procedure with negotiation and competitive dialogue should not be used.* (emphasis added)

However, even if interpreted narrowly, these are two new grounds that make procedures involving negotiations available and that, in my view, come to destroy the logic of the limited availability of these procedures (and, equally, of the competitive dialogue), unless a very restrictive *objective* assessment of the *actual* need to procure not-readily available or innovative solutions is carried out by the European Courts[131]—which seems an almost impossible exercise.[132] In that regard, it is submitted that an effects-based approach should be undertaken on the basis of article 18 of Directive 2014/24, so that resort to the competitive procedure with negotiation is not possible if that would artificially narrow competition. This is partially supported by the further clarification offered by recital (45) of the Directive, which stresses some obvious requirements to the effect that:

> The competitive procedure with negotiation *should be accompanied by adequate safeguards* ensuring observance of the principles of equal treatment and transparency. In particular, contracting authorities should indicate beforehand the minimum requirements which characterise the nature of the procurement and which should not be changed in the negotiations. Award criteria and their weighting should remain stable throughout the entire procedure and should not be subject to negotiations, in order to guarantee equal treatment of all economic operators. Negotiations should aim at improving the tenders so as to allow contracting authorities to buy works, supplies and services perfectly adapted to their specific needs. Negotiations may concern all characteristics of the purchased works, supplies and services including, for instance, quality, quantities, commercial clauses as well as social, environmental and innovative aspects, in so far as they do not constitute minimum requirements. It should be clarified that the minimum requirements to be set by the contracting authority are those conditions and characteristics (particularly physical, functional and legal) that any tender should meet or possess in order to allow the contracting authority to award the contract in accordance with the chosen award criteria. In order to ensure transparency and traceability of the process, all stages should be duly documented. Furthermore, all tenders throughout the procedure should be submitted in writing. (emphasis added)

It is submitted that this additional guidance misses the point, given that it basically foresees an only partially negotiated procedure that would not diverge significantly from an open or restricted procedure with the acceptance of variants (see below §II.B.iv). In that regard, it is important to stress that contracting authorities will still need to respect the

[131] See Davey (n 50) 105–06; and Telles and Butler (n 49) 13, who clearly indicate that although 'Article 26(4)(a)(iii) appears to be similar to the previous requirement of Article 1(11)(c) of Directive 2004/18/EC, it does not in fact require a degree of particular complexity as had previously been the case.'

[132] Along the same lines, but opting for a proposal of an alternative subjective test that could generate significant complications, see Telles and Butler (n 49) 13, who indeed find that 'Under Directive 2014/14/EU, the test should essentially be subjective in nature: the contracting authority must justify why, in that specific situation, it needs to use either of these procedures. This should not depend on any external unit of measurement or comparison, i.e what the reasonable contracting authority would do in that situation. By "subjective", it is meant the actual situation being faced at that moment by that specific contracting authority. In any event, the authors are of the view that the availability of broader grounds will enable easier reliance on any of the requirements set forth in Article 26(4)(a).' It is submitted here that such an approach would be excessively lenient and that a degree of proportionality or reasonableness of the sort included in a *reasonable contracting authority test* would be preferable. For a similar proposition regarding the competitive dialogue rules in Dir 2014/24, see Arrowsmith and Treumer (n 116) 46, who argue that 'in deciding whether an authority is "objectively" able to define the technical, financial, or legal composition of the contract it is to be judged against a "reasonable" contracting authority of the same size and nature'.

conditions of the tenders they publish, which can significantly limit their ability to engage in technical negotiations with tenderers in a way that resorting to variants would not. In that regard, the ECJ has recently stressed that

> even though the contracting authority has the power to negotiate in the context of a negotiated procedure, it is still bound to see to it that those requirements of the contract that it has made mandatory are complied with. Were that not the case, the principle that contracting authorities are to act transparently would be breached … [the applicable EU rules do] not allow the contracting authority to negotiate with tenderers tenders that do not comply with the mandatory requirements laid down in the technical specifications of the contract.[133]

More generally, in practice, it is unlikely that contracting authorities will respect those requirements and implement effective safeguards that prevent excesses in the scope of the negotiations and the way in which they are carried out. More importantly, the use of these procedures should not be solely assessed against the principles of transparency and equal treatment, but most importantly, against the requirements of the principle of competition (as further elaborated below). Generally speaking, it would not be surprising if competitive procedures with negotiation became the most used procedure after the implementation of the 2014 rules. However, it would also be equally unsurprising that old problems linked to an abusive use of these procedures were to be revived and constitute the object of significant litigation in the coming years. In that regard, the regulation of negotiated procedures without prior notice may become less relevant, given the permissibility and flexibility that the competitive procedure with negotiations seems to come wrapped in.

Recourse to the Negotiated Procedure Without Prior Publication of a Contract Notice. Finally, it is important to stress that a further potential restriction of access to the tender procedure derives from the eventual abusive recourse to negotiated procedures with no transparency requirement whatsoever. This has been permanently stressed in the case law applicable to negotiated procedures generally (discussed above), and the ECJ has permanently stressed the strict requirements that control decisions to proceed to the direct award of contracts under this 'non-procedure', which are subject to a strict assessment of whether the contracting authority 'acted diligently and whether it could legitimately hold that the conditions [for recourse to this procedure] were in fact satisfied'.[134] Consequently, there is no doubt that this procedure must be understood as exceptional.[135] This is now clearly indicated in article 26(6) of Directive 2014, which establishes that Member States shall not allow the application of those procedures in any other cases than those referred to in article 32. In turn, article 32 of Directive 2014/24 sets out a *numerus clausus* of exceptions, which must be interpreted strictly, in order to prevent competitive distortions.[136]

Preliminary Conclusion as Regards the Recourse to Closed and Non-Competitive Procedures. At this point, it should be clear that contracting authorities have a limited degree of discretion to conduct purchasing activities not covered by the EU public procurement rules (ie, must avoid a strategic abuse of the rules on coverage). However, as a result of

[133] Case C-561/12 *Nordecon and Ramboll Eesti* [2013] pub electr EU:C:2013:793 37 and 39. *Cf* art 29(7) Dir 2014/24 for a different approach.

[134] See Case C-19/13 *Fastweb* [2014] pub electr EU:C:2014:2194 50.

[135] Case C-19/13 *Fastweb* [2014] pub electr EU:C:2014:2194 49; Case C-292/07 *Commission v Belgium* [2009] I-59 106.

[136] For an empirical approach to the use of negotiated procedures without prior transparency and their justification, see GS Ølykke, *On Actual and Percieved Monopolies* (Working Paper, 2013), available at http://ssrn.com/abstract=2283110.

the 2014 reform, it is not longer true that their capability of resorting to procedures other than open or restricted is similarly limited. Despite the fact that, in principle, the exceptions established by the EU directives on public procurement are exhaustive and should be interpreted restrictively, recourse to procurement procedures that allow for negotiations and restrictions in the number of candidates has been clearly fostered by the 'toolbox approach' and 'flexibilisation' of the 2014 reform. As discussed in previous sub-sections, this is particularly clear in view of the very significant expansion of the *in-house* and public–public cooperation exceptions (as mechanisms of avoiding the tender of contracts altogether), as well as the flexibilisation and almost free choice that contracting authorities now have to resort to the competitive procedure with negotiations and competitive dialogue. However, it is submitted that an overly lenient and flexible approach to the choice of procedures (or their avoidance) could have very significant negative implications for competition and ultimately defeat the purpose of the procurement exercise. Consequently, on the basis of the previous case law of the European Courts and the principle of competition newly consolidated in article 18 of Directive 2014/24, it is submitted that a restrictive and competition-oriented approach should lead the appraisal of the choices carried out by the contracting authorities. Therefore, it is submitted that recourse to competitive negotiated or competitive dialogue procedures should only take place when the specific circumstances of the case can clearly be subsumed in the grounds foressen in article 26(4) of Directive 2014/24, strictly and restrictively interpreted, and always provided that their use does not result in the artificial narrowing of competition proscribed by article 18 of Directive 2014/24. The same applies to the negotiated procedure without prior publication as per articles 26(6) and 32 of Directive 2014/24.

More generally, the competition principle requires that contracting authorities refrain from resorting to procurement procedures other than open and restricted ones—without forgetting that they must also refrain from conducting 'unregulated' procurement activities by resorting to entities apparently not covered by the definition of 'contracting authority' or by conducting below-thresholds procurement artificially—when doing so could generate a negative impact on market competitive dynamics. Therefore, it is submitted that, when the exceptions detailed in articles 26(4) and (6) and 32 of Directive 2014/24 are (hypothetically or theoretically) available to the contracting authority, but resorting to these closed or non-competitive procedures would result in a relevant negative impact on competitive dynamics in the market, the contracting authority might be obliged to conduct the procurement process according to the rules of the open or restricted procedure if doing so does not generate a disproportionate burden (see below §II.C.iv, in relation to the particular case of re-tendering of cancelled and terminated contracts). From the reverse view, it is submitted that contracting authorities are under an obligation to avoid restrictions of competition derived from the choice of procurement procedures. This obligation should be discharged by having recourse to open or restricted procedures when not doing so would be disproportionate if compared to the administrative complications or the increased costs implied by the imposition of a more competitive procurement procedure—ie, when the negative effects of the restriction of competition associated with the conduct of the tender by procedures other than open or restricted ones are larger than the additional costs associated to such competitive procedures.[137]

[137] On the limits that apply in cases where an excessive administrative burden could be generated, see Case 104/75 *De Peijper* [1976] ECR 613.

As a specification of this criterion, it should be stressed that there are few cases clearly outside this general rule—which covers those established by article 32(2)(b) and 32(3)(c) of Directive 2014/24, since no competition is possible *at all* when the contract may be awarded only to a particular economic operator for technical or artistic reasons, or for reasons connected with the protection of exclusive rights (32(2)(b)),[138] or does not need to be protected in this way when it refers to supplies quoted and purchased on a commodity market (32(3)(c)). In the rest of the cases regulated in articles 26(4) and (6) and 32 of Directive 2014/24, enough room for this balancing of competition considerations seems to be available and, consequently, contracting authorities should evaluate the competition impact of resorting to the less competitive procedures formally available before adopting such decision.

iii. Sale of Bid Documents as a Barrier to Entry

There are certain issues not expressly covered by the EU directives on public procurement—which are, consequently, left to the domestic regulation of Member States (with the significant restriction of the necessary compliance with general TFEU principles)—that, however, can have a relatively significant impact on the level of competition that can be attained in a given tender procedure and, as a result, that can alter the competitive dynamics in the market concerned. Inasmuch as they restricted or altered competition in the public procurement setting, however, those national regulations could be impairing the results aimed at by the EU directives on public procurement and, consequently, could be in breach of EU law (above chapter five).

One of these issues is the sale of bid documents to potentially interested tenderers, usually at a fee set to cover the expenses generated by the reproduction and delivery of the tender documentation, but sometimes set at higher levels (*entry fees*). The imposition of this type of payment to participate in a procurement process might derive from budgetary constraints or from formal public procurement or general administrative law regulations.[139] Where the contracting authority decides to charge a fee that all potentially interested tenderers have to pay in order to have access to the tender documentation it is reducing the chances of attaining a high level of competition and erecting a potentially significant barrier to enter the procurement process, probably inadvertently. Even if these fees might be beneficial for the contracting authority in the short run—as they can finance part of the costs of the specific project that the tender has originated and, under certain circumstances, can deter the participation of those tenderers with higher production costs—*significant entry costs can generate important reductions of competition in public procurement procedures* (whose exclusionary effects might be even more acute in relation to SMEs, as they might be more reluctant or financially unable to bear such fees) *and, in the end, thwart the ability of the public procurement process to achieve efficiency and value for money*.[140] Also, the establishment of entry fees does not necessarily contribute to dissi-

[138] In any case, it must be welcome that Dir 2014/24 has clarified that these exceptions shall only apply when no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement.

[139] Indeed, the charge of such a fee is common practice; see Arrowsmith et al (n 50) 369.

[140] See: F Naegelen and M Mougeot, *Les marchés publics: règles, stratégies, politiques* (Paris, Economica, 1993) 73–93.

pating bankruptcy risk in public procurement (which is one of its theoretical functions),[141] and seems to have no other purpose than the coverage of tender costs by the public buyer. From this perspective, the implicit costs derived from the reduction of competition seem to be potentially higher than the explicit benefits derived from the additional revenue for the contracting authority—although a case by case analysis is required to reach final conclusions. Therefore, it is submitted that effective policies should be adopted to reduce or even eliminate entry fees and entry costs, as they may seriously hamper the participation of firms—particularly when competitive procurement is repeated over time.[142] Along these lines, it has been recommended that no *entry fees* be charged and that, when they are imposed, their import reflects only the real costs of the tender documentation; so that their exaction should not discourage potential bidders.[143] In general terms, hence, charging this type of entry fees runs contrary to recommendations to reduce the cost of participation and bid preparation.[144]

Therefore, when implemented, the establishment of entry fees (particularly in the form of fees to access the tender documents that do not reflect the real costs of the preparation of those documents) are measures adopted by Member States' domestic public procurement regulations that might impede the effective development of competition in the procurement setting. Even if these measures might not violate the provisions of the EU public procurement directives directly—or perhaps even the provisions of the TFEU related to the fundamental freedoms if interpreted according to the *Keck* doctrine (as they in principle affect equally all potential tenderers; see above chapter five)—in the most extreme cases, where they distort competition by unnecessarily restricting the number of potential participants in the tender, they should be held guilty of violating the competition principle that should guide the design of Member States' domestic public procurement rules.

Consequently, and as a matter of general interpretation, it is my opinion that the establishment of entry fees in public procurement procedures that do not reflect the real cost of document preparation erects an unnecessary barrier of entry to the procurement process and has the immediate effect of reducing competition. It follows that such measures run contrary to the competition principle and, by failing to pass a proportionality test (ie, by exceeding the real cost of document preparation), run afoul of the goals of the directives and jeopardise the development of effective competition within the internal market. Consequently, such domestic regulations should be declared contrary to EU law and, as a matter of general practice, contracting authorities should refrain from extracting those payments from potentially interested tenderers. As a corollary, the criteria that contracting authorities should apply when considering the establishment of entry fees should be clearly restrictive and, consequently, they should not impose them at all or—when obliged by budgetary or other administrative domestic regulations—should set them at the lowest possible level and never exceed the real costs of document preparation. Otherwise, such procurement practices should be deemed disproportionate and in breach of the competition principle.

[141] See: AR Engel et al, 'Managing Risky Bids' in Dimitri et al (n 51) 322, 331–32.

[142] Albano et al (n 51) 275–76.

[143] World Bank, *Guidelines: Procurement under IBRD Loans and IDA Credits* (May 2004, revised October 2006), available at go.worldbank.org/RPHUY0RFI0, 2.11.

[144] OECD, *Competition in Bidding Markets* (2006) 19.

iv. Delays and Other Restrictions in the Disclosure of Information Required to Prepare and Submit a Bid

A related but different issue regarding access to tender documentation with potentially relevant competition implications concerns the possible delays and other restrictions in its disclosure to tender participants—since contracting authorities can alter competition between potentially interested undertakings or between participants in a tender through their handling and disclosure of relevant information. The EU public procurement directives contain no specific rules regarding these issues, which have to be analysed according to the applicable general principles. At first sight, it might seem that the principle of equality of treatment and non-discrimination could suffice to prevent distortions of competition *within* the particular tender in which the contracting authority delays disclosure of relevant documentation to all or some tender participants. In this respect, the EU judicature has already interpreted the scope of the non-discrimination and transparency obligations incumbent upon the contracting authority as regards disclosure of tender information and has ruled that 'all technical information relevant for the purpose of a sound understanding of the contract notice or the tendering specifications must be made available as soon as possible *to all the undertakings taking part in a public procurement procedure*';[145] and that lack of planning or delays in the preparation of the information by or on behalf of the contracting authority is no excuse for delayed disclosure 'since in order to ensure that all prospective tenderers enjoyed equality of opportunity, it could have waited until it was in a position to make all the information in question available to *all prospective tenderers* in order to launch' the tender.[146] The EGC has, consistently, ruled that 'the unequal treatment consisting in a delay in making certain technical information available to the tenderers, with the exception of the successful tenderer, constitutes a procedural defect' and that the relevance of the information disclosed belatedly or not at all will be a key factor in determining whether the procedural defect should result in the annulment of the tender process or not.[147]

It is submitted that these findings of the EGC are on the right lines, but are too narrow and fall short of guaranteeing undistorted competition in public procurement by falling into what could be termed the 'trap of tender-specific reasoning'. The EGC is apparently failing to differentiate clearly between, on the one hand, circumstances that affect all potentially interested participants in a tender for a given contract and, on the other hand, circumstances that only affect the tenderers that actually participate in the tender. By doing so, the EGC limits the extent of its analysis under the principle of non-discrimination to the tenderers that actually participate in the tender where the public authority discloses information belatedly or in a discriminatory manner—on the implicit assumption that the only undertakings that are in a similar situation (ie, that merit equal treatment or are beneficiaries of the ensuing obligation of transparency) are those that decided to participate in the tender. By doing so, it is submitted, the EGC misses the important point of taking into

[145] Case T-345/03 *Evropaïki Dynamiki v Commission (CORDIS)* [2008] ECR II-341 145 (emphasis added). See also Case T-297/05 *IPK International v Commission* [2011] ECR II-1859 124.

[146] Case T-345/03 *Evropaïki Dynamiki v Commission (CORDIS)* [2008] ECR II-341 154 (emphasis added).

[147] Case T-345/03 *Evropaïki Dynamiki* 160ff. See also Case T-50/05 *Evropaïki Dynamiki v Commission (ECMS)* [2010] ECR II-1071, where delays in disclosure of source code to tenderers other than the incumbent are discussed.

consideration the effect of delays in disclosure of critical tender documentation on the *potentially* interested participants that decided not to take part in the process—probably because of the lack of available information.[148]

From this broader perspective, it should be clear that late disclosure of information relevant for the purpose of a sound understanding of the contract notice or the tendering specifications is particularly apt to generate negative results regarding competition, since it can determine non-participation by potentially interested tenderers—who, in view of the absence of relevant information, might experience difficulties in gaining a proper understanding of the tendered contract or its object and decide not to participate. Also, as the EGC rightly stressed, the contracting authority cannot excuse itself by arguing that the documentation was not ready at the time of launching the tender, since—in the absence of compelling reasons of urgency—the duty of diligent administration would have required it to wait until all relevant documents were ready to be disclosed to *all prospective tenderers*.[149] Only thus would all competitors be treated equally *ab initio* and, most likely, competition would not be distorted by decisions related to the preparation and disclosure of relevant contract or tender documentation.[150]

Hence, as regards delays and other restrictions in the disclosure of information, it is submitted that compliance with the competition principle—as well as with the principles of non-discrimination, transparency and good, diligent administration[151] properly understood—requires that public authorities do not launch tender procedures unless and until all *relevant* documents are ready and can be promptly disclosed to all potentially interested participants. On the contrary, negative effects can be anticipated, both *within the tender* and *in the market*.

[148] By analogy, see the reasoning of the EGC regarding the need for clarity of tender specifications in C-251/09 *Commission v Cyprus* [2011] ECR I-13 35–51.

[149] Indeed, lack of planning should be no excuse for public buyers, since it runs against the principles of diligence and good administration ('If you fail to plan, you plan to fail'). For additional analysis of the principles of diligent and good administration in the public procurement setting, see Case T-59/05 *Evropaïki Dinamiki (DG AGRI)* [2008] ECR II-157 142–59, confirmed on appeal by the ECJ, Case C-476/08 P *Evropaïki Dinamiki v Commission (DG AGRI)* [2009] ECR I-207. See also Case T-589/08 *Evropaïki Dynamiki v Commission (CITL/CR)* [2011] ECR II-40 80.

[150] Therefore, the principle of competition should apply equally to *all potential* participants in a procedure, as is the case of the principle of equal treatment itself; see Arrowsmith (n 28) 619.

[151] On this general principle of EU administrative law, see T Fortsakis, 'Principles Governing Good Administration' (2005) 11 *European Public Law* 207; J Mendes, *Good Administration in EU Law and the European Code of Good Administrative Behaviour* (EUI Working Paper Law 2009/09), available at http://hdl.handle.net/1814/12101; R Bousta, 'Who Said There is a "Right to Good Administration"? A Critical Analysis of Article 41 of the Charter of Fundamental Rights of the European Union' (2013) 19(3) *European Public Law* 481–88; and HCH Hofmann and C Mihaescu, 'The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case' (2013) 9(1) *European Constitutional Law Review* 73–101. Of particular relevance here is one of the manifestations of the general principle of good administration, ie, the principle of proper functioning of the administration—which implies that 'administrations are required to carry out their activities not only in accordance with the relevant legal rules but also in a professional manner and in keeping with the facts of common experience' (Fortsakis, 209). See also HP Nehl, *Principles of Administrative Procedure in EC Law* (Oxford, Hart Publishing, 1999) 101–65, with a special focus on authorities' duties of care. For a broader discussion of these issues in the context of public procurement with a view on the likely accession of the EU to the ECHR, see A Georgopoulos, 'The EU Accession to the ECHR: An Attempt to Explore Possible Implications in the Area of Public Procurement', in V Kosta, N Skoutaris and V Tzevelekos (eds), *The EU Accession to the ECHR*, Modern Studies in European Law 48 (Oxford, Hart Publishing, 2014) 271–90. For even broader, but very relevant, critical remarks concerned with good administration as a foundation for future legal developments, see P Craig, 'A General Law on Administrative Procedure, Legislative Competence and Judicial Competence' (2013) 19(3) *European Public Law* 503–24.

v. Grounds for Exclusion of Potential Bidders: In General, Establishment of Additional and Excessively Restrictive Disqualification Grounds[152]

General Principles or Rules. Article 56 of Directive 2014/24 on general principles (*rectius*, general rules) for the choice of participants and the award of contracts significantly expands and modifies the rules in Article 44(1) of Directive 2004/18. Article 56(1) of the new Directive condenses the content of Article 44(1) of Directive 2004/18 and changes its drafting significantly in order to clarify (although it may not have been necessary) that contracts can only be awarded where both the tenderer and its tender comply with all applicable requirements under the relevant procurement documents. By the change of drafting, it also suppresses the reference to a (mandatory) sequence of evaluation that required that '[c]ontracts shall be awarded … after the suitability of the economic operators not excluded … has been checked', which seemed to require that exclusion and qualitative selection of economic operators was conducted prior to the analysis of their tenders in accordance with award criteria (which is the logical sequence, in any case). In order to clarify this flexibility in connection with open procedures (given that, in the rest of the procedures, a reversal of the sequence selection-award is not feasible), Article 56(2) of Directive 2014/24 expressly foresees the possibility (subject to Member States' eventual transposition decision to exclude it or to restrict it to certain types of procurement or specific circumstances) for contracting authorities to 'examine tenders before verifying the absence of grounds for exclusion and fulfilment of the selection criteria' but, in such case, 'they shall ensure that the verification of the grounds for exclusion and the selection criteria is done in an impartial and open manner so that no contract is awarded to a tenderer that should have been excluded … or that does not meet the selection criteria set out by the contracting authority'.

This provision seems to anticipate the problems that such a sequence can generate, given that contracting authorities will (always) have an incentive to 'twist' exclusion and selection criteria to be able to retain the best offer they have received. Moreover, unless the procurement is carried out under circumstances that make the assessment of the tender (both in technical and economic terms) simpler and quicker than the general assessment of the tenderers, there seems to be an advantage in proceeding first to exclude non-suitable or non-qualified tenderers in order to avoid the costs (in terms of time, at least) of evaluating their tenders. Moreover, the contracting authority can significantly reduce the cost of exclusion and selection analyses (both for tenderers and for itself) by resorting to the acceptance of the European Single Procurement Document (ie, a set of self-declarations) and other facilitating measures under article 59 of Directive 2014/24 (below, §II.A.xi). Therefore, the practical impact of this new provision can be doubted, as contracting authorities may only find an advantage in the reversal of the assessment sequence in a limited number of open procedures and, even in those cases, they may want to avoid any potential challenge on the basis of discrimination derived from the ex post assessment of the tenderer that has submitted the best tender against exclusion grounds and qualitative selection criteria.

[152] For a different perspective on this same topic, see A Sánchez Graells, 'Exclusion, Qualitative Selection and Short-listing in the New Public Sector Procurement Directive 2014/24', in F Lichere, R Caranta and S Treumer (eds), *Novelties in the 2014 Directive on Public Procurement*, European Procurement Law Series, vol 6 (Copenhagen, Djøf Forlag, 2014) 97–129.

Mandatory Exclusion Grounds. As regards the professional quality or personal situation of the candidate or tenderer, article 57(1) of Directive 2014/24 sets out the reasons why a candidate or tenderer *shall* be excluded from participation in a public tender.[153] Under article 45(1) of Directive 2004/18, these reasons were restricted to cases of involvement in a criminal organisation, corruption, fraud and money laundering.[154] Article 57(1) of Directive 2014/24 now extends the scope of the grounds for mandatory disqualification and incorporates new reasons for the exclusion of tenderers based on a wider definition of corruption, the inclusion of two mandatory grounds related to terrorism financing and other terrorist offences, child labour and the trafficking of human beings.[155] All these circumstances make express reference to criminal law concepts and, consequently, can only be taken into account after the candidate or tenderer has been the subject of a conviction by final judgment.[156]

Member States must specify, in accordance with their national law and having regard to EU law,[157] the conditions for implementing this mechanism of automatic exclusion or debarment of candidates and tenderers—which in any case must foresee that the obligation to exclude an economic operator shall also apply where the person convicted by final judgment is a member of the administrative, management or supervisory body of that economic operator or has powers of representation, decision or control therein (art 57(1) *in fine* Dir 2014/24).[158] Given that this exclusion is *ancillary* or *derivative* as regards the main criminal proceedings, and that the interests protected by those criminal law rules are of the utmost importance in order to maintain the rule of law—particularly as regards the development of economic activities—their interpretation in restrictive terms should be warranted in the main criminal proceedings and no major (unwarranted) distortions of competition should be expected from the enforcement of the provisions contained in article 57(1) of Directive 2014/24, unless they are applied in a disproportionate way. On this point, it is also worth stressing that, similar to what was already provided for in article 45(1)III of Directive 2004/18, article 57(3) of Directive 2014/24 now foresees that 'Member

[153] See E Hjelmeng and T Søreide, 'Debarment in Public Procurement: Rationales and Realization' in Racca and Yukins (n 45) 215–32.

[154] Generally, see E Piselli, 'The Scope for Excluding Providers who Have Committed Criminal Offences under the EU Procurement Directives' (2000) 9 *Public Procurement Law Review* 267. See also Arrowsmith (n 28) 1277–81; Trepte (n 23) 337–41; S Williams, 'The Mandatory Exclusions for Corruption in the New EC Procurement Directives' (2006) 31 *European Law Review* 711; and, although in relation with World Bank regulations, id, 'The Debarment of Corrupt Contractors from World Bank—Financed Contracts' (2007) 36 *Public Contract Law Journal* 277. For a recent update on the *status quaestionis* at EU level, see R Williams, QC, 'Anti-Corruption Measures in the EU as They Affect Public Procurement' (2014) 23 *Public Procurement Law Review* NA95–NA99. For a different take on the use of reputation as a deterrent, see G Racca and R Cavallo Perin, 'Corruption as a Violation of Fundamental Rights: Reputation Risk as a Deterrent against the Lack of Loyalty' in Racca and Yukins (n 45) 23–48.

[155] See H-J Prieβ, 'The Rules on Exclusion and Self-Cleaning under the 2014 Public Procurement Directive' (2014) 23 *Public Procurement Law Review* 112, 113-116.

[156] By analogy with art 57(2) Dir 2014/24, where reference is made to 'a judicial or administrative decision having final and binding effect', it seems reasonable to interpret the proviso 'final judgment' in art 57(1) as requiring a judgment which has the force of *res judicata* in accordance with the legal provisions of the country where the candidate or tenderer was convicted.

[157] For a critical assessment of the implications of a lack of harmonisation of these matters at EU level, see W De Bondt, 'Equal Treatment and Corporate Criminal Liability: Need for EU Intervention in Public Procurement?' in D Brodowski, M Espinoza de los Monteros de la Parra and K Tiedemann (eds), *Regulating Corporate Criminal Liability* (New York, Springer, 2014) 297–309.

[158] Arrowsmith (n 28) 1283–86.

States may provide for a derogation from the mandatory exclusion … on an exceptional basis, for overriding reasons relating to the public interest such as public health or protection of the environment'.[159] On the contrary, under-enforcement of this provision seems clearly undesirable also from a competition perspective—since the development of market activities under any of the abovementioned circumstances almost necessarily results in distortions of market dynamics—and contracting authorities should do their best to discover whether there exist criminal convictions against the candidates participating in the tenders that they carry on.[160] In this sense, the rules adopted by Member States to implement this debarment mechanism should adopt a broad approach and provide active standing to any interested or third party to bring the existence of such criminal convictions to the attention of the contracting authority, even on an anonymous basis; ie, should establish effective whistleblower mechanisms.[161]

Remarkably, other than the expansion of *criminal* grounds for exclusion, the application of the rules for the mandatory exclusion of tenderers has suffered a second important modification in Directive 2014/24, given that its article 57(2) transforms the discretionary grounds for exclusion included in article 45(2)(e) and (f) of Directive 2004/18 and now makes it mandatory to exclude tenderers on the basis of a *lack of payment of taxes or social contributions* where the contracting authority is aware that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions and this has been established by a judicial or administrative decision having final and binding effect in accordance with the legal provisions of the country in which it is established or with those of the Member State of the contracting authority.[162] Where there is no final judgment or administrative decision, the lack of payment of taxes or social contributions remains a discretionary ground for exclusion (below). Given that this is a ground for exclusion that has a much weaker justification than the ones based on very grave infringements of criminal law covered by article 57(1), the rules are more clearly prone to abuse and to disproportionate enforcement.[163] Hence, in the case of the lack

[159] See Arrowsmith (n 28) 1281–82. In this regard, it is submitted that the interpretation of the concept of 'general interest' developed by the ECJ in the area of free movement (of goods, in relation to art 36 TFEU and the so-called Cassis rule of reason) may be of relevance for the interpretation and construction of such potential derogations. For a first description and numerous references to the relevant ECJ case law, see section 6 on 'Justifications for Barriers to Trade' in the European Commission, *Guide to the Application of Treaty Provisions Governing the Free Movement of Goods* (2010), available at ec.europa.eu/enterprise/policies/single-market-goods/files/goods/docs/art34-36/new_guide_en.pdf. See also S Enchelmaier, 'Article 36 TFEU: General' in PJ Oliver (ed), *Oliver on Free Movement of Goods in the European Union*, 5th edn (Oxford, Hart Publishing, 2010) 215–312. For critical assessment of the exceptions to the free movement rules, see P Oliver and S Enchelmaier, 'Free Movement of Goods: Recent Developments in the Case Law' (2007) 44(3) *Common Market Law Review* 649–704; E Spaventa, 'Leaving Keck Behind? The Free Movement of Goods after the Rulings in Commission v Italy and Mickelsson and Roos' (2009) 35(6) *European Law Review* 914–32; and G Mathisen, 'Consistency and Coherence as Conditions for Justification of Member State Measures Restricting Free Movement' (2010) 47(4) *Common Market Law Review* 1021–48.

[160] In that regard, it is difficult to understand the suppression of art 45(1) *in fine* Dir 2004/18, which reinforced this proactive requirement.

[161] For similar proposals, although related to the US, see WE Kovacic, 'Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting' (1995–96) 29 *Loyola University of Los Angeles Law Review* 1799, and ES Callahan and TM Dworkin, 'Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act' (1992) 37 *Villanova Law Review* 273.

[162] Prieβ, 'The rules on exclusion and self-cleaning under the 2014 Directive' (2014) 116–17.

[163] On this issue, and the very limited control that the principle of proportionality imposes on the design and application of these rules, see the very recent Case C-358/12 *Consorzio Stabile Libor Lavori Pubblici* [2014] pub electr EU:C:2014:2063, where Italian rules imposing very harsh treatment against minor delays in the payment of social security contributions were considered adequate and proportionate.

of payment of taxes and social security contributions, article 57(3) *in fine* of Directive 2014/24 authorises Member States to create an (additional) derogation, not necessarily based on public interest reasons,

> where an exclusion would be clearly disproportionate, in particular where only minor amounts of taxes or social security contributions are unpaid or where the economic operator was informed of the exact amount due following its breach of its obligations relating to the payment of taxes or social security contributions at such time that it did not have the possibility of taking measures [addressed at sorting out the situation] … before expiration of the deadline for requesting participation or, in open procedures, the deadline for submitting its tender.[164]

In order to ensure consistency of such a *de minimis* exception to the mandatory rule established in Article 57(2) of Directive 2014/24, a common definition of what constitutes 'minor amounts' seems necessary. Otherwise, this is an issue likely to end up being referred to the ECJ for a preliminary interpretation, the answer to which may be almost impossible for the Court to provide, unless it is clearly willing to create a judicial *de minimis* threshold for this ground of exclusion.

Discretionary Exclusion Grounds. For its part, article 57(2)II and 57(4) of Directive 2014/24 list the objective considerations of professional quality which *may* be taken into account by the contracting authority to justify the exclusion of a contractor from participation in a public contract and, again, develop the system beyond the pre-existing rules of Directive 2004/18.[165] The circumstances indicated in this second and fourth paragraphs of article 57 of Directive 2014/24 do not impose the automatic disqualification of the affected candidate or tenderer, but empower the contracting authority to do so at its own discretion—subject, of course, to existing domestic rules restricting the scope of such discretion. With some drafting modifications as compared to the 2004 equivalents, but with fundamentally the same content, the list provided in article 57(2)II and 57(4) covers grounds of exclusion on the basis of (i) bankruptcy, judicial administration or assimilated situations, including being part of ongoing proceedings;[166] (ii) demonstrated grave professional misconduct, which renders the tenderer's integrity questionable; (iii) lack of payment of taxes or social security contributions not established by a jurisdictional or administrative decision having final and binding effect (otherwise, the exclusion ground becomes mandatory, above); and (iv) serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria, or withholding of such information. Furthermore, and similarly to what happened with mandatory exclusion grounds, article 57(4) of Directive 2014/24 extends and broadens the list of situations in which an economic operator can (or must) be excluded.[167]

[164] This is clearly a reaction to the (foreseen) outcome in Case C-358/12 *Consorzio Stabile Libor Lavori Pubblici* [2014] pub electr EU:C:2014:2063, and Member States should make the most of this authorisation in order to avoid disproportionate application of these rules.

[165] See Trepte (n 23) 341–51.

[166] However, the new rules intend to introduce some flexibility in this area by stressing that notwithstanding the bankruptcy or assimilated procedures, 'Member States may require or may provide for the possibility that the contracting authority does not exclude an economic operator which is in one of [those] situations … where the contracting authority has established that the economic operator in question will be able to perform the contract, taking into account the applicable national rules and measures on the continuation of business.' For an analysis of the problems derived from a substitution of bankrupt contractors, see S Treumer, 'Transfer of Contracts Covered by the EU Public Procurement Rules after Insolvency' (2014) 23 *Public Procurement Law Review* 21–31.

[167] Prieβ (n 159) 117–121.

Firstly, given the creation of new rules on the European Single Procurement Document (ie, the submission of self-declarations) rather than the supply of full evidence supporting the non-existence of grounds for exclusion and compliance with qualitative selection criteria (art 59 Dir 2014/24, and below §II.A.xi), the ground concerned with misrepresentation and withholding of information is extended to cover situations where the economic operator is 'not able to submit the supporting documents required pursuant to Article 59' (art 57(4)(h) Dir 2014/24). This establishes a *iuris et de iure* presumption that the economic operator that cannot supply the required supporting documentation gravely misrepresented its suitability and qualification to be awarded the contract and seems a natural extension of this grounds for exclusion—which, in my opinion, should however constitute a mandatory ground for exclusion (below).

Secondly, it is worth noting that article 56(1) *in fine* of Directive 2014/24 opens the door to the use of public procurement decisions as a lever to promote enforcement of (or sanction the lack thereof) social, labour and environmental law—thereby strengthening the possibilities to use procurement for the pursuit of such 'secondary' or 'horizontal policies'[168]. In more detail, the provision contemplates that 'Contracting authorities may decide not to award a contract to the tenderer submitting the most economically advantageous tender where they have established that the tender does not comply with the applicable obligations referred to in Article 18(2)'—that is, 'obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X'—which can be modified by the European Commission from time to time, according to article 56(4) of Directive 2014/24. This should be connected to the provision of article 57(4)(a), which indicates that 'Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator … (a) where [they] can demonstrate by any appropriate means a violation of applicable obligations referred to in Article 18(2).' It is important to stress that such exclusion could take place at any moment, which includes the exclusion right at the point of making an award decision. Indeed, contracting authorities can exclude economic operators where they can demonstrate by any appropriate means violations of applicable obligations in the field of social and labour law or environmental law, or of international social and environmental law. Other than the considerations related to the use of public procurement as a lever to reinforce compliance with such 'secondary policies', this new ground for exclusion raises the issue of the standard of diligence that the contracting authority must discharge in order not to be negligently unaware of the existence of such violations. Given that there are different standards for different exclusion grounds, these are issues that are prone to litigation and that will likely require interpretation by the ECJ. In that regard, it is submitted that any means of proof should suffice to proceed to such exclusion, but the violation should be of sufficient gravity as to justify the exclusion under a proportionality test (similarly to what the new Directive proposes in terms of lack of payment of taxes or social security contributions, or 'grave' professional misconduct, see above), since exclusion for any minor infringement of social, labour or environmental

[168] See S Arrowsmith, 'Horizontal Policies in Public Procurement: A Taxonomy,' (2010) 10(2) *Journal of Public Procurement* 149 and the various contributions to S Arrowsmith and P Kunzlik (eds) *Social and Environmental Policies in EC Procurement Law* (Cambridge, Cambridge University Press, 2009).

requirements may be disproportionate and, ultimately, not in the public interest if it affects the level and intensity of competition for the contracts. On a more technical note, it is also worth emphasising that both articles 56(1) *in fine* and 57(4)(a) of Directive 2014/24 serve exactly the same function—ie, the strengthening of the social, labour and environmental aspects of the public procurement function, although in a manner that can seriously diminish its economic effectiveness and that can impose a burden difficult to discharge on contracting authorities (which could now be in a difficult position where they will need to assess tenderers' and tenders' compliance with an increased set of diverse rules of a social, labour and environmental nature). Indeed, both provisions aim at the same outcome, with the only apparent difference that article 56(1) *in fine* is concerned with the tender specifically, whereas article 57(4)(a) is concerned with the tenderer more generally—and, consequently, article 57(4)(a) may be seen as a rule that looks at the past and present (general) compliance of the economic operator with social, labour and environmental law, whereas article 56(1) *in fine* allows the contracting authority to make a prognosis of compliance and reject a tender if its (future) implementation would imply non-compliance with social, labour and environmental law requirements. In any case, their effectiveness will largely depend on the transposition decisions of the Member States and, ultimately, on the actual capacity of contracting authorities to engage in such (possibly complex) assessments of compliance with EU, domestic and international social, labour and environmental rules. In any case, these are grounds for exclusion that can have significant impacts on competition in the market and that resemble in nature those of criminal offences (as, indeed, they can be under the Member States' criminal laws). Consequently, their treatment as mandatory instances of exclusion subject to the pre-existence of a final and binding judgment or administrative decision would have been preferable.

Thirdly, article 57(4)(d) of Directive 2014/24 creates a new (limited) ground for the exclusion of infringers of competition law.[169] Indeed, contracting authorities can now exclude economic operators where they have 'sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition'. In view of its importance, this is discussed further below (§II.A.vi).

Fourthly, article 57(4)(g) of Directive 2014/24 creates yet another ground for exclusion based on poor past performance by the economic operator. Under this new ground, contracting authorities can exclude economic operators that have 'shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract … which led to early termination of that prior contract, damages or other comparable sanctions'.[170] The introduction of past performance as an exclusion ground

[169] Prieβ (n 159) 119. For further discussion, see A Sánchez Graells, 'Prevention and Deterrence of Bid Rigging: A Look from the New EU Directive on Public Procurement', in Racca and Yukins (n 45) 137–57.

[170] It is important to stress that, prior to this rule, the ECJ had found that 'Directive 2004/18 must be interpreted as precluding national legislation which provides that a situation of grave professional misconduct, which leads to the automatic exclusion of the economic operator at issue from a procedure for the award of a public contract in progress, arises where the contracting authority concerned has annulled, terminated or renounced a public contract with that same economic operator owing to circumstances for which that operator is responsible, where the annulment, termination or renouncement occurred in the three-year period before the procedure was initiated and the value of the non-performed part of the contract amounted to at least 5% of the contract's value'; Case C-465/11 *Forposta and ABC Direct Contact* [2012] pub electr EU:C:2012:801 36. Even with the creation of the new ground for exclusion, it will be important to bear in mind that its application cannot be automatic.

responds to long-standing requests of practitioners and brings the EU system closer to that of the US (for further discussion, see below §II.A.viii).

Interestingly, a (soft) corruption-related new ground for exclusion is also created.[171] Further to the ground for mandatory exclusion of economic operators engaged in (hard) corruption (above), contracting authorities can exclude economic operators where they have 'undertaken to unduly influence the decision-making process of the contracting authority, to obtain confidential information that may confer upon it undue advantages in the procurement procedure or to negligently provide misleading information that may have a material influence on decisions concerning exclusion, selection or award' (art 57(4)(i) Dir 2014/24). To be sure, some or all of these activities may be caught by the definition of corruption under domestic laws and, consequently, could substantively overlap with the mandatory ground for exclusion in article 57(1)(b) of the new Directive. However, the mandatory ground for exclusion is only triggered if the economic operator has already been convicted by final judgment. Consequently, the virtuality of article 57(4)(i) of the new Directive resides in allowing the contracting authority immediately to exclude any economic operator engaged in (quasi)corruption or that has otherwise tried to tamper with the integrity of the tender procedure. As a matter of diligence (and subject to applicable domestic rules), in these cases, the contracting authority seems likely to be under a duty to report this behaviour to the competent authorities or courts and to push for criminal prosecution.

Finally, and strengthening the general remarks contained in the recitals of previous generations of procurement directives,[172] Directive 2014/24 has also created two complementary grounds for the exclusion of tenderers in cases of conflict of interest,[173] either generally (arts 24 and 57(4)(e), further discussed in relation to art 58(4), below §II.A.vii), or as a result of the prior involvement of candidates or tenderers in the preparation of the procedure (arts 41 and 57(4)(f), see below).[174] Indeed, the contracting authority can exclude economic operators 'where a conflict of interest within the meaning of Article 24 cannot be effectively remedied by other less intrusive measures',[175] or 'where a distortion of competition [derived] from the prior involvement of the economic operators in

[171] This would have been strengthened if the intermediate drafts of the Compromise Text published in July 2012 had changed art 15 on the principles of procurement to read 'Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner that avoids or remedies conflicts of interest and prevents corrupt practices'. See register.consilium.europa.eu/pdf/en/12/st12/st12878.en12.pdf. However, this is not the drafting retained in the latest version of the Directive.

[172] As criticised by H-J Prieβ, 'Distortions of Competition in Tender Proceedings: How to Deal with Conflicts of Interest (Family Ties, Business Links and Cross-Representation of Contracting Authority Officials and Bidders) and the Involvement of Project Consultants' (2002) 11 *Public Procurement Law Review* 153; and S Treumer, 'Technical Dialogue and the Principle of Equal Treatment—Dealing with Conflicts of Interest after Fabricom' (2007) 16 *Public Procurement Law Review* 99. See also A Sánchez Graells, *Public Procurement and the EU Competition Rules*, 1st edn (Oxford, Hart Publishing, 2011) 305-09.

[173] Arrowsmith (n 28) 1291–97.

[174] Generally, on potential alternative approaches, see S Liao, 'Enhancing Ethics and the Competitive Environment by Accounting for Conflict of Interest in Project Procurement' (2013) 13(2) *Leadership and Management Engineering* 86–95.

[175] It is worth noting that, according to art 24.II of Dir 2014/24, 'The concept of conflicts of interest shall at least cover any situation where staff members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.'

the preparation of the procurement procedure, as referred to in Article 41, cannot be remedied by other, less intrusive measures'. These provisions should allow contracting authorities to ensure the integrity of the procurement process, despite the fact that the conflict of interest will also affect themselves (or members of their staff) and, consequently, these may end up being provisions which disappointed tenderers use in order to challenge their lack of application, rather than provisions directly and positively applied by the contracting authorities themselves—depending, of course, on the institutional robustness of the specific contracting authority concerned (and the litigation environment in any given Member State).

Maximum Length of the Exclusion. Following the position in article 45(1) and 45(2) of Directive 2004/18, article 57(7) of Directive 2014/24 requires that Member States specify the implementing conditions for the exclusion of economic operators by law, regulation or administrative provision, always having regard for EU law. However, it establishes new minimum rules concerning maximum exclusion periods. Indeed, Member States shall

> determine the maximum period of exclusion if no [self-cleaning] measures (discussed below) … are taken by the economic operator to demonstrate its reliability. Where the period of exclusion has not been set by final judgment, that period shall not exceed five years from the date of the conviction by final judgment in the cases referred to in paragraph 1 (ie, mandatory exclusion grounds) and three years from the date of the relevant event in the cases referred to in paragraph 4 of that same article 57 of the new Directive (ie, discretionary exclusion grounds).

This raises the issue of how to compute the maximum duration, particularly in the case of article 57(4) violations, as the reference to the 'relevant event' admits different interpretations (ie, either from the moment of the relevant violation, or the moment in which the contracting authority is aware of it or can prove it). Given that some of the violations may take time to identify (eg, emergence of a previous *bid rigging* conspiracy that can be tackled under art 57(4)(c) Dir 2014/24, below §II.A.vi.b), a possibilistic interpretation will be necessary to avoid reducing the effectiveness of these exclusion grounds. In any case, compliance with domestic administrative rules will be fundamental.

In the specific case of (mandatory or discretionary) exclusion due to lack of payment of taxes or social security contributions, the exclusion seems to be subject to an indefinite period that will only finish once the economic operator settles the outstanding debt or enters into arrangements to do so. This derives from article 57(2) *in fine* of Directive 2014/24, which determines that these grounds for exclusion 'shall no longer apply when the economic operator has fulfilled its obligations by paying or entering into a binding arrangement with a view to paying the taxes or social security contributions due, including, where applicable, any interest accrued or fines'.

In my opinion, such different treatment for these specific exclusion grounds seems unwarranted and other exclusion grounds that indicate the existence of similarly ongoing infringements (such as those concerned with infringements of social, labour and environmental law, or those concerning bankruptcy and administration) should also be subjected to indefinite exclusion until the economic operator complies with the relevant legislation. This result may be achieved anyway depending on the domestic rules applicable to continued infringements, but some further clarification and harmonisation could be desirable in order to keep the level playing field. Moreover, rules on the recognition of domestic exclusion decisions in the rest of the Member States could also be necessary, although this can be indirectly achieved by the European Single Procurement Document (below

§II.A.xi). In general, determining the duration of exclusion grounds in a proportionate manner and trying to ensure harmonisation across the EU could significantly contribute to a level playing field and to a more pro-competitive orientation of the procurement system.

Interpretation, Enforcement and Creation of Additional Exclusion Grounds. Other than by setting up a disproportionate length for exclusion, a rather obvious way in which contracting authorities can limit the possibilities for the development of competition in a given tender is by establishing excessively broad grounds for the (automatic) exclusion of potential bidders. In this regard, it should be stressed that *the lists of reasons for exclusion of tenderers contained in EU public procurement directives* (art 57 Dir 2004/18) *are not exhaustive*.[176] They must be interpreted as only listing exhaustively the grounds based on objective considerations of *professional quality* which can serve to justify the exclusion of a contractor from participation in a public contract—therefore, *a contrario*, additional reasons for the disqualification of bidders on grounds other than their professional quality are not excluded. Indeed, those provisions *preclude Member States or contracting authorities from adding other grounds for exclusion based on criteria relating to the professional qualities* of the candidate or tenderer, and more specifically professional honesty, solvency, and economic and financial capacity.[177] Nonetheless, the wording of some of the grounds for exclusion is rather broad and additional interpretative criteria might be required—particularly as to what should be interpreted as *grave professional misconduct, which renders its integrity questionable* (art 57(4)(c)), *breach of its obligations relating to the payment of taxes or social security contributions* (art 57(2)II), violation of applicable *environmental and social obligations* referred to in article 18(2) (art 57(4)(a)) or *serious misrepresentation* (art 57(4)(h) Dir 2014/24)—since too broad an interpretation of any of these requirements would be tantamount to the establishment of additional grounds for exclusion, in breach of the *numerus clausus* imposed by the Directive and the case law.

In this regard, it seems that an interpretation consistent with the competition principle requires a *narrow construction* of each of these grounds for exclusion, so that minor infringements of tax or social security laws, or of environmental and social laws, irrelevant infringements of professional rules or irrelevant misrepresentations of the candidates' personal situation should be considered insufficient to justify the exclusion of the candidate or tenderer, particularly *if there is no significant competitive advantage gained from the infringement, either within the specific competition or, more generally, in the market*. Therefore, if infringements of tax or social security laws, or environmental or social laws, or professional conduct rules and codes take place, or candidates misrepresent their personal situation in ways that do not give them an *unlawful competitive edge* and, at the same time, their exclusion can have a material negative impact on the level of competition—either within the tender, or in the market, or both—compliance with the principle of competition (as a purposive application of the proportionality test) seems to require

[176] See: S Treumer, 'Recent Trends in the Case Law from the European Court of Justice' in Nielsen and Treumer (n 116) 17, 18–20; id, 'The Discretionary Powers of Contracting Entities—Towards a Flexible Approach in the Recent Case Law of the Court of Justice?' (2006) 15 *Public Procurement Law Review* 71, 73.

[177] Case 76/81 *Transporoute* [1982] ECR 417 9; Joined Cases C-226/04 and C-228/04 *La Cascina* [2006] ECR I-1347 21–22; and Case C-213/07 *Mikhaniki* [2008] ECR I-9999 40–43. This has recently been reiterated in Case C-376/08 *Serrantoni and Consorzio stabile edili* [2009] ECR I-12169 31; C-74/09 *Bâtiments and Ponts Construction and WISAG Produktionsservice* [2010] ECR I-7271 43; and Case C-465/11 *Forposta and ABC Direct Contact* [2012] pub electr EU:C:2012:801 38.

the contracting authority not to exclude those candidates or tenderers. Therefore, it is submitted that the interpretation of the *closed list* of criteria established by article 57(2)II and 57(4) of Directive 2014/24 should be informed by the competition effects of these debarment decisions and a narrow construction should always be favoured unless it results in granting an unlawful competitive advantage to the infringer. In any case, what should be clear is that automatic exclusion mechanisms are not allowed by the case law of the ECJ, which has clearly reiterated that rules that

> impose on the contracting authorities mandatory requirements and conclusions to be automatically drawn in certain circumstances [exceed] the discretion enjoyed by the Member States, pursuant to the second subparagraph of Article 45(2) of [Directive 2004/18, now art 57(4) Dir 2014/24], in specifying the implementing conditions for the ground for exclusion [based on grave professional misconduct] with regard for EU law.[178]

Consequently, a contracting authority must retain the power to assess, on a case-by-case basis, the gravity of the circumstances that would lead to exclusion of the tenderer.[179] And it is submitted that it must also balance them against the effects that such exclusion would have on competition.

In furtherance to the above, the ECJ has also clearly held that the exhaustive character of the list of criteria set out in the directives 'does not however preclude the option for Member States to maintain or adopt substantive rules designed, in particular, to ensure, in the field of public procurement, observance of the principle of equal treatment and of the principle of transparency',[180] on grounds other than professional quality. Therefore, Member States can establish other grounds for the exclusion of tenderers—unrelated to their professional honesty, solvency and economic and financial capacity—if they deem it necessary to guarantee the non-discriminatory and transparent character of their public procurement rules. Nonetheless, Member States must ensure that such measures are proportionate to the goal of preventing discrimination in public procurement—ie, do not go beyond what is necessary to achieve that objective.[181] It is hereby submitted that, as yet another particular application of the competition principle and in accordance with this case law, *a clear limit to the establishment of such additional grounds for exclusion lies in its effects on competition*. When applying the proportionality test to evaluate whether certain additional grounds for the exclusion of candidates or tenderers are consistent with EU law, the benefits of the rule oriented towards the protection of equal treatment amongst tenderers need to be weighed against the restrictions of competition that the imposition of overly restrictive grounds for exclusion can generate, particularly at this early stage of the tender process. Therefore, the establishment of grounds for exclusion that tend to narrow down excessively the pool of potential participants in a tender, or that completely exclude a given type or entire category of potential bidders, will need to be scrutinised carefully. This will be one of the cases where the application of the principle of proportionality alone

[178] Case C-465/11 *Forposta and ABC Direct Contact* [2012] pub electr EU:C:2012:801 35.

[179] Ibid 34.

[180] Case C-94/99 *ARGE* [2000] ECR I-11037 24; Case C-421/01 *Traunfellner* [2003] ECR I-11941 29; Case C-213/07 *Mikhaniki* [2008] ECR I-9999 44. See also Opinion of AG Sharpston in Case C-199/07 *Commission v Greece* 53–64.

[181] Joined Cases C-21/03 and C-34/03 *Fabricom* [2005] ECR I-1559 34; Case C-213/07 *Mikhaniki* [2008] ECR I-9999 48–49; Case C-538/07 *Assitur* [2009] ECR I-4219 21; and Opinion of AG Mazák in Case C-538/07 *Assitur* 42–44. Recently, Case C-376/08 *Serrantoni and Consorzio stabile edili* [2009] ECR I-12169 33.

might be insufficient (see above chapter five) and where a purposive interpretation might be required to ensure a more pro-competitive outcome. Additional grounds for exclusion will therefore not only need to be proportionate, but should not generate unnecessary distortions to competition.

The argument can be pushed further to require that the additional rules for the exclusion of tenderers be designed *exclusively to prevent undertakings from exploiting certain unlawful competitive advantages in the public procurement setting*. As the ECJ has clarified, the purpose of the basic principles of equality and non-discrimination and the ensuing obligation of transparency is to guarantee that 'tenderers [are] in a position of equality both when they formulate their tenders and when those tenders are being assessed by the contracting authority'.[182] Therefore, the underlying rationale of the system of exclusion of tenderers is to prevent the participation of tenderers that are ex ante advantaged vis-à-vis the rest of competitors from resulting in a breach of the principle of equal treatment. Hence, the additional grounds for exclusion established by Member States should be designed in such a way that only situations under which a potential competitive advantage is clearly envisioned are covered—ie, they should not be designed exclusively in accordance with *formal* considerations of equality or non-discrimination. Moreover, in their implementation, contracting authorities need to be able to prove the existence of an *actual advantage* for the candidate or tenderer whose exclusion is being considered,[183] and an opportunity to show that no such advantage exists in the particular instance under consideration should be granted to the affected candidate or tenderer (ie, the establishment of irrebuttable presumptions should not be allowed).[184]

Therefore, it is submitted that it should be expressly recognised and taken into account that the establishment of grounds for exclusion of tenderers other than those listed in article 57 of Directive 2014/24 needs to be based on competition considerations and, more specifically, aimed at preventing the exploitation of actual unlawful competitive advantages by candidates or tenderers—since the establishment of purely formal grounds for the exclusion of tenderers not justified by the existence of associated distortions of competition would unnecessarily restrict access to public procurement.

The New Rules on Self-Cleaning as a Neutralisation of Exclusion Grounds. As a novelty, and in order to allow 'for the possibility that economic operators can adopt compliance measures aimed at remedying the consequences of any criminal offences or misconduct and at effectively preventing further occurrences of the misbehaviour' (rec (102) Dir

[182] Case C-19/00 *SIAC Construction* [2001] ECR I-7725 34; Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527 47; and Case C-213/07 *Mikhaniki* [2008] ECR I-9999 45.

[183] Joined Cases C-21/03 and C-34/03 *Fabricom* [2005] ECR I-1559 33 and 35; and Case C-213/07 *Mikhaniki* [2008] ECR I-9999 62. For a recent application of the advantage criterion that, in my view, imposes an exceedingly demanding requirement as regards its proof, see Case T-4/13 *Communicaid Group v Commission* [2014] pub electr EU:T:2014:437.

[184] That would particularly be the case according to the reading of *Fabricom* made by the EGC, which has considered that the ECJ 'held that a candidate or tenderer cannot automatically be excluded from a tendering procedure without having the opportunity to comment on the reasons justifying such exclusion'; Joined Cases T-376/05 and T-383/05 *TEA–CEGOS* [2006] ECR II-205 65. See also Case C-213/07 *Mikhaniki* [2008] ECR I-9999 69; Case C-538/07 *Assitur* [2009] ECR I-4219 30; and Opinion of AG Mazák in Case C-538/07 *Assitur* 44 and fn 22, where it is argued that those measures may result in the exclusion of persons whose participation entails no risk whatsoever for the equal treatment of tenderers and the transparency of procedures for the award of public contracts—which is clearly undesirable.

2014/24), Article 57(6) establishes rules on self-cleaning[185] and promotes the adoption of corporate compliance programmes. Under the rules of Article 57(6) of Directive 2014/24, any economic operator that should be excluded under any of the grounds in article 57(1) or 57(4)[186] can provide evidence to the effect that measures it has taken are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion and, if such evidence is considered as sufficient by the contracting authority, the economic operator concerned shall not be excluded. The new Directive includes a list of compensatory measures that, as a minimum, shall include proof that the economic operator

> has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

Furthermore, the discretion retained by the contracting authority to assess the sufficiency of the self-cleaning measures adopted by the economic operator is modulated by the requirement that they 'shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct'. As a specific requirement of the duty of good administration and the obligation to provide reasons for any decision adopted in a procurement procedure, '[w]here the measures are considered to be insufficient, the economic operator shall receive a statement of the reasons for that decision'—which, in my opinion, shall be amenable to judicial review under the applicable rules of each Member State.

Oddly, the new Directive restricts the possibility of implementing self-cleaning measures for economic operators that have 'been excluded by final judgment from participating in procurement procedures [which] shall not be entitled to make use of [this] possibility … during the period of exclusion resulting from that judgment in the Member States where the judgment is effective'. This shows a lack of trust in self-cleaning measures and imposes exclusion as an irreversible sanction on the Member State adopting that decision (but, oddly, not on other Member States), which can sometimes disproportionately reduce competition (as well as creating a dual standard applicable in 'domestic' and 'cross-border' participation in procurement by that operator). Therefore, it is submitted that self-cleaning should also be available in these cases, which may justify a particularly tough approach to the evaluation of the sufficiency of the measures implemented by the economic operator. At least, an escape clause should exist in these cases to waive, substitute or defer the exclusion on grounds of public interest if having the economic operator excluded actually harms the interests of the contracting authority (which may be the case in highly concentrated or specialised markets). It may seem possible to achieve this result for mandatory exclusion grounds on the basis of the exclusion provision foreseen in article 57(3) of the new Directive (discussed above), but there is no equivalent for the discretionary grounds

[185] S Arrowsmith, H-J Prieß and P Friton, 'Self-Cleaning as a Defence to Exclusions for Misconduct—An Emerging Concept in EC Public Procurement Law?' (2009) 18 *Public Procurement Law Review* 257. See also Prieβ (n 159) 121–22.

[186] Exclusion on the grounds of lack of payment of taxes or social security contributions is not included due to the fact that the only 'compensatory' measures accepted in the new Directive are payment of the arrears or entering into a binding agreement to do so.

of exclusion. This seems difficult to justify and Member States should explore ways to develop a more consistent and competition-oriented system, particularly if self-cleaning is to be given any value.

vi. Grounds for Exclusion of Potential Bidders: In Particular, Consideration of Previous Breaches of Competition Law as Offences against Professional Conduct

An important instrument in the prevention and deterrence of bid rigging in public procurement—ie, the existence of unlawful agreements between participants or tenderers in public procurement markets—can be found in the rules controlling the disqualification of competition law offenders (in particular, members of a previously discovered cartel). If contracting authorities could exclude potential tenderers that have previously breached competition law—either in a particular instance or, more permanently, by preventing them from future participation—the (financial) interests at stake for any undertaking to participate in bid rigging would increase significantly. In case an effective exclusion system is in place, cartelists know that they risk not only competition law prosecution, but also losing all chance of securing public contracts for a significant period of time, or even permanently. That risk of being excluded from a significant tranche of the market (particularly in sectors where public buyers accumulate a significant volume of purchases) seems a powerful tool that has, so far, been used to only a limited extent in EU law. If so, the scale of the potential (economic) losses should significantly increase the incentive of tenderers to refrain from colluding.[187]

In a development that aims at strengthening that integrated enforcement of competition and public procurement rules, the 2014 Directive has created a specific ground for the exclusion of competition law infringers that allows contracting authorities to exclude tenderers that have colluded. This should be read in connection with the OECD's July 2012 Recommendation on Fighting Bid Rigging in Public Procurement[188] and with the many actions undertaken by national competition authorities of some of the Member States to better liaise with contracting authorities and entities, and to advocate for competition law compliance in the public procurement setting. However, in my view and depending on its future interpretation, the specific ground included in Directive 2014/24 may be too narrow (a) and, consequently, it is worth exploring whether there is a possibility to exclude competition law infringers more *generally* (b). These issues are analysed in the following sub-sections.

(a) Exclusion of Tenderers Engaged in Contemporaneous Bid Rigging.[189] As indicated in the explanatory memorandum of the 2011 Proposal for a new EU Directive, it 'contain[ed] a specific provision against illicit behaviour by candidates and tenderers, such as … entering into agreements with other participants to manipulate the outcome of the procedure [which] have to be excluded from the procedure. Such illicit activities violate basic principles of European Union [law] and can result in serious distortions of competition.' More specifically, Article 22 of the 2011 Proposal for a new EU Directive required that, at

[187] Implicitly, identifying similar risks of economic loss that would generate anti-collusion incentives (in that case, entry), see McAfee and McMillan (n 11) 111 and 150.

[188] Available at http://oecd.org/competition/cartels/fightingbidriggininpublicprocurement.htm. For further discussion, see Sánchez Graells, 'Prevention and Deterrence of Bid Rigging' (2014).

[189] Arrowsmith (n 28) 1267–68.

the beginning of the procedure, tenderers 'provide a declaration on honour that they have not undertaken and will not undertake to: ... (b) enter into agreements with other candidates and tenderers aimed at distorting competition'. Further, in accordance with article 68 of the 2011 Proposal, regulating impediments to award, '[c]ontracting authorities shall not award the contract to the tenderer submitting the best tender where … (b) the declaration provided by the tenderer pursuant to Article 22 is false'. Therefore, if the contracting authority became aware of any illicit, anti-competitive behaviour on the part of tenderers, it was required to disqualify them by applying the impediment to award in article 68(b) of the 2011 Proposal. However, that solution to the need to exclude bid-riggers was partial. The final text of Directive 2014/24 has suppressed articles 22 and 68 of the 2011 Proposal and referred the issue to the new drafting of the grounds for the exclusion of tenderers in article 57(4). Indeed, as briefly mentioned, article 57(4)(d) of Directive 2014/24 creates a new (limited) ground for the exclusion of infringers of competition law. According to that provision, contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator 'where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into *agreements with other economic operators aimed at distorting competition*'.[190] Moreover, it must be highlighted that, according to article 57(5) of Directive 2014/24, where undertakings are affected by any of the grounds for discretionary qualification established in article 57(4), contracting authorities can exclude operators at any time during the procedure 'in view of acts committed or omitted either before or during the procedure'. Some of the relevant aspects of the disqualification regime will, however, still need to be designed at national level (art 57(7) Dir 2014/24), which may impact on the effectiveness of this provision. This is particularly relevant in terms of the maximum length of the exclusion, which, in the absence of a final judgment determining it, is now limited to five years from the date of the conviction by final judgment in the cases referred to in article 57(1) and three years from the date of the relevant event in the cases referred to in article 57(4) (see above). Overall, nonetheless, the new text overcomes some of the difficulties in the initial exclusion system foreseen in articles 22 and 68 of the 2011 Proposal.

Indeed, the disqualification system envisaged in articles 22 and 68 of the 2011 Directive fell short of ensuring that infringers of competition law do not participate in public procurement—mainly, due to two considerations. Firstly, the system only allowed for disqualification prior to award of the contract. However, it can be foreseen that most instances of bid rigging will only be discovered later and, maybe even after the execution of the contract is complete (when the remedy of the impediment to award will be absolutely ineffective). This is only partially remedied by article 57(4) of the new version, given that the exclusion can take place at any time during the procedure (art 57(5) Dir 2014/24)—which maintains the difficulty of envisaging the consequences of a discovery of bid rigging once the contract is being executed (and, in my opinion, this should be resolved via the termination of the contract in a joint application of art 73 Dir 2014/24 and art 101(2) TFEU, see below §II.C.iv). Secondly, it could generate some doubts as to

[190] Emphasis added. This creates the difficulty of interpreting whether the agreement to distort competition needs to be tender-specific or if the provision can be interpreted more widely to include all instances of bid-rigging and, more generally, any involvement in illegal cartel behaviour. The latter is my preferred interpretation.

the possibility of applying article 57(4)(d) of Directive 2014/24 in relation to violations of competition that are not connected with the tender at hand or, more generally, with other types of infringements of competition law (covered by arts 101 and 102 TFEU)—which has been interpreted as now being expressly excluded by the wording of article 57(4)(d),[191] in what is in my opinion a criticisable restriction of the disqualification mechanism.

Indeed, the drafting of article 57(4)(d) deviates from that of article 101(1) TFEU in significant ways, given that it only mentions agreements between undertakings (but not concerted practices or collective decisions and recommendations) and it only refers to those that 'aim at distorting competition',[192] whereas article 101(1) TFEU covers all those that 'have as their object or effect the prevention, restriction or distortion of competition', hence making the subjective element of intention irrelevant (for related discussion, see above chapter five). However, this cannot be interpreted as an intended restriction of the scope of application of the ground for exclusion in article 57(4)(d) as compared to that of article 101(1) TFEU,[193] which would make no sense,[194] and in any case would be contrary to the supremacy of the latter and the duty of sincere interpretation imposed by article 4(3) TFEU. In this regard, even if the interpretation of the grounds for exclusion must be carried out in a restrictive manner (as already stressed repeatedly), that interpretation must still comply with the general rules under EU law (chapter five) and the systematic interpretation requirements derived from the principle of competition embedded in article 18 of Directive 2014/24. Consequently, in order not to strip article 101(1) TFEU of its *effet utile* and to ensure the consistency of the system, it is submitted that the only rational and acceptable interpretation of the ground for exclusion in article 57(4)(d) is to make it at least cover *all conduct that would be prohibited under article 101(1) TFEU*, clarifying at the same time that as bid rigging is a very serious restriction of competition *by object*, it can (almost) never be exempted under article 101(3) TFEU.[195] However, in my view, even this interpretation of the exclusion rule would fall short from ensuring that the public procurement system supports the effectiveness of EU competition law.

In this vein, it must be stressed that even if the new Directive increases legal certainty in some cases, there is still a need for a further developed suspension and debarment system in EU public procurement rules (see below and chapter seven). Moreover, given the optional terms in which article 57(4) of the new rules is drafted (which could result in some or all Member States not applying the ground for disqualification of bid-riggers), such open regulation at EU level can give rise to different regimes across different Member States and, consequently, might facilitate strategic behaviour by infringing undertakings—thereby reducing deterrence. In my view, a stricter and more uniform system of suspension and debarment of competition law infringers would contribute to strengthening the

[191] Prieβ (n 159) 119.

[192] Ibid.

[193] *Cf* ibid.

[194] Even Prieβ (n 159) 119, despite advocating for the indicated interpretation of the provision, acknowledges that 'it could be concluded that the provisions have a different scope of application—although *this makes little sense*' (emphasis added).

[195] On the significant discussion on prohibitions of restrictions by object and restriction by effect and its implications, see CI Nagy, 'The Distinction between Anti-Competitive Object and Effect after Allianz: The End of Coherence in Competition Analysis?' (2013) 36(4) *World Competition* 541–64. See also Commission Staff Working Paper, *Guidance on restrictions of competition 'by object' for the purpose of defining which agreements may benefit from the De Minimis Notice* (SWD(2014) 198 final), available at ec.europa.eu/competition/antitrust/legislation/de_minimis_notice_annex.pdf.

pro-competitive orientation of the public procurement system and to limiting privately created distortions of competition.[196]

(b) A More General Ground to Exclude Competition Law Infringers?[197] Indeed, despite the existence of the new rules just discussed, there may be good reasons to extend the competition-related exclusion grounds beyond that limited situation (ie, to undertakings that have violated competition rules, but not in relation to the contract being tendered, or in forms not covered by any possible interpretation of art 57(4)(d) Dir 2014/24). In my view, this can be done on the basis of article 57(4)(c) of Directive 2014/24, which allows for exclusion 'where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable'.[198] Doing otherwise would run contrary to the general mandate to provide effectiveness to the rules on competition of the TFEU. Also, there is a clear indication that this is squarely within the legislative intent underpinning the 2014 Directive. Indeed, according to recital (101) of Directive 2014/24,

> Contracting authorities should further be given the *possibility to exclude economic operators which have proven unreliable, for instance because of* violations of environmental or social obligations, including rules on accessibility for disabled persons or *other forms of grave professional misconduct, such as violations of competition rules* or of intellectual property rights. It should be clarified that grave professional misconduct can render an economic operator's integrity questionable and thus render the economic operator unsuitable to receive the award of a public contract irrespective of whether the economic operator would otherwise have the technical and economical capacity to perform the contract. (emphasis added)

Hence, it is highly relevant to clarify whether general breaches of competition law qualify as grave professional misconduct, which renders the undertaking's integrity questionable and which the contracting authority can take into account in order to disqualify a candidate or tenderer under article 57(4)(c) of Directive 2014/24.[199]

So far, the EU judicature has not provided interpretative criteria as regards the concept of 'grave professional misconduct, which renders the undertaking's integrity questionable'[200] that is now embraced by Directive 2014/24 and its relation with competition law

[196] Which, however, would not be without cost; see Albano et al (n 51) 347-380.

[197] Arrowsmith (n 28) 1267 also considers that '[i]n the absence of an explicit provision, conduct that violates formal competition law rules … would be ground for exclusion anyway under the general grave professional misconduct provision'.

[198] Against this possibility, see Prieβ (n 159) 119, who argues that 'contracting authorities may not rely on the general fall-back provision for exclusion in art 57(4) lit c. The legislator has exhaustively governed the grounds for exclusion in that regard, as it chose to limit the grounds for exclusion only to agreements which are aimed at distorting competition and not to cover the same conduct as art 101(1) TFEU' and, if his logic is brought to its extremes, also of art 102 TFEU. In my view, this argument based on a l*ex specialis derogate generalis* approach is faulty because all exclusion grounds in art 57(4) are discretionary and, consequently, Member States could decide to use one (eg 57(4)(c)) without the other (57(4)(d)), in which case the restriction would no longer exist. More generally, even if both are adopted by the Member States, it would be contrary to the principle of supremacy for the Directive to try to restrict the scope and effectiveness of a Treaty provision and, in particular, art 101(1) TFEU, which has direct effect.

[199] As mentioned repeatedly, the construction of these rules should be narrow and pay special attention to whether there is a competitive advantage gained from the infringement, either within the specific tender or, more generally, in the market.

[200] It is important to stress that this concept merges the concepts of 'professional misconduct' and of 'an offence concerning professional conduct' that were separately regulated in art 45(2)(c) and (d) Dir 2004/18.

provisions. However, interpreting the concept of 'professional misconduct' under article 45(2)(d) of Directive 2004/18, the ECJ has stressed that 'the concept of 'grave misconduct' must be understood as normally referring to *conduct by the economic operator at issue which denotes a wrongful intent or negligence of a certain gravity* on its part'.[201] This certainly seems to encompass a broad interpretation of the concept and, in particular, one that covers violations of competition rules as an integral part of the concept of 'grave professional misconduct, which renders the undertaking's integrity questionable' for the purposes of interpreting Directive 2014/24. On its part, the preamble of Directive 2004/18 offered some additional guidance in this respect and along the same lines. According to recital (43) *in fine*,

> if national law contains provisions to this effect, non-compliance with … legislation on *unlawful agreements in public contracts* which has been the subject of a final judgment or a decision having equivalent effect may be considered an offence concerning the professional conduct of the economic operator concerned or grave misconduct.[202]

Therefore, under the previous Directive there was already a clear indication that there is room for the inclusion of competition law breaches within the relevant concept of professional misconduct.[203] However, the strict limits that a literal interpretation of recital (43) of Directive 2004/18 could suggest—ie, that the breach has to be related to unlawful *agreements* and must have taken place in relation to *public contracts*, which are exactly the same restrictions criticised and dispelled above—are to be discarded if article 57(4)(c) of Directive 2014/24 is to contribute effectively to the development of a more pro-competitive public procurement system. As already mentioned, indeed, narrowing down the potential competition law breaches of relevance to the interpretation of article 57(4)(c) of Directive 2014/28 to collusive behaviour in the public procurement setting is too narrow an approach, and would now make it redundant in view of article 57(4)(d). To be sure, *bid rigging* is the anti-competitive behaviour that generates the restrictions of competition more directly related—and probably most immediately harmful—to public procurement procedures. However, it does not cover all relevant instances of anti-competitive behaviour from a public procurement perspective. First, not only collusive behaviour can give an advantage to participants in public tenderers; abuses of a dominant position can also distort the competitive conditions in ways that are relevant to public procurement regulations. Second, either type of anti-competitive practice can be developed outside the public procurement setting and still be of relevance—particularly in instances of leveraged exercise of market power between public and private markets or sub-markets (above chapter two, §II.B.v). Consequently, it is highly unlikely that undertakings can pursue anti-competitive behaviour in ways that do not alter the competitive conditions of the markets in which public procurement activities take place and that undertakings involved in collusive or abusive practices do not benefit (directly or indirectly) from a competitive advantage when participating in public tenders.

Hence, it is submitted that all kinds of anti-competitive behaviour should be of relevance

[201] Case C-465/11 *Forposta and ABC Direct Contact* [2012] pub electr EU:C:2012:801 30 (emphasis added).

[202] Emphasis added. The same recital contains identical interpretative guidance as regards breaches of environmental laws and of national laws implementing EU rules on equal treatment of workers. Similarly, see rec (34) of Directive 2004/18 as regards breaches of laws on employment conditions and safety at work.

[203] Similarly, Arrowsmith (n 28) 1251–59.

from a public procurement perspective,[204] and that *the concept of 'grave professional misconduct, which renders the undertaking's integrity questionable' should be interpreted to include all kinds of practices prohibited by competition laws* (not captured by art 57(4)(d)); maybe with the only *exception* of those cases where it can be proven by the undertaking that the breaches of competition law being considered are irrelevant in the specific public procurement setting.[205]

To sum up, except in highly unlikely circumstances, it is submitted that all breaches of competition law–within or outside of a public procurement setting–should qualify as grave professional misconduct that renders the undertaking's integrity questionable and, consequently, be considered to meet the requirements of either paragraphs (c) or (d) of article 57(4) of Directive 2014/24. Hence, according to the rules specified by Member States in that respect (art 57(5)), contracting authorities may be able to take all competition law breaches into account in order to disqualify the undertakings concerned from a given tendering procedure—unless their irrelevance can be proven.[206]

Moreover, given the direct relevance of taking into account previous violations of competition law as grounds for the exclusion of potential bidders for the preservation of undistorted competition—particularly in markets where public procurement is specially prevalent—and the general pro-competitive obligation imposed on Member States in the design of the national legislation that transposes the EU public procurement directives (above chapter five, §III.B), all Member States should adopt express rules allowing for the exclusion of potential bidders on the basis of breaches of competition law, both as instances of contemporary bid-rigging (art 57(4)(d)) and/or more generally as an instance of grave professional misconduct that renders the undertaking's integrity questionable (art 57(4)(c)). By not doing so, it is argued that Member States would be limiting the full effectiveness of the competition principle—and, indirectly, of the competition rules of the TFEU—and, consequently, would be in breach of EU law.

vii. Excessive Qualitative Selection Criteria: Early Restriction of Competition

In addition to the setting of grounds for the exclusion of tenderers, the directives on public procurement allow contracting authorities to define additional requirements for the qualitative selection of candidates.[207] That is, once the suitability of the candidates *has not been questioned* on the basis of any of the general grounds established in the contract documents—either automatically, under the causes regulated in article 57(1) and 57(2), or discretionally by the contracting authority, on the basis of the circumstances regulated by article 57(2)II or 57(4) of Directive 2014/24—contracting authorities can further check their suitability to perform the contract *exclusively* on the basis of their experience, qualifications and means of ensuring proper performance of the contract in question (art 58(1)

[204] Along the same lines, see Trepte (n 48) 117 fn 154.

[205] By analogy, see Case C-213/07 *Mikhaniki* [2008] ECR I-9999 69; Case C-538/07 *Assitur* [2009] ECR I-4219 30; and Opinion of AG Mazák in Case C-538/07 *Assitur* 44. However, discharging such a burden of proof will be almost impossible for the violators concerned.

[206] For further details on the development of an effective system of suspension and debarment based on competition considerations, see below chapter seven, §II.B.

[207] Generally, see Arrowsmith (n 28) 1183–310; Trepte (n 23) 351–58; and Bovis (n 23) 133–35, 224–31, 399–404 and 429–42. See also D Triantafyllou and D Mardas, 'Criteria for Qualitative Selection in Public Procurement: A Legal and Economic Analysis' (1995) 4 *Public Procurement Law Review* 145.

Dir 2014/24).[208] Those criteria concern the tenderers' suitability to perform the contract in general terms and, therefore, do not have the status of award criteria 'as such' under the rules of the directives (below §II.B.iii). Hence, the qualitative selection criteria used by the contracting authority must be based exclusively on the suitability of candidates to pursue a *professional activity* according to the rules of the Member State of establishment (art 58(2) Dir 2014/24), their *economic and financial standing* (art 58(3) Dir 2014/24), or on their *technical and/or professional ability* (art 58(4) Dir 2014/24); and, eventually, on their compliance with *quality assurance standards* and *environmental management standards* (art 62 Dir 2014/24).[209]

It is worth noting that article 58(1) of Directive 2014/24 consolidates and somehow clarifies the requirements in articles 46 to 48 of Directive 2004/18 as regards the fact that selection criteria can exclusively relate to: (i) the suitability to pursue the professional activity concerned, (ii) the economic and financial standing, and (iii) the technical and professional ability of the economic operator; and that, in any case, the requirements shall be limited to 'those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded'. It is also worth stressing that, according to the same provision, and as will be further discussed below, '[a]ll requirements shall be related and proportionate to the subject-matter of the contract'. In any case, where contracting authorities want to establish minimum capacity levels, they have to comply with Article 58(5) of the new Directive (which carries forward the requirements of art 44(2) Dir 2004/18) and 'indicate the required conditions of participation which may be expressed as minimum levels of ability, together with the appropriate means of proof, in the contract notice or in the invitation to confirm interest'. As can be seen, then, the rules of the directives are fundamentally limited to setting the *formal requirements* that contracting authorities can impose on candidates as regards the certificates and other formalities to be provided to prove that they meet the qualitative selection criteria set in the tender documents, with the clear aim of limiting the requirements that can be imposed on candidates and of introducing a certain degree of flexibility which allows interested undertakings to prove their standing and abilities through alternative means—see article 60 and Annex XII of Directive 2014/24 (see further discussion below in relation to the European Single Procurement Document, §II.A.xi).

Despite these general simple rules, Article 58(1) of Directive 2014/24 is not free from interpretive difficulties, since it seems to aim to establish a *numerus clausus* or exhaustive list of selection criteria when it indicates that 'Contracting authorities *may only impose* criteria referred to in paragraphs 2, 3 and 4 of this Article on economic operators as requirements for participation' (emphasis added). However, this is not consistent with the open-ended wording of such paragraphs (see below), and that would contradict the

[208] In this regard, the case law has clearly established that contracting authorities may examine the suitability of suppliers *only* on the basis of the qualitative criteria established in the directives; see Case 76/81 *Transporoute* [1982] ECR 417 6–10; Case C-360/89 *Commission v Italy* [1992] ECR I-3401 16–22. See also P Braun, 'Selection of Bidders and Contract Award Criteria: The Compatibility of Practice in PFI Procurement with European Law' (2001) 10 *Public Procurement Law Review* 1, 2.

[209] Most commonly used participation requirements include: quality certificates, specific budget or revenues, proof of financial standing and financial dealings, technical qualifications, legal eligibility to execute the contract, absence of tax debts and absence of bankruptcy risks; and contracting institutions usually require suppliers to satisfy three to five of such parameters in order to enter the competitive tendering—see L Carpineti et al, 'The Variety of Procurement Practice: Evidence from Public Procurement' in Dimitri et al (n 51) 14, 18.

existing case law of the ECJ, which establishes that contracting authorities have wide discretion to set the *specific requirements* that they consider adequate for the evaluation of the suitability of candidates to perform the contract.[210] In general terms, it has been consistently held by the case law that the contracting authority 'has a broad discretion with regard to the *factors* to be taken into account for the purpose of deciding to award a contract' (emphasis added),[211] which include the criteria of qualitative selection of candidates.[212] Therefore, regardless of the specific drafting, it seems clear that there is actually no *numerus clausus* of selection criteria,[213] as long as they refer to the suitability to pursue the professional activity concerned, the economic and financial standing, or the technical and professional ability of the economic operator (are related and proportionate to the subject-matter of the contract, and are kept to a minimum in order to take into account the need to ensure genuine competition).[214]

It is submitted that, in the exercise of this discretion, contracting authorities could clearly restrict the degree of potential competition in a given tender by requiring compliance with a set of excessive financial, economic, technical, quality or environmental criteria of qualitative selection or tender participation.[215] Therefore, the adoption of specific limits to the discretionary determination of the criteria for qualitative selection might be required in order to avoid unnecessary restrictions of competition. From a general perspective, it is submitted that the applicable criteria should ensure that *competition is kept as open as possible for as long as the procurement processes permit*, since excessively high standards regulating *access* to the procurement process—eg, unnecessarily demanding qualitative selection criteria—are more likely to restrict the ability of the public buyer to obtain value for money than similarly demanding standards in *later phases* of the tendering procedure—eg, highly demanding award criteria.[216] Therefore, as a matter of general orientation, *contracting authorities should not set qualitative requirements unrelated to the object of the contract or exceeding the minimum conditions that would ensure that a compliant candidate can perform the contract*. In other words, qualitative selection criteria should not be used

[210] Joined Cases 27 to 29/86 *CEI and Bellini* [1987] ECR 3347 13–15. Trepte (n 48) 99; Arrowsmith (n 28) 1189–96; Bovis (n 76, 2002) 1029; id (n 55) 59–60; and id, 'Developing Public Procurement Regulation: Jurisprudence and Its Influence on Law Making' (2006) 43 *Common Market Law Review* 461, 470–71.

[211] Case T-145/98 *ADT Projekt* [2000] ECR II-387 147; Case T-169/00 *Esedra* [2002] ECR II-609 95; Case T-183/00 *Strabag Benelux* [2003] ECR II-135 73; Joined Cases T-376/05 and T-383/05 *TEA–CEGOS* [2006] ECR II-205 50; Case T-148/04 *TQ3 Travel Solutions* [2005] ECR II-2627 47; Case T-250/05 *Evropaïki Dynamiki (OPOCE)* [2007] ECR II-85 89; Case T-495/04 *Belfass* [2008] ECR II-781 63; Case T-406/06 *Evropaïki Dynamiki (CITL)* [2008] ECR II-247 64; Case T-511/08 R *Unity OSG* [2009] ECR II-10 25; Case T-125/06 *Centro Studi Manieri* [2009] ECR II-69 62.

[212] *Contra*, apparently, Braun (n 208) 1.

[213] *Cf* Arrowsmith (n 28) 1198–204, and Trepte (n 23) 341–2, who considered that the equivalent lists under arts 45(2) and 46 Dir 2004/18 imposed a *numerus clausus* 'The reasons [for the exclusion of tenderers on grounds of their general unsuitability] are exhaustive, as demonstrated in the early case of *Transporoute*' (with reference to Case 76/81 *Transporoute* [1982] ECR 417). However, the discussion between acceptable criteria and admissible means of proof or documentary requirements is bound to create confusion in any case.

[214] This last caveat has been suppressed in the Directive, but was included in the original 2011 proposal by the European Commission and, in my view, gave all rules on selection criteria a much more pro-competitive spin and imposed stricter proportionality requirements. In any case, this pro-competitive requirement should be seen as an (implicit) extension of art 18(1) Dir 2014/24 (see chapter five, §III).

[215] Indeed, one of the main restrictions to participation in public tenders is 'overly narrow pre–qualification criteria, placing too much emphasis on past experience or firm size'; OFT, *Assessing the Impact of Public Sector Procurement on Competition* (2004) 15–16 and 105–10. Also OECD, 'Procurement Markets' (1999) 1 *OECD Journal of Competition Law and Policy* 83, 96; and id (n 148) 10.

[216] Along the same lines, Albano et al (n 52) 105 fn 30.

to ensure that tenderers will excel when performing the contract—which is an issue to be addressed, eventually, by the award criteria (see below §II.B.iii)—but simply be set at the level required to discard those candidates that are unprepared to deliver to the basic standard set by the contracting authority because they do not meet certain minimum objective criteria that clearly indicate the ability of an undertaking to do so. Therefore, self-constraint should guide the exercise of discretion by contracting authorities in the setting of qualitative selection criteria if unnecessary restrictions of competition are to be avoided.

Consistently with this approach, and as briefly mentioned, EU public procurement rules expressly establish a *proportionality requirement* in the setting of qualitative selection criteria, which is consistent with the protection of undistorted competition in the public procurement setting and, if properly applied, should guarantee that contracting authorities do not impose excessive requirements in restraint of potential competition for the contract. In this regard, article 58(1) *in fine* of Directive 2014/24 determines that all requirements shall be *related and proportionate* to the subject matter of the contract. In light of the above, while it is true that contracting authorities can exercise a substantial degree of discretion as regards the election of the specific requirements that will be used to evaluate the suitability of the candidates on the basis of their economic and financial standing and their technical and professional abilities, their discretion is restricted by the fact that the minimum levels required to be complied with in relation to each of the criteria established by the contracting authority have to be proportionate and directly related to the subject matter of the contract. Furthermore, it seems that the principle of proportionality should not only affect each of the requirements individually—guaranteeing that the minimum level imposed by each of the criteria is not excessive or disproportionate—but should also control the aggregate effect of the set of qualitative selection criteria established by the contracting authority in a given tender procedure—so that, taken together, they do not result in unnecessary restrictions of competition.

Along these lines, it is submitted that contracting authorities should be particularly careful not to require financial standing levels that are disproportionate to the complexity or dimensions of the contract,[217] since these are factors that can reduce the possibilities of participation by SMEs in a particularly significant way.[218] Moreover, procurement projects can be structured so as to guarantee their self-standing viability and, in most cases, the financial risks faced by the public buyer will be covered by guarantees provided by the tenderers or contractors (below §II.A.xiv and §II.C.i). Hence, there seems to be no particular reason for general financial requirements to be set at overly demanding levels. In this regard, the modification of the rules on economic standing and financial requirements introduced by article 58(3) of Directive 2014/24 must be welcome. Article 58(3) provides substantive guidance on the requirements concerned with the economic and financial standing of the economic operator and, interestingly, focuses on requirements of

[217] This criterion is closely related to the requirements of bid bonds, performance bonds and other sureties or financial guarantees, since the financial and economic standing of candidates will determine their ability to supply those guarantees up to a certain amount. Hence, some of the reasoning and considerations put forward when analysing those other requirements in the procurement process might also be of relevance here; see below §II.A.xiv and §II.C.i.

[218] See: Commission Staff Working Document, European code of best practices facilitating access by SMEs to public procurement contracts (SEC(2008) 2193) 14–15.

minimum yearly turnover, which is one of the criteria more widely used in practice. More importantly, article 58(3) of Directive 2014/24 introduces a cap on economic and financial standing requirements that is particularly addressed to foster SME participation. Indeed,

> The *minimum yearly turnover* that economic operators are required to have *shall not exceed two times the estimated contract value*, except in duly justified cases such as relating to the special risks attached to the nature of the works, services or supplies. The contracting authority shall indicate the main reasons for such requirement in the procurement documents.[219]

However, in order to avoid this becoming the de facto standard requirement, it is important to stress that contracting entities and authorities still have to comply with the requirement that—within that limit—the specific requirements set are 'strictly proportionate to the subject-matter of the contract', taking into account the need to ensure genuine competition. It is also worth stressing that under article 58(3) of Directive 2014/24, contracting authorities can 'require an appropriate level of professional risk indemnity insurance', which should allow them to reduce financial standing requirements where those are justified in the existence of financial risks derived from defective or non-performance.[220] Also, and along the same lines, contracting authorities should avoid adopting excessively narrow requirements as regards technical competencies, or requiring availability of certain technologies or equipment, since they might also result in the exclusion of less specialised (or more generalist) candidates, or candidates willing to opt for alternative technologies or new methods and processes of delivery—hence, restricting the scope for innovation in the public procurement setting, and potentially violating obligations of technical neutrality (below §II.A.xv), and reducing the effectiveness of the rules allowing for the reliance on third party capacities (below §II.A.x).

Finally, and interestingly enough, Article 58(4) includes a *rule against conflicts of interest* disguised as a requirement of professional ability (which seems to stretch the concept, at least if taken on its ordinary meaning). Indeed, it establishes that 'A contracting authority may assume that an economic operator does not possess the required professional abilities where the contracting authority has established that *the economic operator has conflicting interests which may negatively affect the performance of the contract*' (emphasis added). This development should be welcome, as it aims to cover a significant gap in the regime of Directive 2004/18, which had no rules concerned with the existence of conflicts of interest (despite mentioning them in the recitals),[221] but more clarification should have been provided as to the type of conflicts of interest that justify the exclusion of the economic operator on the basis of its lack of professional ability. In that regard, it is important to stress that article 24 of Directive 2014/24 defines 'conflicts of interest' for other purposes,[222] indicating that it

[219] Emphasis added. This rule must be adjusted where the contract is tendered in lots and, in that case, the cap to double the value 'shall apply in relation to each individual lot. However, the contracting authority may set the minimum yearly turnover that economic operators are required to have by reference to groups of lots in the event that the successful tenderer is awarded several lots to be executed at the same time.' In cases of framework agreements and dynamic purchasing systems, this cap should be calculated on the basis of expected maximum size of specific contracts.

[220] In that regard, and regardless of the literal tenor of art 58(3) Dir 2014/24, contracting authorities should assess financial requirements globally and be prepared to trade-off strict financial standing with insurance coverage with the aim of promoting competition and access to procurement contracts, particularly for SMEs.

[221] See above n 172 and accompanying text.

[222] Member States shall ensure that contracting authorities take appropriate measures to effectively prevent,

> shall at least cover any situation where staff members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.

However, the conflicts of interest that can affect economic operators are not necessarily identical, nor their mirror image and, consequently, some further clarification will be necessary in the future.[223] In any case, it is submitted that the interpretation of this provision will need to be oriented towards the avoidance of distortions of competition in the selection of tenderers, so that contracting authorities refrain from excluding tenderers affected by conflicts of interest that do not result in distortions of competition and that do not affect significantly the performance of the contract. In that regard, it is worth taking into account that this has been the approach recently followed by the GC, which has found that

> the fact that a tenderer, even though he has no intention of doing so, is *capable of influencing the conditions of a call for tenders in a manner favourable to himself* constitutes a situation of a conflict of interests. In that regard, the conflict of interests constitutes a breach of the equal treatment of candidates and of equal opportunities for tenderers.[224]

It seems clear that a proper interpretation of the provisions in article 58(4) of Directive 2014/24 requires a clear link to a distortion of competition for the contract and, consequently, competition-neutral conflicts of interest do not seem to be relevant under a restrictive interpretation of the grounds for exclusion of tenderers and candidates.

viii. In Particular, the Use of Previous Experience and Past Performance as Qualification Requirements

A specific criterion for the evaluation of the suitability of candidates to perform the contract that merits closer scrutiny is the requirement of *previous experience*—and the concomitant, but separate, evaluation of *past performance* in public procurement, as qualitative selection criteria or requirements, since the establishment of clear-cut criteria that are proportional to the requirements of the contracting authority and that do not unnecessarily distort competition by excluding new entrants or relatively inexperienced firms in a specific field is not automatic. Indeed, recourse to previous experience and past performance requirements in public tendering has been receiving increasing attention,[225] particularly for its (exclusionary) effects on competition in the procurement process, and consequently seems to deserve detailed consideration.[226]

identify and remedy conflicts of interests arising in the conduct of procurement procedures so as to avoid any distortion of competition and ensure equal treatment of all economic operators. See below §II.B.i.

[223] For general discussion on the conceptualisation of conflicts of interest and suggestions for future development, see N Nikolov, 'Conflict of Interest in European Public Law' (2013) 20(4) *Journal of Financial Crime* 406–21.

[224] Case T-4/13 *Communicaid Group v Commission* [2014] pub electr EU:T:2014:437 53 (emphasis added). See also Joined Cases C-21/03 and C-34/03 *Fabricom* [2005] ECR I-1559 29 and 30, and Case T-160/03 *AFCon Management Consultants and Others v Commission* [2005] ECR II-981 74.

[225] Albano et al (n 52) 111 fn 43.

[226] As already pointed out (above n 215), one of the main restrictions to participation in public tenders is related to excessive past experience requirements; see OFT (n 13) 15–16 and 105–10. Along the same lines,

The use of *previous experience* as a qualitative selection criterion is expressly regulated in general terms by article 58(4) of Directive 2014/24, which envisages that 'contracting authorities may require, in particular, that economic operators have a sufficient level of experience demonstrated by suitable references from contracts performed in the past', as detailed in part II of annex XII, which sets out a time limit of five years for works and three years for services and supplies, but foresees that evidence of relevant works, services or supplies carried out more than five or three years before the tender will be taken into account if the contracting authorities so indicate in the tender documentation. A more specific rule for public contracts having as their object supplies requiring siting or installation work, services or works also specifies that 'the professional ability of economic operators to provide the service or to execute the installation or the work may be evaluated with regard to their skills, efficiency, experience and reliability' (art 58(4) *in fine* Dir 2014/24), although without setting a specific timeframe for the evaluation of such experience. In general terms, therefore, the use of general previous experience as a relevant criterion for the assessment of the tenderers' technical standing under Directive 2014/24 should be beyond doubt.[227] Nonetheless, the fact remains that the requirements of previous experience should always be imposed making sure that they are 'strictly proportionate to the subject-matter of the contract' (art 58(1) *in fine* Dir 2014/24) and, in any case, that they do not distort competition in the market (eg, by unduly earmarking the contracts in favour of experienced undertakings). Moreover, it is worth stressing that Directive 2014/24 has eroded the restrictions on the use of experience as both a selection and an award criterion,[228] and now allows for the specific previous experience of the members of staff allocated to the contract to be taken into account on top of the general experience used in the qualitative selection of the tenderer, which is bound to create some practical difficulties and may result in distortions of competition (as further discussed below §II.B.iii).

For its part, *past performance evaluation* is a more specific criterion than previous experience, in that it is restricted to the works, supplies or services rendered to public authorities—and, under a very strict conception, to the particular contracting authority.[229] Also, past performance includes a (subjective) evaluation of the previous experiences of the candidate with contracting authorities and is largely based on 'satisfaction' considerations—which are more difficult to appraise than objective delivery or completion information.[230] Past performance, then, is a different (albeit related) criterion from previous

warnings against the 'chilling effect' of past performance evaluation have been raised by Schooner (n 65) 656–58. *Contra*, see S Kelman, *Procurement and Public Management. The Fear of Discretion and the Quality of Government Performance* (Washington, AEI Press, 1990) 93.

[227] For the seminal decision on this area, see Case 31/87 *Beentjes* [1988] ECR 4635 15-16. See also Case C-532/06 *Lianakis* [2008] ECR I-251 30–32; and Case C-199/07 *Commission v Greece* [2009] I-10669 55–56. This has been reconfirmed very recently in Case C-641/13 P *Spain v Commission* [2014] pub electr EU:C:2014:2264.

[228] Indeed, under Dir 2004/18, previous experience, regardless of whether it was taken into account as a selective qualification criterion or not, could be used as an award criterion; see Case 31/87 *Beentjes* [1988] ECR 4635 15; Case T-169/00 *Esedra* [2002] ECR II-609 158; Case T-148/04 *TQ3 Travel Solutions* [2005] ECR II-2627 86; Case T-59/05 *Evropaïki Dinamiki (DG AGRI)* [2008] ECR II-157 101. See also Opinion of AG Geelhoed in Case C-315/01 *GAT* 51.

[229] For discussion from an economic perspective, see G Spagnolo, 'Reputation, Competition, and Entry in Procurement' (2012) 30(3) *International Journal of Industrial Organization* 291–96.

[230] This criterion is particularly developed in the US, where the US FAR regulates its use; see DA Femino, Jr, 'Evaluating Past Performance' (1989) *Army Lawyer* 25; WW Goodrich, Jr, 'Past Performance as an Evaluation Factor in Public Contract Source Selection' (1997–98) 47 *American University Law Review* 1539; KR Heifetz,

experience,[231] and it had no express regulation in the EU public procurement directives until article 57(4)(g) of Directive 2014/24 established poor or unacceptable past performance as a discretionary ground for the exclusion of tenderers. Given the implications that this criterion can have for undistorted competition, it is worth focusing on the limits that EU law set on its use in procurement procedures.

Past Performance as an Exclusion or a (Milder) 'Negative' Qualitative Selection Criterion. As briefly mentioned above, article 57(4)(g) of Directive 2014/24 establishes that contracting authorities can exclude economic operators that have 'shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract … which led to early termination of that prior contract, damages or other comparable sanctions'. Hence, the use of this ground for the absolute (discretionary) exclusion of a tenderer seems beyond doubt, but there are important points of definition of the implementation rules that remain for Member States to address in the transposition into their legal orders, as clearly stressed in recital (101) of Directive 2014/24, which stresses that contracting authorities

> should also be able to exclude candidates or tenderers whose performance in earlier public contracts has shown major deficiencies with regard to substantive requirements, for instance failure to deliver or perform, significant shortcomings of the product or service delivered, making it unusable for the intended purpose, or misbehaviour that casts serious doubts as to the reliability of the economic operator. National law should provide for a maximum duration for such exclusions.

Beyond its use as an exclusion criterion, *a maiore ad minus*, it is possible to think about ways of using poor past performance as a 'negative' criterion for qualitative selection (eg, by detracting points at qualification stage from tenderers and candidates with a negative track record, instead of completely excluding them from participation).[232] Hence, the door towards the consideration of poor or faulty previous performance in public contracts is now open by article 57(4)(g) of Directive 2014/24. Remarkably, this provision may overturn the practice and case law that prevented contracting authorities from taking past performance into consideration. In my opinion, even if good or positive past performance should not

'Striking a Balance between Government Efficiency and Fairness to Contractors: Past Performance Evaluation in Government Contracts' (1998) 50 *Administrative Law Review* 235. For a general description, with particular emphasis on the shortcomings or perceived practical difficulties in the implementation of the system, see J-C Guerrero and CJ Kirkpatrick, 'Evaluating Contractor Past Performance in the United States' (2001) 10 *Public Procurement Law Review* 243; N Causey, 'Past Performance Information, de facto Debarments, and Due Process: Debunking the Myth of Pandora's Box' (1999–2000) 29 *Public Contract Law Journal* 637; and KF Snider and MF Walkner, 'Best Practices and Protests: Toward Effective Use of Past Performance as a Criterion in Source Selections' (2001) 1 *Journal of Public Procurement* 96. For a systematic model of past performance evaluation (based on US practice) and focused on a '*level of confidence assessment rating*', see VJ Edwards, *How to Evaluate Past Performance: A Best-Value Approach*, 2nd edn (Washington, George Washington University, 1995). For a development of the practicalities of past performance evaluation, see OFPP, *A Guide to Best Practices for Past Performance* (1995); and PS Cole and JW Beausoleil (eds), *Past Performance Handbook* (Vienna, Management Concepts, 2002).

[231] RC Nash Jr and J Cibinic Jr, *Formation of Government Contracts*, 3rd edn (Washington, George Washington University, 1998) 736–37; and Guerrero and Kirkpatrick (n 230) 246.

[232] For a discussion of increasingly sophisticated ways of treating past performance, particularly at selection stage, see I Horta, A Camanho and A Lima, 'Design of Performance Assessment System for Selection of Contractors in Construction Industry E-Marketplaces' (2013) 139(8) *Journal of Construction Engineering Management* 910–17.

be taken into consideration either for selection or award purposes (because of the effect it has in entrenching the incumbents, as further discussed below),[233] it seems sensible to introduce its use for 'negative' purposes in order to allow contracting authorities to (self) protect their interests by not engaging contractors prone to not delivering as expected.[234] This seems particularly proportionate in view of the rules on 'self-cleaning' that allow contractors to compensate such poor past performance by showing that they have implemented changes to avoid them recurring,[235] always provided that only serious instances of properly documented poor past performance are used as an exclusion or negative qualitative selection criterion, given that exclusion grounds need to be interpreted strictly.[236]

Prohibition of Use of Past Performance as a Valid 'Positive' Criterion of Qualitative Selection. As mentioned in passing, prior to the approval of Directive 2014/24, the use of past performance in public procurement had not been regulated in the EU. However, the case law had indirectly addressed the issue of the admissibility of past performance as a qualitative selection criteria and seemed to have answered in the negative by ruling that

> the past acquisition of significant experience in the field of [providing services to public authorities] and, more specifically, to the [contracting authority], cannot under any circumstances be taken into account by the contracting authority when selecting tenders if the principles of equal treatment and non-discrimination are to be respected.[237]

It is submitted that this trend in case law excluded the consideration of *specific* experience in supplying public authorities—and, concretely, the contracting authority, as a valid criterion of qualitative selection of candidates or tenderers. It is also my opinion that the treatment of poor past performance as a discretionary ground for exclusion, or even a milder criterion of 'negative' qualitative selection (as just discussed), do not alter this position—in the sense that *specific* experience in supplying public authorities cannot be used as a qualitative selection requirement. Currently, then, the evaluation of past performance seems to be no longer banned under the EU public procurement regime, but the effects that can derive from such an assessment are limited. Furthermore, in more general terms applicable to the criterion of previous experience (art 58(4) Dir 2014/24), a requirement

[233] Indeed, 'the past acquisition of significant experience in the field of [providing services to public authorities] and, more specifically, to the [contracting authority], cannot under any circumstances be taken into account by the contracting authority when selecting tenders if the principles of equal treatment and non-discrimination are to be respected'; Case T-59/05 *Evropaïki Dinamiki (DG AGRI)* [2008] ECR II-157 para 104. Similarly, although in less explicit terms, see Case T-183/00 *Strabag Benelux* [2003] ECR II-135 para 79; and Case T-495/04 *Belfass* [2008] ECR II-781 para 76.

[234] This can, in turn, create a managerial culture more oriented towards ensuring proper delivery of contracts; see KF Snider et al, 'Corporate Social Responsibility and Public Procurement: How Supplying Government Affects Managerial Orientations' (2013) 19(2) *Journal of Purchasing and Supply Management* 63–72.

[235] For discussion, with reference to the US' and World Bank's debarment regimes, see R Majtan, 'The Self-Cleaning Dilemma: Reconciling Competing Objectives of Procurement Processes' (2013) 45 *George Washington International Law Review* 291–348.

[236] Indeed, as the interpretative guidance of rec (101) Dir 2014/24 emphasises, 'In applying facultative grounds for exclusion, contracting authorities should pay particular attention to the principle of proportionality. Minor irregularities should only in exceptional circumstances lead to the exclusion of an economic operator. However repeated cases of minor irregularities can give rise to doubts about the reliability of an economic operator which might justify its exclusion.'

[237] Case T-59/05 *Evropaïki Dinamiki (DG AGRI)* [2008] ECR II-157 104. Similarly, although in less explicit terms, see Case T-183/00 *Strabag Benelux* [2003] ECR II-135 79; and Case T-495/04 *Belfass* [2008] ECR II-781 76.

that only experience acquired in dealing with the public sector be taken into account is to be considered discriminatory—and, as such, is irrelevant and limits competition.[238]

Therefore, it can be extracted as a preliminary conclusion that, under the EU public procurement regime, contracting authorities can impose previous experience (but not past performance) requirements as qualitative selection criteria as long as certain limits are respected, amongst which (i) proven experience related to contracts performed for both public and private entities shall be awarded the same treatment, (ii) the time limits set by Annex XII of Directive 2014/24 shall be respected (ie, five years for works and three years for other contracts), and (iii) experience requirements must be proportionate and directly related to the subject matter of the contract (above §II.A.vii). Beyond that, poor past performance can now be used as a discretionary exclusion ground (art 57(4)(g) Dir 2014/24 and above §II.A.v) and, it is submitted, as a milder 'negative' criterion of qualitative selection, but never as a positive requirement.

General Prohibition to Handicap Experienced Contractors or to Advantage Inexperienced Undertakings. In furtherance of what has just been discussed, it is submitted that this interpretation of the regime applicable to previous experience requirements—largely limited to considerations of 'formal equality'—still leaves room for potential restrictions of competition that, in my view, could be avoidable by recourse to a competition-oriented purposive interpretation of the relevant provisions in Directive 2014/24. From an economic perspective, and under certain conditions, reliance on previous experience can be considered a useful tool to reduce contracting authorities' information costs and uncertainty, as well as a device to incentivise public contractors' good performance on the basis of a reputation system. However, it goes hand in hand that previous experience requirements raise a significant entry barrier—even if they are formally proportionate to the importance or complexity of the tendered contract—so that, in order to minimise their restrictive effects on competition (or to maximise the intensity of competition), the introduction of some *compensatory mechanism* to ensure a neutral evaluation for newcomers could be desirable.[239] Therefore, the possibility of introducing some compensatory mechanism for the evaluation of previous experience could be desirable from a theoretical, economic perspective as a mechanism to lower the barriers to enter the tender procedure.

It must be acknowledged, however, that even if desirable from an economic perspective for its positive effects in increasing competition in the public procurement arena, the implementation of certain compensatory measures as regards candidates' previous experience might be contentious—depending on the limits that one derives from the principle of equal treatment. Indeed, adopting a radical approach to such a compensatory device—such as granting new entrants or relatively inexperienced organizations (market, or tender) average experience for selection and evaluation purposes—could raise discrimination issues (against more experienced candidates). Hence, this seems to be a field where the trade-off between the basic principles of the public procurement system (ie, equality and competition) requires a restraint on the theoretically most pro-competitive alternatives (above ch five, §IV.B). However, it is submitted that this does not exclude the

[238] See: Commission Staff Working Document, 'European code of best practices facilitating access by SMEs to public procurement contracts' (SEC(2008) 2193) 14–15.

[239] See: Albano et al (n 52) 113–15. Similarly, C Dellarocas et al, 'Designing Reputation Mechanisms' in Dimitri et al (n 51) 446, 469–71. See also B Cesi and GL Albano, 'Past Performance Evaluation in Repeated Procurement: A Simple Model of Handicapping' in Piga and Thai (n 121) 875.

adoption of a pro-competitive interpretation and the use of the mechanisms laid down by article 58 of Directive 2014/24 for the appraisal of the technical standing of tenderers.

A Possible Approach towards the Treatment of Previous Experience as a Proxy for Technical Ability. In that regard, it is submitted that recourse by contracting authorities *exclusively* to previous experience as the criterion to appraise the economic operators' technical abilities raises an unnecessary and unjustified barrier to entry to procurement processes and, as such, contracting authorities should be banned from using it—not only as a requirement imposed by the literal interpretation of article 58 and Annex XII of Directive 2014/24, but also as a result of its purposive interpretation according to the competition principle (above ch five, §III.A). In this regard, it should be noted that article 58(4) of Directive 2014/24 indicates that 'contracting authorities may require, in particular, that economic operators have a sufficient level of experience demonstrated by suitable references from contracts performed in the past' and Annex XII establishes a number of means by which evidence of the economic operators' technical abilities *may* be furnished (amongst which proof of previous experience by means of lists of recent works, supplies or services is included). It is submitted that the *soft* and open wording of these paragraphs, coupled with the mandate of pro-competitive interpretation or self-construction of the directive, excludes the possibility that contracting authorities limit the acceptable references for the appraisal of the economic operators' technical abilities to lists of recent previous experiences.

Therefore, similarly to what will be argued in relation to technical specifications (below §II.A.xv), it is submitted that contracting authorities are under an obligation to adopt a neutral and flexible approach to the determination of economic operators' technical abilities and, particularly as regards the acceptable means of proof, and that they are bound to the adoption of a 'possibilistic approach'. Therefore, contracting authorities should be prepared to verify economic operators' technical abilities on the basis of references different from previous experience—even if they have not been expressly included in the notice or in the invitation to tender—and should adopt a pro-competitive approach in the determination of the equivalence of the alternative references and the minimum previous experience requirements set in the tender documents.

Lastly, along the same possibilistic lines, it is also suggested that the pro-competitive purposive interpretation of previous experience requirements mandates contracting authorities not to adopt too narrow a conception of the *relevant* previous experience—so that not only previous completion of the exact same type of works, supplies or services qualify as acceptable or *suitable* references, but are extended to similar works, supplies and services.

Preliminary Conclusion. To sum up, it is submitted that a pro-competitive interpretation of the previous experience requirements allowed for under the EU public procurement regime requires contracting authorities to set proportionate minimum relevant experience levels and to adopt a neutral and flexible (possibilistic) approach towards the determination of economic operators' technical abilities by means of references other than lists of previous works, supplies or services—particularly in the case of new entrants or relatively inexperienced firms.

ix. Restrictive or Discriminatory Short-Listing or Invitation of Candidates

An issue closely related to the establishment of qualitative selection requirements (above §II.A.vii and §II.A.viii) refers to the short-listing of candidates in other than open procedures—where contracting authorities apply short-listing or invitation criteria to determine the pool of potential tenderers.[240] As established in article 65 of Directive 2014/24, in restricted procedures, competitive procedures with negotiation, competitive dialogue procedures and innovation partnerships,[241] contracting authorities may limit the number of suitable candidates they will invite to tender or to conduct a dialogue with, provided a sufficient number of suitable candidates is available; in which case, the contracting authorities shall indicate in the contract notice the objective and non-discriminatory criteria or rules they intend to apply, the minimum number and, where appropriate, the maximum number of candidates they intend to invite. The minimum number of candidates must be at least five in restricted procedures, and at least three in the procedure with negotiation, in the competitive dialogue procedure and in the innovation partnership. There is no mandatory maximum number of candidates—but, in any event, the number of candidates invited must be sufficient to *ensure genuine competition*. Therefore, potential restrictions of competition in short-listing or inviting of potential candidates seem to be related, at least, to two different factors: the criteria used in the short-listing or invitation, and the establishment of the range of potential candidates to be invited or short-listed—each of which will be discussed in turn.

Criteria that Can Be Used for Invitation or Short-Listing Purposes. A preliminary issue that should be sorted out is whether the short-listing or invitation criteria or rules to be indicated in the contract notice must be the same as the qualitative selection criteria regulated in article 58 of Directive 2014/24 or not.[242] In this regard, a literal interpretation seems to exclude such an approach, since article 65(2) of Directive 2014/24 makes an open reference to 'objective and non-discriminatory criteria or rules', without further specification. In this regard, no further particularisation of the criteria referred to by article 65(2) is to be found in the preamble of Directive 2014/24 and, in a similar fashion, the recitals to Directive 2004/18 and, particularly recital (40), only established that such a reduction of candidates should be performed on the basis of objective criteria indicated in the contract notice—and further clarified that those objective criteria do not necessarily imply weightings. Along the same lines, a systematic interpretation of Directive 2014/24 can shed some further light. When regulating the short-listing of *solutions* to be discussed or of *tenders* to be negotiated, article 66 of Directive 2014/24 is clear in requiring that contracting authorities do so by applying the *award criteria* stated in the procurement documents. Therefore, short-listing of solutions must be done in accordance with the award criteria applicable in the given procedure. On the contrary, article 65 of Directive 2014/24 does not establish such a direct link between short-listing or invitation criteria and qualitative selection

[240] On qualification, prequalification and short-listing in general, see Arrowsmith et al (n 50) 585–648; Arrowsmith (n 28) 626–27 and 1204–05; S Treumer, 'The Selection of Qualified Firms to be Invited to Tender under the EC Procurement Directives' (1998) 6 *Public Procurement Law Review* 147; and Braun (n 208).

[241] Therefore, these rules do not apply to negotiated procedures without publication of a contract notice—given that, under any of the circumstances envisaged in art 32 Dir 2014/24, the short-listing procedure does not formally take place and contracting authorities can award the contract directly.

[242] This issue already presented interpretative doubts under the regime of the previous generation of public procurement directives; see Treumer (n 240) 148–49.

criteria when the contracting authority is reducing the number of otherwise qualified *candidates* to be invited to participate. In view of this different approach, it is submitted that a literal and systematic interpretation of articles 65 and 66 of Directive 2014/24 indicates that contracting authorities can limit the number of potential tenderers according to criteria and rules other than those set out in article 58 of Directive 2014/24, as long as such criteria and rules are objective and non-discriminatory. To be sure, contracting authorities can apply qualitative selection criteria 'as such' in a relative (not necessarily weighted) manner to short-list or invite bidders in restricted, negotiated and competitive dialogue procedures,[243] but they are not obliged to do so—and can, therefore, have recourse to additional and/or different criteria.[244]

Notwithstanding the above, it is submitted that the decisions of contracting authorities on the criteria to be used for the invitation or short-listing of potential candidates, other than having to be conducted in an objective and non-discriminatory manner and to result in similarly objective and non-discriminatory criteria and rules (as a general requirement of the principle of non-discrimination or equal treatment), are further subject to the additional general constraints imposed on the selection of qualitative selection criteria—and, particularly, are required to be *related and proportionate* to the subject-matter of the contract (by analogy to art 58(1) *in fine* Dir 2014/24) and to a *pro-competitive* purposive orientation, since they must not result in a number of bidders that is insufficient to ensure genuine competition for the contract (ex art 65(2) Dir 2014/24).[245] Therefore, even if contracting authorities have recourse to different or additional short-listing or invitation criteria, they must comply with the same requirements already discussed (above §II.A.vii) and, particularly, be oriented towards ensuring that suitable potential candidates are not discouraged from participating when confronted with the invitation or short-listing criteria set by the contracting authority in the contract notice—since their objective must not be to deter participation, but simply to pre-establish the rules that will regulate the issuance of invitations in case the number of applicants exceeds the maximum of the range set.

Issues Regarding the Range or Number of Candidates to be Invited or Short-Listed. As regards this second aspect of the short-listing or invitation of potential candidates (ie, the setting of the range of competitors to be invited), it is important to stress that the mandatory rules set by article 65(2) of Directive 2014/24 still leave some room for the generation of (unnoticed) restrictions of competition and, consequently, can be fine-tuned through a pro-competitive interpretation. As set by article 65(2), contracting authorities have to invite at least the minimum number of candidates in the range set in the contract notice, as long as there are enough candidates that meet the qualitative selection and, if there are any, the minimum levels of ability required (ex art 58 Dir 2014/24).[246] If that is not the case, the authority can proceed with the candidate or candidates that meet those criteria and the invitation or short-listing (additional) requirements, if any; but contracting authorities are prevented from complementing the number of invited candi-

[243] That was the alternative favoured by Treumer (n 240) 148.

[244] See: Trepte (n 48) 320–21; also Braun (n 208) 3.

[245] The distorting competitive effects of short-listing decisions has been emphasised in the framework of the competitive dialogue procedure; Rubach-Larsen (n 117) 75–76.

[246] Although in relation to the regime under Dir 93/97, see Case C-138/08 *Hochtief and Linde-Kca-Dresden* [2009] ECR I-9889.

dates (to reach the minimum in the range or any other number of candidates) with other economic operators who did not request to participate, or with candidates who do not have the required capabilities[247]—which must be considered an implicit requirement of the principle of equal treatment and the ensuing obligation of transparency.[248] No express reference is made to the enforcement of the maximum number of candidates set in the invitation range. In this regard, it is submitted that article 65(2) of Directive 2014/24 has a neutral approach towards the setting of a maximum number of candidates (which shall only be set 'where appropriate') and a strong pro-competitive orientation (since it specifically requires that 'in any event the number of candidates invited shall be sufficient to ensure genuine competition'), and so the rules should somehow be interpreted asymmetrically—ie, as setting mandatory criteria related to the minimum number of candidates, and more limited guidance as regards their maximum number.[249]

It is submitted that there are at least two situations in which the outcome of the invitation procedure might potentially lead to an unnecessary restriction of competition and, hence, should be carefully considered by contracting authorities—and, arguably, give rise to a modification of the tender rules (ie, to a waiver of the maximum number of invitees) or, if necessary, to a re-tendering of the contract under less restrictive shortlisting or invitation requirements. One of such situations should be identified when the number of potential candidates *slightly exceeds the maximum* number of candidates to be invited according to the range set in the contract notice—and, in the extreme case where there is only one interested undertaking not to be invited. In those cases, excluding only one candidate will arguably not generate a significant advantage to the contracting authority—in terms of administrative and information costs—and, on the contrary, could generate a potentially significant distortion of competition for the contract and/or in the affected market. In such a case, a balancing of the requirements of the competition principle and the proportionality of the setting of a maximum number of invitees might require that the cap set by the range is waived and that all interested undertakings are invited to participate in the procedure. Such a solution should not require the re-tendering of the contract, since it does not materially affect the rules regulating the tender—but, on the contrary, benefits the candidates (at least the one that would otherwise be excluded) and increases competition, and it does not prejudice any undertaking's rights, as there is no right to participate in a tender with a limited number of competitors in any case.

Another similar situation may arise where the contracting authority is faced with a relatively large number of potential candidates that sought invitation to the tender and, however, failed to meet *one and the same* short-listing or invitation criterion.[250] In that case, it is my view that the contracting authority should review the decision to include that

[247] For an alternative reading of the provision, aimed at flexibilising the rule to incorporate late requests to participate; Arrowsmith (n 28) 676.

[248] And which results in a restriction of the theoretical or potentially competition-maximising alternatives, in line with the role of the principle of equal treatment as a check and balance to the competition principle embedded in the EU public procurement directives (see above chapter five, §IV.B).

[249] On the number of candidates to be invited, see Arrowsmith (n 28) 681–84.

[250] Arguably, the same situation arises when the contracting authority receives a very limited number of submissions in an industry with a large number of competitors (since it could be deduced by their refraining from showing interest when they do not meet all the selection requirements). However, in that case, the potential restriction is more difficult to identify and, in general terms, could derive from other factors concerning the tender. Therefore, this type of restriction should be assessed carefully.

particular requirement in the contract notice in light of the apparent restriction of competition that it generates—and the potential distortions that it could also be generating in the market. It is submitted that the proportionality and close link between the requirement and the subject-matter of the contract (or any other relevant project characteristic) should be particularly clear for the contracting authority to stick to the short-listing or invitation criterion and to continue the contracting process with a limited number of candidates—and, even in stricter terms, if the number of suitable invitees has fallen below the minimum set in the range (and, in the extreme case of there only being one). On the contrary, if a closer analysis of the concerned invitation or short-listing criterion shows that the contentious criterion is relatively unnecessary or superfluous for the proper selection of a contractor, the contracting authority should amend the tender rules—and, if necessary, cancel the tender and re-tender the contract under less restrictive short-listing or invitation requirements.[251] The only envisageable plausible restriction to the adoption of this more pro-competitive approach seems to be found in the proportionality of the measure, so contracting authorities could be freed from this re-tendering requirement if and when doing so results in disproportionate economic hardship or in unacceptable delays. It is submitted that the ultimate justification for such obligations, other than the mandates of the principle of competition, is to be found in article 65(2) of Directive 2014/24, which, unconditionally, requires that in any event, the number of candidates invited in restricted procedures, negotiated procedures with publication of a contract notice and in the competitive dialogue procedure *be sufficient to ensure genuine competition*.

Preliminary Conclusion. To sum up, article 65(2) of Directive 2014/24 should be interpreted in the sense that contracting authorities must comply with specific procompetitive requirements when establishing criteria or rules for the short-listing or invitation of candidates, as well as when setting the range of competitors to be invited in other than open procedures, in order to avoid unnecessary restrictions of competition—particularly as regards the maximum number of potential invitees.

x. More Precise Rules Governing Reliance on the Capacities of Other Entities

Following the case law of the ECJ[252] and further developing the rules applicable to the reliance on third party capacities, article 63 of Directive 2014/24 maintains the functional approach in Directive 2004/18 and consolidates the rules on reliance on the capacities of other entities that were scattered in articles 47(2), 47(3), 48(3) and 48(4) of that Directive. Article 63 of Directive 2014/24 continues to make it clear that, as long as it is appropriate for a particular contract, any economic operator can rely on the capacities of other entities, regardless of the legal nature of the links which it has with them, to which aim it it shall prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing a commitment by those entities to that effect.[253] Equally and

[251] In these cases, the cancellation of the tender and the re-tendering of the contract under less restrictive conditions meets the requirements and criteria analysed below §II.B.x to justify such decisions by contracting authorities, particularly in view of the pro-competitive implications of such measures.

[252] See Case C-176/98 *Holst Italia* [1999] ECR I-8607 26 and 27; Case C-314/01 *Siemens and ARGE Telekom* [2004] ECR I-2549 43; and C-94/12 *Swm Costruzioni 2 and Mannocchi Luigino* [2013] pub electr EU:C:2013:646 32.

[253] This is the case even for entities belonging to the same group. See Case C-218/11 *Édukövízig and Hochtief Construction* [2012] pub electr EU:C:2012:643. For a critical assessment, see A Sánchez Graells, *Why Do You*

under the same conditions, 'a group of economic operators … may rely on the capacities of participants in the group or of other entities'.[254] Importantly, the ECJ has stressed that these rules are 'consistent with the objective pursued by the directives in this area of attaining the widest possible opening-up of public contracts to competition to the benefit not only of economic operators but also contracting authorities'.[255] In that vein, it has been clearly established that exceptions or restrictions to this rule need to be clearly justified and overcome a strict proportionality analysis, which implies that they will only apply in *exceptional circumstances*. Indeed, in the interpretation of these rules and their scope, it is important to take into account the recent finding by the ECJ concerning a prohibition on reliance on the capacities of multiple undertakings, where it has clearly indicated that

> there may be works with special requirements necessitating a certain capacity which cannot be obtained by combining the capacities of more than one operator, which, individually, would be inadequate. In such circumstances, the contracting authority would be justified in requiring that the minimum capacity level concerned be achieved by a single economic operator or, where appropriate, by relying on a limited number of economic operators, in accordance with the second subparagraph of Article 44(2) of Directive 2004/18 [now art 58(1) Dir 2014/24], as long as that requirement is related and proportionate to the subject-matter of the contract at issue … since those circumstances constitute an exception [it] precludes that requirement being made a general rule under national law.[256]

Consequently, it is clear that, in view of the pro-competitive justification for the rules on reliance on the capacities of other entities and the interpretation confirmed by the ECJ, Member States need to keep a functional and open approach towards the acceptance of schemes involving the reliance on multiple third parties. More generally, it is submitted that Member States need to keep a possibilistic approach towards the assessment of these issues, particularly in order to ensure that small and medium sized enterprises are able to participate in public procurement.[257]

However, Directive 2014/24 goes beyond these general rules and imposes more specific (and restrictive) criteria concerning reliance on other operators for certain requirements. Firstly, with regard to criteria relating to the *educational and professional qualifications* or to the *relevant professional experience*, economic operators may only rely on the capacities of other entities where the latter will perform the works or services for which these capacities are required.

Secondly, the contracting authority shall verify *whether the other entities* on whose capacity the economic operator intends to rely *fulfil the relevant selection criteria or whether there are grounds for their exclusion*. Consequently, an entity which does not meet a relevant selection criterion, or in respect of which there are grounds for exclusion, may be excluded (ie, may not be relied upon). In the precise terms of article 63(1) of Directive 2014/24,

Need to Have Sustained Profits to Perform a Public Contract? A Critical View on C-218/11 (22 October 2012), available at howtocrackanut.blogspot.co.uk/2012/10/why-do-you-need-to-have-sustained.html.

[254] Interestingly, art 19 of the new Directive provides specific rules for groups of operators.

[255] Case C-305/08 *CoNISMa* [2009] ECR I-12129 37; C-94/12 *Swm Costruzioni 2 and Mannocchi Luigino* [2013] pub electr EU:C:2013:646 34.

[256] Case C-94/12 *Swm Costruzioni 2 and Mannocchi Luigino* [2013] pub electr EU:C:2013:646 35 and 36.

[257] Ibid 33.

> the contracting authority shall require that the economic operator replaces an entity which does not meet a relevant selection criterion, or in respect of which there are compulsory grounds for exclusion. The contracting authority may require or may be required by the Member State to require that the economic operator substitutes an entity in respect of which there are non-compulsory grounds for exclusion.

Thirdly, Member States may provide that in the case of works contracts, service contracts and siting or installation operations in the context of a supply contract, contracting authorities may require that certain *critical tasks be performed directly by the tenderer itself* or, where the tender is submitted by a group of economic operators, by a participant in that group. And, finally, where an economic operator relies on the capacities of other entities with regard to criteria relating to economic and financial standing, the contracting authority may require that the economic operator and those *entities be jointly liable for the execution of the contract*.

In my view, the first two additions are sensible and aim to prevent instances where reliance on third party capabilities is merely formal. However, the same cannot be said from the other two requirements.

Regarding the requirement for certain critical tasks to be performed by the tenderer itself,[258] there is no good reason for such a requirement, given that it is already assuming full liability for such tasks. Imposing a requirement that the task is actually carried out by the main contractor can have the effect of excluding other tenderers that could actually fulfil the contract relying on the capabilities of third parties and, consequently, runs contrary to the functional approach in the current Directive, goes beyond the terms of article 19 of Directive 2014/24[259] and, ultimately, of the case law of the ECJ on teaming and joint bidding (see below §II.A.xvi). Specifically, this provision seems to run contrary to the Court's case-law, which

> provides that Community rules do not require that, in order to be classed as a contractor—that is, an economic operator—a person who enters into a contract with a contracting authority must be capable of direct performance using his own resources. The person in question need only be able to arrange for execution of the works in question and to furnish the necessary guarantees in that connection.[260]

Therefore, there should be no doubt as to the incompatibility of this rule with the previous case law of the ECJ and the requirements of the principle of competition—which, it is submitted, should suffice to declare it ineffective in view of the undesirable results it can create. On a related note, it is worth stressing that the requirement of joint liability for

[258] Under the previous rules, seen in the light of the case law of the CJEU (in particular, Case C-176/98 *Holst Italia* [1999] ECR I-8607), there was uncertainty as to whether contracting authorities were allowed to require performance of a contract by the main contractor 'in person' (eg, to prohibit subcontracting). During the legislative process, it was stressed that, especially in contracts involving continued cooperation with the economic operator over a certain time (works, services and supplies involving installation), there could be a legitimate interest in having the chosen contractor itself perform the essential tasks. This ended up being included in the final text of Dir 2014/24.

[259] Indeed, it only requires that 'in the case of public service and public works contracts as well as public supply contracts covering in addition services or siting and installation operations, legal persons may be required to indicate, in the tender or the request to participate, the names and relevant professional qualifications of the staff to be responsible for the performance of the contract in question'.

[260] Case C-305/08 *CoNISMa* [2009] ECR I-12129 41, with reference to Case C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409 90.

the execution of the contract can make it very difficult to reach subcontracting agreements or similar arrangements for the reliance on third parties for the partial execution of a minor part of the contract. Moreover, it can result in complicated structures of side letters of indemnity that raise the legal costs linked to participation. In my opinion, in relation to both requirements, the contracting entity should be satisfied with the liability of the main contractor and, if need be, 'self-protect' through requirements for adequate professional risk indemnity insurance under article 58(3) of Directive 2014/24. Therefore, a pro-competitive interpretation of these rules requires subjecting their use to very strict proportionality tests in order to avoid unnecessary restrictions of the ability of tenderers to rely on third party capacities in ways that fall short of teaming and bidding jointly for contracts.

xi. Excessive Documentary Requests for the (Non-)Exclusion and Qualitative Selection of Candidates, and the European Single Procurement Document as an Intended Solution

As regards the formalities associated with the exclusion and qualitative selection of candidates and tenderers, article 60 of Directive 2014/24 regulates in minute detail the certificates, statements and other means of proof that contracting authorities can require in order to check for the absence of grounds of exclusion and compliance with qualitative selection criteria and makes it clear that, together with Article 62 on quality assurance standards and environmental management standards,[261] it sets a *numerus clausus* of documentation that can be required from economic operators. Such documents are fundamentally the same foreseen in articles 45(3), 47 and 48 of Directive 2004/18, which are now moved to several annexes in the new Directive. Therefore, there are limited changes in that respect.[262]

Nonetheless, article 59 of Directive 2014/24 introduces a significant attempt to make documentary requirements flexible and to reduce red tape in public procurement by means of the *European Single Procurement Document* (ESPD) (ie, a collection of self-declarations) and other facilitating measures.[263] As recital (84) indicates, these are measures clearly oriented towards a reduction in the costs of participation and are an attempt to avoid the imposition of excessive documentary requirements by the contracting authorities,[264]

[261] Art 62 of the new Directive fundamentally consolidates the rules in arts 49 and 50 Dir 2004/18, with some updates to the standards referred to and with some changes in drafting, the only one of which seems relevant is that contracting authorities must now only accept other evidence of equivalent quality assurance standards and environmental management standards where the economic operator concerned has no access to such certificates, or no possibility of obtaining them within the relevant time limits for reasons that are not attributable to that economic operator. This seems to reduce the scope for the submission of equivalent certificates in some instances and could be unduly restrictive of competition. However, this effect will largely depend on the interpretation given to this 'waiver clause'. The same applies to art 64 Dir 2014/24, which deals with official lists of economic operators and is substantially identical to the current rules under art 52 Dir 2004/18—although, admittedly, the new Directive has aimed to simplify the drafting.

[262] Prieβ (n 159) 123.

[263] For further discussion, including the now abandoned proposal for the creation of a European Procurement Passport, see A Sánchez Graells, 'Are the Procurement Rules a Barrier for Cross-Border Trade within the European Market? A View on Proposals to Lower that Barrier and Spur Growth' in Tvarnø, Ølykke and Risvig Hansen (n 30) 107, 121–26, available at http://ssrn.com/abstract=1986114.

[264] European Commission, *Public Procurement Reform Factsheet No 2: Simplifying the Rules for Bidders* (2014), available at http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/reform/fact-sheets/fact-sheet-03-simplification-public-purchasers_en.pdf.

with the ultimate aim of fostering participation (particularly by SMEs).[265] Under this new system, economic operators will be able to submit an ESPD 'consisting of an updated self-declaration as preliminary evidence in replacement of certificates issued by public authorities or third parties confirming' that they are not affected by exclusion grounds, that they meet selection and short-listing criteria (as applicable) and that they will be able to produce hard documentary evidence of such circumstances without delay, upon request of the contracting authority (art 59(1) Dir 2014/24)).[266] In order to try to increase the advantages of the ESPD, it is conceived as a 'reusable' instrument, so that '[e]conomic operators may reuse an ESPD which has already been used in a previous procurement procedure, provided that they confirm that the information contained therein continues to be correct'.[267]

The contracting authority will then be free to request submission of such documents at any point of the process where this appears necessary to ensure the proper conduct of the procedure[268] and, in any case, shall require them from the chosen contractor prior to awarding the contract, unless it already possesses these documents or can obtain these documents or the relevant information by accessing a national database (art 59(4) Dir 2014/24). In that regard, it is worth stressing that, as a complementary facilitating measure, article 59(5) of the new Directive foresees that economic operators shall not be required to submit supporting documents or other documentary evidence where the contracting authority has the possibility of obtaining the certificates or the relevant information directly and free of charge from a national database in any Member State (eg, a national procurement register, a virtual company dossier, an electronic document storage system or a prequalification system).[269]

It should be recalled that failure to provide the required documentation in support of the self-declarations submitted by the economic operator will constitute a discretionary

[265] On the need to further the efforts to provide access to procurement for SMEs, particularly in view of the limited results achieved in the past, see K Loader, 'Is Public Procurement a Successful Small Business Support Policy? A Review of the Evidence' (2013) 31 *Environment and Planning C: Government and Policy* 39–55.

[266] Indeed, the ESPD 'shall consist of a formal statement by the economic operator that the relevant ground for exclusion does not apply and/or that the relevant selection criterion is fulfilled and shall provide the relevant information as required by the contracting authority. The ESPD shall further identify the public authority or third party responsible for establishing the supporting documents and contain a formal statement to the effect that the economic operator will be able, upon request and without delay, to provide those supporting documents.' Moreover, where the contracting authority can obtain the supporting documents directly by accessing a database pursuant to art 59(5), the self-declaration shall also contain the information required for this purpose, such as the internet address of the database, any identification data and, where applicable, the necessary declaration of consent.

[267] For a general discussion on the use of standardised forms in procurement, mainly on the side of the contracting authority, see E McEvoy, *Enhancing Transparency Through the Use of Standardised Procurement Templates?* (Working Paper, 2012), available at http://ssrn.com/abstract=2394000.

[268] Recital (84) clarifies that 'Requiring submission of the supporting documents at the moment of selection of the candidates to be invited could be justified to avoid that contracting authorities invite candidates which later prove unable to submit the supporting documents at the award stage, depriving otherwise qualified candidates from participation', which may, however, restrict the effectiveness of the ESPD altogether.

[269] As a complement, and according to art 59(6) of the new Directive, 'Member States shall make available and up-to-date in e-Certis a complete list of databases containing relevant information on economic operators which can be consulted by contracting authorities from other Member States. Upon request, Member States shall communicate to other Member States any information related to the databases referred to in this Article.' Moreover, according to art 61(1), 'With a view to facilitating cross-border tendering, Member States shall ensure that the information concerning certificates and other forms of documentary evidence introduced in e-Certis established by the Commission is constantly kept up-to-date.'

ground for exclusion (art 57(4)(h), above §II.A.v), which the contracting authority can apply any time (art 57(5) Dir 2014/24). In that regard, the system seems too lenient towards the failure to support any of the prior declarations. Under the initial 2011 proposal, it would generate an impediment to award under Article 68, now suppressed. Indeed, it is hard to understand why contracting authorities would be free to award the contract to an economic operator that cannot support its own self-declarations and how that would not infringe the principles of transparency, equal treatment and non-distortion of competition. In my view, this should constitute a case of mandatory exclusion of the economic operator concerned, unless there were good reasons beyond its control that prevented it from submitting the required documentation in a timely fashion.

More generally, this rather revolutionary proposal[270] for the acceptance of the ESPD (*rectius*, 'mere' self-declarations) clearly has the potential to reduce the costs of participating in the tender for unsuccessful bidders by increasing the incentive to participate. However, it only generates a relatively small advantage for successful bidders (ie, only a time gain, and of an uncertain length at that), increases the length of the procedure (since there is no regulation concerning the time that the authority must give the successful tenderer to produce the requested documents prior to award), and generates a risk of potential award to non-compliant bidders that would require repeating the award process (with the corresponding difficulties regarding the need to ensure that other bidders keep their offers open, new award notices, etc).[271]

In order to complete this proposal, it is submitted that it would be necessary to set speedy but reasonable time limits to produce the requested documents and to strengthen the consequences of failing to produce supporting evidence for the self-declarations, which should not only be an impediment to award, but also be clearly identified as a ground for mandatory exclusion—and maybe expressly set it as a head of damage that allows contracting authorities to recover any additional expenses derived from the need to proceed to a second-best, delayed award of the contract (without excluding the eventual enforcement of criminal law provisions regarding deceit or other types of fraud under applicable national laws). Also, rules on annulment of the awarded contract and other sanctions are needed for those instances where the discovery of the falsity of the documents occurs after

[270] Revolutionary at least for countries with 'traditional' administrative procedure regulations.

[271] These risks are identified in the Commission, *Impact Assessment of the Proposal for a Directive of the European Parliament and of the Council on Public Procurement* 70 (SEC(2011) 1585 final) ec.europa.eu/internal_market/publicprocurement/modernising_rules/reform_proposals_en.htm, but simply dismissed on the hope that self-declarations would bring a significant reduction of time and costs and a potential automatisation of selection and award procedures. The analysis conducted in the impact assessment was overly optimistic, eg: 'If measures reducing the information obligations placed on firms were to be implemented (eg through generalising the "winning bidder provides" provisions), this could theoretically reduce the efficiency of the evaluation process for contracting authorities and entities if, in some cases, a firm identified as a winner fails the evidentiary tests (and the contracting authority or entity would have to go to their second choice or repeat the process). From the information available, such instances are not that common, and in most cases contracting authorities and entities should save time by accepting self-certification of compliance from bidders who ultimately do not win the contract. Also, if more firms feel able to bid, competition could increase, which could lead to greater price savings or improvements in quality for the contracting authority or entity.' The premise that instances where the winner fails to meet the evidentiary tests are rare simply cannot be imported from an ex ante full control scenario to an ex post verification paradigm. The increase in risks based on strategic behaviour by bidders and the potential difficulties in meeting short submission deadlines prior to award of the contract are just not comparable with the current situation—at least, unless stronger consequences are attached to failing to provide the requested documentation or, more clearly, in cases of falsity of declarations.

contract award—since this case is not fully covered by the provision of article 73(b) of Directive 2014/24 (below §II.C.iv), which only requires that contracting authorities have the possibility to terminate a public contract during its term, where it turns out that 'the contractor has, at the time of contract award, been in one of the situations referred to in Article 57(1) and should therefore have been excluded from the procurement procedure'. Hence, if the self-declaration that the economic contractor has been unable to support is not concerned with article 57(1), there is not even an indirect way to challenge (at least clearly) the award of the contract despite the infringement of article 59(4) of the new Directive. In my opinion, challenges under domestic contract rules governing misrepresentations or falsity in private documents should be available in this case, but it would have been desirable for the new rules to have included a specific termination clause in this case in article 73 of Directive 2014/24.

xii. More Scope For a Power/Duty to Seek Clarifications and Additional Information from Tenderers at Qualitative Selection Stage.

On a related note, and still concerning how the treatment of documentation can be made flexible, it is also relevant that article 56(3) of Directive 2014/24 extends the powers of contracting authorities to seek clarifications or additional information from candidates and tenderers. Previously, article 51 of Directive 2004/18 simply foresaw that contracting authorities 'may invite economic operators to supplement or clarify the certificates and documents' concerned with their personal situation—ie, the documents and certificates concerned with the (lack of) grounds for exclusion and compliance with qualitative selection criteria (including their suitability to pursue a professional activity, their economic and financial standing, their technical and/or professional ability, or their systems to ensure compliance with quality assurance and environmental management standards).[272] Under the rest of the rules of Directive 2004/18, clarifications were only allowed in competitive dialogues and always provided that 'this does not have the effect of modifying substantial aspects of the tender or of the call for tender and does not risk distorting competition or causing discrimination' (art 28(7) Dir 2004/18).[273]

For its part, article 56(3) of Directive 2014/24 goes well beyond the 2004 rules and empowers contracting authorities to adopt a more proactive role. Specifically, this provision foresees that, unless expressly excluded under the domestic rules of the Member State, contracting authorities that establish that specific documents are missing, or that consider that the information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous, may 'request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency'. This should be seen as a codification of the ECJ case law concerned with the duty of good administration[274] in the

[272] Interestingly, the CJEU has strengthened this possibility in its recent Judgments in Case C-599/10 *Slovensko* [2011] ECR I-10873, and Case C-336/12 *Manova* [2013] pub electr EU:C:2013:647.

[273] For discussion of the rules under Dir 2004/18 and their implementation, see A Sánchez Graells, 'Rejection of Abnormally Low and Non-Compliant Tenders in EU Public Procurement: A Comparative View on Selected Jurisdictions', in M Comba and S Treumer (eds), *Award of Contracts in EU Procurement*, European Procurement Law Series, vol 5 (Copenhagen, Djøf Forlag, 2013) 289–93.

[274] See references above n 151.

area of public procurement and needs to be read in conjunction with its interpretation of the limits imposed by the principles of transparency and equal treatment.[275] Despite being concerned with the tender phase rather than the selection of candidates itself, the closest 'precedent' to the rule in article 56(3) of Directive 2014/24 should be found in the ECJ position that EU procurement law

> does not preclude a provision of national law … according to which, in essence, the contracting authority may ask tenderers in writing to clarify their tenders without, however, requesting or accepting any amendment to the tenders. In the exercise of the discretion thus enjoyed by the contracting authority, that authority must treat the various tenderers equally and fairly, in such a way that a request for clarification cannot appear unduly to have favoured or disadvantaged the tenderer or tenderers to which the request was addressed, once the procedure for selection of tenders has been completed and in the light of its outcome.[276]

After the proposal for Directive 2014/24 was already being discussed, the ECJ further clarified that such 'guidance in relation to tenders … can also be applied to applications filed at the screening stage for candidates in a restricted procedure',[277] hence suppressing any doubts as to the applicability of the rule throughout the tender procedure and not only in any specific phase. Even more specifically, it clarified that

> a contracting authority may request the correction or amplification of details of such an application, on a limited and specific basis, so long as that request relates to particulars or information, such as a published balance sheet, which can be objectively shown to pre-date the deadline for applying to take part in the tendering procedure concerned, [but bearing in mind that] this would not be the case if the contract documents required provision of the missing particulars or information, on pain of exclusion.[278]

Moreover, an interpretation of article 56(3) of Directive 2014/24 in view of the ECJ case law may well result in a positive obligation to contact tenderers and seek clarification or additional information (given that contracting authorities do not have an unfettered discretion not to exercise their power to seek clarifications),[279] at least under certain conditions, such as when 'the circumstances of the case, of which [the contracting authority] is aware, suggest that the ambiguity probably has a simple explanation and is capable of being easily resolved'.[280] Therefore, article 56(3) of Directive 2014/24 should be welcome inasmuch as it can contribute to the development of a common (minimum) standard of 'good administration' in public procurement across all EU Member States—regardless of the requirements of their domestic codes of administrative procedure or similar provision. Moreover, recent case law of the EGC confirmed that contracting authorities can even go beyond this and, provided that the principle of equal treatment (of all candidates)

[275] See Case T-19/95 *Adia interim v Commission* [1996] ECR II-321, and Case T-195/08 *Antwerpse Bouwwerken v Commission* [2009] ECR II-4439.

[276] Case C-599/10 *Slovensko* [2011] ECR I-10873 41.

[277] Case C-336/12 *Manova* [2013] pub electr EU:C:2013:647 38.

[278] Ibid 39 and 40. See also Case C-42/13 *Cartiera dell'Adda and Cartiera di Cologno* [2014] pub electr EU:C:2014:2345. For discussion, see A Brown, 'The Court of Justice Rules that a Contracting Authority May Accept the Late Submission of a Bidder's Balance Sheet, Subject to Certain Conditions: Case C-336/12 Danish Ministry of Science, Innovation and Higher Education v Manova A/S' (2014) 23 *Public Procurement Law Review* NA1–NA3. See also Case C-74/09 *Bâtiments and Ponts Construction and WISAG Produktionsservice* [2010] ECR I-7271.

[279] Case T-211/02 *Tideland Signal v Commission* [2002] ECR II-3781.

[280] Case T-195/08 *Antwerpse Bouwwerken v Commission* [2009] ECR II-4439 56.

and the rights of defence (of the candidate being investigated) are respected, they can directly approach third parties or authorities when they attempt to interpret or verify the documentation provided by candidates at selection stage.[281] Consequently, on the basis of article 56(3) of Directive 2014/24 and this recent case law, as well as favouring a functional and possibilistic approach to the screening of candidates at selection stage, it is submitted that contracting authorities must take all appropriate steps to avoid the rejection of candidates on the basis of shortcomings in the available documentation that could be overcome if the contracting authority were to exercise the appropriate level of diligence.[282]

xiii. Official Lists of Contractors and Certification Systems

The same logic and criteria applied in the analysis of the rules relating to the qualitative selection of candidates and bidders (above §II.A.vii–ix) are of relevance in the analysis of the rules regulating the establishment of official lists of contractors, suppliers or service providers,[283] or of systems of certification by public or private bodies complying with European certification standards within the meaning of Annex VII of Directive 2014/24.[284] Such registers[285] and certification systems are aimed at reducing administrative costs and at simplifying the documentation requirements involved in tender procedures,[286] allowing undertakings (or groups of undertakings) to register or get certified for a given period of time, and thereby comply with the formalities regarding professional, economic, financial, quality and environmental standing in all tenders developed during that period of time simply by producing proof of registration or certification (art 64(3) Dir 2014/24).[287] They also provide partial or limited proof of suitability to contracting authorities of other Member States by the registered or certified contractors of the Member State holding the official list (art 64(4), 64(5) and 64(6)), and particularly 'certified registration on official lists by the competent bodies or a certificate issued by the certification body shall constitute a presumption of suitability with regard to requirements for qualitative selection encompassed by the official list or certificate', thereby partially carrying on this reduction

[281] Case T-91/12 *Flying Holding and Others v Commission* [2014] pub electr EU:T:2014:832.

[282] In the end, rejection of a candidate whenever the contracting authority could have requested clarification may be a disproportinate measure restrictive of competition.

[283] The practice of developing and keeping bidders' mailing lists has long been used in some Member States. For a review of the use of the same technique in the US, see RE Lieblich, 'Bidder Pre-Qualification: Theory in Search of Practice' (1972) 5 *Public Contract Law Journal* 32; P Shnitzer, *Government Contract Bidding*, 3rd edn (Washington, Longman–Federal Publications, 1987) 4–9; and KM Jackson, 'Prequalification and Qualification: Discouragement of New Competitors' (1989–90) 19 *Public Contract Law Journal* 702.

[284] See: Arrowsmith (n 28) 1311–20; Trepte (n 23) 358–63; and Bovis (n 23) 136–37, 170–71 and 231–32.

[285] For related discussion, see W Kostka, 'Vendors' List for Procurement Following Expressions of Interest—A Critical Analysis of a New Procurement Mechanism for the EU Institutions' (2014) 23 *Public Procurement Law Review* 219–28.

[286] See: S Arrowsmith, 'Framework Purchasing and Qualification Lists under the European Procurement Directives' (part 1) (1999) 8 *Public Procurement Law Review* 115, 116.

[287] However, given the functional and anti-formalistic interpretation of the ECJ regarding the possibility of relying on the capacity of other entities, particularly in Case C-94/12 *Swm Costruzioni 2 and Mannocchi Luigino* [2013] pub electr EU:C:2013:646 35 and 36, the actual effectivity of these systems and their continued existence can be queried. Indeed, it can be argued that certification systems should only cover 'works with special requirements necessitating a certain capacity which cannot be obtained by combining the capacities of more than one operator' as, otherwise, the whole certification system is completely superficial if the contracting authority must (as indeed it shall) accept any 'jigsaw' of (partial) certifications presented by a group of undertakings (or by an uncapable main contractor that enters into subcontract agreements) in order to prove that they have sufficient (aggregate) economic, technical and financial standing.

of the administrative burden to the participation in cross-border tender procedures. These systems can create significant competition problems, particularly depending on the domestic rules applicable by Member States as concerns the authorisation for private certification entities to operate in the market, or the tariffs and prices applicable to certification services, which can raise significant barriers of access to the procurement market. However, these are issues not covered by Directive 2014/24 and, consequently, are dealt with under the applicable competition rules.[288]

In order to guarantee the functionality of these registration and certification systems, Directive 2014/24 establishes certain additional rules—such as a prohibition of revision of information which can be deduced from the ensuing certificates by contracting authorities without justification (art 64(5)), the obligation to run the systems in a non-discriminatory manner (art 64(6)), the non-mandatory character of such systems for operators of other Member States, or the recognition of equivalent certificates and alternative means of proof (art 64(7) Dir 2014/24). It also creates some additional mechanisms for the exchange of information between Member States in order to reduce further the administrative burden (art 64(8) Dir 2014/24).

From a substantive point of view, it is worth noting that the requirements applicable to Member States in the design of such registration and certification systems are guided by the general rules and criteria regarding qualitative selection of candidates (art 64(2) Dir 2014/24). This is a logical requirement, since these systems should be conceived as instances of (indirect) qualitative selection of bidders with potential effects over a large number of tenders. Indeed, as directed by article 64(2) of Directive 2014/24, Member States shall adapt the conditions for registration on these lists and for the issue of certificates by certification bodies to the relevant provisions regulating qualitative selection criteria, including the specific rules applicable to groups of undertakings as regards their economic and financial standing. Therefore, in general terms, the same pro-competitive requirements already discussed (above §II.A.vii–ix) apply here. Notwithstanding this general idea, registers of approved contractors and certification systems present an additional feature that seems to merit detailed analysis: the establishment of the categories or types of contracts, as well as the quantitative thresholds for which registration or certification is available. In this regard, it should be noted that nothing in Directive 2014/24 expressly regulates the categories and thresholds applicable to certification and registration procedures. Establishing excessively narrow or excessively broad categories for registration or certification might generate distortions of competition between registered and non-registered (or certified and non-certified) tenderers, as well as competition amongst tenderers included in each of these groups.

In this regard, it is submitted that an objective, transparent and competition-neutral way to organise the registration and certification systems is to adopt the classifications and descriptions contained in the Common Procurement Vocabulary (CPV)[289]—which, in my opinion, are binding on Member States for these purposes (art 4 *in fine* Commission

[288] For a recent case where the ECJ rubber-stamped the Italian minimum tariffs for certification in public procurement, subject to proportionality, see Case C-327/12 *Soa Nazionale Costruttori* [2013] pub electr EU:C:2013:827.

[289] Commission Regulation (EC) No 213/2008 of 28 November 2007 amending Regulation (EC) No 2195/2002 of the European Parliament and of the Council on the common procurement vocabulary (CPV) and Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council on public procurement procedures, as regards the revision of the CPV (Regulation 213/2008) [2008] OJ L74/1.

Regulation 213/2008). In this regard, certification and registration for each activity and for each product should be available separately, without affecting the possibility of obtaining joint registration or certification for multiple activities and/or products by a single undertaking or group of undertakings. Also, the economic thresholds set for certification or registration—ie the value of the contracts for which certification or registration is obtainable—should not be set at excessively high levels, thereby limiting the competitive ability of undertakings in the high range of each of the categories. On the contrary, if possible, the system should allow for 'continuous' certification or registration—ie, for a continuous sliding scale of values, perhaps grouped at small intervals—so that each undertaking can get certified or registered to tender for contracts with a value up to whichever amount is proportionate to its particular economic and financial standing, without the need to meet specific minimum thresholds.[290]

In any case, it should be emphasised that the establishment of these registration and certification systems should not prevent unregistered or uncertified operators from proving that they meet the applicable professional, technical, economic, financial, quality and environmental requirements by means other than the relevant certificates—so that lack of registration or certification shall not per se determine the exclusion of interested undertakings from a given tender procedure.[291] Put otherwise, *registration or certification cannot be used as a mandatory selection requirement by contracting authorities*. This is specifically regulated with relation to economic operators from other Member States, who cannot be obliged to undergo such registration or certification in order to participate in a public contract (art 64(7) Dir 2014/24). As regards domestic economic operators, it is submitted that the anti-formalist logic applicable to the system of qualitative selection (above §II.A.vii), as well as the mandates of the principle of competition and the principle of equality and non-discrimination, prevent contracting authorities from excluding domestic contractors due to the sole fact that they are not registered or certified for a given category of contracts.[292] In this regard, official lists of contractors and certification systems should be seen as an instrument aimed at easing and fostering participation in tender procedures, but cannot constitute barriers or impediments to access such procedures. Therefore, contracting authorities should be obliged to adopt a possibilistic approach (mentioned above §II.A.viii, and further developed below §II.A.xv) and accept proof of compliance with the relevant professional, technical, economic, financial, quality and environmental requirements by means other than certification or registration (analogically, as regards the obligation to accept proof by means other than certification of compliance with quality and environmental standards, see arts 60 and 62 Dir 2014/24).

[290] The only minimum threshold that could be relevant would be the setting of the threshold that triggers the application of the EU public procurement directives. However, if Member States opt for the development of a certification or registration system, they might as well also adopt it for procurement activities not covered by the directives (ie, procurement below thresholds) and, consequently, then, there would be no clear justification for the setting of minimum economic thresholds—other than, arguably, considerations related to the administrative costs of running the certification or registration system which, in this case, should be proportionate to the minimum thresholds set.

[291] Generally, on certain types of mandatory qualification lists and the undesirability of their restrictive effects—although based on the previous utilities directive—see S Arrowsmith, 'Framework Purchasing and Qualification Lists under the European Procurement Directives' (part 2) (1999) 8 *Public Procurement Law Review* 161, 171–80 and 185–86.

[292] Although based on the previous EU directives, see Arrowsmith, ibid 175–76, who found support for this argument in Case C-87/94 *Commission v Belgium* [1996] ECR I-2043 51–56, where the ECJ determined that 'the principle of equality underlying the directive applies as much to domestic as to foreign firms'.

xiv. Excessive Participation Guarantees (Bid Bonds or Bid Deposits)

EU public procurement directives do not regulate the issue of the financial guarantees or deposits that contracting authorities usually require from tenderers in order to ensure the validity of their offers during a given period of time after their submission and prior to the award of the contract—also known as bid bonds or bid deposits. The only reference to be found in Directive 2014/24 to these financial requirements is related to their inclusion in contract notices—which should, where appropriate, detail 'economic and technical conditions, financial guarantees and information required from economic operators' (Annex IX.2(f) Dir 2014/24). Therefore, Member States have substantial discretion to regulate the requirements applicable to bid bonds or deposits under domestic public procurement law—such as their mandatory or waivable character, their amount, the acceptable means for their provision, validity period, etc. It is submitted that this is one aspect of the public procurement process that can give rise to significant restrictions of competition and, consequently, merits further scrutiny.

From an economic perspective, bid bonds develop a function that is different from performance bonds (see below §II.C.i) and, consequently, seem to merit separate treatment. Bid bonds or deposits can be used to screen financially solid and reliable suppliers[293]—although this same function can probably be better performed by the rules on financial and economic standing (above §II.A.vii)—and, functionally, can be seen as a mechanism to protect contracting authorities against the additional costs and expenses that a withdrawal of its offer by the proposed awardee of the contract could generate, particularly if it forces the re-tendering of the contract. From this perspective, they can be seen as a requirement to ensure that tenderers will honour the terms of their proposals and, if awarded the contract, will actually enter into the contractual relationship and execute it under those conditions—or, alternatively, that they will compensate the contracting authority for any price differential between the withdrawn proposal and the actual terms in which the contract can be entered into with an alternative contractor. It can be argued that the imposition of financial liability for withdrawn offers will depend on the applicable contract legislation dealing with pre-contractual or quasi-contractual liability, and in most instances, the same compensatory results would probably be attainable without the need to require financial guarantees to cover these risks (which could, moreover, be recoverable under the professional risk indemnity insurance that contracting authorities can require under art 58(3) Dir 2014/24, depending on the content of the policy and the reasons for the default). Nonetheless, bid bonds and deposits provide the contracting authority with a readily enforceable mechanism to cover any additional costs and expenses derived from withdrawal or non-compliance with the terms of the offer and, consequently, a marginal purely financial function can be envisaged to justify their requirement.[294] Nonetheless, given that the anticipated additional expenses associated with the (re)assignment of the contract to the next best tenderer or the re-tendering procedure will in most instances be relatively limited—as will be the general ability of public entities to assume or at least finance those costs—this function seems to be rather secondary.

Under a complementary perspective, it should be emphasised that requiring tenderers

[293] Albano et al (n 51) 276.

[294] However, in practice, they may well fail to produce the desired results. For a critical review concerned with the US experience, see D Bezer, 'The Inadequacy of Surety Bid Bonds in Public Construction Contracting' (2010–11) 40 *Public Contract Law Journal* 87.

to put forward bid bonds or deposits also generates potential restrictions of competition—similar to the entry fees already discussed (above §II.A.iii);[295] that should be taken into account when assessing the desirability of including this requirement in a given tender and, more specifically, when deciding the amount of the financial guarantees that should be provided by tenderers in order to participate. In this regard, it should be taken into account that disproportionate financial guarantees required by contracting authorities (eg bank guarantees required in unnecessarily large amounts or to cover risks unrelated to the award procedure, such as the ensuing performance of the contract, or even risks which are beyond the control of the participating undertakings) can constitute an obstacle to the participation of more financially constrained candidates—and, particularly, SMEs—in public procurement procedures,[296] thereby reducing competition for the contract and, potentially, restricting competition in the market. Consequently, contracting authorities should consider not requiring financial guarantees automatically, but strictly on the basis of considerations relating to risk assessment[297]—so that no (or very low) guarantees are required where there is a very low risk of default or the expected damages are negligible. Furthermore, unjustified and prolonged retention of the resources of the economic operators after award of the contract should be avoided by fostering prompt release of the guarantees involved once the contract has been awarded (since the risks that they aimed to cover would no longer exist).

From a legal point of view, there seems to be room to ensure the effectiveness of these general economic insights through the application of the principles of competition and proportionality. In this regard, in order to avoid unnecessary restrictions of competition, contracting authorities should in general be bound to restrict the requirements of bid sureties and guarantees to a level that is proportionate to the specific tender, to their financial position, and to the specific object of the contract. In this regard, contracting authorities must avoid distorting competition by requiring excessive bid bonds or deposits, particularly in instances where no significant financial harm or hardship can be expected from an eventual withdrawal or breach of its offer by the selected contractor. Therefore, the amount of this financial collateral should be set at a level that is proportionate to the actual risks intended to be covered and, as a complementary criterion, to the value of the contract—and the guarantees released as soon as those risks disappear (ordinarily, with the award of the contract).

xv. Use of Restrictive Technical Specifications

The EU public procurement directives have adopted an open and flexible approach to the drafting of technical specifications that strongly relies on *equivalence* of standards and technical solutions and that places increased importance on *performance specifications* based on the results to be achieved through the tender process and the performance of the subsequent contract—in order to achieve *technical neutrality*.[298] Recital (74) of Direc-

[295] Albano et al (n 51) 276.

[296] See: Commission Staff Working Document, European code of best practices facilitating access by SMEs to public procurement contracts (SEC(2008) 2193) 15–16.

[297] Albano et al (n 51) 276. Also Savas, *Privatization and Public-Private Partnerships* (2000) 200.

[298] Generally, see Arrowsmith (n 28) 254–55, 648–50, 846–52 and 1068; and Trepte (n 23) 271–92. In similar terms, reference has been made to an 'equivalent standard' doctrine to stress the technical neutrality required by the directives; see Bovis (n 76) 1026–27 and (n 23) 220–22.

tive 2014/24 establishes a direct link between the drafting of technical specifications and the promotion of competition, stressing that '[t]he technical specifications drawn up by public purchasers need to allow public procurement to be open to competition as well as to achieve objectives of sustainability'. More importantly, article 42(2) of Directive 2014/24 requires that technical specifications 'shall afford equal access of economic operators … and shall not have the effect of creating unjustified obstacles to the opening up of public procurement to competition'.[299] Hence, this approach follows the path started by Directive 2004/18 and seeks to encourage the submission of tenders that reflect the possible diversity of technical solutions[300] and, consequently, to allow for effective competitive public procurement through enabling a broader set of undertakings to participate in a given tender.[301] This flexible approach is fundamentally based on competition considerations.[302] Even if the avoidance of discrimination and fragmentation of the market through the use of restrictive technical specifications has always been one of the main goals of the EU directives on public procurement,[303] the adoption of this more liberal and clearly pro-competitive approach to the use of technical specifications in public procurement seems to depart definitively from previous 'secondary' policies that used procurement to develop and enforce a European standardisation policy.[304] This development is particularly welcome from a competition perspective and, it is submitted, *this new and more pro-competitive approach needs to be reinforced through the consistent (and purposive) interpretation of the ensemble of rules related to technical specifications* established by the EU directives,[305] as their impact on competition could hardly be overstated.[306]

Article 42(3) of Directive 2014/24 mandates that the requirements applicable to a given

[299] Arrowsmith (n 28) 648–50.

[300] Indeed, according to rec (74), 'it should be possible to submit tenders that reflect the diversity of technical solutions[,] standards and technical specifications in the marketplace, including those drawn up on the basis of performance criteria linked to the life cycle and the sustainability of the production process of the works, supplies and services'.

[301] MA Dittmer, 'The New Utilities Directive' in the EU' in Nielsen and Treumer (n 116) 29, 44–45. Along the same lines, although in more general terms, see OECD (n 148) 10; and id, Procurement Markets (1999) 86 and 95. This is hardly a novelty; see NAPA, *Standards, a Procurement Tool; the Meaning of Standardization in the Economics of Purchasing* (1950) 11. Similarly, see Shnitzer (n 283) 4–2.

[302] The importance of drafting sufficiently open specifications to encourage effective competition has long been recognised as one of the main issues in the design of public procurement procedures; see Thomas (n 9) 123–40. In similar terms, R Judson, 'The Use of Functional Purchase Descriptions for Advertised Procurements' (1977) 11 *National Contract Management Journal* 1; and Savas (n 54) 189–90. Also along the same lines, McAfee and McMillan (n 11) 60. Recently, see RP McAfee, *Improving Federal Procurement: The Benefits of Vendor-Neutral Contract Specifications* (Working Paper, 2006), available at http://ssrn.com/abstract=882509.

[303] JA Moreno Molina, *Contratos públicos: Derecho comunitario y derecho español* (Madrid, McGrawHill, 1996) 125. For an overview of the pre-existing system of rules regulating the use of technical specifications in EU public procurement, see Arrowsmith (n 28) 1101–41.

[304] Arrowsmith (n 28) 648–49. On that 'regulatory' use of procurement, see Arrowsmith et al (n 50) 407–40. For recent developments on that front, mainly concerned with voluntary standards, see E Rotondo, 'The Application of the Proposed European Standardisation Regulation in Practice' (2013) 22 *Public Procurement Law Review* NA1–NA5. For more in-depth discussion, see A Venckute, 'Leading Cases on Technical Specifications and Standards in EC Public Procurement' (2010) Proceedings of the 4th International Public Procurement Conference, available at ippa.org/IPPC4/Proceedings/01ComparativeProcurement/Paper1-17.pdf.

[305] Especially because non-compliance with rules on technical specifications has traditionally been one of the main focuses of infringement of EU public procurement rules; see Bovis (n 55, 1997) 21–22; id, *Public Procurement in the European Union* (New York, Palgrave–Macmillan, 2005) 136–37; and id (n 55, 2006–06) 58–59.

[306] Y Allain, 'New European Directives on Public Procurement: Change or Continuity?' (2005–06) 35 *Public Contract Law Journal* 517, 525.

contract be formulated either *in terms of performance or functional requirements*, including environmental characteristics,[307] provided that the parameters are sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract, or *by reference to technical specifications accompanied by the words 'or equivalent'*, or by combining the previous alternatives.[308] Hence, the directives give contracting authorities a significant degree of flexibility as regards the drafting of technical specifications on the premise that the specific way in which they do so (i) should be essentially *functional* and serve the main purpose of clearly allowing tenderers to determine the subject-matter of the contract and the contracting entities to award the contract—ie should mainly be oriented towards ensuring a reasonable degree of technical precision in the specifications[309]—and (ii) should (at the same time) be *largely irrelevant* because all technically and/or functionally equivalent tenders shall be taken into consideration by the contracting authority—in short, contracting authorities must accept any product or service capable of meeting their functional requirements.[310] Therefore, the approach of the directives is essentially *anti-formalistic* and intends to establish a mechanism whereby all technically and/or functionally equivalent alternatives are considered equally valid for the purposes of determination of tender compliance, evaluation and award of the contract. The same approach is reflected in the *prohibition of references to a specific make or source, or a particular process which characterises the products or services provided by a specific economic operator, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products*—which, however, shall be permitted on an *exceptional basis* where a sufficiently precise and intelligible description of the subject-matter of the contract by reference to technical specifications or in terms of performance or functional requirements (or both) is not possible; in which case such reference shall be accompanied by the words 'or equivalent' (art 42(4) of Dir 2004/18).[311]

Therefore, taken together, the basic rules established by the directives set up a framework where the contracting authority has broad discretion and flexibility as regards the way in which it drafts the technical specifications applicable to a given tender[312]—with

[307] In this regard, it is worth stressing that, according to rec (92) Dir 2014/24, 'Article 11 TFEU requires that environmental protection requirements be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development. This Directive clarifies how the contracting authorities can contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring that they can obtain the best value for money for their contracts.'

[308] For a broader discussion on the need to avoid imposing non-harmonised (standardised) technical requirements, see KE Sørensen, 'Non-Harmonized Technical Regulations and the Free Movement of Goods' (2012) 23(2) *European Business Law Review* 163–212.

[309] Opinion of AG Jacobs in Case C-174/03 *Impresa Portuale di Cagliari* 72; and Arrowsmith (n 28) 648–50.

[310] Arrowsmith (n 28) 1145–46. This approach may be reinforced by the strict terms under which the EU case law allows contracting authorities to reject tenders that are compliant with the technical requirements established in the tender documents, even in cases of alleged risks to human health; see Case C-6/05 *Medipac-Kazantzidis* [2007] ECR I-4557 55; and Opinion of AG Sharpston in Case C-6/05 *Medipac-Kazantzidis* 78. See also Case C-489/06 *Commission v Greece* [2009] ECR I-1797 43; and Opinion of AG Mazák in Case C-489/06 *Commission v Greece* 33. Also in very clear terms, see Case T-114/06 R *Globe* [2006] ECR II-2627 76. Similarly, Case T-40/01 *Scan Office Design* [2002] ECR II-5043 76. The effects of this line of case law are not limited to public procurement; see Case C-288/08 *Nordiska Dental* [2009] ECR I-11031; and Case C-219/11 *Brain Products* [2012] pub electr EU:C:2012:742.

[311] An exception criticised by Arrowsmith (n 121) 1155, who considered that reference to a specific make etc should only be allowed when the requirements cannot be described in any other way *at all*.

[312] For discussion, see PHLM Kuypers and MJ Gruppen, 'A Technical Specification: How Precise?' in Piga

the objective of not unduly restricting its ability to specify with a reasonable degree of precision the subject matter of the contract and the criteria that will be used to evaluate the tenders submitted by the candidates—and, at the same time, undertakings have a similar flexibility in the design of their tenders, provided that they guarantee their functional equivalence and the intended performance.[313]

As a result of this anti-formalist approach based on functional and performance equivalence, most of the potentially anti-competitive effects derived from the use of restrictive technical standards should have been eliminated,[314] but the effectiveness of this change of approach will be largely dependent on the application of more specific rules regarding the assessment of equivalent tenders. In this sense, the implementation of the rules set by the directives needs to go further than just requiring that tender documents *formally* accept the submission of offers based on equivalent technical solutions or designed to achieve the specified functional or performance requirements. The effectiveness of the principles of functional and performance equivalence need to be ensured in practice, and be actually and fully applied by public buyers. Hence, *certain limitations to the discretion of the contracting authorities in administering this new system should be stressed*, such as the need (i) to avoid the establishment of excessively specific or discriminatory technical specifications, as well as (ii) excessively demanding requirements (or 'gold plating'), (iii) particularly as the use of (eco)labels is concerned; (iv) to guarantee the adoption of a flexible and neutral approach towards the determination of the technical and/or functional equivalence of solutions, particularly as regards the acceptable means of proof; or (v) to stress the prohibition on discriminating against *'equivalent' solutions* in the evaluation of tenders and award of public contracts.

Avoidance of Excessively Specific or Discriminatory Technical Specifications. Even if the adoption of the anti-formalist and functional approach just described significantly lessened the likelihood that contracting authorities will set excessively specific or discriminatory technical specifications—given that, *if properly applied*, it should ensure that *any* equivalent solution is *equally treated* by the public purchaser and, hence, should trump any attempts to discriminate amongst tenderers—there might still be room for residual restrictions of competition if contracting authorities draft their technical specifications or set up performance requirements in a way that favours or advantages certain candidates over others—eg, by displaying the information in a given way or by making reference to criteria that give an advantage to certain undertakings over others, for instance, because they are performance requirements usually used in certain (geographic) markets or by certain producers and not by others. In this regard, it is submitted that the previous case law of the EU judicature has not lost currency after the change of approach adopted by the 2004 directives on public procurement and now clearly consolidated in Directive 2014/24.

and Thai (n 121) 149; and L Turley, 'Moving Towards Performance-Based Specifications in Public Procurement' (IISD Briefing Note, December 2013), available at observgo.uquebec.ca/observgo/fichiers/30094_specs_public_procurement.pdf.

[313] Nonetheless, contracting authorities seem to enjoy more limited flexibility as regards changes to technical specifications (see below §II.B.ix generally, on amendments to substantial elements of calls for tenders, such as technical specifications). On this, S Arrowsmith, 'Amendments to Specifications under the European Public Procurement Directives' (1997) 6 *Public Procurement Law Review* 128.

[314] See: M Lipari, 'I principi di trasparenza e di pubblicità' in GA Benacchio and D de Pretis (eds), *Appalti pubblici e servizi di interesse generale* (Trento, Universita degli studi di Trento, 2005) 255, 278–79; and Trepte (n 23) 273.

It is noteworthy to stress that the principle of equal treatment not only prohibits overt discrimination, but also all covert forms of discrimination which lead in fact to the same result.[315] In this regard, if the technical specifications selected are so specific and abstruse that—as a rule—only certain candidates are able immediately to discern their relevance, and the use of those references has the effect of supplying more information (or otherwise giving a material advantage) to those undertakings—thereby making it easier for those undertakings to submit tenders which comply with the 'coded' references appearing in the contract notice—they will be in breach of the rules on technical specifications and, ultimately, of the principle of equality and non-discrimination.[316] Therefore, in drafting their technical specifications and setting the corresponding performance requirements, contracting authorities should avoid resorting to references that are so specific as to advantage certain candidates over others or as to otherwise generate a competitive distortion in breach of the principles of equal treatment and competition. Nonetheless, as already mentioned, the possibilities of such instances of covert discrimination taking place have been substantially reduced by the current approach of procurement directives towards equivalence and functionality of technical specifications.

Avoidance of Excessively Demanding Technical Specifications ('Gold Plating'). A different, although related risk, is that contracting authorities set excessive or unnecessarily demanding technical specifications and, by doing so, indirectly restrict the pool of potential candidates for a given tender. This seems to be the concern behind article 42(2) of Directive 2014/24, when it clearly states that technical specifications shall not have the effect of creating *unjustified* obstacles to the opening up of public procurement to competition. Such a situation is not only undesirable from a strict competition perspective, but also from a broader consideration of the goals of public procurement—since the efficiency of the system might be significantly jeopardised by the acquisition of goods, works or services that unnecessarily exceed the ordinary requirements of the contracting authority.[317] Therefore, the adoption of a *criterion of proportionality coupled with competition concerns* in the drafting of technical specifications seems justified and desirable to guarantee the effectiveness of the obligations set by the directives and, particularly, to ensure that contracting authorities do not alter competition through disguised excessive technical specifications.[318]

To be sure, contracting authorities have a broad discretion in the definition of their *needs*—or, for these purposes, the public needs whose satisfaction they are entrusted with—and in the establishment of the *technical and performance requirements* that goods, works or services must meet in order to satisfy those needs properly. However, their degree of discretion should be broader as regards the former than as regards the latter (see above chapter two). Under EU public procurement law,[319] while contracting authorities have an unlimited discretion in the definition of their particular needs, they do not enjoy

[315] Case 22/80 *Boussac* [1980] ECR 3427 9; Case 3/88 *Commission v Italy* [1989] ECR 4035 8; Case C-225/98 *Commission v France* [2000] ECR I-7445 80; and Case C-234/03 *Contse* [2005] ECR I-9315 36.

[316] Case C-225/98 *Commission v France* [2000] ECR I-7445 81; and, by analogy, Case C-421/01 *Traunfellner* [2003] ECR I-11941 28. See Trepte (n 23) 79.

[317] See: Trepte (n 48) 78–9; and id, 'Transparency Requirements' in Nielsen and Treumer (n 116) 49, 54.

[318] *Contra*, see Arrowsmith (n 121) 1144.

[319] More stringent conditions might apply under domestic law, particularly under budgetary or general administrative regulations or policies that mandate the exercise of this discretion according to certain austerity or efficiency criteria that, however, are alien to EU public procurement law.

unrestricted discretion when 'translating' those needs into the technical specifications or performance requirements applicable to the public tender. The limits to this discretion should be found in the principles of proportionality and competition. Therefore, *if technical specifications are clearly disproportionate to the satisfaction of the needs identified by the contracting authority and that excessiveness generates a material negative impact on competition for the contract*—and, indirectly, on competition in the market—they should be declared in breach of the rules set by the directives. *These requirements are cumulative*, and so disproportionate technical or performance requirements that do not generate a material restriction of competition, and proportionate requirements that materially affect the potential competition for a contract should not be outlawed by the rules on technical specifications.

Hence, recourse to excessive technical specifications should be banned when the pool of potential candidates for the contract would be increased under proportionate requirements—ie, when the number of potential candidates would be larger *but for* the excessively demanding requirements—or, put otherwise, when certain undertakings are unnecessarily *excluded* from the tender only because of their inability to meet the disproportionately stringent technical specifications. This does not prevent contracting authorities from taking into account differences in quality or other aspects of the proposals submitted by the candidates if they wish to do so—by having recourse to the criteria of the economically more advantageous offer rather than pure price or cost considerations. However, they should not do so by establishing unnecessarily demanding requirements, but through the setting of award criteria (below §II.B.iii) or by awarding constraints (below §II.B.vi). Indeed, technical specifications should be oriented towards setting the 'basic' requirements that define the subject-matter of the contract and compliance with which ensures the satisfaction of the needs of the contracting authority. 'Additional or sumptuous' technical or performance features not strictly required for the satisfaction of the need identified by the contracting authority should not be included as part of the technical specifications, but, if this is the case, they should be reserved as criteria for the evaluation of bids and the award of the contract. In this way competition would not be unduly restricted by the imposition of disproportionate technical specifications and, consequently, the mandate of article 42(2) of Directive 2014/24 would be fully complied with.

The Appropriate Use of Eco-Labels and other Labels Certifying Social or Other Product Characteristics.[320] On a related note, it is important to stress that Directive 2014/24 has gone beyond the limited rules of article 23(6) of Directive 2004/18 and put a clear emphasis on the possibility to use eco-labels and labels certifying certain social aspects of products and services (such as fair trade, or sustainability)[321] as part of the process of detailing technical specifications and, generally, with the goal of creating some clear space for the

[320] Generally, see C Nouira, G Grolleau, and N Mzoughi, 'Public Purchasing and Eco-Labelling Schemes: Making the Connection and Reinforcing Policy Coherence' (2004) 15(2) *Journal of Interdisciplinary Economics* 131–51.

[321] See E Fisher and S Corbalán, 'Fair Trade and European Public Procurement: Legal Principles and Governance Dynamics' (2013) 9(1) *Social Enterprise Journal* 11–27; C Weller and JM Pritchard, 'Evolving ECJ Jurisprudence: Balancing Sustainability Considerations with the Requirements of the Internal Market' (2013) *European Procurement & Public Private Partnership Law Review* 55; D Dragos and B Neamtu, 'Sustainable Public Procurement in the EU: Experiences and Prospects', in F Lichere, R Caranta and S Treumer (eds) *Novelties in the 2014 Directive on Public Procurement*, European Procurement Law Series, vol 6 (Copenhagen, Djøf Publishing, 2014) 301–36.

introduction of environmental and social considerations in the drafting of technical specifications.[322] This was a highly contentious issue under the rules of Directive 2004/18 and required the intervention of the ECJ in order to interpret the limits in the incorporation of label-related requirements in procurement procedures.[323] Directive 2014/24 now aims at consolidating the guidance provided by the ECJ. As clearly stressed in recital (75),

> Contracting authorities that wish to purchase works, supplies or services with *specific environmental, social or other characteristics* should be able to refer to particular labels, such as the European Eco-label, (multi-)national eco-labels or any other label *provided that the requirements for the label are linked to the subject-matter of the contract*, such as the description of the product and its presentation, including packaging requirements. It is furthermore essential that those requirements are drawn up and adopted on the basis of objectively verifiable criteria, using a procedure in which stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations, can participate, and that the label is accessible and available to all interested parties. … *References to labels should not have the effect of restricting innovation.*[324]

This general approach was later implemented in article 43 of Directive 2014/24, which sets clear restrictions on the types of labels that can be used by contracting authorities. From a competition perspective and particularly bearing in mind the general requirement of *technical neutrality*, it is important to stress that the label requirements can only concern criteria which are linked to the subject-matter of the contract and are appropriate to define characteristics of the works, supplies or services that are the subject-matter of the contract (art 43(1)(a) Dir 2014/24)[325] and, more importantly, that 'contracting authorities requiring a specific label shall accept all labels that confirm that the works, supplies or services meet equivalent label requirements' (art 43(1)III Dir 2014/24). This is in line with the position of the ECJ, which had clearly indicated that contracting authorities are banned from imposing compliance with a specific (eco)label rather than using the detailed specifications defined by that (eco)label[326] and, consequently, accepting all functional equivalents—as requested by the general rules controlling the setting of technical specifications and, more

[322] For a recent case concerned with the balance between environmental requirements and compliance with the rules on technical neutrality of technical specifications, see Case T-402/06 *Spain v Commission* [2013] pub electr EU:T:2013:445. Generally, for discussion, see R Caranta, 'Sustainable Public Procurement in the EU', in R Caranta and M Trybus (eds), *The Law of Green and Social Procurements in Europe*, European Procurement Law Series, vol 2 (Copenhagen, Djøf Forlag, 2011) 15–51; J Hettne, *Legal Analysis of the Possibilities of Imposing Requirements in Public Procurement that Go beyond the Requirements of EU Law* (2012), available at www.regeringen.se/content/1/c6/21/03/99/c9f52838.pdf; P Kunzlik, 'Green Public Procurement—European Law, Environmental Standards and "What to Buy" Decisions' (2013) 25(2) *Journal of Environmental Law* 173–202; and A Wiesbrock, 'An Obligation for Sustainable Procurement? Gauging the Potential Impact of Article 11 TFEU on Public Contracting in the EU' (2013) 40(2) *Legal Issues of Economic Integration* 105–32.

[323] Case C-368/10 *Commission v Netherlands* [2012] pub electr EU:C:2012:284. For discussion, see T Kotsonis, 'Commission v Netherlands (C-368/10): Environmental and Fair Trade Considerations in the Context of a Contract Award Procedure' (2012) 21 *Public Procurement Law Review* NA234–NA244; A Semple, 'Grounds for Change: ECJ Judgment in Dutch Coffee Case Points to Need for Reform of Procurement Rules. Case C-368/10 Commission v Netherlands' (2012), available at www.procurementanalysis.eu/resources/Grounds+for+change+-+Case+368+of+2010.pdf; and M Muller-Wrede, 'Sustainable Purchasing in the Aftermath of the ECJ's Max Havelaar Judgment' (2012) *European Procurement & Public Private Partnership Law Review* 110.

[324] Emphasis added. For discussion on the last point, concerning innovation, see M Burgi, 'Can Secondary Considerations in Procurement Contracts be a Tool for Increasing Innovative Solutions?', in Tvarnø, Ølykke and Risvig Hansen (n 30) 275–90.

[325] M Martens and S de Margerie, 'The Link to the Subject-Matter of the Contract in Green and Social Procurement' (2013) *European Procurement & Public Private Partnership Law Review* 8.

[326] Case C-368/10 *Commission v Netherlands* [2012] pub electr EU:C:2012:284 70.

generally, the principles of non-discrimination, equal treatment and competition. This has now prompted the new rule under article 43(3) of Directive 2014/24, according to which:

> Where a label … sets out requirements not linked to the subject-matter of the contract, contracting authorities *shall not require the label as such* but may define the technical specification by reference to those of the detailed specifications of that label, or, where necessary, parts thereof, that are linked to the subject-matter of the contract and are appropriate to define characteristics of this subject-matter. (emphasis added)

Consequently, the rules on (eco)labels clearly follow the general criteria that regulate the establishment of technical specifications and particularly the prohibition of references to a specific make or source, or a particular process which characterises the products or services provided by a specific economic operator, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products of article 42(4) of Directive 2014/24. Moreover, as will happen with any other sorts of technical specifications (as discussed immediately below), contracting authorities are bound to adopt a possibilistic approach to the assessment of compliance with (eco)label requirements. This is particularly clear from the provision that, in cases where the tenderer has not been able to obtain the specific label indicated by the contracting authority or an equivalent label within the relevant time limits for reasons that are not attributable to that economic operator, it is necessary for contracting authorities to accept other appropriate means of proof, which may include a technical dossier from the manufacturer, provided that the economic operator concerned proves that the works, supplies or services to be provided by it fulfil the requirements of the specific label or the specific requirements indicated by the contracting authority (art 43(1) *in fine* Dir 2014/24). In my view, this provision encapsulates the ultimate requirement of the principle of technical neutrality.

Guaranteeing Neutrality and Flexibility in the Determination of Technical and/or Functional Equivalence of Solutions and, Particularly, as regards the Acceptable Means of Proof: The Adoption of a 'Possibilistic Approach'. According to the rules of articles 42(5) and 44 of Directive 2014/24, the burden of proving equivalence of the submitted proposal with the technical and performance requirements of the tender lies with the tenderer, who has to discharge it to the *satisfaction of the procuring entity*, but can in principle choose at its own discretion any adequate means to fulfil this requirement—which mainly includes technical dossiers of the manufacturer and test reports from a recognised body.[327] Therefore, while the discretion of the procuring entity as regards the admissible means of proof seems to be significantly constrained and all (objectively) adequate means should be available to the tenderer to prove that all technical and performance requirements are met, the contracting authority seems to retain a larger degree of discretion in deciding whether, in the light of the available evidence, the proposed solution is actually equivalent to the requirements of the technical specifications.[328] To be sure, the decision regarding these two aspects of technical equivalence—ie, the admissibility or objective suitability of a given means to prove it, and the evaluation of the evidence put forward by those means—are hardly divisible, since the one will significantly affect the other. In this regard, and in order

[327] Arrowsmith (n 121) 1151–53.

[328] Ibid 1151–52. However, this should not be construed as establishing a *subjective test*, since 'rejection of a tender on this basis would be subject to review'; see Trepte (n 23) 286 fn 52.

to prevent the adoption of administrative practices that could jeopardise the objectives of the anti-formalist and functional approach adopted by the directives, an obligation to be neutral and flexible as regards the means of proof and the assessment of the functional and performance equivalence of the bids should be imposed on contracting authorities (similarly, see below §II.B.i). This is not intended to mean that they need to be lax in their assessments or waive any of the technical specifications governing the tender, but that they *should undertake the equivalence evaluation with a 'possibilistic approach' and abandon excessively rigid or formal positions*. In this sense, nothing prevents contracting authorities from indicating what means of proof and what kinds of evidence will be of particular importance in conducting this assessment, but they *must* accept any alternative equivalent means of proof and be prepared to rely on different types of evidence put forward by the tenderers, without restriction and without attaching higher value to the former over the latter. In any case, if contracting authorities decide to set particular means by which functional equivalence or performance suitability can be proven, they must ensure that they are not restrictive and do not discriminate amongst tenderers; and, in any case, they must be prepared to accept alternative means and to attach them with the same evidentiary value.[329]

Regardless of the general approach adopted by contracting authorities in assessing technical and functional equivalence, there are additional restraints on the exercise of such discretion that derive from more general rules and, particularly, from the general principles of non-discrimination and transparency, and from the duty to give reasons.[330] As regards the requirements of transparency and non-discrimination, it should be stressed that

> in order to be effective, [these principles] must therefore cover not only the initial definition of technical specifications and award criteria by contracting authorities, but also the way in which those specifications and criteria are interpreted and applied during an award procedure.[331]

As regards the obligation to provide reasons, it is expressly established in article 55(2)(b) of Directive 2014/24 that this specific obligation includes the reasons for a decision of non-equivalence or a decision finding that the works, supplies or services do not meet the performance or functional requirements set by the technical specifications.[332] Therefore, contracting authorities will need to provide specific reasons as regards their assessment of the evidence presented by tenderers and, more importantly, decisions on the equivalence of these solutions shall be based on objective and non-discriminatory criteria, and fully disclosed to the tenderer—in accordance with the transparency obligations.

Stressing the Prohibition on Discriminating against 'Equivalent' Solutions in the Evaluation of Tenders and Award of Public Contracts. Finally, as yet another requirement of the principles of equality and competition, it should be stressed that the criteria established for the evaluation of bids and the award of the contract cannot directly or indirectly discriminate against solutions that do not comply strictly with the technical specifications

[329] See: OECD (n 148) 230–31 and 318.

[330] It is noteworthy to stress that the ECJ has recently emphasised that this duty to give reasons must be discharged in a *timely* manner; see Case C-250/07 *Commission v Greece* [2009] ECR I-4369 67–72. See also Case T-465/04 *Evropaïki Dinamiki (DG FISH)* [2008] ECR II-154; and Case C-456/08 *Commission v Ireland* [2010] ECR I-859.

[331] Opinion of AG Sharpston in Case C-6/05 *Medipac-Kazantzidis* 77.

[332] Generally, on the obligation to give reasons and to disclose information, see Arrowsmith (n 28) 1337–80.

('original solutions') but that meet their requirements by way of performance or functional equivalence ('equivalent solutions').[333] Therefore, all solutions able to satisfy the performance requirements established or derived from the technical specifications, regardless of the specific solutions adopted by the tenderer to reach these output requirements, must be evaluated in the same way. Evaluation criteria can only treat more favourably solutions that provide additional or enhanced functional and performance characteristics—as long as they are set as such from the outset and duly publicised by the contracting authority (below §II.B.iii)—or solutions that refer to derived costs or technical implications of the proposed solutions, such as maintenance costs or expected reliability of the technology, and therefore two solutions that satisfy the same function under equivalent performance terms can be graded differently if they impose different costs or guarantee different levels of availability or produce different levels of errors or failures—but not otherwise. Therefore, award criteria that discriminate between technical solutions *as such*—ie, that do not rely on additional factors duly set, communicated and applied by the contracting authority—are banned by the consistent application, and the need to guarantee the effectiveness, of the rules of the directives on technical specifications not only at the phase of their setting, but throughout the tender.

xvi. Teaming and Joint Bidding: Formation of Bidding Consortia

In general terms, and further to the rules on reliance on the capacities of third parties for qualitative selection purposes,[334] teaming and joint bidding are allowed under the EU rules on public procurement. In principle, EU rules are neutral towards the phenomenon of teaming and joint bidding (ie, are not biased either in favour of or against them) and restrict themselves to a general enabling provision. Article 19(2) of Directive 2014/24 expressly establishes that 'groups of economic operators, including temporary associations, may participate in procurement procedures', and they can do so without having to assume a specific legal form at the time of submitting a bid or otherwise requesting to participate in the tender. However, the group selected may be required to do so when it has been awarded the contract, to the extent that this change is necessary for the satisfactory performance of the contract (art 19(3) Dir 2014/24), for instance where joint and several liability is required (rec (15) Dir 2014/24). Other than establishing that contracting authorities may clarify in the procurement documents how groups of economic operators are to meet the requirements regarding economic and financial standing or technical and professional ability referred to in article 58 of Directive 2014/24 (above §II.A.v), provided that this is justified by objective reasons and is proportionate,[335] and that Member States can establish standard terms for how groups of economic operators comply with those same requirements (art 19(2)II Dir 2014/24), Directive 2014/24 does not provide

[333] The potential for this type of discrimination will admittedly be larger in the case of recourse to 'technical specifications' as such in the description of the subject-matter of the contract, since distinction between 'original' and 'equivalent' solutions when the tender specifications are set by performance or functional requirements is almost impracticable and probably even logically inconsistent.

[334] Which are applicable to groups of operators as foreseen in art 63(1) *in fine*: 'a group of economic operators … may rely on the capacities of participants in the group or of other entities'.

[335] According to rec (15) Dir 2014/24, such conditions could, for instance, include requiring the appointment of a joint representation or a lead partner for the purposes of the procurement procedure or requiring information on their constitution.

significant rules as regards the treatment of grouping and joint bidding. Thus, the specific regulation of bidding consortia is left to Member States,[336] subject to compliance with the general principles of the TFEU and other requirements of EU primary law.[337]

The fact that article 19(2) of Directive 2014/24 expressly allows for teaming and joint bidding arguably requires Member States to include provisions to that effect in their domestic public procurement laws[338] and, consequently, to regulate expressly the phenomenon of bidding consortia in accordance with the general principles of EU public procurement law: ie, equality of treatment, non-discrimination, transparency and competition. It is submitted that the need for domestic public procurement laws to regulate bidding consortia is imposed by the obligation of Member States to guarantee the results aimed at by the EU directives. Undoubtedly, article 19(2) of Directive 2014/24 sets the aim of allowing for the participation of bidding consortia in EU public procurement. Hence, domestic regulations must ensure that it is feasible for consortia to participate in public tenders. This might require more from national laws than simply refraining from prohibiting their participation, since the formation of consortia could be discouraged in the case of complete absence of regulation—as legal uncertainty could negatively affect the incentives to form bidding consortia. In this regard, it might be useful to explore the main limits to be respected and the main guiding criteria derived from the general principles of EU public procurement rules that Member States should take into account when regulating bidding consortia, since their regulation might be particularly relevant in ensuring undistorted competition in the public procurement setting.[339]

[336] Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745 60; Case C-92/00 *HI* [2002] ECR I-5553 37; and Case C-57/01 *Makedoniko Metro* [2003] ECR I-1091 61.

[337] Case C-57/01 *Makedoniko Metro* [2003] ECR I-1091 69. For further interpretative criteria, see Opinion of AG Stix-Hackl in Case C-57/01 *Makedoniko Metro* 63–69; and Arrowsmith (n 28) 1321–25.

[338] The majority of procurement regulations allow for joint bidding, see Carpineti et al, Variety of Procurement Practice (2006) 32; although the specific rules differ significantly across European countries, see GL Albano et al, 'Regulating Joint Bidding in Procurement' (2009) 5 *Journal of Competition Law and Economics* 335, 337–47.

[339] Carpineti et al (n 214) 33. In stronger terms, doubting the compatibility of joint bidding practices with competition policy, except for a few cases, see A Estache and A Iimi, *Joint Bidding in Infrastructure Procurement* (World Bank Policy Research Working Paper No 4664, 2008), available at http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-4664. See also V Krishna and J Morgan, *(Anti-)Competitive Effects of Joint Bidding and Bidder Restrictions* (Princeton University, Woodrow Wilson School Discussion Paper in Economics No 184, 1997); and A Iimi, '(Anti-)Competitive Effect of Joint Bidding: Evidence from ODA Procurement Auctions' (2004) 18 *Journal of the Japanese and International Economies* 416. For a review of the competition issues that can derive from teaming agreements, see RW Bergstrom, 'Antitrust Immunity or Exemption for Activities Involving Government Contracts—"Weapon Systems" and "Team Bidding"' (1964–65) 59 *Northwestern University Law Review* 433; DT Hibner, 'Antitrust Considerations of Joint Ventures, Teaming Agreements, Co-Production and Leader–Follower Agreements' (1982) 51 *Antitrust Law Journal* 705; CL Eger, 'Contractor Team Arrangements under the Antitrust Laws' (1987–88) 17 *Public Contract Law Journal* 595; JW Chierichella, 'Antitrust Considerations Affecting Teaming Agreements' (1988) 57 *Antitrust Law Journal* 555, 558; PB Work, 'Antitrust Issues Relating to Arrangements and Practices of Government Contractors and Government Procuring Agencies in Markets for Specialized Government Products' (1988) 57 *Antitrust Law Journal* 543; WE Kovacic, 'Antitrust Analysis of Joint Ventures and Teaming Arrangements involving Government Contractors' (1989–90) 58 *Antitrust Law Journal* 1059; CW Sherrer, 'Joint Ventures on Government Contracts: A Walk through a Rose Garden Planted over Land Mines' (1989–90) 19 *Public Contract Law Journal* 331; AP Ingrao, 'Joint Ventures: The Use in Federal Government Contracting' (1990–91) 20 *Public Contract Law Journal* 399; A Erridge and R Nondi, 'Public Procurement, Competition and Partnership' 1 (1994) *European Journal of Purchasing and Supply Management* 169; WA Polk, 'Antitrust Implications in Government Contractor Joint Venture and Teaming Combinations' (1998–99) 28 *Public Contract Law Journal* 415; F Dymond, 'DOD Contractor Collaborations: Proposed Procedures for Integrating Antitrust Law, Procurement Law, and Purchasing Decisions' (2002) 172 *Military Law Review* 96; MW Mutek, 'Government Concerns over Contractor Team Formation: Is the Message Consistent?' (2005) 40 *Procurement Lawyer* 3. See also S Lee, 'Implementing a Reasonable Rule for Imposing

A basic and preliminary criterion that needs to be set clearly is that *public procurement rules on teaming and joint bidding should be in perfect compliance with article 101 TFEU* on agreements between undertakings and its case law[340]—since public procurement rules cannot establish derogations or carve-outs to this fundamental provision of primary EU law (above chapter five, §II.C).[341] In this regard, teaming and joint bidding must be seen as instances of collaboration between undertakings and, consequently, should be prohibited if they have as their object or effect the prevention, restriction or distortion of competition (ex art 101(1) TFEU), unless (i) they meet the requirements for the legal exemption of article 101(3) TFEU,[342] (ii) they can be considered *de minimis*,[343] or (iii) they are otherwise exempted from the general prohibition.[344] Of particular relevance here will be the interpretation that should be given to article 101(3) TFEU in the field of public procurement—ie, what requirements should be met by *efficient* teaming and joint bidding agreements to benefit from the legal exemption.

In this regard, it should be noted that—provided the conditions regarding the indispensability of the restrictions derived from the agreement, and regarding the preservation (*rectius*, non-elimination) of competition in the market are complied with, so that teaming and joint bidding agreements do not distort competition in the market—otherwise restrictive consortia agreements are desirable if they expand the number of candidates or tenderers (ie, if they are concluded between firms that do not have the economic capabilities to undertake the procured contract individually)[345] and/or if they intensify the competition between existing candidates or tenderers (ie, if they improve upon the participants' efficiency to the benefit of the public buyer).[346] Therefore, the relevant criteria from

Criminal Penalty on Joint Bidders in Public Bid: Critical Comment on South Korea's Case' (2010–11) 19 *Currents: International Trade Law Journal* 24.

[340] Generally, see C Kennedy-Loest, C Thomas and M Farley, 'EU Public Procurement and Competition Law: The Yin and Yang of the Legal World' (2011) 7 *Competition Law International* 77. See also C Estevan de Quesada, 'Competition and transparency in public procurement markets' (2014) 23 *Public Procurement Law Review* 229–44.

[341] Hence, art 19(2) Dir 2014/24 can under no circumstances be interpreted as a derogation or limitation of the applicability of art 101 TFEU in the public procurement setting.

[342] Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/1.

[343] Communication from the Commission, Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (*de minimis*) [2014] OJ C 291/1. See also Commission Staff Working Paper, *Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice* (SWD(2014) 198 final), available at ec.europa.eu/competition/antitrust/legislation/de_minimis_notice_annex.pdf. See also Case C-226/11 *Expedia* [2012] rep electr EU:C:2012:795.

[344] For example, by virtue of a block exemption regulation. Although there is currently none that specifically addresses issues of joint bidding in public procurement, under certain circumstances, these agreements could be covered by more general provisions on specialisation and joint marketing of products; see Commission Regulation No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty to categories of specialisation agreements [2010] OJ L335/43.

[345] See: OECD, *Public Procurement: The Role of Competition Authorities in Promoting Competition* (2007). On this criterion of *solo participation*, currently used in several European countries—clearly, in countries such as Italy, Austria and Romania; and more indirectly in the United Kingdom, France, Belgium and Malta, where restrictive joint bidding is forbidden under general competition law criteria—see Albano et al (n 338) 338 and 353–60.

[346] Albano et al (n 51) 364–66. Similarly, Carpineti et al (n 214) 32–33. Similarly, see Trepte (n 23) 50–51. Generally, see Note by the Delegation of the European Union, *Roundtable on the Role of Efficiency Claims in Antitrust Proceedings* (DAF/COMP/WD(2012) 81), available at ec.europa.eu/competition/international/multilateral/2012_oct_efficiency_en.pdf and the note prepared by the European Commission to the OECD, *Roundtable on the Role and Measurement of Quality in Competition Analysis* (DAF/COMP/WD(2013) 32), available at ec.europa.eu/competition/international/multilateral/2013_june_roundtable_quality_en.pdf.

a competition law perspective seem to be that *teaming and joint bidding must contribute to intensifying competition within the tender while not generating significant competitive distortions in the market*—eg, not generating significant exclusionary effects or otherwise imposing unnecessary restrictions on the market behaviour of the parties to the consortium agreement.

Hence (particularly in the event of a competition challenge by the authorities) undertakings concluding joint bidding and teaming agreements should be able to prove that they can only submit a compliant tender if they participate together, or that the terms of their joint tender are substantially better for the public buyer than those they could offer independently—ie, that there are specific and measurable efficiencies derived from the teaming or joint bidding strategy and that they are passed on to the public buyer.[347] For their part, contracting authorities will need to be on the lookout for potential negative impacts on competition in the market, as well as the inclusion of unnecessary restrictions in the teaming and joint bidding documents. In this respect, domestic public procurement regulations could expressly require members of bidding consortia to produce copies of their agreements and to submit upfront justifications of their grouping decisions and the associated efficiencies, in order to evaluate their compatibility with competition law and, consequently, to prevent the participation of consortia when this could have a negative impact on competition in the market.[348] The information required should enable the contracting authority to appraise the situation properly, but not be too burdensome to tenderers.

Another important criterion should be that Member States should depart from formal criteria based on rigid interpretations of the principle of equal treatment in designing their domestic provisions on bidding consortia—such as rules regulating their composition, their modification, etc.[349] Rules on bidding consortia should adopt a pro-competitive orientation and, consequently, *should foster participation of consortia to the maximum possible extent permitted by competition law*. In this regard, the general criterion should be to allow the most flexible solutions unless their implementation could be materially negative for the development of the tender process. Along these lines, in relation with, for example, modifications of a group of contractors—such as the inclusion of new members, exclusion or substitution of previous members, re-allocation of shares to the consortium, or of responsibilities and tasks, etc—these should be allowed under national public procurement rules if they are not material, in the sense that the modified composition or internal rules of the consortium have not altered the contracting authority's decision to qualify the group or to allow it to proceed to any of the stages of the procurement process already conducted.[350] It is submitted that this flexibility should go as far as to allow for the

[347] The burden of proof should lie with the grouped tenderers, just as the burden of proof regarding efficiencies in merger control lie with the merging entities; see Communication from the Commission, Notice—Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5, 76–88, esp 77; and Communication from the Commission, Notice—Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2008] OJ C265/6. Indeed, authorities are in a poor position to evaluate synergies and efficiencies stemming from teaming and joint bidding if the parties do not provide them that information—with, arguably, the only exception of *regulator-like* centralised purchasing authorities—see Albano et al (n 338) 343.

[348] Along the same lines, advocating for disclosure of teaming or consortia agreements to contracting authorities, see RL Owens, 'Preparing Team Agreements for Government Contracts' (1974) 46 *New York State Bar Journal* 29, 30.

[349] See: Case C-57/01 *Makedoniko Metro* [2003] ECR I-1091.

[350] See: Treumer (n 176) 76–77; Arrowsmith (n 28) 1322–23 (with reference to the criterion that the tenderer

substitution of a consortium with one of its (leading) members, as long as it can prove that it still fulfils all the relevant requirements set by the tender specifications and documents (for instance, by subcontracting to the former members of the consortium or with equally acceptable or equivalent third companies)—since, at least functionally, the group of undertakings involved in the tender would not be materially altered, even though the distribution of risks, responsibilities and benefits amongst them might have significantly changed. Such flexibility is required by the need to favour the continued participation of consortia (or, at least, their core members) in the tender process, since it increases competition and enhances the chances of the public buyer obtaining value for money.[351]

Certain *limits on this flexible approach* may also be derived from the need to maintain undistorted competition within the tendering process and, particularly, from the need to prevent illicit exchanges of information—such as prohibiting members of a given consortium from forming part of a different consortium for the same project (ie, a prohibition of (successive) multiple bidding, on which see below §II.A.xvii)—either at the initial tendering for the contract or, if such were the case, in the re-tendering of projects initially abandoned or otherwise put to competition for a second or last time—unless extraordinary circumstances concur, such as the lapse of a significant period of time. Similarly, a limit could be imposed on the simultaneous participation of an undertaking as a member of a consortium and individually, or as a member of two consortia (see below §II.A.xvii). However, it is submitted that *the desirability of these rules is unclear*—as they are highly dependent on the structure of the market concerned; tend to restrict competition within the tender; and, usually, their intended results could be achieved through less restrictive measures[352]—and some of them are highly likely to be self-established by tender participants through exclusivity and non-competition clauses in their consortia agreements—which should be clearly covered as *ancillary restraints* to the consortia agreements when analysed from a competition law perspective.[353] Consequently, public procurement rules might not need to regulate these limits expressly and a prudential approach to the administration of the proposed flexibility in the enforcement of national rules on bidding consortia by contracting authorities might suffice to ensure undistorted competition—maybe with the aid or concurrence of competition authorities (see below chapter seven, §III).

xvii. Prohibition on Multiple Bidding

Although it is not expressly provided for in the EU directives—and, hence, it is up for the Member States to decide whether or not to adopt such a rule—the establishment of a prohibition of multiple bidding is relatively common in public procurement.[354] Being a ground for the exclusion of tenderers, however, its analysis under the EU public procure-

remains *in substance* the same party originally selected); and Bovis (n 23) 410–16. Although in relation to the substitution of a subcontractor, see also Opinion of AG Bot in Case C-91/08 *Wall*, and Case C-91/08 *Wall* [2010] ECR I-2815 38, where the relevant criterion is found in whether the identity of the subcontractor was a decisive factor in concluding the contract.

[351] Exclusively in relation to consortia *as such*—hence, probably adopting a more limited approach—see Treumer (n 180) 76 fn 24.

[352] Arrowsmith (n 28) 1322–23.

[353] See: Communication from the Commission, Notice—Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C101/97, 28–31.

[354] Trepte (n 48) 312–13.

ment rules is clearly relevant. Generally, procurement notices, calls for tenders or other procurement invitations often establish that in the event that a natural or legal person (including legal persons within the same legal group) submits more than one offer—whatever the form of participation (ie, as an individual legal entity, or as leader or partner of a consortium or grouping)—all the applications in which that person (and legal persons within the same legal group) had participated would be automatically excluded.[355]

Therefore, the prohibition covers two sets of circumstances. On the one hand, it bans the multiple participation of one single entity in a tender process. On the other hand, and to avoid fraudulent situations in which formally different entities are used to avoid the prohibition of one single economic entity, it prevents the multiple participation of various persons belonging to the same legal group in a tender process. This distinction is not irrelevant, given that the prohibition regarding entities of the same group presents the feature of being a ground for the rejection of tenderers based on their professional qualities (ie, based on their control or shareholding structure) and a prohibition whose justification is *derived* or *dependent* on the justification of the prohibition of multiple bidding per se. Consequently, the configuration of the ban on multiple bidding could be conceptualised as integrating two concentric prohibitions: a *core* prohibition of multiple participation by a single entity in a given tender; and a *corollary* or *extension* of the prohibition to entities belonging to a legal group, which aims at preventing discrimination between self-standing entities and those integrated in group structures. Therefore, the analysis of the *core* prohibition and of the *extended* prohibition should follow different rationales. The inquiry should focus on one of them at a time, and will start by the *extension* of the prohibition, since it refers to issues already covered and, consequently, should be disposed of first.

The Corollary of the Multiple Bidding Prohibition, or its Extension to Entities belonging to the Same Legal Group. As already mentioned (above §II.A.v), the grounds for exclusion based on professional qualities of the tenderers—and the existence of relationships of control between them, or their control structure, is clearly a professional quality—are exhaustively listed in article 57 of Directive 2014/24, which precludes Member States or contracting authorities from adding other grounds for exclusion based on criteria relating to professional qualities of the candidate or tenderer, such as professional honesty, solvency and economic and financial capacity.[356] Nevertheless, it does not preclude the option for

[355] The drafting of these clauses may change across contracting authorities and tender procedures, but they do not usually cover subcontracts and other forms of *weaker* relations between undertakings participating in a tender. Hence, what cannot be agreed under more *structural* agreements—such as consortia agreements—can be agreed under a *looser* supply or services contract. That generates a loophole in these clauses and restricts their effectiveness in actually preventing multiple participation of an undertaking in several competing tenders. However, since they are not necessarily desirable clauses, there is no point in extending their coverage, at least in the absence of special circumstances. More generally, on the discrimination that could be generated if different types of consortia (eg, permanent consortia on the one hand and consortia of producers' and workers' cooperatives, and consortia of artisan or handicraft businesses on the other) were treated differently, see Case C-376/08 *Serrantoni and Consorzio stabile edili* [2009] ECR I-12169. More generally, rules that impose the automatic exclusion of tenderers have been rejected by the ECJ, as emphasised in the Opinion of AG Mazák in Case C-90/09 P *General Química and Others v Commission* fn 16, where it is stressed that 'the Court has considered rules of national law automatically excluding certain participants from public contracts as contrary to EU law. See Joined Cases C-21/03 and C-34/03 *Fabricom* [2005] ECR I-1559, paragraphs 33 and 35; Case C-213/07 *Michaniki* [2008] ECR I-9999, paragraphs 63 to 69; Case C-538/07 *Assitur* [2009] ECR I-4219, paragraphs 29 to 33; and Case C-376/08 *Serrantoni and Consorzio stabile edili* [2009] ECR I-0000, paragraphs 40 to 46.'

[356] Case 76/81 *Transporoute* [1982] ECR 417 9; Joined Cases C-226/04 and C-228/04 *La Cascina* [2006] ECR

Member States to maintain or adopt substantive rules designed, in particular, to ensure, in the field of public procurement, observance of the principle of equal treatment and of the principle of transparency.[357] Given that the *extension* of the ban on multiple bidding has as its clear rationale the prevention of discrimination between self-standing entities and those integrated in group structures, prima facie it seems to constitute a case of permitted additional ground for the exclusion of tenderers not regulated by article 57 of Directive 2014/24.

However, as also noted, when establishing these additional grounds for the exclusion of tenderers, Member States must comply with the principle of proportionality and the automatic exclusion of tenderers for the sole fact of belonging to the same legal group seems to be in breach of this latter requirement. Interestingly, EU case law seems to be moving in the direction of restricting the scope of this type of (extended) prohibition by outlawing the automatic exclusion from tendering procedures of tenderers between which there exists a relationship of control (as defined by national law) without giving them an opportunity to prove that, in the circumstances of the case, that relationship had not led to an infringement of the principles of equal treatment of tenderers and of transparency.[358] This would be in line with the rules applicable to the treatment of conflicts of interest (art 24 Dir 2014/24, and §II.A.vii and §II.B.i), which only justify the exclusion of candidates and tenderers 'where a conflict of interest … cannot be effectively remedied by other less intrusive measures' (art 57(4)(e) Dir 2014/24).[359] Consequently, as regards the *extension* of the prohibition on multiple bidding, it should be noted that it cannot be configured as a ground for *automatic* exclusion of tenderers.[360] More importantly, its final admissibility (even under a non-automatic configuration) will depend on the acceptability and justification of the *core* prohibition on multiple bidding, which will now be discussed.

The Core Prohibition on Multiple Bidding and its Competition Implications. As anticipated, the admissibility of the ground for exclusion of tenderers based on their multiple participation in a given tender will depend on its final justification or rationale. If it is considered that it refers to a professional quality of the tenderer, the analysis should be

I-1347 21–22; and Case C-213/07 *Mikhaniki* [2008] ECR I-9999 40–43. This has recently been reiterated in Case C-376/08 *Serrantoni and Consorzio stabile edili* [2009] ECR I-12169 31; C-74/09 *Bâtiments and Ponts Construction and WISAG Produktionsservice* [2010] ECR I-7271 43; and Case C-465/11 *Forposta and ABC Direct Contact* [2012] pub electr EU:C:2012:801 38.

[357] However, as evidenced in Case C-465/11 *Forposta and ABC Direct Contact* [2012] pub electr EU:C:2012:801 41, generally, 'the principles or rules of EU public procurement law do not allow, on the grounds of the protection of the public interest, the legitimate interests of the contracting authorities or the maintenance of fair competition between economic operators, national legislation … requiring the contracting authorities to automatically exclude an economic operator from a procedure for the award of a public contract'. A similar reasoning can apply to extensions of exclusion grounds in order to ensure observance of the principle of equal treatment and of the principle of transparency.

[358] Case C-538/07 *Assitur* [2009] ECR I-4219 30–32; and Opinion of AG Mazák, ibid, 45.

[359] Indeed, the EU courts have repeatedly reiterated that 'the exclusion of a tenderer in a situation of a conflict of interests is essential where there is no more appropriate remedy to avoid any breach of the principles of equal treatment of tenderers and transparency', Case T-415/10 *Nexans France v Joint undertaking Fusion for Energy* [2013] ECR pub electr EU:T:2013:141 117. See Case T-345/03 *Evropaïki Dynamiki v Commission (CORDIS)* [2008] ECR II-341 71ff; see also, to that effect, Case C-538/07 *Assitur* [2009] ECR I-4219 21; and Case C-376/08 *Serrantoni and Consorzio stabile edili* [2009] ECR I-12169 39 and 40.

[360] This practice runs contrary to certain domestic precedents. In relation to France, for example, see C Cabanes and B Neveu, *Droit de la concurrence dans les contrats publics. Pratiques anticoncurrentielles, abus de position dominante, controls et sanctions* (Paris, Le Moniteur, 2008) 54 and 57–67.

performed according to the same criteria and rules just mentioned. In that case, arguably, the very weak connection between the prohibition of multiple tendering and the protection of equality and transparency in the tender process would outlaw the adoption of this ground for exclusion of tenderers—for not being included in the exhaustive list of article 57 of Directive 2014/24, and not being specifically designed to ensure equality of treatment in the procurement setting. In this regard, however, it should be stressed that the rationale for a prohibition of multiple tendering is usually identified as the prevention of the risk of a conflict of interest[361] or of distorted competition between the tenderers.[362] It is generally accepted that the simultaneous or dual participation of a given undertaking in a tender procedure will be detrimental to the interests of the public buyer, since competition within the tender will be reduced either by too soft a competitive tension between the different groups where the same entity is included, or by overt or covert collusion between the competing groupings of tenderers (facilitated by the simultaneous participation of one entity).[363] Therefore, the rationale behind the prohibition is clearly grounded on *competition considerations*, not on equality of treatment in the procurement setting. Hence, the link between the prohibition on multiple bidding and the principles of equality of treatment and transparency is not direct, and non-discrimination can hardly be understood to constitute its final justification. Therefore, doubt could be cast on the admissibility of this ground for exclusion if it was considered to relate to the tenderers' professional qualities. However, that does not seem to be the case, since multiple bidding is not a quality of an undertaking, but merely a strategic (or commercial) decision, largely tender-specific. Thus, it is submitted that this ground for exclusion should not be considered under the rules established by the case law applicable to article 57 of Directive 2014/24.

Not being a ground for exclusion based on professional qualities of the tenderer, then, it is not forbidden by the *numerus clausus* of the list regulated by article 57 of Directive 2014/24. Moreover, seen from the perspective of the prevention of conflicts of interest, it is saved from the *numerus clausus* in article 57 by the requirement under paragraph 4(d) that the relevant conflict of interest is one of those established in article 24 (which does not directly mention multiple bidding) and, even failing that, by the additional implicit requirement in article 57(4)(e) that exclusion on that ground is only effected where the conflict of interest cannot be effectively remedied by other less intrusive measures. Consequently, Member States are in principle free to adopt the prohibition on multiple tendering—subject to compliance with the general principles of the TFEU and, notably, with the principles of proportionality and competition. Therefore, the analysis of the *core* prohibition on multiple tendering (and, indirectly, of its *extension*) needs to be conducted according to the competition considerations that lie at its foundations and to be oriented to ensure compliance with the principle of proportionality, as required by the TFEU and EU case law.

[361] However, it is a sort of conflict of interest not clearly caught by the definition in art 24.II Dir 2014/24.

[362] See: Joined Cases T-376/05 and T-383/05 *TEA–CEGOS* [2006] ECR II-205 51 and 64.

[363] Other reasons might also be found to justify this clause, such as the need to avoid a substantial similarity in the composition of different groupings of tenderers—since genuine competition is less likely to take place between two bidders with a similar composition—or the need to keep information confidential; Arrowsmith (n 28) 1322–23. However, these reasons remain largely unconvincing and, as Arrowsmith stresses, could be by-passed if steps were taken to avoid the risks of confidentiality of information being violated. Also, a case by case approach, allowing for exceptions to the ban on dual participation permitted by the contracting authority, seems preferable.

In this regard, the focus should be initially put on the competition considerations underlying the prohibition of multiple bidding. As mentioned, this rule is primarily derived from a concern for the risk of conflict of interest or of distorted competition between the tenderers that multiple participation of a single undertaking could generate. Even if these concerns might be justified from a theoretical perspective and apply in a relatively large number of cases, it should be stressed that there can be circumstances in which no conflict of interest arises—or in which it is not relevant—and in which no collusion or other form of coordinated behaviour takes place just because an undertaking engages in multiple participation in a single tender. Consequently, an automatic or absolute prohibition on multiple bidding might be too broad. As a second step, from a proportionality perspective, it should also be taken into account that, even in those cases where a conflict of interest or a certain risk of collusion are envisaged, the rule of automatic exclusion of *all* tenders in which the undertaking is involved might be too harsh and, in the end, it could have even worse results for the public buyer. The inquiry will focus on each of these concerns separately, in an effort to limit the prohibition of multiple bidding and eventually to re-shape it to fit within more proportionate limits.

The Generality of the Core Prohibition. As regards the existence of situations where no relevant conflict of interest or coordination of behaviour takes place—and, hence, where the automaticity of the prohibition could be excessive—it should be noted that it is not the behaviour of the undertaking participating in more than one grouping or consortia (or on its own and as a member of one of the groupings) that should matter in this context, but rather the behaviour of the groupings of undertakings acting as tenderers. From that perspective, as long as the groupings of undertakings behave independently and differently, and as long as the simultaneous participation of a given undertaking does not render the groups substantially identical (ie, in the event of the groups being integrated by several undertakings, most of which only participate as members of one of the groupings under analysis), no major competition issues should be anticipated.

It should not necessarily be seen as an exceptional case that, in some instances—and generally for some reason related to the way the tender specifications or other requirements have been set by the public buyer—the participation of a given undertaking might be material in enabling different groupings to participate in a given tender while, at the same time, the actual input of that given undertaking might be relatively unimportant in quantitative or qualitative terms—and, hence, largely irrelevant to determining the general design and the conditions of the tender submitted by each grouping.[364] That could, for instance, be the case where all the groups of candidates need to obtain a given input protected by an exclusive right, or to meet with a specification that requires a technology only available from one provider. In those cases, the 'single' provider could impose the condition of participating as a member in its consortia to each and all the groupings. In those cases, if the technology is relatively unimportant in terms of total costs of the contract and the participation of the undertaking in the consortium does not grant decisive

[364] In some instances, if the public buyer could have anticipated that need and drafted the specifications or tender documents differently—especially by separating the part that had to be contracted necessarily to that particular undertaking, even by recourse to negotiated procedure without any previous notice, according to art 32(2)(b) Dir 2014/24—the situation of multiple participation could have been avoided or, at least, framed differently. Therefore, public buyers facing instances of multiple participation might want to review them to search for opportunities to apply this type of alternative solution.

influence on the decisions of the consortium (eg, by holding a minority non-strategic participation), there does not seem to be a reason for concern from a public procurement or competition perspective.

In such cases in which the simultaneous participation of a given undertaking in more than one grouping is instrumental in allowing the existence of various tenders, while incapable of determining or materially altering the content of the several tenders,[365] there should not be scope for the application of a rule banning multiple bidding or multiple participation. This is so because, rather counterintuitively, *the imposition of the ban on multiple bidding might result in less competition for the contract* and, in the end, might jeopardise the possibilities of attaining value for money. Indeed, the imposition of the ban on multiple participation would not only force the 'single' provider to restrict its participation to one grouping (automatically excluding from the tender the other group or groups where it was or could be integrated), but would reinforce its bargaining power and allow the extraction of better economic conditions from the rest of the members of the consortia and, more likely, from the public purchaser itself (since any increase in costs is likely to be passed on through the price offered in the tender, or through lessened quality in a different dimension). Therefore, a detailed competition analysis should be undertaken on a case by case basis before determining the acceptability of multiple bidding by a specific undertaking, in order to prevent the establishment of an automatic rule generally preventing multiple bidding—which is capable of generating restrictive rather than pro-competitive effects.

The Effects of the Prohibition. As regards the consequences of the application of the rule—ie, the exclusion of *all* the offers in which the undertaking (or related undertakings) was involved—there also seems to be room for relaxation, at least under certain circumstances. Unless the offers affected by multiple bidding are not the ones that would provide the public buyer with the best value, and unless there is still a sufficient number of tenders not affected by the multiple participation of the undertaking (which, in some instances, could be one single tender), it seems to run against the interest of the public buyer—and, ultimately, against the public interest—to exclude automatically all the offers in which the undertaking was involved. The rule seems disproportionate to the goals it is designed to achieve. In these cases, the extent to which the content of the tenders has been affected by the multiple participation of the undertaking, and the effect that accepting the offer would have on the competitive dynamics of the market should be used as guiding criteria. If multiple participation by the undertaking has not materially altered the conditions of the tender (evaluated from an overall perspective), and awarding the contract under these circumstances is not bound to alter significantly the competitive dynamics of the market, the contracting authority should retain the discretion to accept the tender that offers the best value—since imposing the social costs derived from the automatic dismissal of all the tenders in which the undertaking was involved seems disproportionate.

An Alternative Test. In light of the above, there seems to be room for substantially narrowing down or relaxing the prohibition of multiple bidding, and substituting it with a more flexible approach. A test based on competition criteria seems more desirable,

[365] These situations will most often be self evident, since the fact that one undertaking is participating in more than one grouping is arguably the result of lack of interest of the members of *both* groupings in obtaining exclusivity from the undertaking involved in more than one offer. Therefore, its participation in each of the offers should hardly ever be considered as particularly strategic or valuable in that process.

particularly if the burden of proof of the existence of coordination or collusion lies properly on the public authority—because the imposition of the burden on the tenderers to prove that it had not occurred seems an instance of *probatio diabolica*. Since, in the case of coordination or collusion, the tenders submitted by the several groupings or consortia in which the same undertaking takes place should be substantially similar,[366] and even display some of the traits usually associated with instances of bid rigging (such as cover offers, rotation or other allocation strategies, etc),[367] the public buyer seems to be in a good position to identify the existence of collusion or other types of coordinated behaviour on the basis of the offers submitted.[368] Once indicia of these types of behaviour are produced by the contracting authority, the burden of proof should be reversed and it would be for the entity participating in more than one consortium (or for the consortia themselves) to provide a plausible explanation for the existence of the substantial similarities in their tenders. Failure to discharge that reversed burden of proof would lead to the rejection of the offer or offers and, when warranted, might even give rise to independent investigations under competition law rules (see below chapter seven, §II.A).

Preliminary Conclusion. To sum up, it is submitted that the establishment of a 'core' prohibition on multiple bidding is not precluded by the rules of the EU directives on grounds of exclusion ex article 57 of Directive 2014/24 and interpretative case law (since it is not based on the personal qualities of tenderers, but on a largely tender-specific strategic decision and, ultimately, in the prevention of conflicts of interest). However, this prohibition needs to comply with the requirements of the principle of proportionality. In order to comply with the latter, the *core* prohibition should not be designed in excessively broad terms. It should rather allow for the specific evaluation of the competitive impact of multiple bidding in each individual case. Also, it is important that its consequences should not be the automatic exclusion of *all* the tenders in which the undertaking with multiple participation was involved, but that contracting authorities should retain a limited degree of discretion to accept one of the tenders if rejecting them all would impose a disproportionate cost or be otherwise disproportionately harmful to the public buyer (ie, to the public interest).

As regards the *extension* of the prohibition against legal persons belonging to the same legal group, similar criteria apply—however, this time, as directly imposed by article 57 of Directive 2014/24 and the interpretative case law. It has been concluded that it should be considered a breach of EU law to establish the automatic exclusion from tendering procedures of tenderers between whom there exists a relationship of control as defined by national law, without giving them an opportunity to prove that, in the circumstances of the case, this relationship had not led to an infringement of the principles of equal

[366] It should be noted that the 'suspicious' similarities should affect the offers overall, not the specific share of the undertaking participating in more than one group. Indeed, no particular value should be assigned to the fact that the specific part or contribution of the undertaking participating in more than one consortium is the same in both tenders, since that is probably the behaviour that would lead to the most competitive outcome, or that would be imposed on the 'multi-bidding' undertaking by competition law principles more generally—particularly if it holds a dominant position or is affected by the theory of the essential facilities; in which cases, particularly demanding non-discrimination standards would apply to the conduct of this undertaking.

[367] See: OECD, *Guidelines for Fighting Bid Rigging in Public Procurement. Helping Governments to Obtain Best Value for Money* (2009) 12–15.

[368] This task could be facilitated by the additional information required from groups of undertakings, which should state the reasons for the formation of the group at tender submission (see above §II.A.x).

treatment of tenderers and of transparency. In that case, both the requirements related to the *core* prohibition on multiple bidding *and* the specific requirements of its *extension* to tenderers between which there exists a relationship of control as defined by national law must be complied with, since they are cumulative.

xviii. Bundling and Aggregation of Contracts

Similarly to what was discussed in relation to centralisation of purchases (above §II.A.i), it is clear that these two trends 'should be carefully monitored in order to avoid excessive concentration of purchasing power and collusion, and to preserve transparency and competition, as well as market access opportunities for SMEs' (rec (59) Dir 2014/24). Hence, the rules applicable to the bundling and aggregation of contracts should have a prominent position under the applicable procurement rules. This was not the case under the 2004 EU public procurement directives, which regulated neither the division of contracts into lots, nor the bundling of those lots or the aggregation of contracts by the public buyer. The only rules regarding division of contracts into lots aimed at establishing specific criteria for the calculation of the value of the tendered contracts for the purpose of determining the applicability of the EU public procurement regime (art 9(5) Dir 2004/18, which is now contained in art 5(8) and 5(9) Dir 2014/24)—and, more specifically, with the purpose of preventing the circumvention of EU rules by the artificial division of contracts into lots whose value remains below the thresholds that trigger their application (above §II.A.ii).[369] Other than that, reference to the division of contracts into lots, their bundling or aggregation was only made in relation to contract notices—which, where the contracts are subdivided into lots, must indicate 'the possibility of tendering for one, for several or for all the lots' (Annex VII A Dir 2004/18). Therefore, Member States seemed to hold substantial discretion to set domestic public procurement rules on the division of contracts into lots, the bundling or aggregation of lots and contracts to be tendered together, the establishment of rules allowing or not for multiple and/or conditional tendering for different lots in a given tender procedure, etc. The situation has now been slightly altered by the inclusion of more specific rules concerning the division of contracts into lots in article 46 of Directive 2014/24, which fundamentally rest on a general expectation that contracting authorities will consider the possibility of dividing contracts into lots and, where they decide against it, provide a justification (ie, 'divide-or-explain' requirement).[370] Indeed, according to article 46(1), contracting authorities 'may decide to award a contract in the form of separate lots and may determine the size and subject-matter of such lots' and, when they decide otherwise, they 'shall … provide an indication of the main reasons for their decision not to subdivide into lots', which may be included in the procurement documents. This duty to 'divide-or-explain' is conceived as a *soft* requirement not amenable to review, as indicated in recital (78) of Directive 2014/24, where it is explained that:

[369] This has been an issue that has generated substantial litigation, even if the treatment of the division of contracts into lots for jurisdictional purposes in the EU directives is relatively straightforward. See Case C-323/96 *Commission v Belgium* [1998] ECR I-5063; Case C-16/98 *Commission v France* [2000] ECR I-675; Case C-385/02 *Commission v Italy* [2004] ECR I-8121; Case C-241/06 *Lämmerzahl* [2007] ECR I-8415; and Case C-412/04 *Commission v Italy* [2008] ECR I-619.

[370] For a discussion of the 'divide-or-explain' rule that was included in the 2011 proposal that led to Dir 2014/24 and, more generally, regarding the treatment of lots in the proposal, see Sánchez Graells (n 263) 127.

> The contracting authority should have a duty to consider the appropriateness of dividing contracts into lots while remaining free to decide autonomously on the basis of any reason it deems relevant, *without being subject to administrative or judicial supervision*. Where the contracting authority decides that it would not be appropriate to divide the contract into lots, the individual report or the procurement documents should contain an indication of the main reasons for the contracting authority's choice.[371]

Moreover, it should be taken into consideration that under article 46(4) of Directive 2014/24, 'Member States may [render] it obligatory to award contracts in the form of separate lots under conditions to be specified in accordance with their national law and having regard for Union law'—which, *a contrario*, implies that Member States are free to reduce the requirements concerned with the division of contracts into lots to that soft requirement of 'divide-or-explain'. Consequently, given the full discretion that Member States retain when deciding whether or not to implement the more specific rules in article 46 of Directive 2014/24,[372] and whether to make them mandatory or voluntary, it is appropriate to take a general approach to the competition analysis of the decisions (and rules) concerning the aggregation and bundling of contracts (or, reversely, of their division into lots).

In this connection, it should be stressed that the bundling of requirements into a single contract or the division of that same contractual object into several lots, as well as the rules imposing the minimum or maximum number of lots a single tenderer can bid for, allowing or excluding conditional or 'package' bidding and so on, can generate significant effects on competition for those contracts and in the market concerned.[373] The bundling of independent requirements into a single contract (or the aggregation of otherwise independent contracts) by one or several public buyers may restrict the number of potential bidders and, therefore, generate anticompetitive effects,[374] and alter the structure of the markets.[375] Put otherwise, dividing contracts into several lots may in most instances increase competition,[376] not only for the specific public contract but also for future contracts,[377] and in more general terms, in the market from which the public buyer is procuring goods and services. The (sub)division of contracts into lots can particularly

[371] Emphasis added. This will, however, clearly depend on the domestic rules of administrative or public law considering the exercise of discretion, which application should not be pre-empted by this general remark in the recital of the Directive—given that, indeed, recitals of a Directive fall short from creating specific rules, or having the force of disapplying others. See Case 215/88 *Casa Fleischhandels v BALM* [1989] ECR 2789 31.

[372] 'Member States should remain free to go further in their efforts to facilitate the involvement of SMEs in the public procurement market, by extending the scope of the obligation to consider the appropriateness of dividing contracts into lots to smaller contracts, by requiring contracting authorities to provide a justification for a decision not to divide contracts into lots or by rendering a division into lots obligatory under certain conditions', rec (78) Dir 2014/24.

[373] This has been recently supported empirically. See Amaral, Saussier and Yvrande-Billon (n 8) 17–34. For a review of bundling and its effect on competition in the US, see DD Pangburn, 'The Impact of Contract Bundling and Variable-Quantity Contracts on Competition and Small Business' (1995–96) 25 *Public Contract Law Journal* 69; and I Akyuz, 'Bundling into the Millennium: Analyzing the Current State of Contract Bundling' (2000–01) 30 *Public Contract Law Journal* 123, 124.

[374] See: J-Y Chérot, *Droit public économique*, 2nd edn (Paris, Economica, 2007) 728. For a position against contract aggregation see Savas (n 54) 186. See also OFT (n 13) 16–20 and 110–25.

[375] At least in those cases where bundling of different goods or services induces vertical integration amongst previously independent public contractors; see OFT (n 13) 89–91 and 118.

[376] McAfee and McMillan (n 11) 57–60; V Grimm et al, 'Division into Lots and Competition in Procurement' in Dimitri et al (n 51) 168, 175.

[377] Carpineti et al (n 214) 23–24.

promote participation by SMEs[378]—thereby broadening competition to the benefit of contracting authorities,[379] as well as reducing the need to resort to more restrictive 'secondary policies' aimed at encouraging SME participation (such as set-asides or mandatory subcontracting).[380] Therefore, in general terms, dividing contracts into lots or avoiding the aggregation of otherwise independent requirements into a single contract can have significant pro-competitive effects both on the tender and the market. Directive 2014/24 includes most of these economic insights in recital (78) and, consequently, article 46(1) aims at requiring contracting authorities to at least consider the possibility of dividing contracts into lots in order to achieve those benefits.

Nonetheless, it must be taken into account that the division of contracts into lots also presents some difficulties or undesirable effects and can generate some additional costs.[381] Firstly, division of a given contract into lots may not be feasible in the light of the respective works, supplies and services. Therefore, rules regulating the division of contracts into lots should allow for sufficient flexibility so as not to impose artificially the fractioning of the contractual object where it is technically or economically unfeasible, or where it would substantially impair the effectiveness of the procurement process or raise the procurement costs disproportionately. This is encapsulated in Directive 2014/24, which clearly indicates that the reasons that could justify avoiding the division of a given contract into lots include the 'risk [of] rendering the execution of the contract excessively technically difficult or expensive, or that the need to coordinate the different contractors for the lots could seriously risk undermining the proper execution of the contract' (rec (78)). On the other hand, public procurement rules should restrict the ability of contracting authorities to bundle or aggregate artificially otherwise independent needs or requirements if doing so generates a competitive distortion—ie, if it excludes potential tenderers with a more limited capacity of supply, not integrated vertically, or otherwise not able to meet the bundled requirements, while they would be able to meet some of the requirements if unbundled or not aggregated. Therefore, it is to be praised that the 2014 public procurement rules encourage lot division unless it proves to be inadequate or disproportionate to the nature and amount of works, supplies and services concerned.

Secondly, economic theory has stressed that the division of the contract into lots might yield pro- or anti-competitive results depending on the relationship between the

[378] Indeed, 'Public procurement should be adapted to the needs of SMEs. … To that end and to enhance competition, contracting authorities should in particular be encouraged to divide large contracts into lots. Such division could be done on a quantitative basis, making the size of the individual contracts better correspond to the capacity of SMEs, or on a qualitative basis, in accordance with the different trades and specialisations involved, to adapt the content of the individual contracts more closely to the specialised sectors of SMEs or in accordance with different subsequent project phases.' Rec (78) Dir 2014/24, with reference to the Commission staff working document, European code of best practices facilitating access by SMEs to public procurement contracts (SEC(2008) 2193) 6–7. Also Bovis (n 55) 117; Carpineti et al (n 214) 23–24; M Burgi, 'Small and Medium-Sized Enterprises and Procurement Law—European Legal Framework and German Experiences' (2007) 16 *Public Procurement Law Review* 284, 293–94; and DM McKevitt, A Flynn and P Davis, 'Public Buying Decisions: A Framework for Buyers and Small Firms' (2014) 27(1) *International Journal of Public Sector Management* 94–106.

[379] See J de Brux and C Desrieux, 'To Allot or Not to Allot Public Services? An Incomplete Contract Approach' (2014) 37(3) *European Journal of Law and Economics* 455–76.

[380] As discussed in MV Kidalov and KF Snider, 'US and European Public Procurement Policies for Small and Medium-Sized Enterprises (SME): A Comparative Perspective' (2011) 13(4) *Business and Politics* art 2. See also F Maréchal and P-H Morand, 'Small Business Participation Procurement Policy: Subcontracting vs Allotment' (2012) 78(2) *Recherches économiques de Louvain* 5.

[381] See: McAfee and McMillan (n 11) 57–60.

number of lots and the number of interested bidders. This is also reflected in Directive 2014/24, which offers the option of not allotting contracts where 'the contracting authority finds that such division could risk restricting competition' (rec (78)). Indeed, one of the potentially negative effects of the division of the contract into lots is the facilitation of collusion.[382] Therefore, setting a number of lots that generates difficulties for coordination and allocation of lots amongst potentially colluding tenderers is desirable.[383] In this regard, economic theory seems to provide two general criteria: the number of lots should be smaller than the expected number of participants (so that the impossibility of allocating lots to all interested tenderers diminishes the stability of collusion and forces it to spread over several tenders, thereby increasing the likelihood of detection), and the number of lots should exceed the number of incumbent contracts by at least one (implicitly reserving at least the additional lot for a new entrant or new contractor).[384] Therefore, it also seems undesirable to adopt rigid rules setting a specific number of lots into which the contract should be automatically divided, since it could easily fall outside the desirable range for specific contracts and tendering procedures. In that regard, Directive 2014/24 rightly leaves it to the contracting authority to decide the number of lots to be created and whether to do so according to quantitative or qualitative criteria.

Finally, another important issue in the design of rules regarding lot division is to determine whether bidders can engage in multiple or 'package' bidding—and, if so, what are the minimum and maximum number of lots for which they can bid—and if conditional bidding is allowed, thus permitting bidders to offer varying conditions dependent upon the number and mix of lots awarded to them. In this regard, economic theory again stresses the importance of setting flexible rules that allow for a trade-off between fostering competition by smaller bidders and allowing larger bidders to exploit economies of scale, as well as for independent decisions to be made by tenderers—since multiple or package bidding will encourage bidders to submit more competitive offers for given packages than they would for independent lots or for all the lots.[385] In this regard, it has been stressed that contracting authorities should not limit the number of lots tenderers can bid for in a way which would impair the conditions for fair competition,[386] with maybe the only restriction of setting a relatively low maximum number of lots that a single bidder can be awarded at one time[387] (which constitutes a specific case of awarding constraint; see below §II.B.vi).[388] Therefore, it seems desirable to adopt rules so that the public buyer can reduce the minimum size of contracts/lots, and thereby maximise the number of smaller sup-

[382] Division of contracts into lots allows for *accommodation*; PR Milgrom, *Putting Auction Theory to Work* (Cambridge, Cambridge University Press, 2004) 234–39; and increasing the frequency of bidding increases the likelihood of collusion (ie, more smaller tenders, or more tenders divided into lots, might give rise to increased opportunities for collusion); see OECD (n 148) 35. See also Grimm et al (n 376) 168.

[383] See: OECD, *Guidelines for Fighting Bid Rigging in Public Procurement* (2009) 4.

[384] See: Grimm et al (n 376) 168–69; and K Binmore and P Klemperer, 'The Biggest Auction Ever: The Sale of the British 3G Telecom Licenses' (2002) 112 *Economic Journal* C74.

[385] N Dimitri et al, 'Multi-Contract Tendering Procedures and Package Bidding in Procurement' in id (n 51) 193, 194–215. Basically, the flexibility advanced tries to avoid second-guessing by the public buyer on the value of the lots or bundles, which the bidders are prepared to appraise independently. On the issue of the different values of bundles and its effect on competition, see MM Linthorst et al, 'Buying Bundles: The Effects of Bundle Attributes on the Value of Bundling' in Piga and Thai (n 121) 513.

[386] Commission Staff Working Document, European code of best practices facilitating access by SMEs to public procurement contracts (SEC(2008) 2193) 6–7.

[387] Savas (n 54) 186.

[388] See: Carpineti et al (n 214) 36.

pliers otherwise excluded, without hindering the ability of larger suppliers to bid for large sets of contracts in the event of their being characterised by positive complementarities.[389]

To sum up, economic theory seems to support the finding that public procurement rules should be designed so as to encourage the division of contracts into lots whenever this is technically and economically feasible, and to allow the contracting authority to set the specific number of lots according to the circumstances of the tender. Similarly, contracting authorities should be able to restrict the maximum number of lots that a single tenderer can be awarded—if awarding the entire contract to a single contractor can generate a negative impact on competition; and particularly when ensuring that one or more lots are available for non-incumbent contractors is relevant to preventing distortions of competition in future contracts and/or in the market concerned. Finally, conditional and 'package' bidding should be allowed, in order to minimise the potential inefficiencies that lot division could generate. These insights of economic theory are now reflected to a large extent in article 46 of Directive 2014/24, and further considered in recital (79).

Firstly, article 46(2) ab initio allows for multiple bidding, indicating that the contract notice or the invitation to confirm interest should indicate whether tenders may be submitted for one, for several or for all of the lots in which a given contract is divided. Secondly, article 46(2)II of Directive 2014/24 allows for restrictions on the number of lots that can be awarded to the same tenderer, establishing that even where tenders may be submitted for several or all lots, contracting authorities may limit the number of lots that may be awarded to one tenderer.[390] In that case, the Directive sets up a double requirement of transparency to avoid distortions in the award decision-making, establishing that such awarding constraint will be applicable provided that the maximum number of lots per tenderer is stated in the contract notice or in the invitation to confirm interest, and as long as the procurement documents disclose the objective and non-discriminatory criteria or rules the contracting authority will apply for determining which lots will be awarded where the application of the award criteria would result in one tenderer being awarded more lots than the maximum number. All these rules remain, however, discretionary. Hence, it is still necessary to rely on the principle of competition and its requirements in order to inform their implementation.

The general criterion, in my view, should then be that in the exercise of this discretion as regards the division or aggregation of requirements, the fixing of the number of lots tendered, and the rules for conditional and 'package' bidding, contracting authorities must ensure that competition in the market is not distorted and, where possible and feasible, promote competition for the contract—particularly by avoiding the configuration of contracts which result in potentially interested competitors being excluded. As a default rule, division into a large number of lots will be preferable to a division into an insufficient number of exceedingly big lots, since tenderers could compensate for such an 'excessive fragmentation' of the object of the contract by submitting bundled offers—while an insufficient division of the object of the contract cannot be compensated by tenderers

[389] Dimitri et al (n 385) 215. This option might not be optimal in all types of (dynamic) auctions, though (ibid 206); and Ausubel and Cramton (n 51) 226–27.

[390] As further explained in rec (79), 'Where contracts are divided into lots, contracting authorities should, for instance *in order to preserve competition* or to ensure reliability of supply, be allowed to limit the number of lots for which an economic operator may tender; they should also be allowed to limit the number of lots that may be awarded to any one tenderer' (emphasis added).

submitting partial offers or offers for amounts smaller than the object of the tender (as those bids would be considered non-compliant and, hence, rejected; below §II.B.iv).

Arguably, in order to be effective, the rules and decisions on lot division will need to be complemented with clear award criteria as regards the comparability of offers for a different number of lots (on this, generally, see below §II.B.iii), as well as with rules applicable in case the offers submitted do not cover all the lots tendered. In this case, asking bidders to submit offers for the entire contract, for each individual lot and for the packages of lots that they would like to be awarded (with different prices and conditions) would arguably eliminate all the benefits of lot division, since tenderers that could not bid for the entire contract (even under less favourable conditions than they could offer for a given lot or group of lots) would be excluded anyway. Therefore, a preferable rule seems to be to allow the submission of bids for independent or grouped lots, without mandatory requirements regarding the entire contractual object. In case one or various lots could not be covered in the initial tendering, the contracting authority could then engage in re-tendering the pending lots by following a subsequent negotiated procedure with all the participating tenderers, or a new procedure, depending on the circumstances (on the rules and criteria regarding procedure selection, see above §II.A.ii). Under exceptional circumstances, the option should also be available to the contracting authority not to award any of the lots for which it has received offers if it is clear that this would jeopardise the effectiveness of the follow-up tenders for the remaining lots—which should then be re-tendered in a single contract. However, if the design of the lots was properly conducted in the first place—ie, if lots had been designed according to sensible functional and economic criteria, and an effort had been made to ensure their balance—this situation should be largely marginal. Along these lines, but covering the separate option of whether contracting authorities can 'cherry-pick' or 'mix-and-match' offers for different lots,[391] article 46(3) of Directive 2014/24 clearly indicates that this is possible, provided certain conditions are met. Indeed, where more than one lot may be awarded to the same tenderer, contracting authorities may award contracts combining several or all lots where they have specified in the contract notice or in the invitation to confirm interest that they reserve the possibility of doing so and indicate the lots or groups of lots that may be combined (on criteria applicable to such conditional award rules, see below §II.B.vi).

As a preliminary conclusion, it is submitted that despite the discretionary terms of article 46 of Directive 2014/24 and on the basis of the final goal of maximising competition, contracting authorities should resort to division of contracts into lots whenever it is not unfeasible technically or economically, and should set rules that ensure that, while still giving tenderers the largest possible flexibility to submit package and conditional bids, competition is not distorted by undue contract division or aggregation. Rules on contract division should be complemented and reinforced by consistent award criteria and rules on the re-tendering of unawarded lots.

[391] The justification is provided in rec (79), which indicates that 'the objective of facilitating greater access to public procurement by SMEs might be hampered if contracting authorities would be obliged to award the contract lot by lot even where this would entail having to accept substantially less advantageous solutions compared to an award grouping several or all of the lots. Where the possibility to apply such a method has been clearly indicated beforehand, it should therefore be possible for contracting authorities to conduct a comparative assessment of the tenders in order to establish whether the tenders submitted by a particular tenderer for a specific combination of lots would, taken as whole, fulfil the award criteria laid down in accordance with this Directive with regard to those lots better than the tenders for the individual lots concerned seen in isolation.'

xix. Induced and Mandatory Subcontracting

EU public procurement directives establish rules on subcontracting with the specific 'secondary' policy objective of encouraging the involvement of small and medium-sized undertakings in the public contracts procurement market (eg, rec (78) Dir 2014/24). In this regard, article 71(2) of Directive 2014/24 establishes that contracting authorities may ask tenderers to indicate any share of the contract they may intend to subcontract to third parties and any proposed subcontractors—with the aim of providing transparency in the subcontracting chain (rec (105) Dir 2014/24). It also makes it clear that subcontracting does not alter the principal economic operator's liability (art 71(4) Dir 2014/24) and, in any case, leaves Member States with the discretion to opt for more stringent liability rules under national law (art 71(7) Dir 2014/24). The rest of article 71 introduces new rules on the control of subcontractors and their compliance with exclusion and qualitative selection criteria and, particularly, compliance with the environmental and social rules indicated in article 18(2) of Directive 2014/24 (art 71(6) Dir 2014/24), as well as new rules on the required checks when subcontractors are to perform contractual obligations at a facility under the direct oversight of the contracting authority (art 71(5) Dir 2014/24). It also introduces new rules concerning the direct payment to subcontractors by the contracting authority. Firstly, it facilitates the establishment of mechanisms of direct payment to subcontractors upon their request (art 71(3) Dir 2014/24) and, secondly, it allows Member States to go further—eg, by providing for direct payments to subcontractors without it being necessary for them to request such direct payment (art 71(7) Dir 2014/24). Therefore, the directive does not impose, but seems to favour, buying strategies aimed at inducing or mandating the subcontracting of significant parts of the tendered contracts.[392]

In this regard, it should be stressed that, although there is no express indication in the directive to that effect, the percentage of work to be subcontracted by tenderers could in principle be used as an award criterion in determining the most economically advantageous tender (ex art 67(2) Dir 2014/24)—although doubts can be harboured as to the relevance of this criterion, particularly for its questionable link to the subject-matter of the contract (which should not be affected by direct execution or subcontracting of the works, as long as the undertaking entrusted with the activity meets the relevant suitability criteria), and for the difficulties in envisaging the economic advantage that can derive from different levels of subcontracting (for further details as regards the requirements applicable to award criteria, see below §II.B.iii).

Finally, it is also worth underlining that, according to the interpreting case law of the EU judicature—and largely in the opposite direction of the approach followed by Directive 2014/24 in article 71, but in line with what is established in article 63(2)[393]—contracting authorities can prohibit or restrict

> the use of subcontracting for the performance of essential parts of the contract [more] precisely

[392] See: Arrowsmith (n 28) 1325–28.

[393] Indeed, it should be taken into consideration that in the case of works contracts, service contracts and siting or installation operations in the context of a supply contract, contracting authorities may require that certain critical tasks be performed directly by the tenderer itself or by a participant in a group of economic operators as referred to in art 19(2) Dir 2014/24, which seems to run contrary to the facilitation or mandate of subcontracting, at least under specific circumstances.

> in the case where the contracting authority has not been in a position to verify the technical and economic capacities of the subcontractors when examining the tenders and selecting the lowest tenderer.[394]

Indeed, unchecked subcontracting could be used to circumvent the controls set up by the public procurement system, particularly as regards the evaluation of the professional, economic and technical standing of tenderers. Therefore, restrictions on subcontracting can be justified under certain circumstances.

In general, then, according to the rules of the EU public procurement directives and the relevant case law, contracting authorities enjoy substantial discretion to induce, mandate or prohibit (depending on the circumstances) the subcontracting of significant parts of the tendered contracts. However, as economic theory has shown and as experts have rightly warned, 'measures to facilitate sub-contracting (or an explicit requirement to subcontract) may have undesirable competition effects because they could reduce participation and facilitate collusion'.[395] Consequently, it seems appropriate to undertake an assessment of these rules in the light of the principle of competition.

From an economic perspective, it is important to stress that it has been shown that subcontracting does not usually reallocate work in an efficient manner and provides the main contractor with the ability to extract rents from its subcontractors.[396] Consequently, contrary to the common wisdom encapsulated in recital (78) of Directive 2014/24 (and previously in recital (32) of Directive 2004/18),[397] induced or mandatory subcontracting is an inadequate instrument to 'spread' work or foster efficient SME participation in public procurement—or, at least, is inferior to alternative measures such as lot division (see above §II.A.xviii).[398] Moreover, subcontracting amongst competitors can be an effective way to enforce collusive agreements,[399] or to impose restrictions of competition that could go beyond the indispensible limits to ensure the proper deployment of the subcontract.[400] Therefore, in general terms, there seems to be no good reason for contracting authorities to induce or mandate tenderers to subcontract any significant amount of the works, services or supplies involved in the tendered contract—particularly taking into account that the alternative (and less restrictive) mechanism of lot division is available to them in order to increase competition and foster participation, specially by SMEs.

In the light of the potential distortions of competition that can arise from subcontracting requirements, and as yet another instance of application of the competition principle embedded in the EU public procurement directives, it is submitted that contracting

[394] Case C-314/01 *ARGE* [2004] ECR I-2549 45; and Opinion of AG Kokott in Case C-454/06 *Pressetext Nachrichtenagentur* 56.

[395] OFT (n 13) 19 and 125–27. Along the same lines, OECD, *Public Procurement: Role of Competition Authorities* (2007) 9. See also Bovis (n 55) 97–98; and O Guézou, 'Sous-traitance et Droit de la concurrence' (2005) *Contrats publics—Actualité de la commande et des contrats publics* 57.

[396] Adams and Gray (n 4) 104. For some empirical support in the same direction, see L Moretti and P Valbonesi, *Subcontracting in Public Procurement: An Empirical Investigation* (Department of Economics and Management, University of Padova, Working Paper No 158, 2012), available at works.bepress.com/paola_valbonesi/24.

[397] See: Bovis (n 55) 68 and 116–17. In similar terms, Carpineti et al (n 214) 33.

[398] Grimm et al (n 386) 174 and 180; also V Grimm, 'Sequential versus Bundle Auctions for Recurring Procurement' (2007) 90 *Journal of Economics* 1, 2 and 18.

[399] See: OFT (n 13) 19 and 125–27; Carpineti et al (n 214) 34; and MJ Shockro, 'An Antitrust Analysis of the Relationship between Primer Contractors and Their Subcontractors under a Government Contract' (1982) 51 *Antitrust Law Journal* 725.

[400] See: Trepte (n 23) 52–54.

authorities should refrain from mandating or inducing subcontracting (in particular, by using the percentage of subcontracted work as an award criterion) if this could result in restrictions or distortions of competition—which is a highly probable situation. It could be argued that, in such scenario, a general prohibition of subcontracting could be preferable as the default rule—which could be waived where the subject matter of the contract or the industry structure so requires. However, this more restrictive rule would require the contracting authority to second-guess the subcontracting decisions of the market. Therefore, it is submitted that an obligation to abstain from requiring or mandating subcontracting is preferable to banning it altogether.

xx. Framework Agreements

Subject to its specific adoption by Member States (see art 32(1) and recital (16) Dir 2004/18), the 2004 EU public procurement directives introduced framework agreements as a contractual scheme generally applicable by contracting authorities to satisfy their needs.[401] Directive 2014/24 recognises that framework agreements have been 'widely used and [are] considered as an efficient procurement technique throughout Europe' (rec (60)), which justifies a consolidation and further refinement of their rules—as well as a suppression of their discretionary transposition, which is no longer an option under article 33 of Directive 2014/24.

According to the definition provided by article 33(1) of Directive 2014/24, a 'framework agreement' is an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.[402] This procurement device establishes a two-step process that is primarily aimed at providing greater flexibility to the public buyer in cases of repeated purchases of relatively uniform goods and services,[403] as well as in cases of centralised procurement of such goods and services by a (specialised) central purchasing body.[404] Under these rules, when a contracting authority enters into a framework agreement it may subsequently enter into contracts based on such a framework agreement during its term of validity, either by applying the terms set forth in the framework agreement or, if all the terms have not been fixed in advance in the framework agreement, by reopening competition between the parties within the framework agreement in relation to those terms (see rec (61) Dir 2014/24).[405]

Therefore, the rules applicable to framework agreements allow the contracting authority to run a first competitive phase to select a number of suitable contractors on the basis

[401] Previously, the use of framework agreements was regulated in the 'excluded sectors' only and its compatibility with the directives on works, supplies and services was uncertain; Arrowsmith (nn 286, 291). See, eg, Case C-84/03 *Commission v Spain* [2005] ECR I-139; and Case C-237/05 *Commission v Greece* [2007] ECR I-8203. For a general discussion of framework agreements under Directive 2004/18 and 2004/17, with a comparison with the previous regulation, see R Nielsen, 'Framework Agreements' in Nielsen and Treumer (n 116) 81. See also Bovis (n 55, 1997) 55; id (n 55, 2005–06) 88–90 and id (n 23) 173–75, 251–53.

[402] Generally, Arrowsmith (n 28) 1113–82; and Trepte (n 23) 208–12 and 436–45.

[403] On the reasons for the conclusion of multi-supplier frameworks, see Arrowsmith (n 293) 122–26. See also Carpineti et al (n 214) 30–31.

[404] On central purchasing bodies, see Arrowsmith (n 28) 373–77.

[405] For an economic appraisal of framework agreements, see GL Albano and M Sparro, 'A Simple Model of Framework Agreements: Competition and Efficiency' (2008) 8 *Journal of Public Procurement* 356.

of more or less defined terms for the supply of goods, works or services and, later, to run a second competitive or non-competitive phase (depending on the level of specificity of the terms and conditions of the first phase) amongst the contractors included in the framework agreement. The *first phase*—ie, the tender and conclusion of the framework agreement itself—should be compliant with the general rules of Directive 2014/24 as regards choice of procedure and the rules applicable to all phases up to the award of contracts based on this framework agreement (art 33(1) and 33(2) Dir 2014/24). The *second phase*—ie, award of specific contracts based on the framework agreement—should comply with the specific rules established in article 33, which set different requirements depending on the number of economic operators (or contractors) that are part of the framework agreement (art 33(3) controls frameworks with a single economic operator and art 33(4) control frameworks with more than one economic operator), as well as on the degree of precision of the terms of the framework agreement (as distinguished in the sub-paragraphs of art 33(4) Dir 2014/24). In any case, some common rules or restrictions to the scope and implementation of the framework agreement should be respected, such as a limit on its duration—which should not exceed four years, except in cases duly justified by the contracting authorities, in particular by reference to the subject of the framework agreement (art 33(1) *in fine* Dir 2014/24)—or a prohibition of material modification of the terms set in the framework agreement—that is, a requirement that the parties under no circumstances make substantial amendments to its terms (art 33(2) *in fine* Dir 2014/24).

As regards framework agreements concluded *with a single economic operator* by one or more contracting authorities (art 33(3) Dir 2014/24), the rules provided by the directive are restricted to requiring that contracts based on that agreement should be awarded within the limits of the terms laid down in the framework agreement. Therefore, the contracting authority or authorities will have substantial flexibility to set contractual terms adjusted to its or their specific needs and, if necessary, may consult the operator party to the framework agreement in writing, requesting it to supplement its tender as necessary. In this regard, it may be important to emphasise that such consultations and supplements of the tender should not result in a substantial amendment of the terms of the framework agreement (art 33(2) *in fine* Dir 2014/24).

The rules applicable to framework agreements concluded *with several economic operators*—who should be at least three, insofar as there is a sufficient number of economic operators to satisfy the selection criteria and/or of admissible tenders which meet the award criteria (by analogy with art 65 Dir 2014/24)[406]—now set three separate procedures, depending on whether all the terms (of the ensuing contract) are laid down in the framework agreement or not (art 33(4) Dir 2014/24). In all cases, under no circumstances can economic operators not included in the framework agreement participate in the ensuing procedures[407]—since they may be applied only between the contracting authorities and

[406] In this regard, in my opinion and to avoid uncertainty, the express requirement of art 32(4) Dir 2004/18 that the minimum number was three should have been kept in art 33(4) Dir 2014/24.

[407] As clearly stressed in rec (60) Dir 2014/24, which highlights that 'a framework agreement should not be open to entry of new economic operators once it has been concluded. This implies for instance that where a central purchasing body uses an overall register of the contracting authorities or categories thereof, such as the local authorities in a given geographical area, that are entitled to have recourse to framework agreements it concludes, that central purchasing body should do so in a way that makes it possible to verify not only the identity of the contracting authority concerned but also the date from which it acquires the right to have recourse to the framework agreement concluded by the central purchasing body as that date determines which specific framework agreements that contracting authority should be allowed to use.'

the economic operators originally party to the framework agreement as concluded (art 33(2)II Dir 2014/24).[408] In the first clear instance, when all the terms (of the ensuing contract) are laid down in the framework agreement, a contract based on the framework can be awarded by application of the terms laid down in the framework agreement without reopening competition (art 33(4)(a) Dir 2014/24). Therefore, contracting authorities enjoy a substantial degree of discretion to conclude the specific contract with *any* of the economic operators included in the framework agreement.[409] As regards the second clear instance, where not all the terms (of the ensuing contract) are laid down in the framework agreement, contracting authorities should run a second competitive phase *amongst* the economic operators included in the framework agreement (art 33(4)(c) Dir 2014/24). It is interesting to stress that, with the aim of providing even more flexibility, Directive 2014/24 establishes a third (ambiguous) instance, whereby even in frameworks where all terms are set out from the beginning, contracting authorities can decide to open a second 'mini-competition' (art 33(4)(b) Dir 2014/24). Indeed, contracting authorities are now given the choice to decide whether specific works, supplies or services shall be acquired following a reopening of competition or directly on the terms set out in the framework agreement, and it indicates that such a decision 'shall be made pursuant to objective criteria … set out in the procurement documents for the framework agreement [which] shall also specify which terms may be subject to reopening of competition'. This second competitive phase, applicable under article 33(4)(b) and 33(4)(c) of Directive 2014/24, should allow for as many specifications of the general terms included in the framework agreement (which, however, cannot be substantially modified) and the award of the contract should be conducted according to the further rules established in article 33(5) of Directive 2014/24, which ultimately require that the result of the 'mini-competition' is determined on the basis of the award criteria set out in the procurement documents for the framework agreement—ie, contracting authorities cannot amend or establish new award criteria for each of the 'mini–competitions' within the framework agreement. In this case, therefore, contracting authorities seem to enjoy a more limited degree of discretion to conclude the specific contracts within the framework agreement.

In general terms, it should be stressed that, as has been rightly pointed out, the configuration of such framework agreements 'while offering significant potential gains in efficiency for both suppliers and procuring entities,[410] also pose complex challenges for the maintenance of competition'.[411] In that regard, it is important to stress that Directive

[408] Again, this is an important point where Dir 2014/24 has strengthened the rules on the duty to indicate clearly in the initial procurement documents which contracting authorities (or categories thereof) will be covered by the framework. See rec (60) Dir 2014/24: '[F]ramework agreements should not be used by contracting authorities which are not identified in them. For that purpose, the contracting authorities that are parties to a specific framework agreement from the outset should be clearly indicated, either by name or by other means, such as a reference to a given category of contracting authorities within a clearly delimited geographical area, so that the contracting authorities concerned can be easily and unequivocally identified.'

[409] *Cf* Carpineti et al (n 214) 30–31.

[410] For an in-depth analysis concerning the UK, see P McDermott, et al, *Effectiveness of Frameworks—A Report by the Working Group on the Effectiveness of Frameworks of the Procurement and Lean Client Task Group*, Final Report to Government by the Procurement/Lean Client Task Group (2012), available at usir.salford.ac.uk/id/eprint/23570.

[411] RD Anderson and WE Kovacic, 'Competition Policy and International Trade Liberalisation: Essential Complements to Ensure Good Performance in Public Procurement Markets' (2009) 18 *Public Procurement Law Review* 67, 82. In similar terms, but adopting a more critic approach to framework agreements (ID/IQ agreements

2004/18 was particularly concerned with such potential anti-competitive effects and provided, in very clear terms, that 'contracting authorities may not use framework agreements improperly *or in such a way as to prevent, restrict or distort competition*' (art 32(2) *in fine* Dir 2004/18, emphasis added). This requirement is now mentioned in recital (61)[412] and implicitly derives from the principle of competition in article 18(1) of Directive 2014/24. Therefore, it is particularly relevant to analyse in which ways the use of framework agreements can alter or distort competition and, consequently, how its rules can be applied in a pro-competitive manner that ensures the effectiveness of the principle of competition embedded in the EU public procurement directives. The main restrictions of competition identified so far derive from the duration and scope of framework agreements,[413] as well as from their effect on the likelihood of collusion amongst economic operators.[414] Each of these potential restrictions, as well as some others, will now be considered in turn. To be sure, some of the potential restrictions are closely related or intertwined, and the potentially restrictive effects of framework agreements should also take into joint consideration the set of potential restrictions from an overall perspective. However, it is submitted that separate analysis can shed a better light on this issue.

*Restrictions as Regards the Duration of Framework Agreements***.** As has been mentioned already, article 33(1) *in fine* of Directive 2014/24 limits the maximum duration of framework agreements to four years, save in exceptional cases duly justified by the contracting authorities, in particular by the subject of the framework agreement—ie, according to the specific technical or commercial characteristics of the goods, works or services included in the framework agreement. This rule seems to provide full discretion to contracting authorities for the conclusion of framework agreements of durations of up to four years, and to impose a higher obligation to prove the necessity to conclude agreements with a duration in excess of that period—to ensure its feasibility from a technical, commercial or some other perspective. Nonetheless, it is submitted that the discretion of the contracting authorities in determining the duration of these agreements must clearly be restricted by competition considerations (ex art 18(1) Dir 2014/24). Therefore, even under the threshold of four years of duration, contracting authorities must set the validity of the

under US FAR terminology) in the US context, see Schooner (n 65) 658–60; and id, 'Commercial Purchasing: The Chasm between the United States Government's Evolving Policy and Practice' in S Arrowsmith and M Trybus (eds), *Public Procurement: The Continuing Revolution* (The Hague, Kluwer Law International, 2003) 137, 152–53. See also CR Yukins, 'Are IDIQs Inefficient—Sharing Lessons with European Framework Contracting' (2008) 37 *Public Contract Law Journal* 545. On ID/IQ agreements, see also JA Howell, 'Governmentwide Agency Contracts: Vehicle Overcrowding on the Procurement Highway' (1997–98) 27 *Public Contract Law Journal* 395; MJ Lohnes, 'Attempting to Spur Competition for Orders Placed under Multiple Award Task Order and MAS Contracts: The Journey to the Unworkable Section 803' (2003–04) 33 *Public Contract Law Journal* 599; MC Wong, 'Current Problems with Multiple Award Indefinite Delivery/Indefinite Quantity Contracts: A Primer' (2006) *Army Lawyer* 17; and KJ Wilkinson, 'More Effective Federal Procurement Response to Disasters: Maximizing the Extraordinary Flexibilities of IDIQ Contracting' (2007) 59 *Air Force Law Review* 231.

[412] With the slightly different wording that indicates that: 'Framework agreements should not be used improperly or in such a way as to prevent, restrict or distort competition.' The 'relocation' of that restriction from the body of the 2014 directive to the recitals in the 2014 version is, in any case, hard to understand—if not on the assumption that art 18 Dir 2014/24 provides a general clause that makes it unnecessary (see chapter five).

[413] Arrowsmith (n 302) 169; id (2nd, n 122) 711–12; and Trepte (n 23) 212. For an interesting case study concerning Sweden, see R Moldén, 'Public Procurement and Competition Law from a Swedish Perspective—Some Proposals for Better Interaction' (2012) 4 *Europarättslig Tidskrift* 557–615.

[414] Anderson and Kovacic (n 411) 82; and Bovis (n 55, 1997) 55. On the potential pro- and anti-collusive effects of framework agreements, see Albano et al (n 51) 378–80.

agreement so as to avoid unnecessary restrictions and distortions of competition, based on a case by case analysis.[415] In this connection, it is also important to stress that the duration of the framework agreement can de facto extend beyond the four-year limit, given that the duration of the contracts awarded under the framework 'does not need to coincide with the duration of that framework agreement, but might, as appropriate, be shorter or longer' (rec (62) Dir 2014/24). It is submitted that a strict proportionality assessment based on the competitive distortions that such longer duration could create is to be applied to the determination of the appropriate duration of the contracts derived from a previous framework agreement, particularly if they significantly overrun the term of the initial framework.[416]

In this regard, the nature of the goods or services procured might be a relevant element, to support the case for a shorter duration for frameworks (and ensuing contracts) concerning relatively new or innovative goods and services, and a relatively longer duration for framework agreements in mature or relatively less innovative markets. Also, the number of economic operators included in the agreement and the turnover of undertakings in the market concerned should be factored into the analysis of the appropriate duration of the framework agreement. It is arguable that the more limited the number of economic operators included in the framework agreement and the higher the turnover in the market, the stronger the argument favouring limited duration for these agreements, since they could generate larger exclusionary effects than in cases where the framework covered a larger number of undertakings in more stable markets. Similarly, the larger the number of contracting authorities involved in the framework agreement, the shorter the desirable period for the framework agreement.

In general terms, it seems that the duration of these agreements should be determined by balancing the duration justified on administrative and commercial grounds, with the degree of potential restrictiveness of competition in the market concerned—and, where a clear conflict emerges, competition considerations should trump commercial justifications and impose a limitation of the duration of the framework—taking into due consideration, however, that framework agreements of a very short duration, eg, lasting for less than a year, probably lack interest (in which case, arguably, the contracting authority should refrain from resorting to this contractual arrangement).

Restrictions as Regards the Scope (Breadth) of Framework Agreements. Similarly, the design of the scope or breadth of framework agreements is also a key element in determining its potentially anti-competitive effects. In this regard, framework agreements including a relatively wide range of different goods and services can potentially result in larger exclusionary effects than mono-product or mono-service framework agreements, since they can limit the possibilities of less diversified operators—and, notably, SMEs—to participate in the framework agreement. Therefore, contracting authorities should take into account that the object of framework agreements should be designed in accordance with the homogeneity or diversity of the bundled products, coupled with the real supply situation (ie, should try to match the capacities of the largest possible number of potential suppliers, particularly those more specialised or, put differently, less diversified) and, inasmuch as possible, tend not to unnecessarily aggregate or bundle requirements into

[415] Along the same lines, Arrowsmith (n 28) 1175–77.
[416] *Cf* Risvig Hamer (n 43).

a single framework agreement (the underlying logic is similar to the one developed in relation to the division of contracts into lots; see above §II.A.xviii).

As a general criterion, it is submitted that contracting authorities should refrain from concluding framework agreements when the size or diversity of their object automatically excludes a significant number of the economic operators potentially interested in supplying part of the requirements included in the framework, since that would generate exclusionary effects. To be sure, potentially interested contractors could team up in order to participate in such framework agreements, which would arguably reduce the need to unbundle the requirements. Therefore, limitations in the extension of the object of framework agreements will be particularly relevant in markets with little or no collaboration between competitors, in highly concentrated industries, or where the tender documents somehow restrict teaming possibilities (on the latter, above §II.A.xvi).

Restrictions as Regards the Number of Economic Operators Included in Framework Agreements, Particularly in the Case of Central Purchasing Bodies. Directive 2014/24 also gives significant discretion to contracting authorities as regards the number of economic operators to be included in framework agreements. In this regard, the rules of article 33 of Directive 2014/24 give contracting authorities the following alternatives: the conclusion of a framework agreement with a single economic operator, or the conclusion of a framework agreement with several economic operators, in which case the minimum should be three—subject to there being a sufficient number of (i) economic operators satisfying the selection criteria, and/or (ii) admissible tenders that meet the award criteria ruling the tender for the framework agreement. Therefore, in general, contracting authorities seem to be free to choose to conclude a framework agreement with (almost) any number of economic operators. However, a systematic reading of article 33 of Directive 2014/24 should result in the obligation of contracting authorities to conclude framework agreements with a sufficient number of economic operators, so that competition is not unnecessarily restricted or distorted.[417]

It is submitted that the need to ensure that the framework is concluded with a sufficient (ie, relatively large) number of economic operators will be more relevant as the number of contracting authorities participating in the framework agreement increases and, most notably, in the case of *central purchasing bodies*. In these cases, the exclusion of an economic operator from the framework agreement—particularly if it is of a relatively long duration (see above this section)—can generate significant distortions of competition and, eventually, lead to its expulsion from the market (particularly if public demand aggregates a significant part of the total market demand; see above chapter two, §II.B.ii). As regards the determination of the specific number of economic operators to be included in the framework agreement, it is submitted that the considerations to be taken into account when determining the number of candidates or bidders to be invited to participate in other than open procedures will also be of relevance here (see above §II.A.ix).

Restrictions Derived from the Conclusion of 'Excessive' Framework Agreements, or

[417] In this regard, the possibility of concluding agreements with a single contractor (ex art 33(3) Dir 2014/24) shall not be seen as an impediment to reaching this conclusion, since recourse by contracting authorities to such an arrangement is prohibited if it prevents, restricts or distorts competition (ex art 18(1)). It is interesting to stress that multi-sourcing has been identified as an important trend for the future development of public procurement practices; see MM Linthorst and J Telgen, 'Public Purchasing Future: Buying From Multiple Suppliers' in Piga and Thai (n 121) 471.

Agreements for a Total Amount in Excess of the Actual or Anticipated Needs of the Contracting Authorities. A further possible source of potential distortions of competition is to be found in the conclusion of framework agreements for total amounts or quantities in excess of the actual or (reasonably) anticipated needs of the contracting authority or authorities, particularly in those cases in which the conclusion of the agreement with a single supplier or in precise enough terms excludes any competition in the second phase of the framework scheme. In the case of a framework with a single supplier, because the basis on which competition developed in the first phase could have been significantly altered itself by tendering a contract whose estimated object significantly exceeds the real demand for goods or services by the contracting authorities—thereby potentially excluding SME and, possibly, resulting in exceedingly advantageous terms for the contracting authority (which would be a case closely resembling other instances of exercise of buying power, see below §III). In the case of framework agreements with multiple economic operators whose terms are precise enough to allow the contracting authority to allocate contracts to any of the operators without competition in the second phase, the distortion of competition could easily be generated by the unbalance that could take place in the case of one or certain contractors receiving a larger proportion of contracts, while the others were left waiting to supply the 'excess' demand that would eventually be left unawarded—which would be an easy way to circumvent the competitive requirements applicable to the first phase of the tender for the framework agreement.[418] It should be stressed that recital (61) of Directive 2014/24 indicates, but not in very clear terms, that there must be 'objective conditions for determining which of the economic operators party to the framework agreement should perform a given task'. However, the possibility of favouring certain undertakings over others within a given framework is far from dispelled on that basis only.

In this regard, it is submitted that contracting authorities should estimate their requirements cautiously and, where in doubt, conclude framework agreements for amounts in the lower levels of their estimated range of necessities. In any case, once the maximum amount of works, goods or services covered by the framework is reached (or close to being reached), the contracting authority will always be in a position to tender a new framework agreement, so no significant limitation of the practicality of these arrangements seems envisageable in a relatively restrictive approach to the definition of their object in quantitative terms. Otherwise, as has been argued, competition could be distorted by 'excessive' framework agreements by (i) including too much in the framework agreement, (ii) the obtainment of unjustified economic advantages on the part of the contracting authority, or (iii) potentially discriminating between the several economic operators included in the framework agreement by discretionally and unjustifiably assigning them contracts for unbalanced amounts of the goods or services covered by the framework agreement. Therefore, as a general criterion and in order to prevent unnecessary restrictions or distortions of competition, contracting authorities should ensure that the quantity envisaged in framework agreements is not out of proportion or 'excessive' as regards its actual or estimated needs during the period covered. Again, the longer the period, the greater the

[418] This issue relates to the problem of how to allocate the total amount of requirements amongst the economic operators included in the framework agreement throughout its duration—so as to limit the maximum number of contracts consecutively awarded to a specific contractor or, more generally, the total number of contracts assigned to each economic operator during the validity of the framework agreement, which will be analysed as a specific type of awarding constraint (below §II.B.vi).

uncertainty regarding projections of necessities and the bigger the room for the type of distortions analysed here. Therefore, duration and 'amount' of framework agreements seem to be two factors that clearly condition each other, and whose aggregate effect should not restrict or distort competition (below this section).

Restrictions Derived from an Excessive Vagueness of the Initial Terms of the Framework Agreement. Another potential source of distortion could lie in the apparently large flexibility that contracting authorities seem to enjoy in the definition of the terms in which the framework agreement is tendered and concluded. In this regard, the express consideration that not all terms of the final contracts need to be laid down in the framework agreement (ex art 33(4) Dir 2014/24) could serve as an argument to support the possibility of concluding framework agreements in relatively vague or imprecise terms. However, it is argued that this could potentially lead to significant restrictions of competition: first and foremost, by hampering the participation of potentially interested candidates that, in view of the vagueness of the object of the contract and the resulting uncertainty, could be deterred from participating; and second, and this is also important, competition could be distorted as a result of the ensuing limited effectiveness of one of the fundamental checks for the implementation of framework agreements—ie, the prohibition on substantial modification of the initial terms of the framework (ex art 33(2) *in fine* Dir 2014/24) since the vagueness of the initial terms lowers the threshold imposed by such restriction (as, logically, the vaguer the initial terms, the broader the room for discretionary unchecked deviation, not detected by a test of 'substantial modification'). Both effects seem clearly undesirable. Therefore, a reading of article 33 of Directive 2014/24 that supports a finding of significant leeway to the conclusion of framework agreements in vague or imprecise terms is to be rejected.

The general rules applicable to the definition of the object of the contract, particularly those related to technical specifications and the essential elements of the contract, are also of relevance here. Therefore, the terms of the framework contract should be precise enough at least to allow tenderers to determine the subject-matter of the framework agreement and contracting entities to award the contract (above §II.A.xv, where an analogous analysis is applied to technical specifications). Even further, it is submitted that the material terms of the framework agreement and/or the ensuing contracts can *only* be left unspecified or remain in indicative terms where it is justified (or required) by the nature and function of the framework agreements—ie, where they are dependent on future needs (such as specific quantities or delivery dates), or may vary between the various contracting entities and/or economic operators included in the framework agreement (such as places for the delivery of goods or rendering of services, or subsequent modifications in prices, such as transport or insurance costs).

Otherwise, all the relevant terms of framework agreements and the ensuing contracts should be duly specified ab initio—both to eliminate all possible uncertainty and to minimise the ensuing chilling effect on potentially interested tenderers, and to set the proper restrictions on the development of the second phase of the framework procedure—where the initial terms cannot be substantially modified. Therefore, as a general criterion, contracting authorities should specify to the maximum possible extent the terms of the framework agreements, leaving in relatively vague or indicative form exclusively those terms which cannot be specified at this initial stage as an implied requirement of the nature and function of framework agreements.

Restrictions Derived from an Increased Likelihood of Collusion Among Economic Operators Included in the Framework Agreement. Finally, contracting authorities should take into account the effects of the recourse to framework agreements on the likelihood of collusion among economic operators, both in the initial phase of the award of the framework and, more probably, in the second phase related to specific contracts. In this regard, however, contracting authorities should mainly focus on designing the framework agreement in a way that makes collusion difficult—particularly in terms of the number of economic operators included in the agreement and as regards the rules regulating 'mini–competitions'. In this respect, the criteria developed in other sections should prove useful.

Aggregate Restrictive Effects of Framework Agreements. As already mentioned, some of the criteria just discussed are strongly interrelated and, in the end, contracting authorities must ensure that, taken together, the characteristics of the framework agreements do not, as such, prevent, restrict or distort competition. To summarise the criteria advanced in this section, therefore, contracting authorities should tend to conclude framework agreements that are (i) limited in duration and (ii) narrow in scope; (iii) include a sufficient number of economic operators to ensure genuine competition; are (iv) proportionate to the actual or the reasonably estimated needs of the contracting or contracting authorities; (v) precise enough so as not to generate uncertainty in potentially interested participants or to give excessive discretion to the contracting authority or authorities; and (vi) do not increase disproportionately the likelihood of collusion amongst competitors (and, to the maximum possible extent, implement measures aimed at preventing and deterring collusion)—both as regards the tender of the framework agreement and the ensuing 'mini–competitions' for specific contracts. All these requirements should be interpreted in particularly restrictive terms when the framework agreement is concluded by a central purchasing body, given its expected larger impact on market dynamics (above chapter two, §IV.C). If, as a result of this overall analysis it is clear that recourse to the framework agreement is highly likely to prevent, restrict or distort competition, contracting authorities should refrain from using framework agreements (ex art 18(1) Dir 2014/24).

xxi. Dynamic Purchasing Systems

The setting up of dynamic purchasing systems by contracting authorities for commonly used purchases the characteristics of which, as generally available on the market, meet the requirements of the contracting authorities generates competition issues similar to the ones just analysed in relation to framework agreements. Dynamic purchasing systems are a different type of two-tier multi-year scheme designed to simplify and reduce the administrative burden associated with the repeated procurement of standardised goods, works or services.[419] Dynamic purchasing systems are governed by rules analogous to those applicable to framework agreements (art 34 Dir 2014/24), albeit somewhat more stringent and always relying on the use of a restricted procedure. They shall be operated as a completely electronic processes (art 34(1) and 34(3) Dir 2014/24; and below §II.A.xxii). The general logic of this dynamic systems is to allow contracting authorities to include

[419] See generally: S Arrowsmith, 'Dynamic Purchasing Systems under the New EC Procurement Directives—A Not So Dynamic Concept?' (2006) 15 *Public Procurement Law Review* 16; and id (n 121) 1207–21. See also Bovis (n 23) 175–76 and 253–56; and M Varney, 'E-Procurement—Current Law and Future Challenges' (2011) 12(2) *ERA Forum* 185–204.

progressively in the system *all* interested economic operators that meet the established selection criteria and that have shown interest, given that 'the number of candidates to be admitted to the system shall not be limited in accordance with article 65' (art 34(2) Dir 2014/24). When a need arises, then, the contracting authority can invite all operators already included in the system—plus those that show last-minute interest in participating in the tender (see art 34(5) Dir 2014/24)—to submit a binding tender for the specific contract, which will generally be awarded according to the criteria set out generally for the dynamic purchasing system, unless adjusted or formulated more precisely for the specific contract (art 34(6) Dir 2014/24). Hence, it is a system mainly oriented towards speeding up the procurement process and reducing the administrative burden in cases of repeated procurement of goods, works and services that can be specified in sufficient detail upfront and for which participating operators can easily submit a tender for each specific procurement. This can be further simplified by dividing the system into categories of products, works or services that are objectively defined on the basis of characteristics of the procurement to be undertaken under the category concerned.

In order to set up a dynamic purchasing system, a contracting authority—be it a central purchasing agency or not—should issue a contract notice making it clear that it refers to a dynamic purchasing system and specify, amongst other matters, the nature of the purchases envisaged under the system and the basic information concerning the purchasing system itself, as well as indicate any division into categories of products, works or services and the characteristics defining them and offer unrestricted and full direct access, as long as the system is valid, to the procurement documents (art 34(4) Dir 2014/24). As mentioned, the setting up of the dynamic purchasing system should follow the rules of the restricted procedure in all its phases up to the award of the contracts to be concluded under the system (art 34(2) Dir 2014/24). However, the contracting authority has no possibility of restricting the maximum number of operators included in the system (art 34(2) Dir 2014/24). Indeed, interested operators that meet the selection criteria set by the contracting authority can, at any point in time, request admission to the dynamic purchasing system by expressing interest in participating; they should, then, be admitted to the system without being subject to any further requirements (art 34(5) Dir 2014/24). The contracting authority must review the request to participate and decide on the admission or rejection of the operator to the system within a maximum of 10 working days following its receipt. That deadline may be prolonged to 15 working days in individual cases where justified, in particular because of the need to examine additional documentation or to otherwise verify whether the selection criteria are met (which can only be extended if no invitation to tender is issued in the meantime) (art 34(5) Dir 2014/24). Contracting authorities shall inform the economic operator concerned at the earliest possible opportunity of whether or not it has been admitted to the dynamic purchasing system.

Contracting authorities may not proceed with the tendering until they have completed the evaluation of all the indicative tenders received within the 10 working day (or extended) deadline (art 34(5) Dir 2014/24). Contracting authorities should then invite all tenderers admitted to the system to submit a tender for each specific contract to be awarded under the system within a specified time limit.[420] The award of the contract should then be made according to the award criteria set in general for the dynamic purchasing system, unless

[420] For clarification regarding limitation periods, see generally Case C-406/08 *Uniplex* [2010] ECR I-817.

they have been formulated more precisely in the invitation to tender for the specific contract (art 34(6) Dir 2014/24).

As general limitations to the setting up and running of these dynamic purchasing systems, they may not last for an indefinite period of time,[421] and contracting authorities shall indicate the period of validity of the dynamic purchasing system in the call for competition. However, there is no need to cancel and restart dynamic purchasing systems if the contracting authority wishes to extend their initial validity. In that case, where the period of validity is changed without terminating the system, the authority must publish again the form used initially for the call for competition for the dynamic purchasing system (art 34(8) Dir 2014/24). Moreover, contracting authorities must run them for free—ie, no charges may be billed prior to or during the period of validity of the dynamic purchasing system to the economic operators interested in or party to the dynamic purchasing system (art 34(9) Dir 2014/24).

Again, as happened with framework agreements, under the 2004 rules, it was explicit that contracting authorities may not resort to this system to prevent, restrict or distort competition (art 33(7) Dir 2004/18). This latter restriction—which, as has already been argued in relation with equivalent clauses, is a specification or emphasis of the more general principle of competition[422] and continues to be relevant as an implicit requirement of article 18 of Directive 2014/24—justifies the specific need to analyse the competition distortions that could arise from these dynamic purchasing systems, and also to assess the way in which their rules can be applied in a pro-competitive way, in order to avoid distortions of competition by the contracting authorities. In this regard, it should be stressed that certain of the specific, and arguably more stringent, rules that regulate dynamic purchasing systems make the probability of their having an anti-competitive impact lower than is the case with framework agreements. As emphasised in recital (63) of Directive 2014/24, indeed, dynamic purchasing systems allow the contracting authority to have acces to a 'particularly broad range of tenders and hence to ensure optimum use of public funds through broad competition in respect of commonly used or off-the-shelf products, works or services which are generally available on the market'.

Given that it should be conducted at all stages by the rules of the restricted procedure, but there is no possibility of limiting the number of participating economic operators, there does not seem to be scope for distortions concerning a limitation of the maximum number of participating tenderers.[423] Similarly, given its dynamic nature, neither the duration of the system nor any of the time limits involved seem to be a source of competition distortions. For the same reason, there is no danger of a system being set in excess of actual or reasonably estimated demands of the contracting authority or authorities. Also, the specifications and general terms of the system must be defined upfront, so there does not seem to be room for chilling effects or excesses of discretion associated with an

[421] It is worth noting that, under the 2004 rules, their duration was limited to four years. In that case, the time limit seemed superfluous and largely contrary to the dynamic nature of the system. Moreover, given that the general publicity of the system was ensured by the requirement to publish simplified contract notices before the award of every particular contract under the system and that admission to the system could be requested at any point in time, there did not seem to be a good reason to force the cancellation and setting up of a new dynamic purchasing system every four years. Similarly, see Arrowsmith (n 419, 2006) 25. This is now possible, which should be seen as a positive development.

[422] Similarly, see Arrowsmith (n 419, 2006) 25; and above chapter five, §II.A.

[423] Concurring with this view, see Arrowsmith (n 419) 22.

excessive vagueness of the specification or terms that rule the dynamic purchasing system. Therefore, the competition distortions that could be anticipated seem to refer, primarily, to issues that are not specific to this type of scheme, but to general issues, such as the grounds for the exclusion of tenderers, the qualitative selection requirements, the use of technical specifications, aggregation of contracts, etc. Therefore, the analysis conducted above in other subsections should be relevant and largely applicable to dynamic purchasing systems. As regards the likelihood of collusion between tenderers, it seems initially reduced by the fact that a relatively large—in principle, unlimited—number of tenderers can take part in the bid for a given contract. Also, given that these schemes are to be run exclusively through electronic systems, contracting authorities might be in a better position to adopt measures that hinder and deter collusion, particularly through technical means or the adoption of relatively different rules for each of the specific contracts to be awarded.[424]

xxii. Electronic Auctions

As a specific method of price-setting, and as a novelty that tried to introduce additional flexibility in certain tendering procedures—particularly, *follow-up tenders* developed in relation with (i) negotiated procedures following an event of irregular tenders or the submission of tenders which are unacceptable under national provisions, (ii) the reopening of competition among the parties to a framework agreement, or (iii) the opening for competition of contracts to be awarded under the dynamic purchasing system—and increase their economic efficiency,[425] Directive 2004/18 allowed Member States to provide that contracting authorities may use electronic auctions (art 54(1) and 54(2) Dir 2004/18).[426] This technique continues to be available under the rules of article 35 of Directive 2014/24, which extends the intended use of the electronic auctions to a larger array of situations, including tenders in open or restricted procedures or competitive procedures with negotiation where technical specifications, can be established with precision. In terms of scope of application, Directive 2014/24 has also clarified that certain public service contracts and certain public works contracts having as their subject-matter intellectual performances, such as the design of works, which cannot be ranked using automatic evaluation methods, shall not be the object of electronic auctions (art 35(1) *in fine*). According to article 34(3) of Directive 2014/24, it is also now clearer that the electronic auction shall be based either (a) solely on prices where the contract is awarded on the basis of price only; or (b) on prices and/or on the new values of the features of the tenders indicated in the procurement

[424] See: OECD (n 377) 7.

[425] See: S Arrowsmith, 'Electronic Auctions under the EC Procurement Rules: Current Possibilities and Future Prospects' (2002) 11 *Public Procurement Law Review* 299; id (n 28) 1179–1207; and O Soudry, 'Promoting Economy: Electronic Reverse Auctions under the EC Directives on Public Procurement' (2004) 4 *Journal of Public Procurement* 340. See also Bovis (n 23) 176–77 and 256–59.

[426] For general discussion on e-Procurement and electronic auctions, see G Racca, 'The Electronic Award and Execution of Public Procurement' (2012) *Ius Publicum Network Review*, available at http://ssrn.com/abstract=2229253; and DC Wyld, 'Reverse Auctions: How Electronic Auctions Can Aid Governments in Significantly Cutting their Procurement Spending and Introduce Greater Competition in Public Sector Contracting' (2013) 151 *Emerging Trends in Computing, Informatics, Systems Sciences, and Engineering* 277–89. See also S Khorana, K Ferguson-Boucher and WA Kerr, 'Governance Issues in the EU's e-Procurement Framework' (2014) *Journal of Common Market Studies* 1–19. For the implications e-Procurement can have in terms of SME access to procurement, see GL Albano et al, *Small But Not Too Much! Evaluating Small and Medium Enterprises' Performance on the Italian Government's E-Marketplace* (Working Paper, 2012), available at http://ssrn.com/abstract=2129127.

documents where the contract is awarded on the basis of the best price-quality ratio or to the tender with the lowest cost using a cost-effectiveness approach (see discussion on award criteria below, §II.B.iii).

If contracting authorities decide to conduct electronic auctions, they must comply with the specific procedure set in the Directive, which determines in fairly precise detail the steps and rules to be followed in the conduct of the electronic auctions (in terms of disclosure of information, time limits, applicable criteria and formulae, etc) (art 35(4) to (9) Dir 2014/24). The use of electronic auctions for the award of the contract seems to be particularly prone to the generation of unacceptable changes in the subject-matter of the contract (below §II.C.ii)—particularly because of the ability of tenderers to alter significantly the terms of their offers during the auction phase—and, consequently, article 54(8) of Directive 2004/18 emphasised that contracting authorities may not use electronic auctions 'to change the subject-matter of the contract, as put up for tender in the published contract notice and defined in the specification'. This restriction is now suppressed in the text of Directive 2014/24, but the limitation seems to remain in place in view of the rules on irregular, unacceptable and unsuitable tenders (art 35(5) Dir 2014/24). In this regard, general restrictions on the need to prevent material changes in the original specifications of the (re-)tendered contract will apply (below §II.B.ix)[427]—particularly in framework agreements and dynamic purchasing systems.

Of more interest for the purposes of this study, it is also important to stress that article 54(8) of Directive 2004/18 also seemed to have been drafted in the light of the potentially pro-collusive features of electronic auctions (above chapter two), which can increase the likelihood of distortions of competition.[428] In this regard, article 54(8) specifies and strengthens the applicability of the principle of competition in the conduct of electronic auctions, by restricting the ability of contracting authorities to 'use them in such a way as to prevent, restrict or distort competition'. Once again, this specific requirement has been suppressed in the text of article 35 of Directive 2014/24, but it is submitted that it remains in place as an implicit requirement derived from the principle of competition in article 18 of the same directive. Therefore, contracting authorities should be particularly careful in the design of the specific rules applicable to the electronic auction, so as to prevent instances of collusion amongst tenderers—particularly, by restricting the information disclosed, which cannot include the identities of the bidders in any circumstances (ex art 35(7) Dir 2014/24). The same level of care should be put in ensuring equality of opportunity for all tenderers to place bids in each of the eventual rounds or phases of the electronic auction (so as not to distort competition *within* the auction), subject to rules restricting the number of tenderers that can advance from one phase to the next—which must be clearly specified in the tender documents and implemented in a transparent manner by the contracting authority. A final consideration regards the decisions made

[427] In general, a restrictive approach towards changes of specifications and other substantial or basic elements of the calls for tenders is required in order to prevent undue distortions of competition. *Contra*, see Arrowsmith (n 28) 947–49. For discussion on the issue of changes during tendering procedures, see M Bowsher, 'EC Procurement Law and Change during the Tender of the Contract' (2003) 20 *International Construction Law Review* 154.

[428] Regarding the competition analysis of electronic auctions, see C Kennedy-Loest and R Kelly, 'The EC Competition Law Rules and Electronic Reverse Auctions: A Case for Concern?' (2003) 12 *Public Procurement Law Review* 27; and, in more general terms, regarding electronic markets, PA Trepte, 'Electronic Procurement Marketplaces: The Competition Law Implications' (2001) 10 *Public Procurement Law Review* 260.

as to the electronic equipment used and the arrangements and technical specifications for connection (Annex VI(f) Dir 2014/24)—which, in order to prevent unnecessary restrictions of competition, should aim at choosing widely spread and easily accessible technologies, so as not to restrict the participation of less technologically advanced tenderers or to advantage unduly one or several tenderers by reason of their communications technology (which is unrelated to the subject-matter of the contract).

xxiii. Electronic Catalogues

Electronic catalogues are another novelty that Directive 2014/24 has introduced in order to boost the development of eProcurement or, at least, to provide minimum guidelines concerning this already used technique.[429] It is important to stress that the use of electronic catalogues does not imply a different type of procedure, but rather 'a format for the presentation and organisation of information in a manner that is common to all the participating bidders and which lends itself to electronic treatment' (rec (68) Dir 2014/24). It is also important to stress that, functionally, electronic catalogues are intended for use in relation to framework agreements for dynamic purchasing systems. The rules in article 36 of Directive 2014/24 are fundamentally oriented towards the transparency requirements linked to the use of electronic catalogues (art 36(3) Dir 2014/24) or their technical features, with a clear stress on the obligation of tenderers to adapt their 'general' electronic catalogues to the specific requirements of the contracting authority (art 36(2) Dir 2014/24).[430] They also specify clear rules governing the reopening of (mini-)competitions in framework agreements and dynamic purchasing systems and, in particular, rules on the specific moment when the information available in the electronic catalogues will be frozen and used for the purposes of the award of a given contract (arts 36(4) to 36(6) Dir 2014/24). Therefore, they do not alter in a material way the competition risks of the procedures in which they are used (and, particularly in framework agreements and dynamic purchasing systems, above §II.A.xx and §II.A.xxi).

Indeed, the use of electronic catalogues per se does not seem to create significant scope for distortions of competition, other than the eventual imposition of the use of exceedingly demanding or non-compatible IT solutions. However, that risk should be excluded

[429] European Dynamics, *Report on Electronic Catalogues in Electronic Public Procurement* (2007), available at ec.europa.eu/internal_market/publicprocurement/docs/eprocurement/feasibility/ecat-vol-2_en.pdf.

[430] Recital (68) Dir 2014/24, indeed stresses that 'the use of electronic catalogues for the presentation of tenders should not entail the possibility of economic operators limiting themselves to the transmission of their general catalogue'. However, there are other concerns linked to the need to standardise electronic catalogues in order to avoid imposing an excessive administrative burden on tenderers: '[I]n order to participate in a procurement procedure in which use of electronic catalogues … is permitted or required, economic operators would, in the absence of standardisation, be required to customise their own catalogues to each procurement procedure, which would entail providing very similar information in different formats depending on the specifications of the contracting authority concerned. Standardising the catalogue formats would thus improve the level of interoperability, enhance efficiency and would also reduce the effort required of economic operators' (rec (55) Dir 2014/24). This is an area where, indeed, standardisation would alleviate participation costs and would reduce barriers to access the relevant procurement procedures, given reluctance as investment in eCatalogues is concerned, see C McCue and AV Roman, 'E-Procurement: Myth or Reality?' (2012) 2 *Journal of Public Procurement* 212–38; M Johnson, 'Supply-Side Barriers to e-Business Technology in the Healthcare Sector' (2014) 7(3) *International Journal of Economics and Business Research* 275–304; and M Rahim and S Kurnia, *Understanding E-Procurement System Benefits Using Organisational Adoption Motivation Lens: A Case Study* (PACIS 2014 Proceedings, Paper 80), available at aisel.aisnet.org/pacis2014/80.

on the basis of the requirement that 'electronic catalogues shall comply with the requirements for electronic communication tools as well as with any additional requirements set by the contracting authority in accordance with article 22' (art 36(2) *in fine*)—which expressly requires that tools and devices 'used for communicating by electronic means, as well as their technical characteristics, shall be non-discriminatory, generally available and interoperable with the ICT products in general use and *shall not restrict economic operators' access to the procurement procedure*' (emphasis added). Consequently, from a competition perspective, the use of electronic catalogues *as such* does not require any further consideration.

B. Assessment of Unnecessary Restrictions in the Evaluation of Bids and Award of the Contract

Independently from the potential restrictions from accessing the procurement process and the specific decisions made by contracting authorities as regards the multiple criteria already analysed—and even if the procurement process has been designed in an open and pro-competitive way, contracting authorities continue to enjoy a relatively wide degree of discretion in subsequent phases of tendering procedures and, in the exercise of this discretion, can still generate substantial pro- or anti-competitive effects. In general terms, it will be argued that the proper assessment of the bids submitted by tenderers and the making of decisions regarding contract award seem to be favoured by the adoption of a neutral and possibilistic approach on the part of the contracting authority—since this is a phase where, probably, equality of treatment and competition concerns need to be taken into special consideration by contracting authorities, and where conflicts of interest need to be carefully avoided (§II.B.i). This will be the case particularly as regards specific aspects of the evaluation of bids and the award of the tendered contracts that seem to create room for the adoption of decisions with potentially anti-competitive effects, such as: the appraisal of the effects of submission of bids by advantaged parties, such as entities previously involved in the design of the tender (or, put otherwise, as regards the involvement of project consultants, §II.B.ii); the selection and application of the criteria for the award of the tendered contracts (§II.B.iii); the treatment granted to non-fully compliant bids and the related issue of the treatment of variants (§II.B.iv); the treatment of abnormally low tenders (§II.B.v); the imposition of awarding constraints (§II.B.vi); the ability to avoid path dependence (§II.B.vii) and, more specifically, the treatment granted to switching costs (§II.B.viii); the conduct of (re)negotiations before or immediately after contract award (§II.B.ix); or decisions regarding the cancellation of tendering procedures following the evaluation stage (§II.B.x). This section will cover these issues in turn.

i. In General, the Adoption of a Neutral and Possibilistic Approach to Bid Evaluation and Contract Award

As a preliminary issue with potential ramifications regarding all the decisions to be adopted at the stage of evaluation of the tenders and award of the contract—although, as mentioned previously, it is also relevant in various previous phases related inter alia to the qualitative selection of tenderers—in my view, contracting authorities are under

an obligation to adopt an approach to the development of these tasks that is both neutral and possibilistic. The existence of a duty of *neutrality or 'impartiality'* of procurement procedures—and, implicitly, of contracting authorities—as a specification of the principles of equal treatment, of the ensuing transparency obligation, and of the principle of competition is a clear requirement of the system envisaged in the directives,[431] and has been hinted at in the EU case law by requiring that 'the impartiality of procurement procedures' is ensured.[432]

The existence of such a neutrality requirement is fundamental, and the EU judicature has consistently stressed the obligation of contracting authorities to guarantee *equality of opportunity* of tenderers at each and every stage of the tendering procedure.[433] Importantly, it should be stressed that

> Under the principle of equal treatment as between tenderers, *the aim of which is to promote the development of healthy and effective competition between undertakings* taking part in a public procurement procedure, all tenderers must be afforded equality of opportunity when formulating their tenders, which therefore implies that the tenders of all competitors must be subject to the same conditions.[434]

Moreover, this ultimately rests on the clear position that a system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators.[435]

In this regard, it has been emphasised that contracting authorities are under a particular duty to avoid conflicts of interest[436] with the result that, after the discovery of such a conflict of interests between a member of the evaluation committee and one of the tenderers, the contracting authority must act with due diligence and on the basis of all the relevant information when formulating and adopting its decision on the outcome of the procedure for the award of the tender at issue in order to comply with the basic obligation of ensuring equality of opportunity.[437] This might require different reactions from the contracting authority, depending on the circumstances of the case, but should always be oriented towards preventing instances of discrimination—ie, not favouring, or discriminating against, a tenderer as a result of the bias of the member of the evaluation committee.[438] Therefore, there should be no doubt as to the neutrality requirements in

[431] In this regard, it should be stressed that the principles of non-discrimination and competition present close links; see above chapter five §IV.A, with references to the relevant case law.

[432] Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745 62. See also Prieβ (n 172) 156.

[433] See: Case C-496/99 P *Succhi di Frutta* [2004] ECR I-3801 108. See also Case T-406/06 *Evropaïki Dynamiki (CITL)* [2008] ECR II-247 83; Joined Cases T-376/05 and T-383/05 *TEA–CEGOS* [2006] ECR II-205 76; Case T-160/03 *AFCon Management Consultants* [2005] ECR II-981 75; and Case T-145/98 *ADT Projekt* [2000] ECR II-387 164.

[434] Case T-345/03 *Evropaïki Dynamiki v Commission (CORDIS)* [2008] ECR II-341 143 (emphasis added). See also Case T-86/09 *Evropaïki Dynamiki v Commission* [2011] ECR II-309 61.

[435] Case C-202/88 *France v Commission* [1991] ECR I-1223 51; Case C-462/99 *Connect Austria* [2003] ECR I-5197 83; and Case T-250/05 *Evropaïki Dynamiki (OPOCE)* [2007] ECR II-85 46.

[436] As now emphasised in rec (16) Dir 2014/24: 'Contracting authorities should make use of all possible means at their disposal under national law in order to prevent distortions in public procurement procedures stemming from conflicts of interest. This could include procedures to identify, prevent and remedy conflicts of interests.'

[437] Case T-160/03 *AFCon Management Consultants* [2005] ECR II-981 75; and, by analogy, Case T-231/97 *New Europe Consulting* [1999] ECR II-2403 41. Recently, see Case T-297/05 *IPK International v Commission* [2011] ECR II-1859 122.

[438] For an overview of evaluating teams regulation and practice in the US—which focus on similar concerns—see SW Feldman, 'Agency Evaluators in Negotiated Acquisitions' (1991–92) 21 *Public Contract Law Journal*

the conduct of the evaluation of tenders and award of public contracts. This is now particularly clear in light of the provisions in article 24 of Directive 2014/24, which expressly requires that Member States ensure that contracting authorities take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators.[439] This measure is complemented by the new ground for exclusion of economic operators in conflict of interest (as discussed above §II.A.vii). Consequently, under the 2014 rules, contracting authorities are under a very clear mandate to detect, investigate and effectively tackle conflicts of interest.

As regards the adoption of a *'possibilistic' or anti-formalistic approach*—oriented towards maintaining the maximum possible degree of competition by avoiding the rejection of offers on the basis of too formal and/or automatic rejection criteria—it is important to underline that the relevant case law has already offered some guidance that points in this direction by stressing that 'the guarantees conferred by the European Union legal order in administrative proceedings include, in particular, the principle of good administration, involving the duty of the competent institution to examine *carefully and impartially* all the relevant aspects of the individual case'[440]—which, in the case of public procurement, should be interpreted as requiring contracting authorities to *exercise due care* in the evaluation of the bids submitted by tenderers.[441] To be sure, the obligation of contracting authorities to review the bids for possible mistakes and to contact tenderers to seek for *correction* is limited as a mandate of the principle of non-discrimination (below §II.B.ix); but the scope for *clarification* of the tenders and for the establishment of rules allowing for a flexible treatment of formally non-fully compliant bids (on this, below §II.B.iv), support the adoption of a possibilistic approach towards the evaluation of bids as a specification or particularisation of the duty of due care or diligent administration that is required of contracting authorities.

In this regard, as reasoned by EU case law, the evaluating team is under an obligation to conduct the revision of the bids in accordance with the principle of good administration and is, consequently, under an obligation to exercise the power to ask for additional information in circumstances where the clarification of a tender is clearly both practically possible and necessary, and as long as the exercise of that duty to seek clarification is in accordance with the principle of equal treatment.[442] It is submitted that this means that the evaluating team is to adopt an anti-formalistic approach that renders the effective appraisal of the tenders possible—regardless of minor deficiencies, ambiguities or apparent mistakes. Indeed, as stressed by the jurisprudence, in cases where the terms of

279; and DI Gordon, 'Organizational Conflict of Interest: A Growing Integrity Challenge' (2005–06) 35 *Public Contract Law Journal* 25.

[439] Arrowsmith (n 28) 1295–96. Generally, see P Lascoumes, 'Condemning Corruption and Tolerating Conflicts of Interest' in JB Auby, E Breen and T Perroud (eds), *Corruption and Conflicts of Interest: A Comparative Law Approach*, Studies in Comparative Law and Legal Culture (Cheltenham, Edgar Elgar, 2014) 67–84. See also DI Gordon and G Racca, 'Integrity Challenges in the EU and U.S. Procurement Systems' in Racca and Yukins (n 153) 117–46.

[440] Case T-236/09 *Evropaïki Dynamiki v Commission* [2012] pub electr EU:T:2012:127 45 (emphasis added); and Joined Cases T-376/05 and T-383/05 *TEA–CEGOS* [2006] ECR II-205 76.

[441] Ibid.

[442] See: Case T-211/02 *Tideland Signal* [2002] ECR II-3781 37–38, and cited case law. See also C-599/10 *Slovensko* [2011] ECR I-10873 and Case C-336/12 *Manova* [2013] pub electr EU:C:2013:647.

a tender themselves and the surrounding circumstances known to the authority indicate that the ambiguity probably has a simple explanation and can be easily resolved, then, in principle, it is contrary to the requirements of good administration for an evaluation committee to reject the tender without exercising its power to seek clarification. A decision to reject a tender in such circumstances is, consequently, liable to be vitiated by a manifest error of assessment on the part of the institution in the exercise of that power,[443] and could result in an unnecessary restriction of competition. In that regard, it should be taken into consideration that

> it is also essential, in the interests of legal certainty, that the contracting authority should be able to ascertain precisely what a tender offer means and, in particular, whether it complies with the conditions set out in the specifications. Thus, where a tender is ambiguous and it is not possible for the contracting authority to establish, swiftly and efficiently, what it actually means, that authority has no choice but to reject that tender.[444]

Therefore, in a nutshell, contracting authorities should ensure that the evaluation of bids leading to the award of the contract is based on the substance of the tenders, adopting a possibilistic or anti-formalist approach that excludes purely formal decisions that restrict competition unnecessarily; subject, always, to guaranteeing compliance with the principle of equal treatment. In that vein, it is important to stress that the duty of good administration does not go so far as to require the evaluation team to seek clarification in every case where a tender is ambiguously drafted.[445] Particularly as regards calculations and other possible non-obvious clerical mistakes, the duty of good administration is considerably more restricted and the evaluation team's diligence only requires that clarification be sought in the face of *obvious* errors that should have been detected by the purchasing agency when assessing the bid.[446] This is so particularly because the presence of non-obvious errors and their subsequent amendment or correction might result in breaches of the principle of equal treatment.[447] Therefore, as general criteria, it seems that the relevant case law intends to favour the possibilistic approach hereby advanced, subject to two restrictions: (i) that it does not breach the principle of equal treatment (ie, that it does not jeopardise the neutrality of the evaluation of tenders), and (ii) that it does not require the contracting authority to develop special efforts to identify errors or insufficiencies in the tenders that do not arise from a diligent and regular evaluation.

Therefore, it is submitted that contracting authorities should develop the activities of evaluation of bids and award of the contract on the basis of such a neutral and possibilistic approach—which must be aimed at trying not to restrict competition on the basis of considerations that are too formal (ie, effectively to appraise which is the tender that actually or in substance offers the best conditions, regardless of minor formal defects or

[443] Case T-211/02 *Tideland Signal* [2002] ECR II-3781 37–38; Case T-63/06 *Evropaïki Dynamiki v OEDT* [2010] ECR II-177 98; Case T-195/08 *Antwerpse Bouwwerken v Commission* [2009] ECR II-4439 56; Case T-554/08 *Evropaïki Dynamiki v Commission* [2012] pub electr EU:T:2012:194 56; and Case T-553/11 *European Dynamics Luxembourg v ECB* [2014] pub electr EU:T:2014:275 300.

[444] Case T-211/02 *Tideland Signal* [2002] ECR II-3781 34; Case T-63/06 *Evropaïki Dynamiki v OEDT* [2010] ECR II-177 98; and Case T-8/09 *Dredging International and Ondernemingen Jan de Nul v EMSA* [2011] ECR II-6123 71.

[445] See: Case T-211/02 *Tideland Signal* [2002] ECR II-3781 37 *ab initio*.

[446] See: Case T-495/04 *Belfass* [2008] ECR II-781 65–71.

[447] Case T-19/95 *Adia Interim* [1996] ECR II-321 43–49. Similarly, Case T-169/00 *Esedra* [2002] ECR II-609 49; and Case T-195/05 *Deloitte Business Advisory* [2007] ECR II-871 102.

non-fulfilment of immaterial requirements) and, at the same time, ensuring compliance with the principle of non-discrimination and the ensuing transparency obligation.

ii. Appraisal of Bids Submitted by Advantaged Parties: The Issue of Involvement of Project Consultants

One issue that could generate a major (negative) impact on competition relates to the acceptability and the appraisal of bids submitted by advantaged parties and, particularly, the issue of the participation as bidders of consultants previously involved in the design of the tender process[448]—especially as regards its technical specifications, the method for the evaluation of bids, and the award criteria.[449] Such prior involvement is now expressly authorised and regulated under articles 40 and 41 of Directive 2014/24. Indeed, under the provisions of article 40, before launching a procurement procedure, contracting authorities may conduct market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements. For this purpose, they can seek or accept advice from independent experts or authorities or from market participants. That advice may be used in the planning and conduct of the procurement procedure, provided that 'such advice *does not have the effect of distorting competition* and does not result in a violation of the principles of non-discrimination and transparency' (emphasis added).

Article 41, then, regulates the procedure for the contracting authority to assess the existence of such potential distortions of competition. To that effect, where an undertaking has advised the contracting authority or has otherwise been involved in the preparation of the procurement procedure, the contracting authority 'shall take appropriate measures to ensure that competition is not distorted by its participation in the tender'. It is irrelevant that the prior involvement has taken place as part of the preliminary market consultations foreseen in article 40 of Directive 2014/24 or otherwise. Moreover, the special duty to avoid distortions of competition arises not only where the tenderer or candidate has directly advised the authority or been involved in the design of the tender, but also when the participating entity is related to it.[450] On the basis of ensuring that the potential conflict of interest is transparent (see below) and in order to ensure equality of opportunity in the disclosure of all relevant documentation (see above §II.A.iii) and to neutralise any

[448] On this issue, see S Treumer, 'Technical Dialogue Prior to Submission of Tenders and the Principle of Equal Treatment to Tenderers' (1999) 8 *Public Procurement Law Review* 147; id, 'Technical Dialogue and the Principle of Equal Treatment—Dealing with Conflicts of Interest after *Fabricom*' (2007) 16 *Public Procurement Law Review* 99; and id (n 180) 73–75. See also Trepte (n 23) 292–96; and Bovis (n 23) 404–10. On the related issue of the holding of pre-tender (technical) discussions with potential tenderers (other than consultants), see S Arrowsmith, 'The Problem of Discussions with Tenderers under the EC Procurement Directives: the Current Law and the Case for Reform' (1998) 7 *Public Procurement Law Review* 65; and id (n 28) 485–88.

[449] See: Prieβ (n 172) 164–70. The same worries were shared by the ECJ in Joined Cases C-21/03 and C-34/03 *Fabricom* [2005] ECR I-1559 29–30. Related to such concerns, and to an implied time advantage, a certain sort of 'engagement' between the contracting authority and the firm involved in the preparatory work has also been identified; see Treumer (n 448, 2007) 100. On the difficult equilibrium between conducting meaningful preliminary (technical) discussions and maintaining equality in the procurement process (with reference to the US), see DA Femino, Jr, 'Presolicitation Discussions and the "Unfair" Competitive Advantage' (1990) *Army Lawyer* 11.

[450] In this regard, the criteria used to determine whether undertakings are related for the purposes of competition law enforcement will be relevant. See art 5(4) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1.

time advantage, 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 Directive relies on the use of these neutralisation measures as a first solution and reserves the exclusion of the advantaged tender to relatively extreme situations.

This issue is very closely related to the grounds for exclusion of potential tenderers (above §II.A.v), where it is now further dealt with under a relatively general clause excluding participation by operators in *conflict of interest* or otherwise advantaged in relation to the specific tender due to their prior involvement. [451] Improving the rules under article 45 of Directive 2004/18,[452] which did not include such elements amongst the criteria to be taken into account to appraise the personal situation of the candidate or tenderer at the stage of qualitative selection,[453] article 57(4)(f) of Directive 2014/24 establishes a discretionary exclusion ground applicable 'where a distortion of competition from the prior involvement of the economic operators in the preparation of the procurement procedure … cannot be remedied by other, less intrusive measures'. In my view—given the existing case law, which will soon be discussed—rather than at selection stage, it might be more appropriate to deal with conflicts of interest at the stage of the evaluation of bids and, in any case, a substantive and detailed analysis needs to be undertaken by the contracting authority.

When this issue was not expressly addressed by the EU public procurement directives, the EU judicature offered guidance that remains valuable in order to assess the competitive position of tenderers previously involved in the design of the tender. According to the relevant case law, EU public procurement directives

> preclude a rule … whereby a person who has been instructed to carry out research, experiments, studies or development in connection with public works, supplies or services is not permitted to apply to participate in or to submit a tender for those works, supplies or services and where that person is not given the opportunity to prove that, in the circumstances of the case, the experience which he has acquired *was not capable of distorting competition*.[454]

[451] It should be stressed that under the relevant case law, 'the fact that a tenderer, even though he has no intention of doing so, is capable of influencing the conditions of a call for tenders in a manner favourable to himself constitutes a situation of a conflict of interests. In that regard, the conflict of interests constitutes a breach of the equal treatment of candidates and of the equal opportunities for tenderers', Case T-415/10 *Nexans France v Joint undertaking Fusion for Energy* [2013] pub electr EU:T:2013:141 114; and Case T-4/13 *Communicaid Group v Commission* [2014] pub electr EU:T:2014:437 53; both with reference to Joined Cases C-21/03 and C-34/03 *Fabricom* [2005] ECR I-1559 29 and 30, and Case T-160/03 *AFCon Management Consultants* [2005] ECR II-981 74.

[452] The lack of treatment of the issue of conflicts of interest in the previous generation of directives had been lamented by Prieβ (n 172) 155. The solution now adopted in art 57(4)(f) Dir 2014/24 had been foreseen in the first edition of this book. See Sánchez Graells (n 172) 306.

[453] Opinion of AG Léger in Joined Cases C-21/03 and C-34/03 *Fabricom* 24 and 32. Indeed, the legislative references to this issue were limited to rec (8) Dir 2004/18 and rec (15) Dir 2004/17, whose general wording indicates that 'before launching a procedure for the award of a contract, contracting authorities may, using a technical dialogue, seek or accept advice which may be used in the preparation of the specifications provided, however, that such advice does not have the effect of precluding competition'. This wording is misleading, since it suggests a more permissible approach than the state of law warrants; see Treumer (n 448, 2007) 102.

[454] Joined Cases C-21/03 and C-34/03 *Fabricom* [2005] ECR I-1559 36 (emphasis added). The finding of the ECJ disregarded the opinion of the Advocate General, who considered that automatic exclusion of project consultants was proportionate to the need to ensure effective competition and did not breach the principle of equal treatment; see Opinion of AG Léger in Joined Cases C-21/03 and C-34/03 *Fabricom* 40–44. The finding of

This has now been codified in article 41 of Directive 2014/24, which is in line with article 57(4)(f) and foresees that the candidate or tenderer concerned 'shall only be excluded from the procedure where there are no other means to ensure compliance with the duty to observe the principle of equal treatment'. Moreover, and similarly to what happens in relation to candidates that have submitted apparently abnormally low tenders (below §II.B.v), prior to any such exclusion, advantaged candidates or tenderers shall be given the opportunity to prove that their involvement in preparing the procurement procedure is not capable of distorting competition. Therefore, national legislation or contracting authorities' decisions cannot impose the automatic exclusion of apparently advantaged parties and, more specifically, of project consultants—but must provide such candidates with the opportunity to prove that competition has not been distorted *as a result of* their previous involvement in the project and, particularly, by the experience thereby acquired.[455]

In this regard, it seems appropriate to require contracting authorities to pay special attention when appraising bids submitted by potentially advantaged parties and, particularly, by incumbent operators (on this, see below §II.B.vii) or by consultants previously involved in project design—be it directly or indirectly, through parties connected to those undertakings. Such an approach would not run against the principle of non-discrimination since, as also expressly found by the ECJ, a person who has carried out certain preparatory work

> is not necessarily in the same situation as regards participation in the procedure for the award of that contract as a person who has not carried out such works [and, consequently] it cannot be maintained that the principle of equal treatment requires that that person be treated in the same way as any other tenderer.[456]

Two options seem to be compatible with the finding of the ECJ. On the one hand, the analysis of the (in)existence of a distortion of competition can be conducted in the abstract, focusing on formal criteria relating to the garden-fencing of the information acquired during the preparatory works, the establishment of so-called Chinese walls, or other criteria regarding the control or decisive influence that might exist between the seemingly advantaged party and any other party with which it is connected.[457] This analysis, however, seems to give scope to rather limited inquiries and to give leeway to potentially substantial distortions of competition—especially because it 'is virtually impossible to envisage any means of ensuring that the information and experience acquired during the preparatory stage will not operate to the advantage of the person concerned when he submits a tender'.[458]

the ECJ has been endorsed on the basis of its pragmatic and balanced approach; see Treumer (n 448, 2007) 104 and 115. Nonetheless, it may have resulted in a more complicated legal test with a rather uncertain outcome, with negative implications that have also been acknowledged (ibid, 115).

[455] Rather obviously, the practical implications of such an opportunity to rebut an implicit presumption of distortion of competition will be largely determined by the way in which the criterion of 'distortion of competition' is shaped and applied. In that regard, a strict and non-formalist approach should be undertaken. *cf* Prieβ (n 172) 166. In order to avoid these limitations, a stricter rule of automatic exclusion could be preferable—such as the one existing in the US, where the companies that are involved in the preparation of the tender are prevented from supplying goods or rendering those services for a *reasonable* period of time; see Shnitzer (n 293) 4–17.

[456] Joined Cases C-21/03 and C-34/03 *Fabricom* [2005] ECR I-1559 28 and 31. See also Treumer (n 448, 2007) 100 and 106.

[457] On the limited weight that should be given to such formal measures, see Treumer (n 448, 1999) 151.

[458] Opinion of AG Léger in Joined Cases C-21/03 and C-34/03 *Fabricom* 42.

On the other hand, it is submitted that a more in-depth control of the potential use of information, time or experience advantages at the tender evaluation stage might yield superior—albeit still limited, results.[459] The control should be based on an analysis of the terms of the tender submitted by the apparently advantaged party against several specific and cumulative criteria. First, this should be against the information made public or disclosed to the rest of the candidates. If there are aspects of the tender that could not have been developed on the basis of that information by a diligent and well-informed average tenderer knowledgeable in that field (admittedly, an open standard not exempt from interpretative difficulties), then, sufficient indicia of an advantage should be found (and, consequently, the contracting authority should reject the tender). A second criterion, which is, however, more difficult to appraise, should focus on the time advantage potentially enjoyed by the apparently advantaged party,[460] and so the contracting authority should determine whether the tender submitted could have been developed, to the same level of detail and development, by a similarly average tenderer that had received the information when it was made available by the contracting authority. Nonetheless, admittedly, such a test is very hard to implement to a satisfying degree of predictability and objectiveness—and, consequently, it seems preferable not to pursue this kind of analysis except in very exceptional cases where (probably due to specially tight timelines for the development and submission of the offer) it is evident that the apparently advantaged tenderer must have had significantly more time for the preparation of its tender (eg, as compared to the level of development and detail of the rest of the offers received). Third, the tender of the apparently advantaged operator should be compared against the degree of compliance of the rest of the tenderers with the specifications and their evaluation against the award criteria. In this regard, if the tender submitted by the apparently advantaged party is one amongst a few (not to mention if it is the only one) that complies with the technical specifications and/or obtains significantly better scores under most or all of the award criteria applicable in the tender, once again, it is important to stress that sufficient indicia of an advantage—or of the previous 'steering' of the preparation of the public contract in a favourable direction—should be found and its tender should be rejected.[461] However, this last criterion should be applied with special care, so as to avoid unduly handicapping more efficient or better prepared apparently advantaged tenderers.

In both cases, rejection of the tender following the described indicia of advantage on the part of the apparently advantaged tenderer seems justified by the almost impossible proof of alternative explanations that would neutralise such strong indications of an effective distortion of competition by that tenderer. Nonetheless, for the sake of promoting procedural rights, apparently advantaged parties should be given the opportunity to provide reasons and alternative explanations to the indicia found—albeit, in this case, a very stringent analysis should be applied by the contracting authorities in view of the potential jeopardy of undistorted competition.[462]

To be sure, this approach rests on the *transparency* of the conflict of interest and can only tackle instances of submission of offers directly by the apparently advantaged tenderer,

[459] The difficulties involved in proving an actual advantage have been stressed by Treumer (n 448, 2007) 109.

[460] Treumer (n 448, 2007) 100 fn 6 and 110, stressing the importance of such a time advantage, generally overlooked in legal theory and legal practice.

[461] Along the same lines, see Treumer (n 448, 1999) 154.

[462] Similarly, see Prieβ (n 172) 169–70; Trepte (n 23) 296; and Treumer (n 448, 2007) 106–07.

or indirectly by any other party that discloses the participation or advice given by the potentially advantaged party. In other cases—where the participation of the potentially advantaged party is not disclosed to the contracting authority—the proposed solution will be largely inoperative, but will constitute a potential case of fraud or misrepresentation that should be controlled by other means.

As regards the *timing* for the control of actual or effective advantages that have benefitted the apparently advantaged operator, it is relevant to note that the ECJ had precluded a contracting authority from excluding a tenderer at any point along the tender process 'until the end of the procedure for the examination of tenders', on the grounds that doing so would restrict the effectiveness of the remedies available to the apparently advantaged operator now excluded from the tender.[463] However, it is argued here that a proper reading of the finding of the ECJ did not preclude the analysis at the stage of tender evaluation because the reasoning applied by the Court is clearly dependent on the assumption that the contracting 'authority has before it all the information which it needs in order to take that decision' and, therefore, should not delay its decision unduly until the procedure has reached a very advanced stage and, therefore, deprives the undertaking concerned of the opportunity to rely on the EU rules on remedies.[464] Therefore if, as hereby held, the proper test depends on the analysis of the tender submitted by the apparently advantaged operator—because, before that, the contracting authority does not have the *relevant* information to reach a meaningful conclusion on the actual or effective existence of an advantage—the abovementioned case law should not be considered an impediment.[465] Moreover, in view of the specific rules now introduced in article 57(5) of Directive 2014/24—which expressly indicate that exclusion based on discretionary grounds can take place 'at any time during the procedure' and based on facts or 'acts committed or omitted either before or during the procedure'—there should be no restriction whatsoever to the application of the ground for the exclusion of the tenderer (and implicitly, the rejection of its tender) on the basis of the advantage derived from its prior involvement at any point of the procedure and, particularly, at the stage of bid assessment.

To sum up, as a mandate of the principles of non-discrimination and competition, particularly as specified in articles 41 and 57(4)(f) of Directive 2014/24, contracting authorities are under a special responsibility to assess tenders submitted by apparently advantaged tenderers—and, particularly, by project consultants—in order to ensure that competition has not been altered. Such an analysis seems to be better performed at the tender evaluation stage and according to non-formalistic criteria, mainly based on a comparison of the tender submitted by the apparently advantaged tenderer against the relevant tender documents and against the rest of the tenders received from tenderers not involved in the preparatory work.

[463] Joined Cases C-21/03 and C-34/03 *Fabricom* [2005] ECR I-1559 41–45.

[464] Ibid.

[465] Moreover, even if the argument hereby advanced was deemed irrelevant (which, in my view, it is not), alternative readings for the softening or accommodation of this finding in *Fabricom* through recourse to an extension of the procedures to allow for the effectiveness of the ensuing remedies have been advanced in a convincing manner; see Treumer (n 448, 2007) 105–06.

iii. Selection and Application of Award Criteria

Regulation of the award criteria applicable to public procurement covered by the EU directives and, particularly, the need to adjust them to the relevant case law of the EU judicature was one of the main reasons for the recasting of previous directives through the approval of Directive 2004/18 (rec (1)) and has once more played a prominent role in the further amendment of the EU public procurement rules by means of Directive 2014/24 (see recs (89) to (94)).[466] The importance of this element of the public procurement system can hardly be overstated,[467] since (i) it 'sets the rules of the game' and largely determines the bidding strategies and behaviour of tenderers;[468] (ii) it constitutes the fundamental rule regulating (and limiting) the discretion of contracting authorities in the award of contracts;[469] (iii) it sets the criteria that should guide the exercise of such discretion (particularly in relatively complex cases where strict recourse to cost/price or other straightforward quantitative criteria might be insufficient to reach meaningful procurement decisions);[470] and (iv) precisely as a result of the relatively ample discretion that they imply, it is submitted that award criteria are one of the elements more prone to abuse by contracting authorities,[471] and more prone to generating potential distortions of competition. Their detailed analysis, therefore, seems to be of the utmost importance.[472]

The Particular Relevance of Competition Considerations as regards the Selection and Application of Award Criteria. Ad liminem, in my view, it should be borne in mind that competition considerations are particularly relevant and specifically entrenched into the rules regulating award criteria in public procurement. The importance of competition considerations in the award of the contract has been stressed in the directives, as a specification of the more general principle of competition. In this regard, recital (90) of Directive 2014/24 emphasises that 'contracts should [must] be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment, with a view to ensuring an objective comparison of the relative value of the tenders in order to determine, *in conditions of effective competition*, which tender is the most economically advantageous tender' (emphasis added). Therefore, it seems clear that, as a point of departure, the selection and the application of award criteria—other than being transparent and non-discriminatory—must guarantee conditions of effective

[466] For an overview of the novelties in Dir 2014/24, see P Bordalo Faustino, 'Award Criteria in the New EU Directive on Public Procurement' (2014) 23 *Public Procurement Law Review* 124–33.

[467] In general, on their importance and the variety of systems of award criteria across different jurisdictions, see Arrowsmith et al (n 50) 673–741; Arrowsmith (n 122) 488–548; and Trepte (n 23) 462–80.

[468] Carpineti et al (n 214) 30. In this regard, concern has been expressed about the strategic implications of using too detailed award criteria and scoring rules, since they could generate collusion amongst tenderers and, consequently, might require a larger degree of discretion on the part of the public buyer in bid evaluation, as a means of reducing collusion in public procurement; see Kovacic et al (n 51) 407. However, these concerns seem to remain largely theoretical. On the effects of predictable scoring rules on collusion—as a way to increase the transparency of the process and, hence, the monitoring capabilities of an eventual cartel—F Dini et al, 'Scoring Rules' in Dimitri et al (n 51) 293, 302–04.

[469] In this regard, the use of overly detailed evaluation schedules has been criticised as unnecessarily limiting the ability of the public buyer to make the best selection of a vendor; see Kelman (n 226) 56. For a general discussion on the interaction between this regulation of purchasing discretion and concerns related to the prevention of corruption, see P Bordalo Faustino, 'Regulating Discretion in Public Procurement: An Anti-Corruption Tool?' in Racca and Yukins (n 153) 147–51.

[470] See: Carpineti et al (n 214) 28.

[471] Bovis (n 55, 1997) 22 and (n 55, 2005–06) 69–71.

[472] See R Caranta, 'Award Criteria under EU Law (Old and New)' in Comba and Treumer (n 273) 21–38.

competition; or, put otherwise, that contracting authorities are bound to guarantee that competition is not prevented, restricted or distorted as a consequence of the chosen award criteria, the weight eventually assigned to each of them, or the way in which they are applied in a specific tender. It is in this light that the rules regulating the selection and application of award criteria should be interpreted.

General Requirements for the Selection of Award Criteria: Conditions Determining the Suitability of Award Criteria. The general rule established in article 67(1) of Directive 2014/24 determines that contracting authorities shall base the award of public contracts on the most economically advantageous tender (MEAT). According to article 67(2) of Directive 2014/24, the MEAT shall be identified on the basis of the price or cost, using a *cost-effectiveness approach*, such as life-cycle costing in accordance with article 68, and may include the *best price–quality ratio*, which shall be assessed on the basis of criteria, 'including qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question'.[473] Therefore, under Directive 2014/24, contracting authorities can opt between two award rules aimed at determining the MEAT, either the award to the offer with the best price-quality ratio (BPQR), or the most cost-effective (MCE) offer.[474] Although contracting authorities should (in principle and as a requirement of their duty of diligent administration) opt for the rule that better suits the specific circumstances of the tender—particularly as regards its object or subject-matter—contracting authorities are substantially free in their decision to opt for taking into consideration only price or cost elements,[475] or *also* other award criteria related to the subject-matter of the contract, in a global assessment of the offer with the best price-quality ratio.[476] However, it should be taken into account that Directive 2014/24 allows Member States to prohibit or restrict the use of price only or cost only to assess the most economically advantageous tender, where they deem this appropriate 'to encourage a greater quality orientation of public procurement' (rec (90) and art 67(2) *in fine* Dir 2014/24).

Where such prohibition or restriction does not apply, in the event of contracting authorities opting for the former criterion (ie, MCE offer), they can only take into consideration the prices offered by tenderers and other costs included in the applicable life cycle costing methodology, if any, which would include both costs imputed to environmental

[473] It is important to stress that the meaning of MEAT under Dir 2014/24 deviates from the use of that expression in Dir 2004/18, where contracting authorities could opt between two award rules, the award to the 'most economically advantageous tender' (MEAT), now tender with the best price-quality ration (BPQR), or the award to the 'lowest priced tender', now the most cost-effective tender. The explanation provided in rec (89) Dir 2014/24 indicates that 'The notion of award criteria is central to this Directive. It is therefore important that the relevant provisions be presented in as simple and streamlined a way as possible. This can be obtained by using the terminology "most economically advantageous tender" as the overriding concept, since all winning tenders should finally be chosen in accordance with what the individual contracting authority considers to be the economically best solution among those offered. In order to avoid confusion with the award criterion that is currently known as the "most economically advantageous tender" in Directives 2004/17/EC and 2004/18/EC, a different terminology should be used to cover that concept, the "best price-quality ratio". Consequently, it should be interpreted in accordance with the case-law relating to those Directives, except where there is a clearly materially different solution in this Directive.'.

[474] Arrowsmith (n 28) 737–39.

[475] According to rec (90), 'It should be set out explicitly that the most economically advantageous tender should be assessed on the basis of the best price-quality ratio, which should always include a price or cost element.'

[476] For discussion on the different treatment of the price factor that this flexibility generates, see M Rocha de Gouveia, 'The Price Factor in EC Public Tenders' (2001–02) 31 *Public Contract Law Journal* 679.

externalities linked to the product, service or works during its life cycle,[477] and costs borne by the contracting authority or other users such as costs relating to acquisition, costs of use, such as consumption of energy and other resources, maintenance costs, or end-of-life costs, such as collection and recycling costs (art 68(1) Dir 2014/24). Subject to the rules on the treatment of abnormally low tenders (below §II.B.v), the contract should then be awarded almost automatically to the most cost-efficient compliant tender.

On the other hand, if contracting authorities opt to award the contract to the offer with the best price–quality ratio (BPQR offer), they can take into consideration criteria such as

> (a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions; (b) organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or (c) after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion. (art 67(2) Dir 2014/24)

This list of criteria is not exhaustive. However, as the ECJ stressed regarding the immediate precendents of this rule, although it

> does not set out an exhaustive list of the criteria which may be chosen by the contracting authorities, and therefore leaves it open to the authorities awarding contracts to select the criteria on which they propose to base their award of the contract, *their choice is nevertheless limited to criteria aimed at identifying the tender which is economically the most advantageous*.[478]

Therefore, it will be particularly important to stress the need for award criteria (i) to be linked to the subject matter of the contract (ie, to be 'relevant'),[479] and (ii) to allow the contracting authority actually to determine which tender is economically the most advantageous (ie, to be 'enabling').

In this regard, the interpretative case law has been clear in restricting the use of certain types of criteria for the determination of the offer with the best price-quality ratio (and, ultimately, of the most economically advantageous offer)—which, although relevant in general terms, are not tender-specific criteria. In the first place, as already mentioned, criteria of economic and financial standing and of technical capability, and criteria that concern the tenderers' suitability to perform the contract in general terms do not have the status of award criteria—but must be considered qualitative selection criteria under the rules of the directives (above §II.A.vii). As stressed by the EU judicature, '"award criteria" do not include criteria that are not aimed at identifying the tender which is economically the most advantageous, but are instead essentially linked to the evaluation of the

[477] Provided the monetary value of such externalities can be determined and verified; such costs may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs. For discussion, see D Dragos and B Neamtu, 'Sustainable Public Procurement: Life-Cycle Costing in the New EU Directive Proposal' (2013) *European Procurement & Public Private Partnership Law Review* 19–30. See also O Perera, B Morton and T Perfrement, *Life Cycle Costing in Sustainable Public Procurement: A Question of Value* (IISD Paper, 2009), available at iisd.org/publications/life-cycle-costing-sustainable-public-procurement-question-value.

[478] Case C-532/06 *Lianakis* [2008] ECR I-251 29 (emphasis added); Case 31/87 *Beentjes* [1988] ECR 4635 19; Case C-19/00 *SIAC Construction* [2001] ECR I-7725 35–36; Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7213 54 and 59; and Case C-315/01 *GAT* [2003] ECR I-6351 63–64. See also Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527 37.

[479] See: Trepte (n 23) 468–72.

tenderers' ability to perform the contract in question'.[480] Therefore, 'a contracting authority is precluded … from taking into account as "award criteria" rather than as "qualitative selection criteria" the tenderers' experience, manpower and equipment, or their ability to perform the contract by the anticipated deadline'.[481] Hence, without doubt, the case law of the ECJ prior to the entry into effect of the 2014 rules prevented contracting authorities from using the past experience of the tenderer as an award criterion.[482]

However, it must be stressed that this has been the object of a significant reform in Directive 2014/24, given the specific introduction of a modified experience criterion that, according to article 67(2)(b), allows contracting authorities to determine the BPQR offer partially on the basis of the 'experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract'. In that way, Directive 2014/24 decouples the treatment of the general experience of the tenderer as a qualitative selection criterion (art 58(4), where the full-force of ECJ case law applies) from the assessment of more limited and specific aspects of experience evaluation clearly linked to the subject-matter of the contract, which allow for the specific experience of staff assigned to performing the contract to be taken into consideration at award stage, 'where the quality of the staff assigned can have a significant impact on the level of performance of the contract' (art 67(2)(b) Dir 2014/24, which restricts, specifies or modifies the ECJ position). The justification given by Directive 2014/24 for this change is that:

> Wherever the quality of the staff employed is *relevant to the level of performance of the contract*, contracting authorities should also be allowed to use as an award criterion the organisation, qualification and experience of the staff assigned to performing the contract in question, as this can affect the quality of contract performance and, as a result, the economic value of the tender. This might be the case, for example, in contracts for intellectual services such as consultancy or architectural services. Contracting authorities which make use of this possibility should ensure, by appropriate contractual means, that the staff assigned to contract performance effectively fulfil the specified quality standards and that such staff can only be replaced with the consent of the contracting authority which verifies that the replacement staff affords an equivalent level of quality. (rec (94), emphasis added)

In my view, all of this indicates that the use of staff (specific) experience at award stage will need to be assessed under strict proportionality terms (particularly as the 'significance'

[480] Case C-532/06 *Lianakis* [2008] ECR I-251 30.

[481] For a clear distinction between qualitative selection and award criteria, see Case C-532/06 *Lianakis* [2008] ECR I-251 32. In relation to this case, see T Kotsonis, 'The Nature of Award Criteria and the Subsequent Stipulation of Weightings and Sub-Criteria: *Lianakis v Dimos Alexandroupolis* (C-532/06)' (2008) 17 *Public Procurement Law Review* NA128; and S Treumer, 'The Distinction between Selection and Award Criteria in EC Public Procurement Law—A Rule without Exception' (2009) 18 *Public Procurement Law Review* 103, 110–11. For commentary on this judgment from the perspective of several Member States' practices, see the other contributions on the same issue of the *Public Procurement Law Review* (2009, no 18), and in particular K Krüger, 'Superiority in Experience and Skills May Distinguish a Better Tender Bid! Critical Reflections from Norway on the Lianakis Ruling' (2009) 18 *Public Procurement Law Review* 138–45.

[482] Case C-532/06 *Lianakis* [2008] ECR I-251 30 and 32; Case C-199/07 *Commission v Greece* [2009] I-10669 55–56: and after the approval of Dir 2014/24, but prior to the expiry of its transposition period, Case C-641/13 *Spain v Commission* (financial support for cuenca hidrográfica del Júcar) [2014] pub electr EU:C:2014:2264 33–41. For discussion, see M Orthmann, 'The Experience of the Bidder as Award Criterion in EU Public Procurement Law' (2014) 1 *Humboldt Forum Recht* 1ff. See also the critical considerations offered by Arrowsmith (n 28) 749–61.

of its impact on the level of performance of the contract is concerned), given that exceptions (art 67(2)(b)) to the general rules (art 58(4)) of Directive 2014/24 and the applicable interpretative case law need to be constructed strictly. Moreover, recourse to this sort of award criterion will still need to comply with general requirements and avoid distortions of competition such as first-comer advantages for incumbent contractors (see below §II.B.vii and §II.B.viii).

Indeed, it must be stressed that admissible award criteria must in any case be *tender-specific*,[483] or relate to the tender as such, not to the general qualities of the tenderer that have already (or should have) been analysed by the contracting authority in previous phases of the procedure. The EU judicature has been crystal clear in emphasising this limitation, by stressing that

> it is settled case law that the quality of tenders must be evaluated on the basis of the tenders themselves and not on that of the experience acquired by the tenderers with the contracting authority in connection with previous contracts or on the basis of the selection criteria (such as the technical standing of candidates) which were checked at the stage of selecting applications and which cannot be taken into account again for the purpose of comparing the tenders.[484]

Consequently, the award criteria must be relevant from a tender-specific standpoint.[485]

A second limitation can be found in the need for award criteria to enable the contracting authority to assess which is the most economically advantageous amongst the tenders received for a given contract. In this regard, it is important to underline that contracting authorities

> shall determine the economic and quality criteria which, taken as a whole, must make it possible to determine the most economically advantageous tender for the contracting authority. The determination of these criteria depends on the object of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the object of the contract, as defined in the technical specifications, and the value for money of each tender to be measured. [… Moreover] the criteria for the award of the contract should enable tenders to be compared and assessed objectively. (see rec (46) Dir 2004/18)

The case law of the EU judicature has provided additional specific guidance in this respect.[486] Along these lines, the ECJ has determined that, in order to be acceptable under the directives, award criteria must be aimed at identifying the offer with the best price-quality ratio (or, generally, the economically most advantageous offer) and must themselves be linked to the subject-matter of the contract. All of this has now been stressed in recital (92) of Directive 2014/24, which clearly states that:

[483] On this requirement, compliance with which is particularly difficult for social criteria, see H Pongérard Payet, 'Le critère social exprès d'attribution: Un cadeau en trompe-l'œil fait aux élus' (2006) 12 *Actualité juridique—Droit administratif* 635, 639–641.

[484] Case T-148/04 *TQ3 Travel Solutions* [2005] ECR II-2627 86. See also Case 31/87 *Beentjes* [1988] ECR 4635 15; and Case T-169/00 *Esedra* [2002] ECR II-609 158.

[485] A related, although distinct, issue is whether award criteria must be absolute (ie, refer to the tender in isolation) or can be relative (ie, can rank tenders or evaluate them by means of comparison). It can be argued that the first option is more desirable, since it provides bidders with greater certainty. Furthermore, it has been suggested that EU case law excludes relative award criteria; see TH Chen, 'An Economic Approach to Public Procurement' (2008) 8 *Journal of Public Procurement* 407.

[486] For discussion, particularly as regards the requirements applicable to social and environmental award criteria, Bovis (n 23) 179–84 and 263.

> When assessing the best price-quality ratio contracting authorities should determine the economic and qualitative *criteria linked to the subject-matter of the contract* that they will use for that purpose. Those criteria should thus allow for a comparative assessment of the level of performance offered by each tender in the light of the subject-matter of the contract, as defined in the technical specifications. In the context of the best price-quality ratio, a non-exhaustive list of possible award criteria which include environmental and social aspects is set out in this Directive. Contracting authorities *should be encouraged to choose award criteria that allow them to obtain high-quality works, supplies and services that are optimally suited to their needs*. (emphasis added).

Generally, this requirement is now consolidated in article 67(3) of Directive 2014/24, which provides further clarification and indicates that award criteria are linked to the subject-matter of the public contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved in the specific process of production, provision or trading of those works, supplies or services; or a specific process for another stage of their life cycle, 'even where such factors do not form part of their material substance'. These issues were discussed in recent ECJ case law, where it was clarified that 'there is no requirement that an award criterion relates to an intrinsic characteristic of a product, that is to say something which forms part of the material substance thereof'.[487] Consequently, the link to the subject matter of the contract or the tender specific nature of the award criteria allow for certain leeway as regards the inclusion of requirements that do not alter the physical characteristics of the goods, or their material substance. However, it is submitted that significant restrictions can apply due to the requirement for contracting authorities to avoid excessive requirements or gold-plating (see below).

Moreover, it should be stressed that award criteria must not confer an unrestricted freedom of choice on the authority, they must be expressly mentioned in the contract documents or the tender notice, and they must comply with all the fundamental principles of EU law, in particular the principle of non-discrimination[488]—and, also, with the principle of competition. All of which is now also stressed in recital (92)[489] and expressly regulated in article 67(4) of Directive 2014/24, according to which award criteria shall not have the effect of conferring an unrestricted freedom of choice on the contracting authority and they 'shall ensure the possibility of effective competition'. Therefore, generally speaking, it is clear that contracting authorities are prevented from using award criteria that are unrelated (or do not present sufficient links) to the subject-matter of the contract, that are incapable of, or superfluous in determining the most economically advantageous offer (ie, that are irrelevant for the purposes of assessing which is the offer that provides the *best price–quality ratio*), or that confer the contracting authority unrestricted freedom of choice amongst tenders. As regards the suitability of award criteria, then, the analysis should be conducted on a case by case basis, since a particular criterion might be relevant and adequate in some cases, and completely irrelevant and unacceptable in other cases, depending on the subject-matter of the contract. These restrictions should be interpreted

[487] Case C-368/10 *Commission v Netherlands* [2012] pub electr EU:C:2012:284 91.

[488] Case C-513/99 *Concordia Bus Finland* 2002] ECR I-7213 59–64; Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527 33.

[489] 'The chosen award criteria should *not confer an unrestricted freedom of choice* on the contracting authority and they *should ensure the possibility of effective and fair competition* and be accompanied by arrangements that allow the information provided by the tenderers to be effectively verified' (emphasis added).

in a particularly stringent manner when doing otherwise would not allow for an objective assessment of the tenders, or could result in the prevention, restriction or distortion of competition.

General Requirements for the Selection of Award Criteria: Weighting of Award Criteria. Contracting authorities not only need to select a set of award criteria that is relevant, specifically linked to the subject matter of the contract, that allows them actually to assess overall which is the most economically advantageous tender in an objective, transparent and non-discriminatory way, and that guarantees that tenders are assessed in conditions of effective competition; but must also *rank and weigh them*.[490] Indeed, according to recital (90) of Directive 2014/24,

> To ensure compliance with the principle of equal treatment in the award of contracts, contracting authorities should be obliged to create the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied in the contract award decision. Contracting authorities should therefore be obliged to indicate the contract award criteria *and the relative weighting given to each of those criteria*. (emphasis added)

In this regard, according to article 67(5) of Directive 2014/24, unless weighting is not possible for demonstrable objective reasons, when contracting authorities opt to award the contract to the most economically advantageous offer, they shall specify at the initial stage of the tender the relative weightings which they have given to each of the criteria chosen to determine the most economically advantageous tender (except where this is identified on the basis of price alone).[491] In all cases, these weightings can be expressed by providing for a range with an appropriate maximum spread. And, as mentioned, where the contracting authorities consider that weighting is not possible for demonstrable objective reasons, they shall at least rank the criteria, indicating them in descending order of importance.[492]

The relevance of the weighting of the award criteria and the obligation to set the weightings expressly in advance or, at least, to specify clearly their ranking, has also been stressed by the case law as a direct mandate of the principle of transparency and as a requirement to guarantee that potential tenderers are aware of all the elements to be taken into account by the contracting authority in identifying the offer that provides the *best price–quality ratio* (and, ultimately, the economically most advantageous offer), and their relative importance, when they prepare their tenders.[493] The EU judicature has determined that the specific weighting of the award criteria selected in the initial stage of the tender can be specified at a later stage, as long as certain very stringent rules are complied with,

> namely that the decision to do so: does not alter the criteria for the award of the contract set out in the contract documents; does not contain elements which, if they had been known at the time the tenders were prepared, could have affected that preparation; and [is] not adopted on the basis of matters likely to give rise to discrimination against one of the tenderers.[494]

[490] Trepte (n 23) 472–74.

[491] For a related discussion concerning the specific scales or evaluation methods to be used and the ensuing obligation of disclosing them to tenderers, see Case T-476/07 *Evropaïki Dynamiki v Frontex* [2012] pub electr EU:T:2012:366.

[492] See: Arrowsmith (n 28) 767–71.

[493] Case C-532/06 *Lianakis* [2008] ECR I-251 36; Case C-87/94 *Commission v Belgium* [1996] ECR I-2043 88; Case C-470/99 *Universale-Bau* [2002] ECR I-11617 98; and Case C-331/04 *ATI EAC* [2005] ECR I-10109 24.

[494] Case C-532/06 *Lianakis* [2008] ECR I-251 43; and Case C-331/04 *ATI EAC* [2005] ECR I-10109 32. See also Kotsonis (n 481) NA131–4.

In any case, it seems clear that, in order to prevent all kinds of discrimination, the final weighting of the award criteria must be set by the contracting authority and communicated to all tenderers before opening the tenders.

Other than that, in principle, contracting authorities retain significant freedom to choose the specific weighting assigned to each of the selected award criteria. In this regard, however, it is important to stress that the EU judicature has constrained this discretion by holding that,

> provided that they comply with the requirements of Community law, contracting authorities are free not only to choose the criteria for awarding the contract but also to determine the weighting of such criteria, provided that the weighting enables an overall evaluation to be made of the criteria applied in order to identify the most economically advantageous tender.[495]

Therefore, the setting of specific weightings for the selected award criteria is subject both to (i) the need to allow for a proper overall assessment of the tender according to the criteria applied (ie, does not marginalise or render irrelevant any of the criteria selected and allows the result of the evaluation to provide a proper overall assessment of the tender), and (ii) the general obligation to comply with all the requirements of EU law—and, particularly, with the principles of non-discrimination and competition.

Moreover, as long as it is justified by the importance of a given criterion for the subject-matter of the contract—ie, as long as it is proportional to the goals pursued in the selection of that award criterion—contracting authorities can give each award criterion the specific weighting that they consider adequate, even if it is very high in absolute terms.[496] However, it still seems possible to harbour doubts as to whether contracting authorities can resort to weighting systems that result in the consideration of non-price factors over price considerations, as well as to weighting systems that take into consideration factors other than price only. Although such an interpretation could probably match a literal interpretation of this case law, it is submitted that, in principle, such a reading could be considered to go against the purpose of the directives, which clearly refer to the 'most economically advantageous offer' and, consequently, seem to require *economic* considerations to play a significant—and arguably predominant—role in the selection and weighting of the award criteria. In this regard, even if non-economic (such as environmental or social) considerations can clearly be taken into account, it is generally doubtful that they can be *solely* taken into account or, put otherwise, that they can completely displace or trump economic considerations. In that regard, it is important to stress that this has now been clarified to the effect that 'the most economically advantageous tender should be assessed on the basis of the best price–quality ratio, *which should always include a price or cost element*' (rec (90) Dir 2014/24),[497] and, even more, that

> To identify the most economically advantageous tender, *the contract award decision should not be based on non-cost criteria only*. Qualitative criteria should therefore be accompanied by a cost criterion that could, at the choice of the contracting authority, be either the price or a cost-effectiveness approach such as life-cycle costing. However, the award criteria should not affect

[495] Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527 39. Treumer (n 176, 2005) 21 and (n 176, 2006) 78.

[496] Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527 42–43, where a weighting of 45% for an environmental criterion was upheld by the ECJ as being proportional to the utmost importance of environmental considerations in the procurement of energy.

[497] *Cf* Arrowsmith (n 28) 761–63.

> the application of national provisions determining the remuneration of certain services or setting out fixed prices for certain supplies. (rec (92) Dir 2014/24, emphasis added)

Consequently, the only restriction admissible in the use of *cost or price criterion as an element on which tenderers do not compete* is now established in article 67(2)II of Directive 2014/24, which provides that '[t]he cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only'. In connection with this, it should be stressed that this serves to suppress (direct) price (or cost) competition between the tenderers but, as long as the (non-price, non-cost) criteria and weighting selected by the contracting authority comply with the principles of the TFEU and, particularly, with the principles of transparency and competition—ie, if they do not give rise to discrimination, or to prevention, restriction or distortion of competition—there seems to be no insurmountable objection to such an approach, provided the general criteria set by the ECJ are not infringed—ie, as long as the criteria used are aimed at identifying the (economically) most advantageous offer, are linked to the subject-matter of the contract, and do not confer on contracting authorities unrestricted freedom of choice.

General Requirements for the Selection of Award Criteria: Adoption of a Neutral Approach in Their Application. Finally, an additional consideration regarding the application of the selected and weighted award criteria might be relevant. As already mentioned, the principles of non-discrimination and transparency must rule the way in which tender specifications and award criteria are *interpreted and applied* during an award procedure.[498] In this regard, the adoption of a neutral approach towards the evaluation of tenders and the interpretation and application of the award criteria selected and their respective weightings is of the utmost importance (above §II.B.i). The emphasis on the need to conduct an *objective* appraisal of the tenders received for a given contract (see recital (92) Dir 2014/24) and the strong emphasis put by the EU case law on the importance of the principles of non-discrimination and transparency in this phase should be coupled with the need to conduct these assessments in such a way as to guarantee that they are done in conditions of effective competition. Indeed, along these lines, it should be stressed that article 67(4) of Directive 2014/24 requires that the award criteria 'shall ensure the possibility of effective competition', particularly by being accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria. Moreover, it is now expressly indicated that, 'in case of doubt, contracting authorities shall verify effectively the accuracy of the information and proof provided by the tenderers' (see discussion on the duty to seek clarifications, §II.A.xii and §II.B.i). Consequently, there is a clear requirement for neutral and accurate assessment of the tenders in view of the applicable award criteria. Therefore, transparency, equality and competition considerations will not only be relevant in the initial stages—where the award criteria are selected and assigned different (or not) weightings—but, maybe more fundamentally, in the evaluation stage, where the contracting authority adopts specific decisions in relation to each of the tenders on the basis of such award criteria and weightings. The remainder of this section will focus on the

[498] See: Case 31/87 *Beentjes* [1988] ECR 4635 29 and 31; Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7213 62–63; and Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527 38. See also Opinion of AG Sharpston in Case C-6/05 *Medipac-Kazantzidis* 77; and Arrowsmith (n 286) 127.

competition distortions that could potentially arise in relation to decisions related to the setting, weighting and application of award criteria by contracting authorities.

Restrictions Derived from Award Criteria that Result in De Facto Exclusion of Tenders or the Advantage of Some Tenders over Others. Even if rules on qualitative selection and non-discrimination requirements are formally complied within a given tender, the adoption of certain award criteria could generate the same results as an infringement of those rules. That could be the case if the award criteria or their weighting favoured tenders submitted by certain operators on the basis of conditions that could not have been used for the purposes of the qualitative selection of candidates or that automatically exclude de facto a significant number of tenders (or even restrict the number of compliant tenders to one).

For instance, they could do so by requiring the implementation of quality management systems for the purposes of the specific contract that would have proven excessive or irrelevant for the purposes of assessing the general suitability of the tenderer;[499] or that exclude certain operators because they focus on requirements whose implementation would be impossible for tenderers that did not comply with these or other requirements beforehand, or whose partial implementation would not be economically viable with regard exclusively to the specific contract.[500] These sorts of requirements are now potentially covered by article 67(2) of Directive 2014/24, given that it allows contracting authorities to include award criteria that do not relate 'to an intrinsic characteristic of a product, that is to say something which forms part of the material substance thereof' and, consequently, can focus on factors involved in the specific process of production, provision or trading or a specific process for another stage of their life cycle, 'even where such factors do not form part of their material substance'. In these instances, it is still important to highlight that the adoption of such award criteria could generate significant distortions or restrictions of competition—without, it must be admitted, generating a substantial potential for discrimination and, currently, with an apparent legal coverage under article 67(2) of Directive 2014/24. Therefore, in view of the requirements of the principle of competition, such a strategy should be significantly restricted and *contracting authorities should guarantee that the award criteria and their weighting ensure equality of opportunity of all tenderers* and, consequently, should not focus on or advantage compliance with criteria not restricted to the tender itself—ie, criteria that undertakings would be in a position to comply with or not depending on previous or general conditions unrelated (or not specifically related) to the subject-matter of the contract.[501] Drawing the line between, on the one hand, justified

[499] However, this has been accepted as a proportionate requirement by the GC in Case T-288/11 *Kieffer Omnitec v Commission* [2013] pub electr EU:T:2013:228. For criticism, see A Sánchez Graells, *GC on Quality Assurance Standards in Public Procurement: A Knee-Jerk Reaction (T-288/11)* (7 May 2013), available at howtocrackanut.blogspot.co.uk/2013/05/gc-on-quality-assurance-standards-in.html.

[500] In similar terms, rejecting the possibility of establishing general requirements that go further than required by the object of the contract, see Trepte (n 48) 197–98.

[501] For instance, if certifying compliance with a given quality standard for the product required the previous certification of the general operations of the undertaking as being compliant with a more general quality control system, and the tender documents did not require tenderers to be certified under that standard—then, giving better evaluations to certified than to non-certified products would generate a distortion of competition by de facto excluding or reducing the chances of award to non-certified undertakings (which would not be in a position to get the products certified only for the purposes of the tender). Therefore, by indirectly advantaging or requiring compliance with a condition not imposed at the qualitative selection stage, which refers to more general conditions unrelated to the specific contract, the contracting authority would be distorting competition in a way that should be declared to run contrary to the directives.

award criteria related to production processes or elements related to other stages in the life cycle of the products or services and, on the other hand, excessive and unjustified requirements that de facto advantage certain competitors over others will be difficult. In my view, it should be conducted on the basis of a strict proportionality requirement aimed at preventing unjustified distortions of competition.

These issues were recently analysed (in general terms) by the ECJ in relation to requirements concerning corporate social responsibility policies and, more specifically, with a focus on requirements of compliance with 'criteria of sustainability of purchases and socially responsible business'. These are requirements that clearly affect tenderers as a whole and are indirectly related to the specific scope of the contract (where contracting authorities can, however, avail themselves of the use of social labels).[502] In that regard, and in line with what is submitted here, it is important to stress that the ECJ rejected the possibility of considering such requirements as the establishment of minimum levels of professional or technical ability and emphasised that such considerations are incompatible with the rules of the procurement Directives when they are unrelated or go beyond the subject matter of the contract.[503] Consequently, in order to avoid distortions of competition (and regardless of the creation of discriminatory situations), contracting authorities must refrain from setting such requirements as either selection or award criteria that result in de facto exclusion of tenders or the advantage of some tenders over others. In my opinion, the reasoning of the ECJ regarding those requirements at qualitative selection phase are transferrable mutatis mutandis to their introduction as award criteria under article 67(2) of Directive 2014/24. Otherwise, the use of this new provision would further erode and damage the distinction between selection and award criteria, which the ECJ has recently emphasised and which, consequently, should be respected in the detailed application of the rules concerning award criteria.[504]

Restrictions Derived from Award Criteria Equivalent to Restrictive Technical Specifications. Similarly to what has just been discussed, certain award criteria or their assigned weightings could be used to avoid (or result in the circumvention of) the rules regarding technical specifications, as preference for a given solution—which is generally banned by the obligation to accept technically equivalent solutions in terms of performance or functional requirements (above §II.A.xv)—could be easily (re)introduced in the form of disguised award criteria or through the assignment of a disproportionate weight to otherwise neutral criteria that favour that specific technical solution over others. Therefore, it is submitted that, in order to prevent distortions of competition and indirect forms of discrimination amongst tenderers, contracting authorities must guarantee that *award criteria and their weighting ensure technical neutrality*, as imposed by the rules regulating the setting of technical specifications.

Restrictions Derived from the Inclusion of Non-Quantifiable or Subjective Award Criteria, and the Ensuing Need to Objectify Treatment of Qualitative Criteria. Another way in which the selection and weighting of award criteria could give rise to distortions of competition—and, probably, to discrimination amongst tenderers—would be through the introduction of non-quantifiable criteria, or essentially qualitative or subjective criteria

[502] Case C-368/10 *Commission v Netherlands* [2012] pub electr EU:C:2012:284 98–112.
[503] Ibid 106–108.
[504] Case C-641/13 P *Spain v Commission* [2014] pub electr EU:C:2014:2264.

that significantly diminished the possibilities of an overall objective appraisal of the tenders or conferred on contracting authorities unrestricted freedom of choice amongst tenderers. In this regard, even if article 67(2)(a) of Directive 2014/24 allows for the taking into consideration of this type of criterion—referring, in general terms, to criteria such as 'technical merit' or 'aesthetic characteristics'—the requirements of relevance and enabling character of the award criteria (see above, this section), as well as the need to avoid conferring on contracting authorities unrestricted freedom of choice and to ensure that the award criteria make provision for an objective assessment of tenderers, should be taken into particular consideration and constrain the decisions adopted by the public buyer.[505]

As regards the requirement of relevance of such qualitative award criteria, it should be stressed that the circumstances under which considerations such as aesthetic characteristics or technical merit will be relevant and material to the subject-matter of the contract are relatively limited (at least if they are unrelated to performance or functional requirements, which are quantifiable and, hence, do not generate significant difficulties). Moreover, it is submitted that they will generally be associated with tenders that should be ruled by the requirements applicable to *design contests*—which are specifically regulated and set special rules in this respect (see arts 78 to 82 of Dir 2014/24),[506] particularly aimed at ensuring the objectivity and independence of the members of the committee entrusted with the evaluation of qualitative or subjective elements of the proposals. Consequently, aesthetic characteristics or technical merit might be assigned very limited relevance in other types of tendering procedures. The substantial irrelevance of such qualitative or non-quantifiable aspects will, then, require only limited consideration in the majority of the cases, if at all.

Moreover, in order to ensure transparency and impartiality, contracting authorities should (as far as possible) set objective or quantifiable *proxies* to measure primarily subjective or qualitative characteristics of the tenders; or, at least, set up mechanisms (possibly based on the rules regarding design contests) to ensure an impartial appraisal of subjective or qualitative dimensions of the tenders. If such quantification, or 'proximisation' or approximation, is possible, the possibilities for discrimination or distortion of competition will be smaller. Consequently, the adoption of this requirement seems desirable whenever its implementation is feasible.

Therefore, a restrictive approach towards the permissibility of the use of these criteria as the *basis* for the award of contracts—again, in cases other than design contests—seems appropriate. Consequently, this type of consideration should remain as a secondary criterion, or as a rather marginal *complement*, to objective and easily quantifiable criteria used to determine the award of the contract to the most economically advantageous tender. Along these lines, and attending to the subject-matter of the contract, contracting authorities should give proper weighting to qualitative or subjective criteria (even if 'quantified')—which, in my opinion, should be rather limited and marginal in most instances.

To sum up, it is submitted that contracting authorities are bound to ensure the objective and transparent assessment of tenders, particularly by (i) avoiding undue recourse to qualitative or non-quantifiable (subjective) award criteria in procedures other than design contests, and (ii) assigning them a proper (limited) weighting; and, in general,

[505] See: Arrowsmith (n 28) 766–71.
[506] See Arrowsmith (n 121) 829–39; Trepte (n 23) 232–4; and Bovis (n 23) 248–51.

they are under a duty to exercise self-restraint in their decisions regarding such criteria, particularly when failure to do so could result in their exercise of unrestricted freedom of choice amongst tenderers and/or generate distortions of competition or discrimination of tenderers.

Restrictions Derived from the Inclusion of Forward-Looking Criteria that Would Require Significant Monitoring after Contract Award. Another, admittedly more controversial, way in which competition could be distorted and equal treatment not guaranteed would be by means of the introduction of requirements that are not possible to validate at tender evaluation stage by the contracting authority, independent certifying companies or other tenderers—or, in the event of a review of the contracting decision, by the review board or authority. Such requirements would be largely related to 'contract compliance' conditions or 'conditions for performance of contracts' and to commitments by tenderers to accept the contractual obligation to develop a certain activity or to comply with certain forward-looking requirements (see art 70 Dir 2014/24).[507] In these cases, competition could be rather easily distorted by strategic tenderers offering to comply with those additional requirements ex ante—thereby formally complying with the award criterion—and breaching the contractual covenant ex post—being then subject to penalties or other contractual remedies, which are largely irrelevant for analytical purposes.[508]

Ensuring that the award of contracts according to this type of award criteria—particularly if they are given significant weight by the contracting authority—does not result in discrimination or a distortion of competition through the strategic behaviour of tenderers (and, eventually, of contracting authorities) would require a significant amount of monitoring and surveillance after the award of the contract—which is costly and difficult to conduct by any agent other than the parties to the contract. In such circumstances, the room for discrimination and distortions of competition is widened and, consequently, the possibilities for the exercise of unlimited discretion and for the generation of discriminatory and anti-competitive outcomes might be unduly increased. In this regard, unless very relevant circumstances make the adoption or weighting of such criteria essential or difficult to avoid in relation to the subject-matter of the contract, contracting authorities are bound not to adopt, or to give marginal weight to, award criteria of a forward-looking nature that are not possible to verify or validate at tender evaluation stage (or, more generally, before contract implementation).[509]

Restrictions Derived from the Evaluation Rules Used to Decide Whether a Tender Complies with a Given Award Criterion or Not. A final consideration, largely related to the previous ones, concerns the way in which contracting authorities use or apply award criteria—that

[507] It is important to stress that the ECJ has recently quashed the use of this provision for purposes such as the establishment of minimum wage requirements, given that it would prevent economic operators from exploiting their competitive (cost) advantages, which in my opinion comes to restrict very significantly the virtuality of this provision. In that regard, see Case C-549/13 *Bundesdruckerei* [2014] pub electr EU:C:2014:2235.

[508] In similar terms, harbouring doubts about the legality of forward-looking award criteria, see JM Gimeno Feliú, *La nueva contratación pública europea y su incidencia en la legislación española: La necesaria adopción de una nueva Ley de Contratos Públicos y propuestas de reforma* (Madrid, Civitas, 2006) 217–18. See also G Racca, R Cavallo Perin and GL Albano, 'Competition in the Execution Phase of Public Procurement' (2011) 41(1) *Public Contract Law Journal* 89.

[509] On the ban against using award criteria that are not possible to verify, see Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527 52; and Arrowsmith (n 28) 771–73. However, *cf* with the situation in Case C-19/00 *SIAC Construction* [2001] ECR I-7725.

is, the evaluation rules associated to the award criteria.[510] In this regard, it should be noted that a binary approach—ie, an approach based on meeting or not meeting a criterion, or an 'all-or-nothing' (or zero/one) approach—seems less desirable than a gradual approach or the adoption of sliding-scale-based evaluation rules (see above chapter five, §IV.B). In this regard, whenever possible, it seems preferable that contracting authorities evaluate the degree to which tenders comply with each of the specified award criteria on a sliding scale (such as granting them points from 0 to 10, or 1 to 5, or any other scale). In this regard, the weighting of criteria will become less harsh and the appraisal of the tenders will arguably reflect with greater accuracy their relative strengths and weaknesses according to the overall set of award criteria.[511] If some criteria are considered absolutely mandatory and, consequently, there is no room for a gradual evaluation according to these criteria, it would be preferable to consider if it would not be better to take them into account as technical specifications (compliance with which is made mandatory) or as award constraints (see below §II.B.vi). This is particularly because, otherwise (and unless this was the only criterion taken into consideration, and depending on the weighting of the criteria used by the contracting authority) the contract could be awarded to a tender not compliant with that criterion (which seems logically inconsistent). Therefore, since award criteria are badly equipped to enforce absolute non-waivable requirements, and a gradual approach seems to offer better evaluative outcomes—hence, better enabling the contracting authority to arrive at an overall objective assessment of the tenders and, probably, with smaller possibilities for discrimination amongst tenderers or distortions of competition—the adoption of such evaluation rules for the purposes of awarding the contract seems clearly desirable.

iv. Treatment of Non-Fully Compliant Bids and, in particular, of Variants

During the tender evaluation process, and as a result of applying the evaluation rules just discussed (above §II.B.iii), contracting authorities can determine that a given tender is not fully compliant with the technical specifications or other requirements regulating the tender.[512] This deviation from the tender requirements should be determined in accordance with the mandate to accept functional and performance equivalents (above §II.A.xv) and, consequently, cannot be justified on purely formal terms or by relation to a given standard—at least if alternative standards are available and if the tenderer has proven the equivalence of the proposed solution under the latter (art 42(5) and 42(6) Dir 2014/24). In any case, deviations from the requirements set by the contracting authority in the tender documents can still take place under the test of functional or performance equivalence, and a determination that a bid is not fully compliant with the tender requirements can clearly take place under the regime regulating technical specifications. In that situation, however, there is room for significant variation as regards the degree of non-compliance of bids.[513] At the one extreme, bids can be completely *unsuitable* for the purposes intended by

[510] On this, see Arrowsmith (n 28) 780–90.

[511] Along the same lines, but opting for a monetary equivalent approach, see MA Bergman and S Lundberg, 'Tender Evaluation and Supplier Selection Methods in Public Procurement' (2013) 19(2) *Journal of Purchasing and Supply Management* 73–83.

[512] For discussion from a comparative perspective, see Sánchez Graells (n 273) 273–308.

[513] Such differentiation between unsuitable and non-fully compliant bids has recently been stressed. See Opinion of AG Poiares Maduro in Case C-250/07 *Commission v Greece* 10–13, where it is argued that a tender cannot be rejected as 'unsuitable' only because it does not satisfy *fully* the criteria set out in the call for tenders,

the contracting authority and, at the other extreme, tenders can be merely *non-compliant* with marginal or secondary issues that would not significantly alter the ability of the tender to satisfy the contracting authorities' needs. Any imaginable situation lying in the middle of these two extremes is possible and, consequently, a rigid rule applicable equally to all instances of formal non-compliance seems to offer relatively limited results. The difficulty in this area derives from the silence of the Directive, which does not provide a rule applicable to non-compliant tenders.

In this regard, contracting authorities might be willing to accept relatively minor deviations from the tender requirements provided that, overall, the tender is beneficial to their interests.[514] Therefore, interpreting the silence of the Directive as imposing an automatic and non-waivable requirement to reject non-fully compliant bids could limit unnecessarily the alternatives of the contracting authority and may defeat the purpose of the procurement procedure by imposing the contracting of overall second-best solutions.[515] Generally, it is worth recalling that the Directive acknowledges that contracting authorities might consider it appropriate to confer expressly on tenderers the possibility of submitting alternative solutions that do not fully comply with all the tender requirements, or even that substantially depart from the tender requirements in certain aspects, as long as they can still satisfy the needs intended to be covered by the contract—ie, *variants* that meet the 'standard' or 'core' tender requirements. As we shall see in further detail, this alternative is available to contracting authorities, as long as they (strictly) comply with certain specific rules laid down in the EU public procurement directives. The treatment granted to non-fully compliant bids and the decisions on the admissibility of variants can alter the outcome of the tendering process and, more generally, can have an impact on competition.[516] Therefore, their analysis under the principle of competition also seems relevant and will be undertaken in this subsection.

Restriction of the Criteria available to Determine Compliance. As a preliminary issue, it should be stressed that—regardless of whether variants are authorised or not, determinations of compliance or non-compliance of tenders should be conducted solely on the basis of the criteria set out in the call for tenders. In this regard, the EU judicature has consistently stressed that, when reference has been made to certain standards in the setting of the technical specifications applicable to a given tender, offers that comply (or are certified to comply) with those standards cannot be rejected on technical grounds.[517] Also,

and that 'unsuitability' rather arises when the tender cannot cover the needs of the contracting entity—ie, when there is a *substantial* departure from the criteria set out in the call for tenders.

[514] Generally, on the acceptance of tenders non-compliant with substantive requirements or procedural formalities, see Arrowsmith (n 28) 724–32.

[515] Unfortunately, that was the situation in Case T-216/09 *Astrim and Elyo Italia v Commission* [2012] pub electr EU:T:2012:574. For a criticism of the formalism adopted by the GC, which has later been (implicitly) dismissed by the ECJ in *Manova*, see A Sánchez Graells, *Summum ius, summa iniuria? GC Supports a Very Narrow Approach to the Dismissal of Non-fully Compliant Tenders (T-216/09)* (25 October 2012), available at howtocrackanut.blogspot.co.uk/2012/10/summum-ius-summa-iniuria-gc-supports.html.

[516] See: C Roussel, 'Variantes et libre concurrence' in C Ribot and J-L Autin (eds), *Environnements. Les mots du Droit et les incertitudes de la modernité. Mélanges en l'honneur du Professeur Jean–Philippe Colson* (Grenoble, Presses Universitáires de Grenoble, 2004) 577, 579–82.

[517] In particular, as regards medical devices that bear a 'CE' marking, the ECJ clearly holds that contracting authorities are generally precluded 'from being entitled to reject … on grounds of technical inadequacy, medical devices which are certified as being in compliance with the essential requirements provided for' by the relevant directive; see Case C-6/05 *Medipac-Kazantzidis* [2007] ECR I-4557 50–52; and Case C-489/06 *Commission v Greece* [2009] ECR I-1797 43.

the principle of equal treatment of tenderers and the ensuing obligation of transparency prohibit contracting authorities from rejecting a tender which satisfies the requirements of the invitation to tender on grounds which are not set out in the tender specifications, but adopted after the submission of the tenders.[518] Therefore, it should be clear that determinations of compliance by contracting authorities are restricted to the criteria set in the contract documentation—primarily as an obligation ensuing from the principle of equal treatment and as a clear rule aimed at preventing contracting authorities from exercising unrestricted freedom of choice amongst tenders.

The Possibility to Ask for Clarifications when a Tender Seems to Be Non-Compliant. A related issue concerns the degree of discretion or the duty under which the contracting authority may find itself when it identifies an imprecise tender or one which does not seem to meet the technical requirements of the relevant tender specifications (ie, a seemingly non-compliant tender). In contrast to the situation concerning abnormally low tenders (below §II.B.v), Directive 2014/24 does not contain any provision which expressly sets out the procedure to be followed in the event that the contracting authority finds that the tender submitted is imprecise or does not meet the technical requirements of the tender specifications (the only provision that deals with clarifications is art 30(6) Dir 2014/24, which is exclusively concerned with the competitive dialogue procedure, and the reference in art 67(4) to a duty to seek clarification when contracting authorities have doubts at award stage regarding 'the accuracy of the information and proof provided by the tenderers' may be seen as equally insufficient). The ECJ has addressed this issue—although exclusively in connection to restricted procedures (which conclusions can be applied to open procedures)—and has found that:

> To enable the contracting authority to require a tenderer whose tender it regards as imprecise or as failing to meet the technical requirements of the tender specifications to provide clarification in that regard would be to *run the risk of making the contracting authority appear to have negotiated with the tenderer on a confidential basis, in the event that that tenderer was finally successful*, to the *detriment* of the other tenderers and in breach of the principle of equal treatment. … it does not follow from Article 2 or from any other provision of Directive 2004/18, or from the principle of equal treatment or the obligation of transparency, that, in such a situation, the contracting authority is obliged to contact the tenderers concerned.[519]

However, despite the non-existence of such a duty to request clarifications, contracting authorities can, if they so wish, engage in a non-discriminatory process whereby they allow for

> the correction or amplification of details of a tender where appropriate, on an exceptional basis, particularly when it is clear that they require mere clarification, or to correct obvious material errors, provided that such amendment does not in reality lead to the submission of a new tender;[520] [always provided that]
>
> In the exercise of the discretion thus enjoyed by the contracting authority, that *authority must treat the various tenderers equally and fairly, in such a way that a request for clarification cannot appear unduly to have favoured or disadvantaged the tenderer or tenderers* to which the request

[518] Case C-6/05 *Medipac-Kazantzidis* [2007] ECR I-4557 54.
[519] Case C-599/10 *SAG ELV Slovensko* [2011] ECR I-10873 37–38 (emphasis added).
[520] Ibid 40.

> was addressed, once the procedure for selection of tenders has been completed and in the light of its outcome.[521]

Therefore, differently to what applies in the case of seemingly abnormally low tenders (below §II.B.v), contracting authorities are not generally bound to request clarifications but can nevertheless do so, as long as they are scrupulous in avoiding any (perceived) instance of discrimination[522]—which may create difficulties where it is unclear whether a tender is non-compliant or abnormally low, particularly if non-compliance would depend on the value given to any specific parameter in the offer.

In my view, as already discussed more generally (above §II.B.i), the argument can be taken even further and there is scope for the adoption of a *'possibilistic' or anti-formalistic approach*, oriented towards maintaining the maximum possible degree of competition by avoiding the rejection of offers on the basis of too formal and/or automatic rejection criteria for non-compliant offers. It is important to underline that the relevant case law has already offered some guidance that points in this direction by stressing that 'the guarantees conferred by the European Union legal order in administrative proceedings include, in particular, the principle of good administration, involving the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case'[523]—which, in the case of public procurement, should be interpreted as requiring contracting authorities to *exercise due care* in the evaluation of the bids submitted by tenderers.[524]

To be sure, as indicated by the CJEU, the obligation of contracting authorities to review the bids for possible mistakes and to contact tenderers to seek *correction* is limited as a mandate of the principle of non-discrimination; but the scope for *clarification* of the tenders, and for the establishment of rules allowing for a flexible treatment of formally non-compliant bids, support the adoption of this possibilistic approach in the evaluation of bids (as a specification or particularisation of the duty of due care or diligent administration that is required of contracting authorities).

In this regard, as reasoned by the ECJ case law, the contracting authority is under an obligation to conduct the revision of the bids in accordance with the principle of good administration (art 41 CFREU)[525] and is, consequently, under an obligation to exercise the power to ask for additional information in circumstances where the clarification of a tender is clearly both practically possible and necessary, and as long as the exercise of that duty to seek clarification is in accordance with the principle of equal treatment.[526] This means that the contracting authority is to adopt an anti-formalistic approach that renders

[521] Ibid 45, emphasis added. One can wonder whether the ex post requirement in the test imposed by the CJEU is not impossible to meet (*probatio diabolica*), and whether it does not set too high a barrier for contracting authorities to engage effectively in clarification exercises.

[522] For critical comments, see D McGowan, 'An Obligation to Investigate Abnormally Low Bids? SAG ELV Slovensko a.s. (C-599/10)' (2012) *Public Procurement Law Review* NA 165. See also the remarks by S Treumer, 'Award of Contracts Covered by the EU Public Procurement Rules in Denmark' in Comba and id (n 273) 39, 58.

[523] Case T-236/09 *Evropaïki Dynamiki v Commission* [2012] pub electr EU:T:2012:127 45; and Joined Cases T-376/05 and T-383/05 *TEA–CEGOS* [2006] ECR II-205 76.

[524] Joined Cases T-376/05 and T-383/05 *TEA–CEGOS* [2006] ECR II-205 83.

[525] Art 41 of the Charter of Fundamental Rights of the European Union ([2007] OJ C303/1). On this general principle of EU administrative law, see Fortsakis, 'Principles Governing Good Administration' (2005). See also Nehl (n 151) 101–65; Mendes (n 151); and Bousta (n 151).

[526] See Case T-211/02 *Tideland Signal* [2002] ECR II-3781 37–38, and cited case law. See also Case T-195/08 *Antwerpse Bouwwerken NV* [2009] ECR II-4439.

the effective appraisal of the tenders possible—regardless of minor deficiencies, ambiguities or apparent mistakes. Indeed, as stressed by the jurisprudence, in cases where the terms of a tender themselves and the surrounding circumstances known to the authority indicate that the ambiguity probably has a simple explanation and can be easily resolved, then, in principle, it is contrary to the requirements of good administration to reject the tender without exercising its power to seek clarification. A decision to reject a tender in such circumstances is, consequently, liable to be vitiated by a manifest error of assessment on the part of the contracting authority,[527] and could result in an unnecessary restriction of competition. Therefore, contracting authorities should ensure that the evaluation of bids leading to the award of the contract is based on the substance of the tenders—by adopting a possibilistic or anti-formalist approach that excludes purely formal decisions that restrict competition unnecessarily; subject, always, to guaranteeing compliance with the principle of equal treatment.

In that vein, it is important to stress that the duty of good administration does not go so far as to require the contracting authority to seek clarification in every case where a tender is ambiguously drafted.[528] Particularly as regards calculations and other possible non-obvious clerical mistakes, the duty of good administration is considerably more restricted and the authority's diligence only requires that clarification be sought in the face of *obvious* errors that should have been detected when assessing the bid.[529] This is so particularly because, as clearly indicated by the ECJ, the presence of non-obvious errors and their subsequent amendment or correction might result in breaches of the principle of equal treatment.[530] Therefore, as the general criterion, it seems that the relevant case law intends to favour the possibilistic approach hereby advanced, subject to two restrictions: (i) that it does not breach the principle of equal treatment (ie, that it does not jeopardise the neutrality of the evaluation of tenders), and (ii) that it does not require the contracting authority to develop special efforts to identify errors or insufficiencies in the tenders that do not arise from a diligent and regular evaluation. In this regard, the additional practical guidance recently offered by the ECJ is valuable:

> [A] request for clarification of a tender may be made only after the contracting authority has looked at all the tenders. … Furthermore, that request must be sent in an equivalent manner to all undertakings which are in the same situation, unless there is an objectively verifiable ground capable of justifying different treatment of the tenderers in that regard, in particular where the tender must, in any event, in the light of other factors, be rejected. In addition, that request must relate to all sections of the tender which are imprecise or which do not meet the technical requirements of the tender specifications, without the contracting authority being entitled to reject a tender because of the lack of clarity of a part thereof which was not covered in that request.[531]

In conclusion, and in view of the possibilistic approach adopted by the ECJ itself towards the assessment of imprecise tenders and tenders that seem to be non-compliant, it is submitted that contracting authorities should develop bid evaluation and contract award on

[527] See Case T-211/02 *Tideland Signal* [2002] ECR II-3781 37–38, and cited case law.
[528] Ibid 37 *ab initio*.
[529] See Case T-495/04 *Belfass* [2008] ECR II-781 65–71.
[530] Case T-19/95 *Adia Interim* [1996] ECR II-321 43–49. Similarly, Case T-169/00 *Esedra* [2002] ECR II-609 49; and Case T-195/05 *Deloitte Business Advisory* [2007] ECR II-871 102.
[531] Case C-599/10 *SAG ELV Slovensko* [2011] ECR I-10873 42-44.

the basis of a neutral and possibilistic approach—which must be aimed at trying not to restrict competition on the basis of considerations that are too formal (ie, to effectively appraise which tender actually or in substance offers the best conditions, regardless of minor formal defects or non-fulfilment of immaterial requirements) and, at the same time, ensuring compliance with the principle of non-discrimination and the ensuing transparency obligation. In practical terms, this flexibility in the screening of non-compliant offers prior to rejection should alleviate the problem.

Admissibility of Variants. In relation with the need to comply with the entire set of tender requirements included in the call for tenders (or the possibility of submitting tenders that depart from them), article 45(1) of Directive 2014/24 grants contracting authorities discretion to authorise or require tenderers to submit variants.[532] According to the case law, 'variants' constitute offers or technical alternatives in relation to the technical specifications laid down in the call for tenders.[533] The possibility of accepting such alternative solutions is gaining a more central position in subsequent generations of procurement rules since, according to recital (45) of Directive 2014/24, '[b]ecause of the importance of innovation, contracting authorities should be encouraged to allow variants as often as possible'. In case they decide to do so, contracting authorities must indicate in the contract notice that variants are authorised or required—since they will not be authorised without this indication (art 45(1) Dir 2014/24). Also, where contracting authorities accept variants, they must expressly state in the contract documents the *minimum requirements* to be met[534] and any specific requirements for their presentation, in particular whether variants may be submitted only where a tender, which is not a variant, has also been submitted (art 45(2) and below this section); and only variants meeting these minimum requirements laid down by the contracting authorities must be taken into consideration (art 45(3) Dir 2014/24). It is also important to take into account that variants shall not be rejected on the sole ground that they would, where successful, lead either to a service contract rather than a public supply contract or vice versa (art 45(3) *in fine* Dir 2014/24). Finally, in a difficult-to-understand additional requirement, it is now indicated that variants 'shall be linked to the subject-matter of the contract' (art 45(1) *in fine* Dir 2014/24).

Article 45 of Directive 2014/24 codifies the conditions set by the ECJ regarding the consideration and assessment of variants for the purposes of awarding a public contract.[535] The relevant case law stressed both the 'specificity' and the 'mandatoriness' of the minimum requirements to be set by the contracting authority. As regards the specificity of the minimum requirements, the ECJ determined that the obligation of the contracting authority to specify them 'is not satisfied where the contract documents merely refer to a provision of national legislation requiring an alternative tender [or variant] to ensure the performance of work which is qualitatively equivalent to that for which tenders are invited'.[536] For its part, regarding the mandatory character of the setting of the minimum

[532] Trepte (n 23) 297–99; and Bovis (n 23) 223.

[533] Case C-421/01 *Traunfellner* [2003] ECR I-11941 26; Case C-423/07 *Commission v Spain* [2010] ECR I-3429 65; Order of 31 January 2005 in Case T-447/04 *Capgemini Nederland v Commission* [2005] ECR II-257 29; and Case T-514/09 *bpost v Commission* [2011] ECR II-420 81.

[534] See rec (45) Dir 2014/24: 'The attention of those [contracting] authorities should consequently be drawn to the need to define the minimum requirements to be met by variants before indicating that variants may be submitted.'

[535] Arrowsmith (n 28) 798–802; and Bovis (n 210, 2006) 470.

[536] Case C-421/01 *Traunfellner* [2003] ECR I-11941 25–30.

requirements, the ECJ also found that 'variants may not be taken into consideration where the contracting authority has failed to comply with the requirements … with respect to the statement of the minimum specifications'.[537]

In order to authorise variants properly, then, contracting authorities should specifically distinguish between minimum or 'core' requirements (which will be mandatory in all cases) and additional requirements or requirements for a 'standard' bid (which will be the ones that bidders do not necessarily have to comply with when submitting 'variant' bids).[538] Contracting authorities seem to retain unfettered discretion to determine in which aspects they can permit variations and, otherwise, which sets of characteristics should remain mandatory as minimum requirements. However, it is submitted that the general criteria controlling the setting of technical specifications and other mandatory requirements seem to be of relevance in this respect and should control the setting of minimum requirements (see above §II.A.xv and below §II.B.vi)—particularly guaranteeing that, as a result of the configuration of the mandatory and the 'waivable' criteria, contracting authorities do not enjoy unrestricted freedom of choice amongst tenders.

By authorising the submission of variants, contracting authorities introduce flexibility in the process and widen the scope of the competition by allowing interested candidates to bring forward alternatives that—while meeting the minimum requirements considered indispensable by the contracting authority—might achieve better results than the specific standard solution envisaged by the contracting authority. In this regard, it is important to stress that—as implicit in the wording of article 45(1) of Directive 2014/24—variants and standard bids should be evaluated according to the same award criteria and, consequently the contract must be awarded to the solution that achieves the best results—ie, to the tender that proves to be the most economically advantageous, whether it is a 'standard' or a 'variant' tender. In this regard, a certain confusion might be generated by article 35(6) *in fine* of Directive 2014/24 when, in relation to the use of electronic auctions, it determines that 'where variants are authorised, a separate formula (to determine automatic re-rankings on the basis of the new prices and/or new values) shall be provided for each variant'. However, it is submitted that the setting of different formulae should aim at taking into account all the relevant parameters regarding the variant for the (automatic) re-evaluation of the bids when values or prices are changed (*rectius*, improved) by the tenderer—which, however, should not result in the application of different award criteria to 'standard' and 'variant' bids. Therefore, where the submission of variants is allowed by contracting authorities, the principle of non-discrimination requires that all tenders—whether 'standard' or 'variant', are treated equally and evaluated according to the same award criteria. Doing otherwise would restrict and distort competition between tenderers submitting 'standard' and 'variant' bids.

In the light of the principle of competition, in my view and whenever possible, contracting authorities should resort to the possibility of authorising variant bids. In this regard, if contracting authorities can identify a set of (secondary) requirements, and, if

[537] Ibid 31–34. Similarly, see Case C-423/07 *Commission v Spain* [2010] ECR I-3429 65.

[538] Functionally, this is similar to the requirement to set minimum, non-negotiable elements in the competitive procedure with negotiations under art 29(1)II Dir 2014/24, which requires that contracting authorities 'identify the subject-matter of the procurement by providing a description of their needs and the characteristics required of the supplies, works or services to be procured and specify the contract award criteria. They shall also indicate which elements of the description define the minimum requirements to be met by all tenders.'

compliance with these requirements does not substantially alter the ability to adopt other solutions to satisfy their needs, they should divide the requirements applicable to the tender into minimum and non-mandatory sets, make express reference to the minimum or unwaivable character of the 'core' requirements, and expressly authorise the submission of variants. Also, despite this being a foreseen possibility in article 45(1) of Directive 2014/24, contracting authorities should not restrict the possibility of submitting variants to tenderers that *also* submit a 'standard' bid, so that any tenderer may be allowed to participate by submitting *solely* a 'variant' bid. In this regard, by adopting this flexible approach, contracting authorities would be fostering competition for the contract and, indirectly, they would be minimising the potentially restrictive effects of the setting of specific technical specifications on competition in the market concerned (above §II.A.xv).[539]

Clearly, allowing for the submission of variants raises the complexity of the evaluation process and might increase the costs associated with the tender procedure. Therefore, a proportionality test seems desirable as a check or balance to this general duty to allow for variants whenever it is feasible and it can spur further competition, with the result that contracting authorities are under no obligation to apply it if it were disproportionate when compared to the administrative complications or the increased costs implied by the imposition of a more competitive procurement procedure (similarly, see above §II.A.ii and §II.A.xviii). Otherwise, if no material complications or extra costs derive from the acceptance of variants, and if distinction between mandatory and secondary requirements is easy to conduct, the principle of competition requires contracting authorities to allow for the submission of variants. This seems to be particularly in line with the anti-formalist approach based on functional and performance equivalence of bids adopted by Directive 2004/18 (see above §II.A.xv) and retained in Directive 2014/24.

Non-Fully Compliant Tenders and Non-Fully Compliant Variants. Regardless of whether contracting authorities authorise or not the submission of variants, the issue of the treatment of non-fully compliant bids remains largely open. On the one hand, where no variants are authorised, bids can be non-fully compliant with the general requirements included in the tender documents. Similarly, where variants are accepted, both 'standard' and 'variant' tenders can be non-fully compliant with the 'minimum' requirements contained in the tender documents. In either case, contracting authorities could have an interest in accepting non-fully compliant bids that, however, are substantially suited to satisfying their needs, and prove to be superior to fully compliant bids in some relevant respects—ie, bids that would be considered the most economically advantageous under the relevant award criteria (even taking into consideration their partial or non-full compliance with one or several criteria) and which might not be admissible precisely (or only) because of such partial or non-full compliance. As suggested, these decisions on the treatment granted to non-fully compliant bids can alter the outcome of the tender and can have an impact on competition and, consequently, merit further scrutiny.

Directive 2014/24 does not contain express rules determining whether contracting authorities are bound to reject non-fully compliant bids in all cases or, on the contrary, whether they can retain a certain degree of discretion to accept them. Nonetheless, this issue has been addressed by the case law of the EU judicature, which has determined that 'the principle of equal treatment of tenderers requires that all the tenders comply with the

[539] Along the same lines, see Roussel (n 516) 582–84.

tender conditions so as to ensure an objective comparison of the tenders submitted by the various tenderers'[540] and that '[t]hat requirement would not be satisfied if tenderers were allowed to depart from the basic terms of the tender conditions … except where those terms expressly allow them to do so'.[541]

In principle, it might seem that—unless contract documents expressly allow for specific departures from the basic requirements (ie, unless variations are authorised)—there is an absolute obligation to dismiss non-fully compliant bids as a requirement or corollary of the principle of equality of treatment.[542] Therefore, it might seem that, other than according to the rules on variants, the acceptance or rejection of a non-fully compliant bid is not within the discretion of the contracting authority—which must automatically reject all non-fully compliant bids in order to guarantee equality of treatment. However, it is hereby submitted that such a reading of the interpreting case law is unnecessarily restrictive and might lead to excessive limitations of competition based solely on largely formalistic criteria that might also diminish the ability of contracting authorities to obtain value for money. Consequently, while complying with the requirements of the principle of equal treatment, an alternative reading might give leeway to more pro-competitive results. In this regard, it seems compatible with the abovementioned case law to allow contracting authorities to include in the tender documents a rule allowing for the acceptance of non-fully compliant bids—and, therefore, to make known to all potentially interested tenderers right from the beginning that such a possibility exists—where certain stringent conditions are met, so that (i) the partial non-compliance does not materially affect the ability of the tender to satisfy the needs of the contracting authority and/or does not grant the tenderer a material advantage over other competing bidders[543] (which, in the case of quantitative criteria could be limited by authorising a given percentage of deviation from the set requirements)—ie, where the tender is not unsuitable, but merely non-fully compliant;[544] (ii) the tender is superior to fully compliant bids in some relevant respects—ie, it is the most economically advantageous under the relevant award criteria—even taking into account the partial and non-material non-compliance with one or various requirements included in the tender documents; and (iii) the rules do not confer on the contracting authority unrestricted freedom of choice amongst tenderers. Such rules could be supplemented by setting a penalisation system for non-fully compliant bids (either fixed, or varying with the number of criteria with which the tender is non-fully compliant), in order to ensure that their overall superiority compensates for and exceeds the potential deficiencies derived from partial non-compliance with one or several tender requirements. Also, contracting authorities could always establish that certain tender requirements are not subject to partial compliance (ie, awarding constraints, below §II.B.vi).

In my view, effective competition for the contract could be fostered by allowing tenderers that cannot fully comply with the specifications to submit tenders for the contract and, as long as the rules applicable to non-fully compliant tenders were clearly set in the

[540] Case C-243/89 *Storebaelt* [1993] ECR I-3353 37.

[541] Ibid 40.

[542] See: Braun (n 208) 12. *Cf* Trepte (n 23) 297.

[543] In relation to the same situation in the US, see RD Looney, Jr, 'Public Contracts: Competitive Bidding: Material Irrelevance versus Irregularity' (1970) 23 *Oklahoma Law Review* 220, 221; and RJ Prevost, 'Contract Modification vs New Procurement: An Analysis of General Accounting Office Decisions' (1984–85) 15 *Public Contract Law Journal* 453.

[544] In this regard, see Arrowsmith et al (n 50) 662. *Contra*, see Savas (n 54) 200.

tender documents ex ante, no breach of the principle of non-discrimination or the ensuing transparency obligation would arise. Therefore, it seems justified to require contracting authorities to adopt such an approach, whenever clear rules and criteria for the appraisal of non-fully compliant rules permit it. Once again, implementing this approach might raise the complexity and costs of the tender procedure and, consequently, should be subjected to a proportionality test.

Preliminary Conclusion. To sum up, it is submitted that, in order to ensure effective competition, contracting authorities should allow for the submission of variant tenders and not automatically reject non-fully compliant bids, as long as this is feasible in relation to the subject-matter of the contract and the applicable award criteria—and subject to a proportionality test that excludes such possibilities when the advantages that they bring do not compensate for the additional complexity and costs of the tendering procedure, or when it would confer on contracting authorities unrestricted freedom of choice amongst tenderers.

v. Treatment of Abnormally Low Tenders

Another issue related to the application of award criteria (above §II.B.iii) and the treatment of non-fully compliant bids (above §II.B.iv) is the treatment of abnormally low tenders[545]—which is configured as a mechanism that allows contracting authorities to depart from the *automatic* or 'acritical' application of award criteria in cases where, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services concerned (see art 69(1) Dir 2014/24). In these cases, contracting authorities are entitled to reject tenders that, in relation to any of the relevant parameters and award criteria (ie, not only price, at least where the award criterion is that of the best price–quality ratio, BPQR),[546] appear to be abnormally low. To do so, contracting authorities should, before rejecting those tenders, request in writing details of the constituent elements of the tender which are considered relevant for the appraisal or verification of its apparent anomaly, such as:[547] the economics of the manufacturing process, of the services provided or of the construction method; technical solutions chosen or exceptionally favourable conditions available to the tenderer for the supply of the products or services or for the execution of the work; originality of the work, supplies or services proposed by the tenderer; compliance with the environmental, labour and social obligations referred to in article 18(2); compliance with the subcontracting obligations established in article 71 and the possibility of the tenderer obtaining state aid (see below, this section) (art 69(2) Dir 2014/24). In view of the evidence supplied by the tenderer upon consultation, the contracting authority shall verify those constituent elements and reach a final decision on

[545] Generally, see Arrowsmith (n 28) 802–15; and Trepte (n 23) 59–60 and 474–77. More specifically, see also GS Ølykke, 'Submission of Low Price Tenders by Public Tenderers—Exemplified by Public Procurement of Railway Services in Denmark' in UB Neergaard et al (eds), *Integrating Welfare Functions into EU Law—From Rome to Lisbon* (Copenhagen, Djøf Forlag, 2009) 253; and id, *Abnormally Low Tenders—with an Emphasis on Public Tenderers* (Copenhagen, Djøf Forlag, 2010).

[546] Case T-495/04 *Belfass* [2008] ECR II-781 100.

[547] This list 'is not exhaustive, [but] it is also not purely indicative, and therefore does not leave contracting authorities free to determine which are the relevant factors to be taken into consideration before rejecting a tender which appears to be abnormally low'. See Case C-292/07 *Commission v Belgium* [2009] I-59 159; and Case C-599/10 *Slovensko* [2011] ECR I-10873 30.

whether to reject the apparently abnormally low tender or not (art 69(3) Dir 2014/24).[548] In that regard, the new rules under Directive 2014/24 establish a limited discretion for the contracting authority. As a matter of guidance, recital (103) indicates that '[w]here the tenderer cannot provide a sufficient explanation, the contracting authority should be entitled to reject the tender'. Generally, a contracting authority may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed. However, the contracting authority *shall* reject the tender where it has established that the tender is abnormally low because it does not comply with applicable obligations referred to in article 18(2) (see art 69(3) Dir 2014/24, in yet another instance of the use of procurement as a lever to enforce compliance with those rules). In the case of rejection of the abnormally low tender, the contracting authority is under a special duty to provide reasons for that decision (art 84(1)(c) Dir 2014/24).

In this regard, it has been stressed by EU case law that this is 'a fundamental requirement in the field of public procurement, which obliges a contracting authority to verify, after due hearing of the parties and having regard to its constituent elements, every tender appearing to be abnormally low before rejecting it'.[549] Indeed, as the ECJ has clearly emphasised, this is a positive and unavoidable requirement, and 'Article 55 of Directive 2004/18 [now art 69 Dir 2014/24] does preclude … a contracting authority from claiming … that it is not obliged to request a tenderer to clarify an abnormally low price'.[550] To be sure, other than in the case of violations of the obligations established in article 18(2) of Directive 2014/24, contracting authorities are not expressly obliged to reject abnormally low tenders (see below)—their duty is just to identify suspect tenders and scrutinise them following the *inter partes* procedure established in the directives, whereby 'the contracting authority must set out clearly the request sent to the tenderers concerned so that they are in a position fully and effectively to show that their tenders are genuine'.[551] In this regard, the ECJ has been clear in stressing that the contracting authority is

> under a duty, first, to identify suspect tenders, secondly to allow the undertakings concerned to demonstrate their genuineness by asking them to provide the details which it considers appropriate, thirdly to assess the merits of the explanations provided by the persons concerned, and, fourthly, to take a decision as to whether to admit or reject those tenders.[552]

Hence, the rules of the directive exclusively impose procedural guarantees to be complied with by contracting authorities prior to rejecting apparently abnormally low tenders,[553] and, consequently, seem to be mainly oriented towards providing affected tenderers with the opportunity to demonstrate that their tenders are genuine[554]—ie, are *primarily* a

[548] For a discussion of the standard applicable to the justification of this decision, particularly in the context of a challenge to that decision, see Case T-638/11 *European Dynamics Belgium and Others v EMA* [2013] pub electr EU:T:2013:530.

[549] Case T-495/04 *Belfass* [2008] ECR II-781 98. Similarly, Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233 51.

[550] Case C-599/10 *Slovensko* [2011] ECR I-10873 34.

[551] Ibid 31.

[552] Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233 55.

[553] Case 76/81 *Transporoute* [1982] ECR 417 18; Case 103/88 *Costanzo* [1989] ECR 1839 16–21; Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233 33–45.

[554] Case 103/88 *Costanzo* [1989] ECR 1839 18; Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233 47; Case T-495/04 *Belfass* [2008] ECR II-781 97.

mechanism to prevent discretionary (or arbitrary) decisions by contracting authorities.[555] In this regard, contracting authorities are obliged to take into account the explanations and proof provided by the affected tenderers and, consequently, cannot apply automatic or simple mathematic rules to *reject* apparently abnormal tenders[556]—although the use of such rules to *identify* suspicious tenders should not be ruled out. As stressed by the case law, the directives do not provide a definition of 'abnormally low tenders', or a method to calculate an 'anomaly threshold'—which are issues consequently left to Member States' domestic regulation,[557] and should be determined for each contract according to the specific purpose it is intended to fulfil (ie, it must be tender-specific).[558] Therefore, the rules of the directives seem to be adequately conceived as a check or balance to the general power of contracting authorities to reject abnormally low tenders—which is an instance of exercise of their broad discretion with regard to the factors to be taken into account for the purpose of deciding to award a contract, or not to award it to a given tenderer.

The justification for this empowerment of contracting authorities to reject abnormally low tenders seems to be that they should not be forced to award the contract under circumstances where there is a reasonable *risk of non-performance* of the contract or of financial instability or disequilibrium,[559] or a risk of breach of applicable legislation by the contractor during the execution of the contract under the tendered conditions (particularly as regards labour and risk prevention legislation, which have now been transformed into mandatory grounds for the rejection of abnormally low tenders); since such an award would hardly satisfy the needs of the contracting authorities and/or would force them to assume certain risks that they might not be willing to accept. The appraisal of such risks must be undertaken by contracting authorities from a neutral or objective perspective (above §II.B.i) and be sufficiently motivated (by analogy with art 69(3) Dir 2014/24). To be sure, contracting authorities cannot exercise unlimited discretion in the assessment and eventual rejection of abnormally low tenders and their decisions should be guided by and be compliant with the general principles of the procurement directives and the TFEU—notably, non-discrimination and competition. In this regard, it should be remembered that the treatment of abnormally low tenders by contracting authorities might generate competition distortions and/or have a negative impact on innovation[560] and, consequently, its analysis also merits further consideration.

Circumstances in Which There Is an Obligation to Reject Abnormally Low Tenders. As already mentioned, the rules contained in the directives do not expressly impose upon contracting authorities the duty to reject abnormally low tenders in all cases.[561] The only

[555] Case 103/88 *Costanzo* [1989] ECR 1839 20 and 26; and Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233 48–49 and 57. See also Case C-599/10 *Slovensko* [2011] ECR I-10873 29.

[556] Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233 72; Case T-495/04 *Belfass* [2008] ECR II-781 102–03.

[557] Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233 67; and Case T-495/04 *Belfass* [2008] ECR II-781 94.

[558] Opinion of AG Ruiz-Jarabo Colomer in Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* 32 and 35; and Case T-495/04 *Belfass* [2008] ECR II-781 94.

[559] See: Arrowsmith (n 28) 805–06; Trepte (n 48) 165–66 and 197; and id (n 23) 474. From an economic perspective, this seems the clearest justification; Engel et al (n 141) 326; and, Carpineti et al (n 214) 36.

[560] Carpineti et al (n 214) 36.

[561] But see: Bovis (n 23) 154–55; and id, *EU Public Procurement Law* (Cheltenham, Edgar Elgar, 2007) 68, who considers that 'the European rules provide for an *automatic* [*sic*] disqualification of an "abnormally low offer"' (emphasis added). In my opinion, and in the light of the arguments developed in the text (particularly the case

specific requirement is for contracting authorities to reject the tender where they have established that the tender is abnormally low because it does not comply with applicable obligations referred to in article 18(2) (art 69(3)II Dir 2014/24). Nonetheless, it is submitted that such an obligation exists beyond this very specific case, at least when certain circumstances concur. In this regard, once a contracting authority—in view of the evidence supplied by the affected tenderer upon consultation, and adopting a neutral approach—has reached the conclusion that a tender is abnormally low and, consequently, that the tender is not genuine and/or entails a certain risk of non-performance, financial instability or disequilibrium, or a risk of breach of particularly relevant legislation by the tenderer, it seems to be a logical requirement of the *principle of diligent administration* that the contracting authority should reject the tender *unless* it can sufficiently motivate a decision not to do so on the basis of overriding legitimate reasons—that is, unless the specific tender provides the contracting authority with advantages that compensate for or exceed the potential risks. Admittedly, a similar reasoning might not be applicable in the event of a potential breach of the relevant legislation by the tenderer, in which case the discretion of the contracting authority to accept the abnormally low tender might even be completely excluded—since, in general, contracting authorities seem to have significant difficulties in accepting *illegal tenders*.

Other than the general restrictions that domestic or special legislation may impose on contracting authorities preventing them from reaching such a decision of non-rejection of an abnormally low tender, the principles of non-discrimination and competition seem to limit even more the possibilities for the contracting authority to do so. In this regard, it should be stressed that contracting authorities cannot exercise unrestricted freedom of choice amongst tenderers and, in my view, granting them discretion to accept tenders found to be abnormally low might result in discriminatory outcomes—since the anomaly of the tender will probably, and by itself, materially affect its ability to satisfy the needs of the contracting authority and, consequently, should be rejected as an unsuitable bid (not merely non-fully compliant; see above §II.B.iv). Moreover, even in the absence of discriminatory features, the principle of competition can still impose additional restrictions on the ability of the contracting authority to accept abnormally low tenders, preventing it from doing so if accepting the abnormally low tender generates or reinforces a distortion of competition in the market concerned.[562] In this regard, contracting authorities should at least be prevented from accepting abnormally low tenders submitted by a dominant undertaking if they can be considered *predatory*, as well as abnormally low tenders that could be proven to result from *collusive agreements* amongst tenderers aimed at sharing the market (ie, as an instance of bid rotation, boycott of other tenderers, etc).[563] In this

law of the EU judicature), that position was incorrect under the 2004 rules and remains incorrect under the new directives. Indeed, Bovis himself presents the system as discretionary for contracting authorities (above (n 23) 264)—therefore blurring the automaticity of his initial position.

[562] Along the same lines, emphasising the existence of a possible obligation to reject in order to protect 'healthy competition between undertakings', see S Treumer, 'Award of Contracts Covered by the EU Public Procurement Rules in Denmark' in Comba and Treumer (n 273) 39, 64. Also in this line of thought, it has also been stressed that 'if the logic of the abnormally low tender provisions is to protect the market (and the contracting authority) from unrealistic bids it makes no sense to leave any discretion in case the test is failed', P Telles, 'Awarding of Public Contracts in the United Kingdom' in Comba and S Treumer (n 273) 251, 267.

[563] Otherwise, contracting authorities would not only be breaching the competition principle embedded in EU public procurement directives—which, as submitted earlier (above chapter five, §II.B), requires them to

regard, it is now indicated in article 35(5) of Directive 2014/24 that 'tenders … where there is evidence of collusion or corruption, or which have been found by the contracting authority to be abnormally low, shall be considered as being irregular', which prevents them from being taken into consideration for the purposes of the respective electronic auction. It is submitted that the same *functional* justification requires their rejection in any other procurement settings. Moreover, in these instances, the involvement or cooperation of competition authorities in the assessment of apparently abnormally low tenders seems particularly desirable (for further details see below chapter seven, §III).

The Particular Case of Abnormally Low Tenders Tainted by State Aid. As a particular instance of, or an exception to, the general rule regarding the taking into consideration of general competition concerns in the analysis of abnormally low tenders, article 69(4) of Directive 2014/24 sets special rules regarding abnormally low tenders tainted by state aid.[564] As anticipated, one of the constituent elements of tenders on which contracting authorities can request tenderers to provide additional information is 'the possibility of the tenderer obtaining State aid' (art 69(1)(a) Dir 2014/24). In this regard, the special rules contained in the directive as regards abnormally low tenders tainted by state aid determine that

> where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender can be rejected *on that ground alone* only after consultation with the tenderer where the latter is 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* .[565]

Therefore, if a tenderer that has submitted an apparently abnormally low tender is the beneficiary of incompatible state aid (ie state aid granted without a prior notification to the European Commission and which cannot benefit from an exemption under any applicable block exemption regulations, or state aid declared illegal for its incompatibility with the internal market), the contracting authority can decide to exclude its tender without any further consideration and solely for that reason.[566] In this regard, it seems clear that the test applicable by the contracting authority in these cases—where they intend to reject the apparently abnormally low tender *exclusively* on the basis that the tenderer has obtained state aid—is limited to the verification of the compatibility of the relevant state

refrain from implementing any procurement practices that prevent, restrict or distort competition—but could also be breaching general EU competition law by detracting from the effectiveness of arts 101 and 102 TFEU (see, in general, the analysis of the state action doctrine above chapter four, §IV).

[564] On the inclusion of this special rule in Directive 2004/18, see Trepte (n 23) 474. For discussion of the changes brought about by Dir 2014/24, see A Sánchez Graells 'Enforcement of State Aid Rules for Services of General Economic Interest before Public Procurement Review Bodies and Courts' (2014) 10(1) *Competition Law Review* 3–34.

[565] Art 69(4) Dir 2014/24 (emphasis added). The test applied under the previous rules, as detailed in art 55(3) Dir 2004/18 instead indicated that the tenderer had to demonstrate that the aid had been 'granted legally', which created significant difficulties. See Sánchez Graells (n 172) 326–30. For discussion on the treatment of abnormally low tenders under the proposal for a new Directive, see GS Ølykke, 'How Should the Relation between Public Procurement Law and Competition Law Be Addressed in the New Directive?' in Tvarnø, Ølykke and Risvig Hansen (n 30) 57, 66–75.

[566] From a broader perspective, it can be questioned whether the analysis of the duty to reject tenders tainted with illegal state aid is limited to the cases where these tenders are abnormally low and cannot be extended also to cases where, but for the existence of the illegal state aid, the tenderer would have submitted a much worse economic, not competitive offer.

aid measure—ie, to request proof that the aid received complies with the requirements for a general exemption (in a block exemption regulation, or otherwise) or has been the object of a positive clearance decision by the Commission (ex arts 107 and 108 TFEU; see above chapter four, §II). Failure by the affected tenderer to prove the compatibility of the state aid measure will entitle the contracting authority to reject the tender as being abnormally low on that ground alone. In such cases, the contracting authority should inform the Commission of this fact (art 69(4) Dir 2014/24).

It is important to stress that state aid that breaches the applicable rules of the TFEU can be either 'unlawful' or 'incompatible' aid.[567] Unlawful aid is considered incompatible with the internal market in general terms. Hence, both sorts of state aid are now covered by article 69(4) of Directive 2014/24 and contracting authorities should be able to react to both types of irregularities. However, given the exclusive competence of the European Commission to determine the compatibility or lack thereof of state aid measures,[568] contracting authorities may find themselves unable to carry out a full assessment of compatibility *stricto sensu* of a given aid measure. If that is the case, the practical effects of the rule in article 69(4) of Directive 2014/24 when there is the suspicion that an apparently abnormally low tender is tainted by state aid can be limited. Indeed, the rule may be seen to amount exclusively to an obligation to suspend award procedures while an eventual procedure before the European Commission is completed[569]—which would not be a practical solution, in view of the relevance of timing in public procurement and its related litigation. However, it is worth exploring whether a different solution might exist.[570]

In the specific case of the rejection of tenders tainted by unlawful state aid, it should be stressed that it is incumbent upon the tenderer to prove that the aid used to subsidise the apparently abnormally low tender was legal at the time of submitting the tender (or, at the latest, at the time of award of the contract). Any subsequent decision by the European Commission would not need to be taken into consideration, given that it would not have sanatory or retrospective effects. Therefore, in view of the lack of need for any further investigation by the European Commission when the contracting authority carries out the *inter partes* process mandated by article 69(4) of Directive 2014/24, there is, in my

[567] State aid will be 'unlawful' when it has been awarded in breach of the procedural obligations set out in Regulation 659/1999 of 22 March 1999 laying down detailed rules for the application of art [108 TFEU] [1999] OJ L83/1. In contrast, illegal state aid will be 'incompatible' if it distorts or threatens to distort competition within the internal market and, consequently, cannot be exempted by the European Commission from the general prohibition of art 107(1) TFEU. Therefore, the test of 'legality' is merely formal, whereas the test of 'compatibility' triggers a substantive assessment. In some cases, however, both tests will be complicated by the issue of whether an existing block exemption regulation covered the aid and, consequently, there was no need for the notification to the European Commission.

[568] Ie, the monopoly of enforcement of state aid rules under art 107(2) and 107(3) TFEU, whereby national courts (and, by implication, national procurement authorities) do not have the power to declare state aid compatible with those provisions. See Case C-199/06 *CELF and Ministère de Culture et de la Communication* [2008] ECR I-469 38, and *Commission Notice on the Enforcement of State Aid Law by National Courts* [2009] OJ C85/1 20.

[569] Along these lines, see W Sauter, 'The Altmark Package Mark II: New Rules for State Aid and the Compensation of Services of General Economic Interest' (2012) 33(7) *European Competition Law Review* 307, 312–13, who considered that 'once it is clear that not all relevant conditions are met the process stalls and intervention by the Commission becomes necessary in order to determine whether a case of exemptable aid is involved. A complaint to the Commission … will then be the only remedy, with generally a limited chance of success.'

[570] For general discussion around this topic, see GS Ølykke, 'The Legal Basis Which Will (Probably) Never Be Used—Enforcement of State Aid Law in a Public Procurement Context' (2011) 3 *European State Aid Law Quarterly* 457–66.

opinion, no obstacle in the allocation of competences for the enforcement of Article 107 TFEU that prevents contracting entities from taking a view as to whether the aid was lawful at the time of award of the contract—subject to judicial review. The only cases where contracting authorities may need to stay procedures are those where the potential applicability of a block exemption regulation is being questioned. However, this is a matter where some flexibility would be desirable (see further below).

Beyond these considerations regarding the compatibility of the granting/receipt of the aid, and in the same line of expanding the effectiveness of the provisions in article 69(4) of Directive 2014/24 to prevent the existence of abnormally low tenders tainted by state aid, doubt could be cast on whether contracting authorities can go further and (based on the general criterion of 'severability' of authorisation and use of state aids)[571] analyse whether the *use* of legally granted state aid to submit the abnormally low tender is legal in itself—ie, whether it constitutes a case of *misuse* of aid,[572] in which case it could also be considered a valid reason for the rejection of abnormally low tenders on that ground alone. Such an approach would probably allow for a common treatment of all unlawful uses of state aid—whether illegal by reason of its award, its incompatibility with the internal market, or its (mis-)use—and, consequently, might seem desirable as a way to reinforce the state aid prohibition through public procurement regulation. However, it is submitted that the exclusive competence of the European Commission to apply articles 107 and 108 TFEU (and the special nature and more limited powers in cases of misuse of state aid),[573] prevent contracting authorities from having direct recourse to such a possibility and, consequently, the test that contracting authorities can apply to apparently abnormally low tenders tainted by state aid seems to be limited to the legality of its being granted, not of its use.[574] In this regard, it seems relevant to stress that unlike 'unlawful aid' (ie, aid that was granted without prior notification to the Commission or in disregard of the standstill obligation of art 108(3) TFEU), 'aid which has possibly been misused' is aid which has been previously approved by the Commission (see recital (15) of Regulation 659/1999) or that benefits from a general (block) exemption and, consequently, is vested with an appearance of legality (*fumus boni iuris*). Such an appearance of legality requires

[571] An issue raised by Trepte (n 23) 60—who, however, also points out that 'there is a danger that decisions on this issue by the purchaser could lead to little more than political revenge'—and, implicitly, seems to regard this option unfavourably. As developed in the text, there are additional reasons that point in the same direction and that should exclude the possibility for contracting authorities to conduct an analysis of the (mis)use of legally granted state aid.

[572] See: Ølykke (n 545) 263, who considers that 'the receipt of legal State aid could … be an objective justification for an apparently abnormally low tender, as long as this use does not amount to *misuse* of the aid' (emphasis added).

[573] See: Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (Regulation 659/1999) [1999] OJ L83/1, particularly rec (1). Along these lines, it is important to stress that according to EU case law (see Case 74/76 *Iannelli* [1977] ECR 557 16) even 'national courts are not competent to judge the compatibility of State aids with Community law'; JM Fernández Martín and O Stehmann, 'Product Market Integration versus Regional Cohesion in the Community' (1990) 15 *European Law Review* 216, 231.

[574] This situation is clearly different from that of arts 101 and 102 TFEU, which must be applied by all authorities of Member States; see J Temple Lang, 'National Measures Restricting Competition and National Authorities under Article 10 EC' (2004) 29 *European Law Review* 397, 399–404. Therefore, a restriction of the effectiveness of the principle of competition in this particular regard, such as that operated by the special rule in art 69(4) Dir 2014/24 seems compatible with the general system of competition rules in the TFEU. In this respect, a 'de-monopolisation' or decentralisation of the enforcement of state aid rules could be desirable, but reaching such a conclusion requires analyses that go well beyond the limits of this study.

careful analysis—and this justifies, for instance, the absence of recovery injunction mechanisms that are generally available in cases of unlawful aid.

This rather formal approach—that largely limits contracting authorities' ability to take the (anti-)competitive effects generated by state aid into consideration in public procurement processes—seems to be consistent with the relevant case law, where the ECJ has clearly held that

> the mere fact that a contracting authority allows bodies receiving subsidies of any kind, whether from that contracting authority or from other authorities, which enable them to submit tenders at prices appreciably lower than those of the other, unsubsidised, tenderers, to take part in a procedure for the award of a public service contract does not amount to a breach of the principle of equal treatment and does not constitute either covert discrimination [or a restriction on freedom to provide services].[575]

In this regard, given the special nature of state aid, the EU judicature seems to have opted for a restriction of the analysis of its effects on competition to the narrow limits of the procedures for the control of state aid, consequently strengthening the exclusive competence of the Commission in this area. Along the same lines, in very clear terms, Advocate General Léger stressed that 'aid that has been notified and declared compatible with the common market cannot affect the decision of the contracting authority to admit a tenderer *or the assessment of its tender*'.[576] It is submitted that the same reasoning applies to state aid exempted on other grounds. Therefore, the denial of contracting authorities' power to reject abnormally low tenders apparently tainted by the misuse of state aid on that ground alone (ex art 69(4) Dir 2014/24) seems to accord with this *ring-fencing* of state aid analysis.

Nonetheless, in my opinion, a closer analysis of the reasons underlying the potential rejection of abnormally low tenders tainted by state aid seems to justify that it could be desirable to soften this rule. In this regard, the logic behind the possibility of rejecting abnormally low tenders on the exclusive ground they are tainted by illegally granted state aid (ex art 69(4) Dir 2014/24) seems to be that, in those cases, there is a risk of contractual non-performance or financial instability or disequilibrium derived from the possibility that the tenderer will be obliged to reimburse the state aid following a recovery decision of the Commission (ex art 14 Regulation 659/1999). In this regard, the decision to reject the abnormally low tender tainted by illegal state aid seems to rely on the risk of financial disequilibrium or instability or contractual non-performance of the tender that the potential recovery of the illegal state aid generates.[577] The special rule contained in article 69(4) of Directive 2014/24 can, hence, be understood as a *iuris et de iure* presumption that an abnormally low tender tainted by illegally granted state aid generates a risk that justifies rejection. As has already been suggested, by not including any value judgement as to the (un)desirability of state aid per se—or as to the effects on competition of the granting of

[575] Case C-94/99 *ARGE* [2000] ECR I-11037 32 and 38. *Cf* Ølykke (n 545, 2009) 263 fn 48.

[576] Opinion of AG Léger in Case C-94/99 *ARGE* 105 (emphasis added).

[577] See: Case C-94/99 *ARGE* [2000] ECR I-11037 30, where the financial instability derived from the obligation to repay illegal aid was accepted as the logic behind the potential use of this cause as a ground for the rejection of tenderers at the qualitative selection phase. See Trepte (n 23) 475. By analogy with this finding, it is submitted that this is the main rationale underlying art 69(4) Dir 2004/18 (and, more generally, the power to reject abnormally low tenders)—which would not constitute a case of improper use of a qualitative selection criterion (ie, financial standing) as an award criterion (or *quasi*), since the focus here is on the financial risk or disequilibrium, or the risk of non-performance generated by the abnormally low tender *in and of itself*, not per relation to the general personal circumstances of the tenderer. *Contra*, see Arrowsmith (n 28) 813–15; and Ølykke (n 545, 2009) 264–69.

such State aid, particularly relating to its subsequent use in participating in the tendering of public contracts, such an understanding of the justification for article 69(4) of Directive 2014/24 (that is limited to the risk of non-performance or financial instability or disequilibrium that contracting authorities face) seems aligned with the abovementioned restrictive approach towards the competitive analysis of state aid by contracting authorities in public procurement procedures.

In this vein, it is relevant to stress that the incompatibility of state aid with the internal market or the misuse of legal state aid—if and when declared by the Commission—might give rise to exactly the same type of recovery decisions and reimbursement obligations (ex art 16 Regulation 659/1999). Therefore, where the Commission has initiated a procedure regarding the compatibility of the aid or the misuse of state aid against the tenderer—or when the Commission clearly indicates its intention to do so in light of the information provided by the contracting authority (by analogy with art 69(4) Dir 2014/24)—there seems to be a potential objective justification for the rejection of the abnormally low tender by the contracting authority solely on this ground. However, it must be stressed that the rejection would in that case not be strictly based on the incompatibility of the aid or misuse of the state aid *as such*—whose determination is the exclusive competence of the European Commission—but as a result of the risk of financial instability or disequilibrium, or contractual non-performance that a potential recovery decision generates. In this regard, then, a contracting authority that identified an instance of potential incompatibility or potential misuse of state aid could be considered under an obligation to seek the opinion of the European Commission in that regard (even if only to obtain a preliminary view)—as a mandate of the duty of diligent administration and faithful collaboration—following which (and in case the Commission confirmed the potential existence of misuse of state aid) the contracting authority could proceed to reject the abnormally low tender because of its intrinsic risk of non-performance or financial instability or disequilibrium.

It must be acknowledged, then, that if there were no relevant risk of non-performance or financial instability or disequilibrium derived from the eventual reimbursement of the misused state aid (and in the absence of a specific presumption equivalent to that of art 69(4) Dir 2014/24), the contracting authorities would not be able to reject the tender, even if they could prove a negative effect on competition, since that seems to be excluded by the special character of article 69(4) of Directive 2014/24 (*lex specialis*) and the approach of the EU case law towards *ring-fencing* such considerations within the state aid control procedure, and under the exclusive competence of the Commission. Nothing would, however, prevent contracting authorities from notifying this situation to the European Commission—and, indeed, it is arguably their obligation to do so, derived from the duty of loyal cooperation. In any case, this is another instance where the involvement or cooperation of competition authorities in the assessment of apparently abnormally low tenders seems particularly desirable (see below chapter seven, §III).

Along these lines, it is worth stressing the potential implications of such duty of loyal cooperation. In my opinion, and by analogy with the obligations of national courts and other administrative authorities, contracting authorities are also under a general obligation to ensure the *effet utile* of state aid rules across the board and to prevent illegal state aid from generating any anti-competitive effects. This has been recognised by the CJEU in *CELF II*:

> The last sentence of Article [108(3) TFEU] is based on the *preservative purpose of ensuring that incompatible aid will never be implemented*. The intention of the prohibition thus effected is therefore that *compatible aid alone may be implemented*. In order to achieve that purpose, the implementation of planned aid is to be deferred until the doubt as to its compatibility is resolved by the Commission's final decision. … *The objective of the national courts' tasks is therefore to pronounce measures appropriate to remedy the unlawfulness of the implementation of the aid*, in order that the aid does not remain at the free disposal of the recipient during the period remaining until the Commission makes its decision.[578]

In my view, this is simply an emanation or specific case of the duty of sincere cooperation imposed by Article 4(3) TEU[579]—which is one of the pillars of the system of enforcement, both of state aid rules[580] and public procurement.[581] Consequently, contracting authorities are under a positive obligation to identify the possible existence of illegal state aid (ie, non-notified or unlawful state aid, as will typically be the case). Once that possibility is identified, they should draw all appropriate legal consequences to prevent the unlawful state aid from generating any effects (and, by implication, to prevent the award of the contract where possible).[582] This is particularly clear in the case of abnormally low tenders tainted with illegal state aid (art 69(4) Dir 2014/24), in relation to which it can be argued that there is a general obligation to dismiss them whenever possible in order to ensure the *effet utile* of the provisions in Article 107 TFEU and Regulation 659/1999 (coupled with Art 108(3) TFEU).[583] However, it must be acknowledged that the actual possibilities to do so may be limited by the split of competences between different institutions.

Preliminary Conclusion. To sum up, contracting authorities are under a duty to reject abnormally low tenders—after complying with the special *inter partes* procedure regulated by article 69 of Directive 2014/24—unless they can sufficiently justify a decision not to do so on the basis of overriding legitimate reasons and only as long as there are no discriminatory or competition distorting effects derived from the acceptance of the abnormally low tender. In the particular case of abnormally low tenders tainted by state aid, the directive sets specific rules that limit the effectiveness of the general principle of competition, according to which rules contracting authorities can reject abnormally low tender offers exclusively on the basis of the reception of state aid by the tenderer if it is not proven that the aid was *granted* legally—and, in the rest of the cases, arguably, they need to wait for a

[578] Case C-1/09 *CELF and Ministre de la Culture et de la Communication* [2010] ECR I-2099 29–30. For discussion, see T Jaeger, 'CELF II: Settling into a Weak *Effet Utile* Standard for Private State Aid Enforcement' (2010) 1(4) *Journal of European Competition Law & Practice* 319.

[579] The basis of these obligations was established in Case Case C-80/86 *Kolpinghuis* [1987] ECR 3969 12. On the extension of these duties not only to national courts, but also and notably to national authorities, see J Temple Lang, 'The Duty of National Courts under Community Constitutional Law' (1997) 22 *European Law Review* 3; id, 'The Duty of National Authorities under European Constitutional Law' (1998) 23 *European Law Review* 109, 114; T Tridimas, *The General Principles of EU Law*, 2nd edn (Oxford, Oxford University Press, 2006) 44–47; and JH Jans et al, *Europeanisation of Public Law* (Groningen, Europa Law Publishing, 2007) 111-2.

[580] *Notice on the Enforcement of State Aid Law by National Courts* (2009) 77.

[581] S Treumer, 'Enforcement of the EU Public Procurement Rules: The State of Law and Current Issues', in id and F Lichère, *Enforcement of the EU Public Procurement Rules*, European Procurement Law Series, vol 3 (Copenhagen, Djøf Forlag, 2011) 17, 26.

[582] Case C-1/09 *CELF and Ministre de la Culture et de la Communication* [2010] ECR I-2099 28 and the case law cited therein, which is considered applicable by analogy, if not directly. Similarly, Treumer (n 581) 24 uses the existence of illegal state aid as an example of a contract that should have never been entered into and that, consequently, should be terminated.

[583] *Cf* Ølykke (n 565) 70.

decision by the European Commission on its (in)compatibility or misuse. Nonetheless, it has also been submitted that, in view of the underlying reasons for the rejection of those tenders (ie, under a risk of non-performance or financial instability approach), the rule could be softened so as to allow contracting authorities to reject abnormally low tenders on the basis of the *incompatibility* or *misuse* of state aid (even if legally granted) when there is a credible risk of financial instability or disequilibrium or of contractual non-performance derived from a potential recovery decision regarding the aid. In both cases, closer participation of competition authorities in the assessment of apparently abnormally low tenders seems particularly desirable.

vi. Awarding Constraints

Contracting authorities might be interested in ensuring that, while developed in a transparent and objective way, and guided by open, non-discriminatory and competition-enabling qualitative selection criteria, technical specifications and award criteria (see above §II.A.vii, §II.A.xv and §II.B.iii), tendering procedures do not produce certain outcomes—such as the award of all the lots tendered to one and the same contractor (§II.A.xviii), or the award of a given number of consecutive contracts to the same contractor under framework agreements (§II.A.xx) or dynamic purchasing systems (§II.A.xxi)—or, on the contrary, they might also be interested in ensuring that tendering procedures guarantee a given output or result—such as the award only to tenderers that meet certain requirements that the contracting authority might wish to impose mandatorily (and that may not easily match other types of technical or commercial requirements). In these cases, contracting authorities might wish to (self)impose awarding constraints, so that the contract (or certain lots therein) is awarded to the tender(s) selected as a result of the ordinary appraisal and evaluation process *provided that* certain (positive or negative) conditions are met—and, otherwise, the award of the contract or lot is modified as required to meet the conditions set as awarding constraints. The logic behind awarding constraints is the same as that which justifies the possibility to reject abnormally low tenders (above §II.B.v); which indeed could also be configured as an awarding constraint that requires the contract to be awarded to the most cost effective offer or offer with the best price–quality ratio *provided that* it is not based on values that are unjustifiably too low—and, consequently, generate a risk of contractual non-compliance or of breach of applicable legislation that the contracting authority wants to avoid.

The EU public procurement directives do not expressly regulate the possible imposition of awarding constraints by contracting authorities and, consequently, it is a matter for Member States' domestic regulation. Therefore, the imposition of awarding constraints should be possible under domestic public procurement rules, subject to compliance with all the other rules contained in the directives, as well as the TFEU general principles—notably, equality of treatment, transparency and competition.

In this regard, in the first place, it is important to exclude the possibility of an indirect creation of grounds for the exclusion of tenderers that would not be allowed for by the general rules of the directives (above §II.A.v and §II.A.vi), as well as the backdoor imposition of technical requirements that run against the mandate to ensure technical neutrality (above §II.A.xv), or other requirements in breach of the obligation to guarantee that award criteria ensure equality of opportunity amongst tenders (above §II.B.iii). Therefore, a first

restriction seems to require that awarding constraints comply with all the requirements applicable to award criteria in general so that, if there are any, they are imposed on the basis (i) of objective criteria (so as to exclude instances of arbitrary choice), (ii) that they are relevant to the subject-matter of the contract (ie, tender-specific), (iii) that they are included in the tender documents and subject to the same level of publicity as general award criteria, (iv) that they do not confer unrestricted freedom of election amongst tenderers on the contracting authority, and (v) that they comply with the general principles of the TFEU—and, above all, that they do not prevent, restrict or distort competition. This requirement seems logically consistent with a conceptualisation of awarding constraints as *negative* award criteria, or as limitations or conditions applicable to the set of award criteria applicable to a given tender procedure.

A second requirement or restriction on the imposition of awarding constraints by contracting authorities seems to be justified by their exceptional nature—or, put otherwise, by the fact that such restrictions seem to be the exception to the general rule that requires that award of the contract be made to the compliant tender (on the issue of non-full compliance, see above §II.B.iv) which, depending on the rule adopted in a specific tender procedure, proves to be the most cost-effective or the one with the best price–quality ratio. Therefore, it is submitted that the imposition of conditions upon or limitations of this general rule—being exceptional—should be allowed on a restrictive basis and construed narrowly.

From a more restrictive perspective, it could be argued that awarding constraints are not allowed precisely because they imply a restriction that might not fit within the rules of the EU public procurement directives—and, more specifically, of article 67 of Directive 2014/24 regarding contract award criteria. However, in my view, such a reading would be unnecessarily narrow. As the EU case law has consistently held, contracting authorities enjoy 'broad discretion with regard to the factors to be taken into account for the purpose of deciding to award a contract',[584] which should include awarding constraints. Moreover, as already mentioned the directive makes express provision for the rejection of abnormally low tenders, hence, implicitly generating room for a restriction of the automatic application of award criteria or, put differently, for the enforcement of awarding constraints. Therefore, it seems more consistent with this broad discretion to allow contracting authorities to impose awarding restrictions (other than those referring to abnormally low tenders), as long as they are justified and proportionate. Therefore, contracting authorities willing to impose awarding constraints should be prepared to indicate expressly the objective or goal of such restrictions (and, when pursuing non-economic goals, to indicate that they are aligned with the requirements discussed above chapter four, §VII.C), and that the constraints imposed on the tender documents are proportionate to those goals. In this regard, the pursuit of goals and ensuing restrictions that are *self-contained* in the specific tendering procedure—for instance, the already mentioned restriction of the number of lots that a single contractor can be awarded, as a means to ensure availability of alternative sources or supply and/or risk dispersion (see above in relation to framework agreements, above §II.A.xx)—seem to be better designed to pass legal muster than goals and restrictions that *go beyond* the specific tender—such as restricting the number of lots that a

[584] As recently repeated in Case T-125/06 *Centro Studi Manieri* [2009] ECR II-69 62. See the additional references listed above n 211.

contractor can be awarded, making it conditional upon the number of public contracts having been awarded to that contractor by other contracting authorities; ie, in pursuance of a different goal of contract-spread which, arguably, is in itself contrary to the rules of the directives.[585]

Finally, as a procedural requirement, when contracting authorities wish to enforce an awarding constraint as set out in the tender documents, they should inform the affected tenderers and give them an opportunity to express their views on the applicability of the awarding constraint and the decision of the contracting authority to amend the award of the contract (or the lots therein) to the next best tender not affected by the awarding constraint—by analogy with article 69(3) of Directive 2014/24.

As a preliminary conclusion, it is submitted that the imposition of awarding constraints by contracting authorities according to Member States' domestic procurement legislation should be permitted, as long as (i) all the requirements applicable to award criteria are complied with (above §II.B.iii); (ii) that, given their exceptional character, they meet the requirements of a strict test of proportionality; and (iii) they ensure proper procedural rights to the tenderers affected by the enforcement of the awarding constraints.

vii. Path Dependence (or Consolidation of Current Commercial Relationships)

As a specific instance of the obligation to adopt a neutral approach towards the award of public contracts (above §II.B.i) and, more generally, as a mandate of the principles of non-discrimination and competition, it is submitted that contracting authorities should avoid instances in which path dependence or the consolidation of current (or previous) commercial relationships unduly advantage incumbent contractors.[586] This objective should be present and condition the decisions made in relation to various aspects of the tender process already discussed—such as the drafting of technical specifications or commercial requirements, the selection and weighting of award criteria, the imposition of awarding constraints, etc. However, in these cases, the obligations to guarantee technical neutrality or equality of opportunity amongst tenderers should limit the possibilities for contracting authorities to unduly 'tilt' the procedure to favour incumbent contractors (above §II.A.xv, §II.B.iii and §II.B.vi). In this regard, however, there seem to be other factors—admittedly more difficult to identify and prevent—that can alter the outcome of the tendering procedure. In particular, as regards the evaluation of tenders and the application of the award criteria ruling the tender procedure, the direct participation of the actual users of the goods, works or services concerned might result in an undue benefit for the incumbent contractor—or, if the level of consumer satisfaction is poor, in undue detriment to or diminishing of its possibilities to get the contract awarded.[587]

This issue is closely linked to the use of past performance as a qualitative selection criterion (above §II.A.viii) and, consequently, seems to merit the same restrictive approach.

[585] See: C Kennedy-Loest, 'Spreading Contract Work to Ensure Security of Supply and Maintain Competition: Issues under the EC Directives' (2007) 16 *Public Procurement Law Review* 116.

[586] *Cf* Arrowsmith (n 28) 747–48.

[587] This shall not be seen as an unnecessary restriction of the contracting authority that limits its ability to choose a proper contractor or avoid awarding contracts to suppliers that cannot perform to the desired standards. On the contrary, such concerns can and shall be reflected in an objective and transparent manner in the tender requirements. What is not acceptable is that such concerns are enforced on the basis of subjective criteria that bias decisions where the exercise of such discretion might remain unchecked.

In this regard, it must be remembered that, according to the relevant case law, past performance 'cannot *under any circumstances* be taken into account by the contracting authority when selecting tenders if the principles of equal treatment and non-discrimination are to be respected'.[588] Consequently, it seems justified to require that contracting authorities ensure this departure from path dependence by ensuring not only that tender documents, requirements and rules do not unduly favour incumbent contractors (below §II.B.viii), but also that the evaluation of tenders and award of the contract are conducted at *arm's length*, so as to ensure that no member of the evaluation teams or decision-making bodies that has a conflict of interest (ie, whose opinion is biased by a previous positive or negative experience in the use of the works, goods or services concerned) participates in these procedures. Article 24 of Directive 2014/24 now offers a direct legal basis to avoid any such instances of conflict of interest (see above §II.A.vii and §II.B.i).

In this regard, it seems relevant to stress that EU case law has consistently held that, after the discovery of a conflict of interests between a member of the evaluation committee and one of the tenderers, the contracting authority must act with due diligence and on the basis of all the relevant information when formulating and adopting its decision on the outcome of the procedure for the award of the tender at issue—so as to ensure at each stage of a tendering procedure equal treatment and, thereby, equality of opportunity for all the tenderers (above §II.B.i). In this regard, it seems desirable that final users of the works, goods or services concerned are not appointed to such bodies or are not otherwise entrusted with these tasks, as a means to prevent discrimination and distortions of competition.

viii. In Particular, the Problem of Switching Costs in Public Procurement

A more specific issue that largely determines the treatment of incumbent contractors relates to rules (or the lack thereof) dealing with the existence of switching costs in public procurement. The existence of conversion or switching costs in public procurement has been traditionally neglected by the EU public procurement directives, but has attracted significant interest amongst economic scholars.[589] Rules applicable to the evaluation of bids make no mention of the criteria that should guide decision-making in this area and the possibility to include them under a life-cycle methodology as foreseen in article 68 of Directive 2014/24 seems very unlikely. However, given its economic importance and its relevance for the outcome of public procurement procedures—particularly in certain sec-

[588] Case T-59/05 *Evropaïki Dinamiki (DG AGRI)* [2008] ECR II-157 104 (emphasis added). See references above n 223.

[589] Generally, on the distortions that switching costs (as a type of first-mover advantage) generate upon market renewal, see Williamson (n 11) 28–29 and 34–35; PD Klemperer, 'Competition when Consumers Have Switching Costs: An Overview with Applications to Industrial Organization, Macroeconomics and International Trade' (1995) 62 *Review of Economic Studies* 515; and J Farrell and PD Klemperer, 'Coordination and Lock-In: Competition with Switching Costs and Network Effects' in M Armstrong and R Porter (eds), *Handbook of Industrial Organization* (Amsterdam, North-Holland, 2007) 1967. More specifically, on the advantage of incumbency for current government contractors in bidding for subsequent contracts, see McAfee and McMillan (n 11) 132–34. On the importance of bidding parity when switching costs are present, see OE Williamson, *The Economic Institutions of Capitalism* (New York, Free Press, 1985) 338–46. See also OFT (n 13) 11–12. This issue has been explored in depth by TR Lewis and H Yildirim, 'Managing Dynamic Competition' (2002) 92 *American Economic Review* 779, 785; id, 'Managing Switching Costs in Multiperiod Procurements with Strategic Buyers' 46 *International Economic Review* 1233 (2005); and id, 'Managing Dynamic Procurements' in Dimitri et al (n 51) 433.

tors, such as information and communication technologies (ICT)[590]—it should come as no surprise that this issue has been presented to the EU judicature in search for interpretative guidance. Indeed, recent developments in EU case law have offered a starting point for the development of interpretative criteria as regards the treatment of switching costs in the light of the principle of equality or non-discrimination—although competition concerns have remained largely unexplored.

A General Approach Favouring a Non-Absolute Obligation to Neutralise Avoidable Incumbency Advantages (Switching Costs). The EU judicature has adopted the position that the existence of switching costs that non-incumbent bidders need to include in their bids (in the form of a non-paid-for running-in phase, in this particular instance) does not constitute a breach of the principle of equal treatment—since they are not per se discriminatory but simply constitute an '*inherent de facto advantage*' for the incumbent contractor at the re-tendering of a given contract.[591] As a matter of general interpretation, the EGC ruled 'that the principle that tenderers should be treated equally does not place any obligation upon the contracting authority to neutralise *absolutely all* the advantages enjoyed by the incumbent'[592] (either as a tenderer, or as a subcontractor of a different tender in the re-tendering procedure), but that

> the potential advantages that may be enjoyed by the existing contractor or the tenderer connected to that party by virtue of a subcontract *must be neutralised only to the extent that it is not necessary for such advantages to be maintained*, that is to say, where it is *easy* to effect such neutralisation, where it is *economically acceptable* and where it *does not infringe the rights* of the existing contractor or the said tenderer.[593]

It is hereby submitted that, as a matter of general approach under EU law, the EGC judgment can be read as suggesting that there exists a *non-absolute obligation of neutralisation of avoidable incumbency advantages*, which should be interpreted in accordance with the principle of proportionality—ie, this obligation would require the neutralisation of the incumbency advantages where it is proportional to do so or, put differently, the contracting authority will not be obliged to neutralise the incumbency advantages when doing so would result in disproportionate obligations or excessive economic hardship. Even if it is not expressly mentioned in the reasoning of the abovementioned judgment, it is submitted that the recognition of such an obligation would be a specification of the more general principle requiring the development of a pro-competitive public procurement system (above chapter five). If fully adopted, this suggested general approach would be founded on a sound economic basis. Economic theory has demonstrated that the *partial neutralisation of switching costs and other incumbency advantages in the public procurement setting can yield better economic results* than non-neutralisation, as the increased competition between bidders will offset the costs internalised by the contracting authority as a result of the change of supplier or service provider.[594] Therefore, the principle set out by this

[590] See: SM Greenstein, 'Did Installed Base Give an Incumbent Any (Measurable) Advantages in Federal Computer Procurement?' (1993) 24 *RAND Journal of Economics* 19; and see also Farrell and Klemperer (n 589) 1980.

[591] Case T-345/03 *Evropaïki Dynamiki v Commission (CORDIS)* [2008] ECR II-341 65–72; with an analogous application of Joined Cases C-21/03 and C-34/03 *Fabricom* [2005] ECR I-1559 36.

[592] Case T-345/03 *Evropaïki Dynamiki v Commission (CORDIS)* [2008] ECR II-341 73–74 (emphasis added).

[593] Ibid 75–80 and 158 (emphasis added).

[594] It has been shown that there may be plausible circumstances in which it is best not to account for switching

recent case law—ie, the establishment of a non-absolute obligation of neutralisation of avoidable incumbency advantages (particularly switching costs), subject to proportionality analysis—seems appropriate from a general perspective.

A Departure from the General Approach that Results in a Too Lenient Treatment of Incumbency Advantages (Switching Costs). However, on closer examination and from an economic perspective, the way in which this general principle was framed and the specific criteria were applied by the EGC in this particular case seem to be largely myopic and seem to point towards the development of a more restricted policy of neutralisation of incumbency advantages than apparently stated. The stress put on the criteria of *easiness and economic acceptability* of neutralisation measures—as opposed to an alternative and more stringent approach based on their *feasibility*, as well as the adoption of a too formal approach towards equality of treatment of the incumbent and challenging bidders, results in a too broad specification of the more general principle abovementioned. When one examines the specifics of the judgment, it seems somewhat biased to assert

> that double payment for the running-in phase would be contrary to one of the principle objectives of the law governing the award of public contracts, which seeks, inter alia, to facilitate the acquisition of the service required in the most economic manner possible.[595]

By restricting the meaning of the 'most economic manner possible' to the *lowest offer* or the *offer with a lowest price* (in a line of reasoning that seems to ignore the distinction between award criteria contained in article 67 of Dir 2014/24; see above §II.B.iii), it fails to take into account various implied costs generated by this approach, such as those derived from a *limit pricing strategy* from the incumbent, or from *reduced competition from potential tenderers* that could consider that the contract is already 'ear-marked' and, consequently, decide not to tender in the presence of significant switching costs. The approach is short-termed and disregards the fact that switching costs might grow over time if the incumbent is repeatedly awarded contracts when re-tendered. Also, this approach runs contrary to recent tendencies towards the appraisal of life cycle (or whole life) costs of the products and services procured by the public buyer.[596]

Indeed, the line of reasoning followed by the EGC seems to tend to establish a *too soft approach* towards the treatment of switching costs under the EU public procurement regime, which only requires the neutralisation of switching costs when it is *easy* and economically acceptable for the contracting authority, and does not run against the rights of the incumbent as a public contractor (ie, under its current contract) or as a tenderer, subcontractor of a tenderer or member of a grouping (ie, as a requirement of the principle of equal treatment amongst tenderers). Therefore, even if the general principle seems to be that there exists a non-absolute duty to neutralise avoidable incumbency advantages, the relatively broad terms in which the exceptions to this general rule have been drafted—and, particularly, the discretion that contracting authorities seem to enjoy when deciding whether or not it is 'easy' or 'economically acceptable' to internalise switching costs or otherwise neutralise similar incumbency advantages—might produce very limited

costs when evaluating bids—even when those costs are large and can influence procurement; see L Cabral and SM Greenstein, 'Switching Costs and Bidding Parity in Government Procurement of Computer Systems' (1990) 6 *Journal of Law, Economics and Organization* 453, 454–64.

[595] Case T-345/03 *Evropaïki Dynamiki v Commission (CORDIS)* [2008] ECR II-341 79.

[596] See: Arrowsmith (n 28) 735–39; and Trepte (n 48) 108.

practical results. Moreover, a too formalistic interpretation of the principle of equality and non-discrimination between tenderers can void this principle of any practical relevance in disciplining the market behaviour of the public buyer.

An Alternative and More Economically Oriented Approach. It is submitted that such a feeble approach towards the neutralisation of switching costs can have major negative implications for the preservation of effective competition in the public procurement of products or services whose provision or supply imply significant switching costs at the time of re-tendering of the relevant contracts—which would run against the principle of competition embedded in EU public procurement directives. A too lenient line of interpretation of the duty to neutralise the competitive advantage that incumbents enjoy in certain types of public procurement procedures might result in a significant loss of the ability of public buyers to realise the benefits of competition and to obtain best value for money in the mid- and long-run, as well as in a competitive distortion of the competitive dynamics in the affected markets—which could result in their artificial segmentation due to the widespread existence of this kind of incumbency advantage. Therefore, in my view, an *alternative and more economically oriented interpretation of the non-absolute obligation of neutralisation of avoidable incumbency advantages* could generate better results for contracting authorities and contribute towards the development of a more procompetitive public procurement system.

Firstly, as regards the proper assessment of the competitive position of the incumbent and the rest of the tenderers, it should be stressed that *neutralisation of switching costs does not breach the principle of equal treatment among tenderers*.[597] From an economic perspective, the incumbent and the rest of the tenderers are *not in equivalent positions*, since the incumbent has a clear cost advantage that derives (largely, and often exclusively) from its previous contractual relationship with the contracting authority. Under these circumstances, granting the same treatment to the incumbent and the rest of the tenderers results in *implied or covert discrimination* for failing to take into account the different situation in which they are placed in the re-tendering of the contract properly,[598] and fails to guarantee the equality of opportunity for all tenderers in the award of the contract. Therefore, establishing neutralisation measures does not breach the rights of the incumbent—which, strictly considered, shall not extend after termination of the contract, ie, are non-existent as far as the re-tendering of a given contract is concerned—or of any other tenderers that rely on the incumbent as a subcontractor in the re-tendering process, since they are not in the same position as the non-incumbent tenderers.

Secondly, as regards the *criteria that could be used in the design of the procurement process to neutralise the existence of switching costs*, several alternatives seem plausible—such as the express assumption of switching costs by the contracting authority (ie, requiring

[597] Doubts have been raised in this regard; see OFT (n 13) 84–89 ('the ability of the public sector to limit the extent of incumbency advantages may be constrained by the procurement rules in the EU Directives … because doing so might require explicit discrimination against the incumbent'). Nonetheless, it is hereby submitted that those apparently discriminatory measures against the incumbent, if properly analysed, are not so. Granting the same treatment to the incumbent and the rest of the tenderers results in (implicit or implied) discrimination for failing to take into account properly the different situation in which they are placed in the re-tendering of the contract.

[598] It should be recalled that the principle of equality requires that similar situations are not treated differently unless differentiation is objectively justified. It is prohibited to treat either similar situations differently, *or different situations identically*. See, by analogy, Joined Cases C-21/03 and C-34/03 *Fabricom* [2005] ECR I-1559 28 and 31.

evaluation of bids without taking into account the switching costs generated by each proposal), or the use of notional or average calculations of those switching costs in the evaluation of the bids,[599] etc. It is submitted that the adoption of one of the potential rules of neutralisation of incumbency advantages should be a matter for future revisions of the EU directives on public procurement, or for national legislation if no need for a harmonised solution is perceived at the EU level.

Regardless of the level of the legislative measures that regulate this specific issue, it is hereby submitted that a particularly interesting approach would consist in *expressly using switching cost estimates as an evaluation criterion*. It would be implemented by requiring each tenderer to provide an estimate of the switching costs that awarding the contract under the proposed conditions would generate for the contracting authority, and to assume the commitment to compensate the contracting authority for any additional switching costs generated during contract implementation under normal circumstances. The *lowest* of these estimates would be added to the bid of the incumbent for the purposes of evaluation. Switching costs would be used as one of the criteria for evaluation of all bids, so that non-incumbent tenderers do not have incentives to increase artificially their estimate of expected switching costs—as a larger estimated value of switching costs would not only disfavour the incumbent by raising the estimate to be added to its proposal for the purposes of bid evaluation, but also significantly handicap their own bids. For its part, the incumbent would have an incentive to depart from limit pricing and other kinds of strategic behaviour, since it would need to compensate this *switching costs effect* with cost efficiency—just like the rest of the tenderers. It is submitted that, as a result of this use of estimated switching costs, incumbents would still enjoy a competitive advantage over the competitors whose proposals generate higher switching costs, while increasing the chances of getting the contract awarded to equally or more efficient competitors (once the existence of switching costs has been neutralised). It logically follows that, if the incumbent gets the contract awarded on the basis of its tender being the most efficient or economically advantageous once the notional switching costs are taken into account, the incumbent should not be obliged to compensate the contracting authority in any manner, for switching costs would simply not exist.[600]

In general terms, this rule would promote both minimisation of switching costs and of production costs and, consequently, should result in enhanced efficiency of the procurement system—as compared to a system with a formal and largely inoperative approach towards switching costs, such as the one that could result from a too narrow interpretation of the general principles underlying the recent case law of the EU judicature in this area. Even if the prices actually paid by the contracting authority are likely to be higher than in the absence of a rule imposing switching cost neutralisation—at least in the case of the contract being awarded to a bidder different from the incumbent—the positive effects on

[599] A similar solution is imposed in the US where incumbent contractors are in possession of government property—which derives a competitive advantage that is neutralised by imputing a notional rental to the incumbent for the purposes of evaluation only—US FAR 45.102; and WN Keyes, *Government Contracts under the Federal Acquisition Regulation*, 3rd edn (Eagan, Thomson-West, 2003) 1019.

[600] It is hereby submitted that this rule is superior to the mere disregard of switching costs at the bid evaluation phase, since the latter approach would not generate incentives for non-incumbent tenderers to submit bids oriented towards the minimisation of switching costs, and the former would penalise bidders whose proposals generated relatively larger switching costs for the public buyer.

future competition and the reduced impact of public procurement decisions on market dynamics will exceed the costs assumed by the contracting authority.[601]

Limits of the Alternative Approach: Neutralisation of Non-Avoidable Incumbency Advantages. The limit of the proposed approach would lie with *unavoidable incumbency advantages*, where their neutralisation could not be performed exclusively by recourse to an estimation of switching costs and the corresponding adaptation of the evaluation and award criteria. In those cases, where the incumbent holds an *absolute advantage* deriving, for instance, from intellectual property rights on the object of the contract—or on an essential part of it—the obligation of neutralisation would need to be assessed on a case by case basis. Where possible, recourse should be had to general licensing or other types of contractual arrangements that can result in the reduction of the *absolute advantage* to an increased cost for the public buyer—given that the rest of the bidders would need to recover the cost of the corresponding licence or any premium or surplus paid for the procurement of essential inputs to supply a given good or render a specific service (however, some additional limits may be applicable, see below §III). Also, the division of the object of the contract might prove useful in separating those aspects where an absolute incumbency advantage exists and those where the incumbent competes on an equal footing with new entrants. In these cases, running a non-competitive procurement procedure (or a procedure where the competitive advantage is not neutralised) for the strictly necessary goods or services, and tendering the rest of the requirements separately (ie, getting the public buyer to assume a residual integration role) can also prove effective in minimising the effects and distortions that can arise from switching costs and other incumbency advantages (the reasoning is similar as regards bundling and aggregation of contracts; for further details, see above §II.A.xviii). Where these alternatives are not available, result in excessive economic hardship for the public buyer, or generate 'secondary' or 'subsequent' distortions of competition, the proportionality clause built into the duty to neutralise incumbency advantages will limit the possibilities of developing a more pro-competitive procurement policy.

Preliminary Conclusion. To sum up, it is submitted that the establishment of a clear non-absolute duty to neutralise avoidable incumbency advantages, particularly in the form of switching costs, does not run against the principle of equal treatment, is fully compatible with the competition principle contained in the EU directives on public procurement, and should result in the express use of switching cost estimates as an evaluation criterion for the award of contracts where the presence of switching costs is material to the economic evaluation of tenders. A similar, albeit more cautious and case-by-case approach towards the neutralisation of non-avoidable incumbency advantages also seems desirable—as long as it complies with a test of proportionality.

ix. Conduct of Renegotiations Prior to or Immediately after Contract Award

In view of some of the features included in the tenders received, as well as in the light of the assessment and ranking of the tenders and the eventual non-full compliance with the tender requirements of some or all of them, contracting authorities could be tempted

[601] Moreover, such an approach towards the neutralisation of incumbency advantages should be considered as part of a public policy strongly advocating the compatibility of products and services. On the desirability of this type of public policy, see Farrell and Klemperer (n 589) 2005–07.

to promote or accept the modification of certain aspects of the tenders received (or their clarification, specification, correction of errors, etc), particularly by conducting (re)negotiations prior to or immediately after the award of the contract to the selected bidder.[602] This interest in the modification of the tenders received can be legitimate in a large number of cases, but also generates significant risks as regards the guarantee of the equal treatment of tenderers and distortions of competition.[603] These concerns apply specifically or in a particularly clear manner to those procedures not covered by the general *ban on negotiations*[604] under the EU directives on public procurement—ie, in competitive procedure with negotiation and in the competitive dialogue procedure—since the contracting authorities could be more prone or consider themselves more empowered to require or allow for amendments in the tenders immediately before or shortly after the selection of the winning bidder and the award of the contract than in the case of non-negotiated procedures (ie, open and restricted procedures).[605] However, the concerns regarding discrimination and potential distortion of competition apply equally to all of them and, arguably, common rules (or at least largely consistent rules) should be established.

The EU public procurement directives do not regulate this issue generally, and only include specific rules regarding the amendment of tenders—following (re)negotiation—in relation with the competitive dialogue procedure. In this regard, articles 30(6) and 30(7) of Directive 2014/24 allow in principle for the amendment of tenders, but clearly establish—although with a slightly different wording—a double restriction on the permissible clarification, specification or optimisation of tenders or the provision of additional information in relation thereto: first, the amendments cannot affect or modify substantial aspects or basic features of the tender or of the call for tenders (ie, its essential terms);[606] and, second, the amendment is not allowed if this generates a risk or is likely to distort competition or cause discrimination.[607] Such a general framework is consistent the previous guidance offered by the Council and the Commission in relation with non-negotiated procedures, where

> all negotiations … on fundamental aspects of contracts, variations in which are likely to distort

[602] The same reasoning applies to changes in rules of procedure or elements of the call for tenders. See Arrowsmith (n 28) 790–93. See also Hjelmborg et al (n 129) 30–31.

[603] Arrowsmith (n 28) 816–34.

[604] See: Statement of the Council and the Commission concerning Article 7(4) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts [1994] OJ L111/114. See also Bovis (n 55, 1997) 66; and id (n 23) 139. For a critical approach to the rule, see K Krüger, 'Ban-On-Negotiations in Tender Procedures: Undermining Best Value for Money?' (2004) 4 *Journal of Public Procurement* 397.

[605] Not surprisingly, then, these are the procedures—particularly competitive dialogue—that have attracted wider scholarly commentary; probably also because of the existence of specific provisions in Dir 2004/18. See Arrowsmith (n 121) 654–59; and id (n 58) 834–35; Brown (n 119) 166–69; C Kennedy-Loest, 'What Can Be Done at the Preferred Bidder Stage in Competitive Dialogue?' (2006) 15 *Public Procurement Law Review* 316, 318–26; and S Verschuur, 'Competitive Dialogue and the Scope for Discussion after Tenders and Before Selecting the Preferred Bidder—What is Fine-Tuning, Etc?' (2006) 15 *Public Procurement Law Review* 327, 330–31.

[606] On the revision of the requirements included in the call for tenders, see Trepte (n 23) 309–17.

[607] However, detection of such instances is difficult and 'the possibilities for conducting illegal negotiations after the submissions appears to be excellent and can normally be performed at a low risk'; see Treumer (n 116) 185. See OGC, *Competitive Dialogue Procedure—Guidance on the Competitive Dialogue Procedure in the new Procurement Regulations* (2006); and Communication from the Commission, Explanatory Note—'Classic' Directive (not published officially), available at ec.europa.eu/internal_market/publicprocurement/docs/explan–notes/classic-Dir–dialogue_en.pdf.

> competition, and in particular on prices, shall be ruled out; however, discussions … may be held but only for the purpose of clarifying or supplementing the content of their tenders [or] the requirements of the contracting authorities and provided this does not involve discrimination.[608]

Therefore, the basic rule on (re)negotiations shortly before the award of the contract seems clearly oriented towards (i) preventing changes in the basic, substantial or fundamental aspects of the call for tenders (such as specifications, conditions or rules of procedure and, particularly, award criteria or their weighting; see below §II.B.iii) or the tenders themselves, and (ii) preventing discrimination and distortions of competition. Even if it is not expressly covered by the content of the directive or the more general ban on negotiations, it is hereby submitted that the same rule should apply to the renegotiation or amendment of tenders (*rectius*, the contract as awarded) shortly after the award of the contract—as doing otherwise would generate a clear escape route for contracting authorities and tenderers to circumvent such restrictions.

The case law of the EU judicature has offered some additional guidance as regards the scope of the acceptable clarifications of tenders, in order to ensure that they do not go beyond that and modify the substance of the tender by reference to the requirements of the contract documents. In this regard, the case law has accepted that certain clarifications do not modify the terms of the tender unacceptably, such as: the provision of clarifications based on data already given in the tender; clarification of the concept of tests included in the tender; repetition of information already contained in the tender accompanied by a specification of the same information in greater detail; the confirmation that certain costs imposed on the contractor by the contract documents are effectively borne by the tenderer; the use of partial charts or exhibits that, without replacing those required by the tender documents, merely serve to illustrate the clarifications sought by the contracting authority; or a clarification of the wording of the tender that does not modify its substance.[609] Therefore, the general criterion (although still relatively abstract) seems to be that clarifications should be analysed on a case-by-case basis and that they should be acceptable as long as 'they in no way modify the *substance* of the tender in relation to the requirements laid down by the contract documents'.[610] Indeed, this resulted in the clear ECJ position that EU procurement law

> does not preclude a provision of national law … according to which, in essence, the contracting authority may ask tenderers in writing to clarify their tenders without, however, requesting or accepting any amendment to the tenders. In the exercise of the discretion thus enjoyed by the contracting authority, that authority must treat the various tenderers equally and fairly, in such a way that a request for clarification cannot appear unduly to have favoured or disadvantaged the tenderer or tenderers to which the request was addressed, once the procedure for selection of tenders has been completed and in the light of its outcome.[611]

In relatively more specific terms, and in relation with the re-tendering of a contract upon

[608] See: Statement of the Council and the Commission concerning Article 7(4) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts [1994] OJ L111/114.

[609] Case T-169/00 *Esedra* [2002] ECR II-609 49–62; and Case T-19/95 *Adia Interim* [1996] ECR II-321 43.

[610] Case T-169/00 *Esedra* [2002] ECR II-609 63 (emphasis added). A similar criterion was developed in the US; see RJ Capio and RE Little, Jr, 'Changes in Government Contracts as they Relate to the Scope of the Contract and the Scope of Competition' (1981–82) 15 *National Contract Management Journal* 74.

[611] Case C-599/10 *Slovensko* [2011] ECR I-10873 41. For discussion, see McGowan (n 522).

finding all previous tenders unsuitable (ex current art 32(2)(a) Dir 2014/24) the ECJ held that

> the amendment of an initial contract condition can be regarded as *substantial* … inter alia, where the amended condition, had it been part of the initial award procedure, would have allowed tenders submitted in the procedure with a prior call for competition to be considered suitable or would have allowed tenderers other than those who participated in the initial procedure to submit a tender.[612]

Most interestingly from the perspective of the restrictions imposed by the principle of competition—or, put otherwise, by the prohibition on accepting amendments that risk distorting or actually distort competition, it is submitted that the restriction to the amendment of non-substantial aspects of the call for tenders or of tenders themselves should not only be excluded when they put at risk or actually distort competition *within* the tender procedure—since these instances would already be caught by the ban on discriminatory amendments—but also (and, perhaps, particularly) when they can generate a distortion *in the market* for the goods, services or works concerned—ie, if, as a result of the amendment or amendments (particularly to the call for tenders) some potentially interested tenderer that did not participate in the tender or was excluded from it, would now be in a condition to submit a tender and compete for the contract. Otherwise, the rule would be insufficient to guarantee non-discrimination at the appropriate level (*trap of tender-specific reasoning*, above §II.A.xvii).

Therefore, given the far reaching implications of the ban on amendments or negotiations that have a potential discriminatory effect or that risk distorting competition (not only among tenderers or candidates, but generally in the market concerned), in numerous instances the contracting authority will not be able to allow for relevant or significant amendments of the call for tenders and/or the tenders received. In such cases, its options not to award the contract in these less convenient or favourable conditions will mainly be limited to the cancellation and re-tendering of the contract, in order to guarantee that the principles of equal treatment and competition are complied with throughout the tendering process. Nonetheless, as shall be seen in the next section, that is an option contracting authorities cannot pursue freely.

x. Restrictive Cancellation of the Tendering Procedures

A final way in which contracting authorities can exercise their administrative discretion during the award phase of tenders is by adopting a decision to cancel the tender and, eventually, retender the contract (on re-tendering, see below §II.C.iv). The decision to cancel the tender can be motivated by several different reasons and, depending on the concurring circumstances, can be a legitimate way for contracting authorities to avoid awarding contracts that cannot satisfy their needs in the conditions in which the award has to be made, or to proceed with tender procedures designed in overly restrictive terms (above §II.A.ix). However, contracting authorities could also decide to cancel tender procedures for strategic reasons—eg, in order to avoid awarding the contract to the specific tenderer that has submitted the most cost-effective or the offer with the best price–quality

[612] Case C-250/07 *Commission v Greece* [2009] ECR I-4369 52 (emphasis added). See also, by analogy, Case C-454/06 *Pressetext Nachrichtenagentur* [2008] ECR I-4401 35.

ratio—which, in certain cases, could infringe the requirements of the principles of equal treatment and competition.

In this regard, it is interesting to note that the public procurement directives do not contain any provisions regarding the circumstances and limits within which contracting authorities can exercise their discretion to cancel the tender before awarding the contract—which, therefore, is an issue left for Member States' domestic public procurement legislation to regulate. However, the case law of the EU judicature has provided some guidance in this respect. In particular, in cases where the contracting authority has only received one suitable tender, the ECJ has clearly established that 'the contracting authority is not required to award the contract to the only tenderer judged to be suitable', on the basis that in situations where there is only one suitable tenderer 'the contracting authority is not in a position to compare prices or other characteristics of various tenders in order to award the contract in accordance with the criteria set out in' the directives.[613] This finding of the ECJ seems too formal and might run contrary to economic theory which supports that, depending on the information available to the sole suitable tenderer at the time of submitting its tender, the existence of effective and sufficient competition should not be excluded.[614]

In more general terms, and apparently regardless of the specific circumstances of the case, the ECJ has also determined that the public procurement directives contain 'no provision expressly requiring a contracting authority which has put out an invitation to tender to award the contract to the only tenderer judged to be suitable'.[615] Therefore, the relevant case law seems to give leeway to unrestricted discretion of contracting authorities to cancel tenders for public contracts at any stage before the contract award, subject to compliance with the general rules of the TFEU.[616] Indeed, the prevailing interpretation is that the procurement directives do 'not provide that the option of the contracting authority to decide not to award a contract put out to tender … is limited to exceptional cases or must necessarily be based on serious grounds'.[617]

However, it seems that such a reading of the case law would be too formal, would often lead to results that run contrary to the procurement directives—and, more specifically, to the principles of equal treatment and competition—and would overlook other restrictions to the exercise of this discretional power by contracting authorities. In this regard, the specific obligation to provide reasons regarding the cancellation of a tender should be taken into due account and reconsidered. As established by article 55(1) of Directive 2014/24, 'contracting authorities shall as soon as possible inform each candidate and tenderer of decisions reached … including the grounds for any decision … not to award a contract for

[613] Case C-27/98 *Fracasso and Leitschutz* [1999] ECR I-5697 32–33. See also Case T-169/00 *Esedra* [2002] ECR II-609 198–203. The position of the ECJ is criticised by Treumer (n 180) 78–79. See also M Dischendorfer, 'Case C-27/98: The Position under the Directives Where There is Only One Bid' (2003) 13 *Public Procurement Law Review* CS159.

[614] For discussion of the possibility of obtaining competitive results with only one contractor, see JM Keisler and WA Buehring, 'How Many Vendors Does it Take to Screw Down a Price? A Primer on Competition' (2005) 5 *Journal of Public Procurement* 291.

[615] Case C-27/98 *Fracasso and Leitschutz* [1999] ECR I-5697 21. This is consistent with the approach previously held in Case T-203/96 *Embassy Limousines* [1998] ECR II-4239 54. See also Case T-271/04 *Citymo v Commission* [2007] ECR II-1375 111.

[616] Case C-27/98 *Fracasso and Leitschutz* [1999] ECR I-5697 23 and 25; and Case C-244/02 *Kauppatalo* [2003] ECR I-12139 33.

[617] Case C-92/00 *HI* [2002] ECR I-5553 40.

which there has been a call for competition, to recommence the procedure'. This statement must show clearly and unequivocally the reasoning of the contracting authority so as to inform the tenderers and candidates concerned of the justification for the cancellation of the tender and to enable the judicature (or other organs entrusted with bid protests) to exercise its powers of review.[618] It seems clear that contracting authorities can only cancel or recommence a tender procedure if there are grounds that justify such a decision—ie, the decision cannot be arbitrary.[619] This general obligation can be reinforced by Member States' domestic legislation imposing upon contracting authorities special duties not to depart from their own previous acts unless they can justify such decisions on particularly well-founded grounds (in protection of legitimate expectations, as a case of estoppel, or otherwise).

Moreover, as with any other decision adopted during a tender process, the decision to cancel the call for tenders must comply with the substantive requirements of the directives and the general principles of the TFEU. This constraint has been expressly emphasised by the ECJ, which found that

> even though, apart from the duty to notify the reasons for the withdrawal of the invitation to tender [there is] no specific provision concerning the substantive or formal conditions for that decision, the fact remains that the latter is still subject to fundamental rules of Community law, and in particular to the principles laid down by the EU Treaty … the decision of a contracting authority to withdraw an invitation to tender … is subject to the relevant substantive rules of Community law.[620]

In my view, then, the obligation to conduct the award of the contract from a neutral and objective perspective—as a general substantive requirement of the directives—reinforces the need for contracting authorities to adopt cancellation decisions exclusively where there are sufficient reasons that objectively support such a decision (above §II.B.i). Finally, compliance with the general principles of the TFEU in the field of public procurement requires contracting authorities to refrain from adopting decisions that result in direct or covert discrimination, and/or that prevent, restrict or distort competition. Thus, if as a result of the cancellation of the tender competition within the (re)tendering procedure (or, more generally, in the market) can be altered—eg, because some tenderers will be prevented from submitting new tenders, among other reasons, because they cannot absorb the additional costs associated with a new tender—the contracting authority should be prevented from adopting the cancellation decision, *unless* there is an overriding legitimate reason that justifies it; which, it is submitted, should be analysed under a strict proportionality test.

[618] Case T-411/06 *Sogelma* [2008] ECR II-2771 119; Case C-22/94 *Irish Farmers* [1997] ECR I-1809 39, and case law cited therein.

[619] *Cf* Case C-92/00 *HI* [2002] ECR I-5553 41, where the ECJ determined that 'although that provision requires the contracting authority to notify candidates and tenderers of the grounds for its decision if it decides to withdraw the invitation to tender for a public service contract, there is no implied obligation on that authority to carry the award procedure to its conclusion'. In my view, both positions are not irreconcilable, since the decision not to go ahead, even if not the only possible one, can still not be arbitrary or unjustified.

[620] Case C-92/00 *HI* [2002] ECR I-5553 42 and 48.

C. Assessment of Unnecessary Restrictions after Award of the Contract

Previous sections have analysed the potential competition distortions derived from the phases of the tendering process that have been expressly regulated in the EU public procurement regime for a long time—that is, in the design and preparation of the tender, and the evaluation of bids and award of the contract—putting a special emphasis on the rules of the directives (or lack of them) and on the interpreting case law of the EU judicature. Even if EU public procurement directives substantially limit their scope to these phases of the tendering procedure—with the exception of provisions regarding remedies for their breach, which will be analysed below §II.C.v—it is important to stress that there is room for competition-distorting public procurement practices also during the implementation phase of the contracts awarded.[621] This has now emerged clearly in Directive 2014/24,[622] which includes new rules concerning the modification of contracts during their duration and the termination of contracts for serious grounds. Therefore, an analysis of such potential restrictions from a competition perspective seems a necessary complement to the analyses conducted so far.

The importance of ensuring that competition-distorting decisions are not adopted after award of the contract rests on two factors. First, it will be important in itself to prevent (new) publicly generated distortions of competition. Secondly, it will be instrumental in ensuring the effectiveness of the system of preparation and award of public contracts—which could be easily circumvented by merely 'postponing' competition-restrictive decisions until after the award of the public contract.[623] Therefore, one of the main criteria in conducting the following analysis will be to try to ensure that the contract is not implemented or altered after its award in such a manner as to render ineffective the limits and constraints imposed on the contracting authority during the preparation and award phases, and also to prevent the occurrence of the types of distortions of competition avoided throughout the tendering procedure.[624]

This section will analyse the requirements of financial guarantees during the implementation of the contract (§II.C.i); the renegotiation of the main conditions of the contract and its modification (§II.C.ii); the extension of the contract and the award of additional works (§II.C.iii); decisions regarding the termination of the contract and its subsequent re-tendering (§II.C.iv); and the setting up of ineffective bid protest mechanisms (§II.C.v). Some of the issues covered in this section have already been partially or totally covered in

[621] Similarly, see V Auricchio, 'The Problem of Discrimination and Anti-Competitive Behaviour in the Execution Phase of Public Contracts' (1998) 7 *Public Procurement Law Review* 113, 124.

[622] Generally, on these new rules, see S Treumer, 'Contract Changes and the Duty to Retender under the New EU Public Procurement Directive' (2014) 23 *Public Procurement Law Review* 148–55. For a discussion of some of the previous solutions in the 2011 proposal that did not get adopted in Dir 2014/24, see id, 'Regulation of Contract Changes Leading to a Duty to Retender the Contract: The European Commission's Proposals of December 2011' (2012) 21 *Public Procurement Law Review* 153–66.

[623] Along the same lines, Racca, Cavallo Perin and Albano (n 508). See also G Racca and R Cavallo Perin, 'Material Changes in Contract Management as Symptoms of Corruption: A Comparison between EU and US Procurement Systems' in Racca and Yukins (n 153) 247–74; and J Vazquez Matilla, 'The Modification of Public Contracts: An Obstacle to Transparency and Efficiency' in Racca and Yukins (n 153) 275–306.

[624] In general terms, on the importance of assuring that competition is not distorted by decisions of the public buyer during the execution of the public contract, see C Yannakopoulos, 'L'apport de la protection de la libre concurrence à la théorie du contrat administratif' (2008) 2 *Revue du Droit publique et de la science politique* 421, 444–48.

previous sections, in relation to twin concerns in previous phases of the tendering process. In these instances, the analysis will be brief and mainly oriented towards adapting the criteria already advanced to this contractual or post-award stage. Moreover, given the lack of specific rules in the directives in some of these areas, the analysis will be largely limited to the case law of the EU judicature and general principles of EU law.

i. Excessive Guarantees (Performance Bonds)

The issue of the competitive impact of surety requirements during the tender procedure has already been analysed and the preliminary conclusions indicated a need to minimise their requirement in order not to raise improperly the entry barriers that candidates and tenderers face (above §II.A.xiv). As already briefly mentioned, bid sureties and performance bonds develop different functions. While bid bonds are mechanisms designed to ensure the validity of the offers and the commitment of tenderers to enter into the contract under the conditions of their tenders, performance bonds develop a different double function: on the one hand, they protect the contracting authority from the risk of the contractor's insolvency before the completion of the contract[625] (although this is an issue that has already been analysed through qualitative selection criteria and, consequently, unless contracts are of a long duration or generate significant new risks not previously faced by the contractor, this justification seems weak); and, on the other hand, they insure against liability for defective works or breach of contract on the part of the contractor (and, consequently, should be analysed in view of the insurance policies that the contractor might have taken out in order to cover these and similar risks).[626]

In view of their different function, then, performance bonds and bid bonds should be set at different levels—and, usually, performance bonds should be set at higher amounts than bid bonds, given that they are generally covering risks of a much larger magnitude. However, it must be stressed that performance bonds can generate similar competition-restrictive effects to bid bonds—in the sense that they can prevent the participation of candidates with relatively more modest financial resources (although, it should be stressed, they are deemed suitable according to the tender requirements) because, ex ante they already evaluate their difficulties in meeting this contractual requirement and refrain from submitting tenders for the contract. Consequently, the same criteria already discussed seem to apply to the treatment of performance bonds by contracting authorities—who should minimise their requirement to the minimum possible extent, in order not to restrict competition unnecessarily. To be sure, the ability of contracting authorities to adopt specific decisions and to adjust the level of performance bonds to the circumstances of a given contract can be limited by public procurement or other domestic legislation of Member States—which, for instance, can impose a set amount of surety (usually as a fixed percent of the contract value). In these cases, it seems that the applicable legislation is unnecessarily restrictive and that its rigidity can generate unwanted negative effects. Therefore, it

[625] On the function of *performance* bonds in the dissipation of insolvency risk, Engel et al (n 141) 332–37. On the complications that insolvency create for the contracting authority, in particular, where a change of contractor is difficult to carry out, see Treumer (n 166) 21-31.

[626] For guidance to contracting authorities, see Department of Finance and Personnel, Central Procurement Directorate, *Procurement Guidance Note on Liability and Insurance in Government Contracts*, PGN 03/12 (2012), available at dfpni.gov.uk/pgn-03-12.

would be desirable for the applicable legislation to be amended in order to provide some flexibility in this respect, at least allowing the setting of different levels of surety within a legislatively imposed spread.

Some criteria seem to be fit for the purpose of minimising the potentially restrictive effects of performance guarantees, such as the setting of a level of surety that does not exceed the objective risks generated by the performance of the contract that have been contractually assumed by the public contractor. Therefore, contracting authorities can opt for self-insurance of certain risks and, in all cases, should take the effective allocation of risks through contract into account in order not to require undue coverage for self-assumed risks. Moreover, contracting authorities should allow for different types of guarantees (such as the substitution of bid bonds with other types of collateral, or even with retention of a proportion of payments due to the contractor), in order to allow for the *self-financing or self-coverage* of the surety scheme linked to the contract. Along the same lines, contracting authorities should take into account the actual evolution of risk exposure during contract implementation, so that an adjustment (decrease) in financial guarantees according to the performance of the contract could be allowed for, in order not to burden the financial resources of the contractors unnecessarily and to allow them to put these resources to more productive uses.

Therefore, in relation to performance bonds and in order to avoid unnecessary restrictions of competition—eg, by preventing the participation of relatively more financially constrained (suitable) tenderers, particularly SMEs—contracting authorities seem to be under a duty to avoid overcompensation of performance risks, to ensure the financial neutrality of their collateral requirements—or, at least, allow for the provision of any type of surety that guarantees that the funds are fully available to them[627]—and to adjust the level of guarantees to the outstanding risks, allowing for an adjustment of financial guarantees according to the state of performance of the contract.

ii. Renegotiation of the Main Conditions of the Contract and its Modification

Renegotiation of the contract during its implementation is another circumstance partially covered previously in the analysis of the closely related issue of negotiations immediately before or shortly after contract award (above §II.B.ix). As a preliminary issue, it is necessary to distinguish between *modifications* of certain elements of the contract according to the rules included in the call for tenders and contractual conditions—such as, for instance, price adjustments according to the evolution of a given index over time, or the revision of deadlines for the execution of certain parts of the contract that depend on future events—and proper *renegotiations* of the terms of the contract in other cases.[628] While the former,

[627] These decisions can also generate a significant competitive impact on the upstream market for the provision of financial guarantees—where certain types of players could face significant entry barriers or be completely excluded if Member States' public procurement rules prevented the use of certain types of sureties or collateral; eg, by requiring that sureties be issued by a given type of financial institution (ie, banks), to the exclusion of others (such as insurance companies). In that regard, financial neutrality regarding performance bonds can generate pro-competitive effects beyond the markets directly concerned by the public procurement activities (as an instance of the effects in *neighbouring* markets; above chapter two, §II.E). However, more detailed analysis of this issue exceeds the scope and possibilities of this study.

[628] For further details on modifications of certain (even basic) elements of the contract according to predefined rules clearly included in the call for tenders, see Case C-496/99 P *Succhi di Frutta* [2004] ECR I-3801 118; where the ECJ determined that, for the contracting authority to be able to amend some conditions of the invitation

which we could label 'contractual adjustments' or 'contractual revisions', are not strictly affected by the ban on negotiations (as they result from the direct implementation of contractual clauses and tender conditions set and disclosed from the beginning—which, logically, are not *re*-negotiated at this stage), the amendment of basic or substantial elements of the contract during its implementation raises significant concerns. In this regard, it is worth remembering that negotiation and amendments to the call for tenders and the tenders themselves are generally restricted, especially before the award of the contract. By the same token, renegotiation at later stages of contract implementation has to be approached from a restrictive perspective,[629] since it could be used to provide favourable treatment to the awardee and, in the end, generate significant distortions of competition.[630]

In this regard, it should be stressed that there can be a larger need for limited renegotiation as the implementation of the contract progresses (as compared to the same renegotiation right before or shortly after the award of the contract), as contractors and contracting authorities might be faced with unexpected situations that require an adjustment of the contract.[631] However, those renegotiations should normally refer to relatively secondary issues related to the subject-matter of the contract, and so the adjustment should not require a material amendment of the basic or fundamental elements of the contract (such as liability clauses, rules regarding transfer of risk, insurance or guarantee schemes, etc)—perhaps with the only exception of the scope, delay and price for the works, goods and services, provided they do not alter the essence of the contract, which should be analysed separately as instances of extension or award of additional works (below §II.C.iii).

Therefore, in order to prevent potential discrimination and distortions of competition, the same rules applicable to (re)negotiations at earlier stages of the process should apply, so that changes in the basic, substantial or fundamental elements of the contract are prevented. In case the contracting authorities' needs can no longer be satisfied without introducing such material amendments to the contractual relationship, it is submitted that the only option will then be to proceed to the termination of the current contract and the re-tendering of its subject-matter under new conditions adjusted to the present circumstances (subject to the limits explored below §II.C.iv). This position has now been endorsed by recital (107) of Directive 2014/24, which clearly indicates that

> It is necessary to clarify the conditions under which modifications to a contract during its performance require a new procurement procedure. … *A new procurement procedure is required in case of material changes to the initial contract*, in particular to the scope and content of the mutual rights and obligations of the parties, including the distribution of intellectual property rights. Such changes demonstrate the parties' *intention to renegotiate essential terms or conditions of that contract*. This is the case in particular if the amended conditions would have had an influence on the outcome of the procedure, had they been part of the initial procedure (emphasis added).

Indeed, these issues have now been regulated in Directive 2014/24, which includes a new

to tender after the successful tenderer has been selected, this possibility has to be expressly regulated in the tender documentation in a way that determines the framework applicable to this revision and guarantees that all tenderers are on equal footing when formulating their respective tenders.

[629] Arrowsmith et al (n 50) 488–503.

[630] Arrowsmith (n 286) 127 and 145.

[631] For discussion, see ME Comba, 'Contract Execution in Europe: Different Legal Models with a Common Core' (2013) *European Procurement & Public Private Partnership Law Review* 302.

article 72 on the modification of contracts during their term. Most of the innovations in Directive 2014/24 are clearly aligned with the proposals outlined above.[632]

First, article 72(1)(a) of Directive 2014/24 recognises the possibility to *carry out modifications that have been provided for in the initial procurement documents* in clear, precise and unequivocal review clauses, such as price revision clauses, or options, and irrespective of their monetary value.[633] In order to prevent abuses in the use of this possibility, it requires that such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used, and that they shall not provide for modifications or options that would alter the overall nature of the contract or the framework agreement.[634]

Secondly, article 72(4) of Directive 2014/24 *prevents modifications of contracts that render them materially different in character from the one initially concluded*. Article 72(4) also provides a list of conditions that will trigger a modification being considered substantial,[635] which include the following situations: (a) the *change of conditions that restricted competition in earlier phases* (ie, modifications that introduce conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure); (b) *changes in the economic balance* of the contract or the framework agreement *in favour of the contractor* in a manner which was not provided for in the initial contract or framework agreement; (c) *modifications that considerably extend the scope* of the contract or framework agreement; or (d) where a *new contractor* replaces the one to which the contracting authority had initially awarded the contract, except in cases excluded by article 72(1)(d).[636]

However, none of these situations is absolute and, in particular, Directive 2014/24 *exempts some sorts of substantial modifications in view of their need or their limited effects*. At this point, it is important to stress that, as mentioned, articles 72(1)(a) and 72(4)(a) of Directive 2014/24 exempt modifications of any value or relevance that are carried out in accordance with previously disclosed revision clauses or options, provided they are clear, precise and unequivocal—which, no doubt, will be the focus of significant litigation in the future.[637] In a similar vein, there is some room for modifications that affect the economic balance of the contract (art 72(4)(c)) and/or extend its scope (art 72(4)(d)) by means of additional work (see below §II.B.iii). Equally, articles 72(1)(d) and and 72(4)

[632] Which were already included in the first edition of this book, see Sánchez Graells (n 172) 345–46.

[633] See rec (111) Dir 2014/24.

[634] See ST Poulsen, 'The Possibilities of Amending a Public Contract without a New Competitive Tendering Procedure under EU Law' (2012) 21 *Public Procurement Law Review* 167–87; K Hartlev and M Wahl Liljenbøl, 'Changes to Existing Contracts under the EU Public Procurement Rules and the Drafting of Review Clauses to Avoid the Need for a New Tender' (2013) 22 *Public Procurement Law Review* 51–73; and K Smith, 'Contract Adjustments and Public Procurement: An Analysis of the Law and its Application' (PPRG PhD Conference Paper, 2014), available at nottingham.ac.uk/pprg/documentsarchive/phdconference2014/smith.pdf.

[635] It has been stressed that the key criteria for the assessment of whether a change should be considered as substantial are in accordance with the ruling in Case C-454/06 *Pressetext Nachrichtenagentur* [2008] ECR I-4401. See Treumer (n 622, 2014) 149, who also stresses the differences in drafting between art 72(4) Dir 2014/24 and *Pressetext*.

[636] See rec (110), which provides clarification regarding cases of justified and unjustified substitution of the contractor with or without a new procurement procedure.

[637] Similarly, Hartlev and Wahl Liljenbøl (n 634).

(d) of Directive 2014/24 exempt certain *unavoidable changes of contractor*, which include three cases: (i) changes that derive from the application of an unequivocal review clause or option (which, probably, would not have needed this reiterative regulation); (ii) changes of contractor derived from the universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, provided that the economic operator taking over fulfils the criteria for qualitative selection initially established (above §II.A.vii), and provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of the Directive; or (iii) in the event that the contracting authority itself assumes the main contractor's obligations towards its subcontractors where this possibility is provided for under national legislation pursuant to Article 71. Of these three possibilities, and from a competition perspective, the only one that deserves careful consideration is the second one, given that it is the only one that changes the competitive dynamics in the market. In that regard, the application of the last anti-circumvention clause may be particularly relevant in controlling cases of fraudulent corporate restructurings.

Finally, article 72(5) of Directive 2014/24 is very clear in establishing that a new procurement procedure in accordance with its rules (ie, the termination of the existing contract and the consequent re-tendering of the substantially modified contract) will be necessary in all situations where the modification of the contract is substantial and does not derive either from clear, precise and unequivocal revision clauses, or from changes justified on grounds of necessity.

Globally, then, the new rules on the modification of contracts during their term fundamentally keep a pro-competitive orientation and set an appropriate framework that, if properly applied, should minimise competition distortions. However, the rules are not fully compliant with the needs of a pro-competitive procurement system when it comes to the issue of contractual extensions and the award of additional works, which have received a particularly lenient treatment in Directive 2014/24, as discussed in the following subsection.

iii. Extensions and Award of Additional Works

As has just been mentioned, one of the particular instances in which renegotiation of the initial terms of the contract seems to merit specific attention is that regarding the adjustment of its scope (including, as necessary, price and delay) in order to cover unforeseen needs by the contracting authority and/or unforeseen complications arising from the implementation of the contract. Even if such elements are clearly substantial or essential to the contract and, hence, its amendment without re-tendering should be generally excluded according to the general rules applicable to renegotiations (above §II.B.ix and §II.C.ii),[638] the trade-off between the need to re-open competition for the contract in the amended

[638] The relevance of price, particularly as regards its amendment during the period of validity of the contract, has been stressed by EU case law; see Case C-454/06 *Pressetext Nachrichtenagentur* [2008] ECR I-4401 59–63; and Case C-496/99 P *Succhi di Frutta* [2004] ECR I-3801 117–21. As already mentioned, the case law allows for rules on revision of prices, as long as they are expressly regulated in the tender documentation and guarantee that all tenderers are on equal footing when formulating their respective tenders (*Succhi di Frutta* at 118 and above §II.C.ii)—which is an issue different from the one discussed in the text, which refers to the revision or amendment of the aggregate price for the contract once unforeseen situations or additional needs are identified—which, consequently, are not covered by the rules on the 'regular' revision of prices.

terms (or for the additional needs to be included in the scope of the contract) and the effective implementation of the initial contract under reasonably efficient conditions seem to merit special rules. In this regard, Directive 2014/24 sets special rules for the extension of the contract, and for the award of additional works, supplies and services, as well as two new exemptions for *de minimis* extensions of the scope of the contract and for modifications triggered by *unforeseeable events*—which, it is submitted, set special rules as regards the revision or renegotiation of the scope of the contract, including as necessary their price (so as to increase the total aggregate value of the initial contract) and delay of execution.[639]

Firstly, in relation to the award of *supply* contracts, article 32(2) of Directive 2014/24 allows contracting authorities to award public contracts by a negotiated procedure without prior publication of a contract notice for additional deliveries by the original supplier which are intended either as a partial replacement of normal supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the contracting authority to acquire material having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance (see rec (108)). The length of such contracts as well as that of recurrent contracts may not, as a general rule, exceed three years. Therefore, the possibility of awarding additional supplies is significantly constrained to cases of technical incompatibility or disproportionate operation and maintenance difficulties—which, in most cases, will not exist; and, in any case, the possibility is temporarily limited to a relatively short period of three years (although the provision seems to allow for extended duration under special circumstances which, it is submitted, should also be justified by the same technical reasons). Also, this procedure has general features that resemble the conclusion of framework agreements with a single supplier and, consequently, some of the analyses applicable in that case seem to be applicable here (above §II.A.xx; particularly as regards the limitation of the maximum duration of this award mechanism, by analogy with the rules cited there).

Secondly, regarding all sorts of contracts and as a rather revolutionary novelty, Directive 2014/24 creates a *de minimis* exemption for modifications of a limited value. This new rule is justified in recital (107), whereby

> [m]odifications to the contract resulting in a minor change of the contract value up to a certain value should always be possible without the need to carry out a new procurement procedure. To this effect and in order to ensure legal certainty, this Directive should provide for *de minimis* thresholds, below which a new procurement procedure is not necessary.

To that effect, article 72(2) of Directive 2014/24 allows for contracts to be modified without a new procurement procedure where the value of the modification is below a double value threshold, ie, where the value of the modification remains below the thresholds set out in article 4 of Directive 2014/24 (an absolute threshold); and they represent no more than 10%

[639] Generally, on the special rules regarding extensions, renewal and amendment of contracts—and the limits that require the (re)tendering of new contracts due to changes broader than permitted by the Directives, see Arrowsmith (n 121) 287–96. For an overview of the situation in the US, see BI Kogan, 'Competitive Bidding and the Option to Renew or Extend a State Purchase Contract' (1969–70) 74 *Dickinson Law Review* 166; and JA Jackson and SA Alerding, 'Expanding Contracting Opportunities without Competition' (1996–97) 26 *Public Contract Law Journal* 205.

of the initial contract value for service and supply contracts or 15% for works contracts (a relative threshold). This *de minimis exemption for contract modifications* is not completely free, given that it may not alter the overall nature of the contract or framework agreement and, in any case (and to avoid a snowball effect), where several successive modifications are made, the value shall be assessed on the basis of the net cumulative value of the successive modifications—as compared to the initial value of the contract—for the purposes of the relative threshold. This new rule runs against the conception of contract modifications under the previous rules, where the EU Courts had taken a very strict approach towards this sort of modifications.[640] From a competition point of view, this flexibility should be welcome in that it allows contracting authorities and public contractors to rely on it and, hence, reduces the need for economic operators to include 'financial cushioning' in offers for unmodifiable contracts. However, it should also be stressed that an understanding of this *de minimis* clause as a 'free bar' of contract modifications could have undesirable results and increase the costs of monitoring contract execution, as well as being prone to abuse and favouritism. In that regard, the application of the principle of competition and the principles of proportionality and good administration may remain instrumental in imposing restrictions on the use of this *de minimis* clause, particularly where it can result in the granting of *undue economic advantages* that, in the end, amount to implicit state aid (in the form of unjustified *de minimis* modifications of contracts that alter the economic balance in favour of the contractor for no good reason). Consequently, this is an area where extreme caution should be exercised by contracting authorities concerned with their integrity and with the avoidance of competition distortions, and one where the involvement of competition authorities in the oversight of contractual modifications could be most effective (see the proposals in chapter seven).

Thirdly, and again for all contracts, article 72(1)(b) of Directive 2014/24 allows contracting authorities to modify existing contracts in relation to additional works, services or supplies by the original contractor that have become necessary and that were not included in the initial procurement, where a change of contractor cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement; and it would cause significant inconvenience or substantial duplication of costs for the contracting authority. Therefore, in this case, the award of the additional works or services must be justified by the occurrence of unforeseen events[641] and can only occur in situations where it is technically or economically unfeasible to separate the additional works or services from the previous ones, or when such separation is feasible but the additional works or services are strictly necessary—ie, when completion of the original contract would be unfeasible or materially burdensome for the contractor and/or the contracting authority. In any case, the directive sets an upper limit, and so any increase in price shall not exceed 50% of the value of the original contract and, where several successive modifications are made, which shall not be aimed at circumventing this Directive, that limitation shall apply to the value of each modification (art 72(1)(b) *in fine* Dir 2014/24). From a competition perspective, this clause is problematic in that it does not set an absolute upper limit for the modifications. Consequently, the effective interpretation and enforcement of the safeguard

[640] Most recently, see Case T-235/11 *Spain v Commission (AVE)* [2013] pub electr EU:T:2013:49.
[641] See rec (109) Dir 2014/24.

clauses embedded in this provision (ie, the strict assessment of the proportionality of the decision to use it, the unforeseeability of the circumstances that trigger its application, and the balancing of the potential anti-competitive effects) will be of paramount importance.

Fourthly, only for works and services, and provided contracting authorities disclose the potential use of such a device for the award of additional works or services as soon as the first project is put up for tender, contracting authorities can award public contracts for new works or services consisting of the *repetition* of similar works or services entrusted to the economic operator to whom the same contracting authorities awarded an original contract, provided that such works or services are in conformity with a basic project for which the original contract was awarded according to the (initial) procedure (which now does not need to be either open or restricted). This procedure is limited both quantitatively, since contracting authorities must disclose the total estimated cost of subsequent works or services—which, it is submitted, limits the maximum amount of additional works or services that can be awarded through negotiated procedures without a prior notice—and temporarily, since it may be used only during the three years following the conclusion of the original contract (art 32(5) Dir 2014/24). This procedure also has general features that resemble the conclusion of framework agreements with a single supplier and, consequently, the analyses applicable in that case seem applicable here (above §II.A.xx).

Finally, article 72(1)(c) of Directive 2014/24 creates a very significant authorisation for modifications of contracts based on *clearly unforeseeable conditions* (in a way that, it is submitted, should inform the interpretation and application of the exception in art 72(1)(b) Dir 2014/24 as well). According to recital (109),

> Contracting authorities can be faced with external circumstances that they could not foresee when they awarded the contract, in particular when the performance of the contract covers a long period. In this case, a certain degree of flexibility is needed to adapt the contract to those circumstances without a new procurement procedure. The notion of *unforeseeable circumstances refers to circumstances that could not have been predicted despite reasonably diligent preparation of the initial award by the contracting authority*, taking into account its available means, the nature and characteristics of the specific project, good practice in the field in question and the need to ensure an appropriate relationship between the resources spent in preparing the award and its foreseeable value. However, *this cannot apply in cases where a modification results in an alteration of the nature of the overall procurement, for instance by replacing the works, supplies or services to be procured by something different or by fundamentally changing the type of procurement* since, in such a situation, a hypothetical influence on the outcome may be assumed. (emphasis added)

In creating this flexibility, article 72(1)(c) of Directive 2014/24 establishes a treble condition for the authorisation of significant contract modifications, which requires that (i) the need for modification has been brought about by circumstances which a diligent contracting authority could not foresee; (ii) the modification does not alter the overall nature of the contract; and (iii) any increase in price is not higher than 50% of the value of the original contract or framework agreement. Where several successive modifications are made, which shall not be aimed at circumventing this Directive, the limitation shall apply to the value of each modification.[642] All of these requirements leading to the exclusion of the general rules in Directive 2014/24 will need to be interpreted strictly and, remarkably,

[642] The same criticism to the inexistence of an absolute limit to the value modifications indicated above applies here.

the concept of 'unforeseeable circumstances' will play a major role. In that regard, it is important to stress that, in the case law of the ECJ (and in relation with the expiry of time limits, but the logic is the same), it has been interpreted as encompassing

> *both an objective element relating to abnormal circumstances unconnected with the person in question and a subjective element involving the obligation, on that person's part, to guard against the consequences of the abnormal event by taking appropriate steps without making unreasonable sacrifices*. In particular, the person concerned *must pay close attention* to the course of the procedure set in motion and, in particular, *demonstrate diligence* in order to comply with the prescribed time-limits. Thus, the concept of force majeure does not apply to a situation in which, objectively, a diligent and prudent person would have been able to take the necessary steps before the expiry of the period prescribed for instituting proceedings.[643]

It is submitted that this sets a high level of duty of care and that, consequently, the possibility to resort to such modifications should be exceptional.[644] It should be taken into account that, in a similar fashion, the ECJ has recently imposed a very restrictive interpretation of the concept of 'overriding reason in the public interest' justifying a direct award of a contract, following a reasoning that is clearly relevant here. Indeed, it has been emphasised that:

> The principle of legal certainty, which is a general principle of European Union law, provides ample justification for observance of the legal effects of an agreement, including—in so far as that principle requires—in the case of an agreement concluded before the Court has ruled on the implications of the primary law on agreements of that kind and which, after the fact, turn out to be contrary to those implications. … However, *that principle may not be relied on to give an agreement an extended scope which is contrary to the principles of equal treatment and non-discrimination and the obligation of transparency deriving therefrom. It is of no import in that regard that that extended scope may offer a suitable solution* for putting an end to a dispute which has arisen between the parties concerned, for reasons outside their control, as to the scope of the agreement by which they are bound.[645]

Moreover, given the profound implications it can have for competition, it is submitted that the contracting authority should be required to at least engage in an assessment of the different consequences that modifying the contract would have as compared to a cancellation and retendering (see below §II.C.iv). In view of that assessment, and where it is not disproportionate or causes excessive costs, it is my opinion that in virtue of the principle embedded in Directive 2014/24, the contracting authority should opt for the cancellation and retendering of the contract.

As a general preliminary conclusion, it seems clear that the special rules contained in Directive 2014/24 for the extension of contracts or award of additional works, supplies or services are clearly restrictive in principle and, most of them (with the clear exception of the *de minimis* rule now included in art 72(2) Dir 2014/24), can only be justified either on the basis of unforeseen or particularly burdensome circumstances, or in instances where the possibility of awarding such additional works, supplies or services was disclosed

[643] References omitted and emphasis added. For a discussion of the concept, see Case T-125/06 *Centro Studi Manieri* [2009] ECR II-69 28.

[644] *Cf* Treumer (n 622, 2014) 151, who considers that the considerations in rec (109) 'appear balanced and flexible, as they take into account the need of a test with consideration of subjective elements and the characteristics of the specific project in question', but also stresses the limited guidance available in the existing case law to date.

[645] Case C-221/12 *Belgacom* [2013] pub electr EU:C:2013:736 40 (emphasis added).

during the initial competition of the contract—and, therefore, was known by tenderers and conditioned their bids. This disclosure, hence, guarantees compliance with transparency obligations and the principle of equal treatment ex ante, and ensures sufficient competition for the (potential) additional works as an element of the competition for the original contract. Therefore, with the exception of the *de minimis* exception, the rules seem to be largely compliant with the basic principles of the directives and the TFEU—which, in general terms, restrict the possibilities of introducing adjustments or amendments to the initial conditions of the contracts unless such a possibility was initially disclosed by the contracting authority in the relevant tender documents and, cumulatively, these documents set specific rules establishing the framework within which contracting authorities can proceed to such amendments. In furtherance to such general requirements primarily oriented at ensuring compliance with transparency obligations, it is submitted that the principles of non-discrimination and competition require or reinforce the obligation of contracting authorities to interpret and apply such provisions in a restrictive manner, so that they do not have undue recourse to them. In any case, the award of extensions or additional works, supplies and services in situations other than those covered by the special rules of articles 32(2), 32(5), 72(1)(b), 72(1)(c) and 72(2) of Directive 2014/24—other than potentially being in breach of the general restrictions to have recourse to non-competitive procedures (above §II.A.ii)—should be considered an unlawful instance of renegotiation of the basic elements of the contract (above §II.B.ix and §II.C.ii) and, accordingly, forbidden for its likely discriminatory and competition-distorting effects.

iv. Termination and Re-tendering

As has been seen (above §II.B.ix and §II.C.ii), the restrictions on the admissible renegotiation of the basic or substantial elements of a contract sometimes leave the contracting authorities with limited alternatives for the cancellation of the tendering procedure or the termination of the contract, and its subsequent re-tendering.[646] Given that the principles of non-discrimination, competition, objectivity and diligent administration (other than additional principles such as the duty of contracting authorities not to depart from their previous acts) restrict the circumstances under which the cancellation of a tender can take place (on this, see above §II.B.x)—while the principle of legal certainty and of the protection of legitimate expectations, and the principle *pacta sunt servanda*, should be adapted so as not to impair the objectives of the public procurement directives and the rules of the TFEU[647]—it is submitted that the decision of the contracting authority as regards the termination of the contract and its subsequent re-tendering cannot be adopted freely.[648]

[646] On the different, although related, issue of the obligation of contracting authorities to terminate contracts concluded in breach of public procurement rules—ie, of termination as a *remedy*, see Case C-503/04 *Commission v Germany* [2007] ECR I-6153 25–42. See, with numerous references, S Treumer, 'Towards an Obligation to Terminate Contracts Concluded in Breach of the EC Public Procurement Rules: The End of the Status of Concluded Public Contracts as Sacred Cows' (2007) 16 *Public Procurement Law Review* 371, 377–78; id (n 180) 80–82; and P Delvolvé, 'Note à Trstenjak, Verica, Conclusions sur CJCE, 18 juillet 2007, Commission v Allemagne, affaire C-503/04' (2007) 5 *Révue française de Droit administratif* 972, 975ff. See also below §II.C.v.

[647] Case C-503/04 *Commission v Germany* [2007] ECR I-6153 33–36. For a critical view, see Treumer (n 646) 377 and 381–82.

[648] Maybe the only exception to this rule is that of contracts entered into for an indefinite period of time, which should be looked at with disfavour, following the *dictum* of the Case C-454/06 *Pressetext Nachrichtenagentur* [2008] ECR I-4401 73.

Therefore, it is submitted, termination decisions should comply with the same general principles restricting the discretion of contracting authorities to cancel a tender procedure.[649] This has now been supported in broad terms in recital (113) of Directive 2014/24, which recognises that contracting authorities are sometimes faced with circumstances that require the early termination of public contracts in order to comply with obligations under Union law in the field of public procurement, and requires Member States to ensure that contracting authorities have the possibility, under the conditions determined by national law, to terminate a public contract during its term if so required by Union law. This general approach to the termination of contracts has been further specified in the rules of article 73 of Directive 2014/24. Under this new provision, contracting authorities must have the possibility to terminate a public contract during its term, at least in three cases. Firstly, and in support of the restrictions on the *modification of contracts*, where the contract has been subject to a substantial modification not exempted under article 72 and, consequently, *would have required a new procurement procedure* (see above §II.C.ii).[650] Secondly, where the *contractor should have been excluded* from the procurement procedure because, at the time of contract award, was affected by one of the situations imposing its mandatory exclusion under article 57(1) of Directive 2014/24 (see above §II.A.v). And, finally, where the contract should not have been awarded to the contractor in view of a *serious infringement of the obligations under the Treaties and Directive 2014/24* that has been declared by the ECJ in a procedure pursuant to article 258 TFEU. These are all very grave breaches of the rules of Directive 2014/24 (and the TFEU), but there seems to be no difficulty in expanding the grounds for termination of the contract to other situations with *identity of function*, such as where the contractor is affected by domestic mandatory exclusion grounds, or by discretionary exclusion grounds where there is no good reason not to take them into account, or where the infringement of the TFEU or Directive 2014/24 is found by other jurisdictional bodies (either as a result of a case where a preliminary reference under art 267 TFEU is posed to the ECJ, or otherwise). Overall, however and as already stressed, a general restriction on the use of termination rights should be found in the requirement that contracting authorities discharge the same duties of good administration implicit in decision to cancel tenders.

In a connected fashion, it is particularly relevant here to stress that the re-tendering of the terminated contract (or, for these purposes, of the contract which never got awarded due to early cancellation of the tendering procedure) must be conducted under circumstances that guarantee non-discrimination (particularly in favour of or against the incumbent contractor; see above §II.B.vii) and development of effective competition for the retendered contract. In this regard, there is one possibility that seems to merit particular attention, which is the election of the procedure applicable to the re-tendering of the contract. In principle, there is no specific rule in the directives that permits the choice of non-competitive procedures in the case of the re-tendering of previously cancelled or terminated contracts. Nonetheless, in view of their clear interest in ensuring the continuity of the works, supplies or services, contracting authorities could be interested in resorting to a negotiated procedure without the publication of a contract notice and in awarding

[649] *Cf* Treumer (n 646) 384. See also Arrowsmith (n 28) 855–57.

[650] See JM Hebly and P Heijnsbroek, 'When Amending Leads to Ending: A Theoretical and Practical Insight into the Retendering of Contracts after a Material Change' in G Piga and S Treumer (eds), *The Applied Law and Economics of Public Procurement: The Economics of Legal Relationships* (London, Routledge, 2013) 163–84.

the retendered contract to the incumbent contractor[651] by reasoning that, at this stage, the remaining contractual obligations can only be performed by the incumbent contractor, and/or by alleging the extreme urgency of the award of the retendered contract (in order to guarantee that a certain deadline is respected, or the continuity of certain supplies or services, particularly if directly rendered to the public).[652]

In principle, the requirements of the provisions regulating the recourse by the contracting authority to negotiated procedures without prior notice might seem to be fulfilled, in that they allow such an election of non-competitive procedures 'competition is absent for technical reasons' (art 32(2)(b)(ii) Dir 2014/24) or

> insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authorities, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with … [as long as the] circumstances invoked to justify extreme urgency [are] not in any event … attributable to the contracting authority.[653]

Therefore, contracting authorities could seem to be in a good position to conduct the re-tendering through negotiated procedures without prior notice and directly award the contract (under the new conditions) to the incumbent contractor (with which negotiations leading to the same outcome were forbidden). However, an overly permissive approach towards the use of this exception in the case of the re-tendering of cancelled or terminated contracts would render the restrictions on negotiations largely irrelevant and, consequently, cannot be considered a result consistent with the system of the directives (above §II.B.ix and §II.C.ii).

The adoption of an alternative and more restrictive approach seems justified by analogy with the position set by articles 1(2) and 2(3) of Directive 2007/66—which respectively introduce new article 2d of Directive 89/665 and new article 2d of Directive 92/13 regarding the ineffectiveness of contracts unlawfully awarded. In this regard, the possibility of excluding the ineffectiveness of contracts on the basis of similar technical or other compelling reasons is considered exceptional and subject to the existence of disproportionate consequences derived from the ineffectiveness of the contract that justify its maintenance (recs (23) and (24) Dir 2007/66). Moreover, the overriding reasons that justify the maintenance of the previous contract should not take into account economic interests directly linked to the contract, which

> include, inter alia, the costs resulting from the delay in the execution of the contract, the costs resulting from the launching of a new procurement procedure, the costs resulting from the change of the economic operator performing the contract and the costs of legal obligations

[651] See: P Henty, 'Is the Standstill a Step Forward? The Proposed Revision of the EC Remedies Directives' (2006) 16 *Public Procurement Law Review* 253, 261.

[652] On the complex issue of determining the actual urgency of a given situation, see K Krüger, 'Urgent Needs—Derogatory Procurement Law Scenarios: Reflections over Ius Necessitatis in the Area of Public Contracting—*A Propos* the EC Directive 2007/66, Amending Directive 89/655/EC on Remedies in Public Contracting' in Piga and Thai (n 121) 166.

[653] Art 32(2)(c) Dir 2014/24. On the requirements applicable to the appreciation of the concurrence of *urgency* for the purposes of resorting to negotiated procedures without prior notice—which were the object of early interpretation by the EU judicature and are currently codified in the text of Directive 2004/18—see Case 199/85 *Commission v Italy* [1987] ECR 1039; Case C-24/91 *Commission v Spain* [1992] ECR I-1989; Case C-107/92 *Commission v Italy* [1993] ECR I-4655; and Case C-57/94 *Commission v Italy* [1995] ECR I-1249. Also, Bovis (n 76) 1033.

> resulting from the ineffectiveness. (art 2d(3) *in fine* Dir 89/665, inserted by art 1(2) Dir 2007/66, and art 2d(3) *in fine* Dir 92/13, inserted by art 2(3) Dir 2007/66)

It is clear that urgency and increased costs are not considered automatically overriding reasons in order to disapply the basic remedy for the unlawful award of contracts (ie, ineffectiveness, see rec (14) Dir 2007/66, and below §II.C.v) and that a very strict proportionality test is applicable to the decision whether to maintain the previous contract. By analogy, equivalent technical and economic reasons and reasons of urgency should also not be considered sufficient justification for the re-tendering of contracts cancelled or terminated as a result of the prohibition to conduct certain negotiations by means of the negotiated procedure without prior notice, unless they imply exceptional circumstances that would lead to disproportionate consequences. Even in this case, if transitory solutions can be envisaged that avoid such disproportionate circumstances while still allowing for the competitive (re)tendering of the contract—such as the limited extension of the original contract for a period sufficient to guarantee, eg, the continuity in the supplies or services—awarding the (new) contract through non-competitive procedures should still be banned.

Therefore, in order to prevent instances of discrimination and restrictions of competition, and to avoid jeopardising the effectiveness of the rules limiting the ability of contracting authorities to renegotiate the basic or fundamental elements of public contracts—which could be easily circumvented by the cancellation or termination and the immediate (re-)award of the contract under new conditions, it is my view that the award of retendered contracts should not be conducted through negotiated procedures without the prior publication of a contract notice—or, at least, should be subjected to particularly stringent scrutiny of the actual occurrence of instances of technical complexity or extreme urgency that justify such an extreme solution in order to avoid disproportionate consequences (which can relate to economic interests not directly linked to the contract). This is particularly so in the case of allegedly extremely urgent situations, because the contracting authority will generally retain a certain margin of discretion as regards the *timing* of the cancellation or termination of the contract and its re-tendering and, consequently, it seems highly doubtful that, in these cases, the circumstances invoked to justify extreme urgency are not attributable to the contracting authority (as required by art 32(2)(c) Dir 2014/24).[654]

To sum up, it is submitted that instances of the retendering of cancelled or terminated contracts seem particularly prone to potential distortions of competition and of direct or covert discrimination (either in favour or against the incumbent contractor or selected bidder), particularly if the re-tendering of the contract could be conducted by means of negotiated procedures without the publication of a prior notice—which would in most cases significantly jeopardise the restrictions on the contracting authorities' ability to negotiate and amend basic or substantial aspects of the contracts. Therefore, special emphasis should be put on compliance with principles of equal treatment and competition, which justify the adoption of a strict approach towards the assessment of the overriding considerations leading to re-tendering through such a non-competitive procedure—particularly as regards technical or other compelling reasons (such as economic interests directly linked to the contract, or reasons of extreme urgency).

[654] Similarly, see Arrowsmith (n 28) 850–52.

v. Setting Up Ineffective Bid Protest Mechanisms

As a final element of the public procurement system with a clear procedural nature and which can generate restrictions or distortions of competition—or, in this case, rather contribute to their prevention or correction, the inquiry will focus on the review mechanisms available to challenge (restrictive) procurement decisions. The setting up of effective bid protest and challenge procedures seems essential to ensure that public procurement activities do not generate restrictions or distortions to competition, by offering sufficient pre-award opportunities to prevent them from actually occurring—or, at least, by ensuring that there is an effective possibility of pursuing a timely[655] and sufficient correction of the restrictions and distortions eventually generated—at a post-award stage.[656] The importance of the design of bid protest or challenge procedures for the effectiveness of any procurement system can hardly be overstated.[657]

In this regard, it is important to point out that EU rules on review procedures concerning the award of public contracts have recently been revisited and amended,[658] particularly with the purpose of ensuring the *effectiveness* of the decisions adopted at the bid protest stage prior to the conclusion of the contract—which is a requirement clearly emphasised by consistent EU case law,[659] and of promoting the declaration of *ineffectiveness* of (certain) unlawfully awarded contracts as the 'most effective way to restore competition and to create new business opportunities for those economic operators which have been deprived illegally of their opportunity to compete' (rec (14) Dir 2007/66).[660] In this regard, it is submitted that competition considerations should be duly taken into account in the transposition and implementation of Directive 2007/66, in order to ensure that the review procedures achieve their goals and, particularly, contribute to ensuring the effectiveness of the principle of competition.

From this perspective, it seems that several factors can contribute to broadening the scope of review procedures sufficiently so as to ensure that restrictions and distortions

[655] On the related issue of the time limits for review, see the recent Case C-161/13 *Idrodinamica Spurgo Velox and Others* [2014] pub electr EU:C:2014:307. See also Case C-19/13 *Fastweb* [2014] pub electr EU:C:2014:2194 58.

[656] Similarly, regarding the difference between ex ante and ex post remedies see Henty (n 651) 254.

[657] In general, on the importance of enforcement and remedies to guarantee compliance with public procurement regulations, as well as the alternatives available in this respect, see Arrowsmith et al (n 50) 749–856. See also DI Gordon, 'Constructing a Bid Protest Process: The Choices that Every Procurement Challenge System Must Make' (2005–06) 35 *Public Contract Law Journal* 427.

[658] See: Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (Directive 2007/66) [2007] OJ L335/31. For a review of the previous regime, see Arrowsmith (n 121) 1363–474; Trepte (n 23) 543–78 (and 591–600 for an overview of the reform proposals advanced by the Commission in the process of the elaboration of Directive 2007/66); and Bovis (n 23) 526–44 and 572–75. For an overview of the previous generation of remedies directives, see A Tyrrell and B Bedford (eds), *Public Procurement in Europe: Enforcement and Remedies* (London, Butterworks, 1997) 1–24; and JM Fernández Martín, *The EC Public Procurement Rules. A Critical Analysis* (Oxford, Clarendon Press, 1996) 204–29.

[659] See: Case C-81/98 *Alcatel Austria* [1999] ECR I-7671 33 and 43; Case C-212/02 *Commission v Austria* [2004] ECR (unpub) 20–23; and Case C-444/06 *Commission v Spain* [2008] ECR I-2045 37. Generally, see the contributions to S Treumer and F Lichère (eds), *Enforcement of the EU Public Procurement Rules*, European Procurement Law Series, vol 3 (Copenhagen, Djøf Forlag, 2011).

[660] See: Henty (n 651) 260–61; and, in further detail, J Golding and P Henty, 'The New Remedies Directive of the EC: Standstill and Ineffectiveness' (2008) 17 *Public Procurement Law Review* 146.

to competition are effectively prevented or sufficiently remedied,[661] such as (i) the setting of broad rules on active standing that do not restrict the possibilities of all interested or affected parties to challenge interim or award decisions adopted by contracting authorities, regardless of their actual degree of participation (or lack of it) in the tender concerned; (ii) the actual availability of standstill obligations and declarations of ineffectiveness of unlawfully awarded contracts as effective remedies; (iii) the setting of rules on the disclosure of information that do not result in derived restrictions of competition or generate incentives for strategic behaviour by tenderers or other parties; and (iv) a proper evaluation of the competition effects of the reviewed decisions, particularly by fostering the involvement of competition authorities in bid protest and challenge procedures. These main issues regarding the adoption of effective bid protest mechanisms will be discussed in turn.

Rules on Active Standing, or Access to Bid Protest and Review Procedures. In order to ensure that bid protest and review procedures are an effective means of preventing distortions of competition or remedying them, the adoption of open or broad rules on active standing is a crucial element[662]—particularly because, in this area, one of the major problems is the reluctance of public contractors and offerors to initiate litigation.[663] This general approach is in line with the consideration of the ECJ, which has recently highlighted that access to review procedures is linked to the requirements of article 47 of the Charter of Fundamental Rights of the EU,[664] and that 'effective legal protection requires that the interested parties … have a real possibility of bringing proceedings and, in particular, of applying for interim measures pending conclusion of the contract'.[665] As emphasised by recital (17) of Directive 2007/66, any person having an interest in obtaining a particular contract and who risks being harmed by an alleged infringement of public procurement rules should have access to review procedures. Therefore, the general approach of the directive seems to be to encourage the design of broad standing rules that grant access both to candidates and tenderers that have participated in the tender at some point (*participation criterion*), and to other persons that might be harmed by the alleged infringement (*effects criterion*).[666] This is consistent with the wording of article 1(3) of Directive 89/665

[661] To be sure, other factors related to the design of bid protest and review mechanisms can have an impact in ensuring the effectiveness of the principle of competition and providing effective remedies—such as the institutional design of bid protest mechanisms, the scope of review, etc. Nonetheless, the analysis is limited to those that, in my opinion, are of major relevance. Some of the institutional aspects (ie, the possibility of granting review competencies to competition authorities) are analysed below chapter seven.

[662] Yannakopoulos (n 624) 450–52. Along the same lines, stressing the importance of a model with wide active standing as an effective mechanism to discipline market activities developed by governments (either directly, or through other entities)—particularly as regards discipline from a competition standpoint, see ML Stearns, 'A Private-Rights Standing Model to Promote Public-Regarding Behaviour by Government Owned Corporations' in MJ Whincop (ed), *From Bureaucracy to Business Enterprise: Legal and Policy Issues in the Transformation of Government Services* (Aldershot, Alsgate, 2003) 121, 130–33. Also MK Love, 'Enforcing Competition through Government Contract Claims' (1985–86) 20 *University of Richmond Law Review* 525; RC Marshall et al, 'The Private Attorney General Meets Public Contract Law: Procurement Oversight by Protest' (1991–92) 20 *Hofstra Law Review* 1; id, 'Curbing Agency Problems in the Procurement Process by Protest Oversight' (1994) 25 *RAND Journal of Economics* 297; and SL Schooner, 'Pondering the Decline of Federal Government Contract Litigation in the United States' (1999) 8 *Public Procurement Law Review* 242.

[663] See: Bovis (n 55, 2005) 137–39 and 162–66.

[664] Case C-19/13 *Fastweb* [2014] pub electr EU:C:2014:2194 57. See also Georgopoulos (n 151).

[665] Case C-19/13 *Fastweb* [2014] pub electr EU:C:2014:2194 60. See also Case C-444/06 *Commission v Spain* [2008] ECR I-2045 38 and 39; and Case C-456/08 *Commission v Ireland* [2010] ECR I-859 33.

[666] *Cf* Case T-182/10 *Aiscat v Commission* [2013] pub electr EU:T:2013:9, where the EGC adopted a very limited approach to the standing in case involving public procurement and State aid issues. For a critical assessment, see

and article 1(3) of Directive 92/13 (both as amended by Dir 2007/66), which require that Member States

> ensure that review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

It is submitted that—admittedly, in rather unclear terms—Directive 2007/66 requires Member States to adopt a broad approach to the setting of detailed rules regulating active standing to access bid protests and review procedures (as clearly indicated by the requirement of making these procedures available 'at least' to potentially affected parties—which seems to be oriented towards not excluding systems granting universal standing); and to do so attending both to the criterion of participation in the tender, and to the criterion of the effects generated or potentially generated by the alleged infringement.

To be sure, an alternative reading could suggest a more restrictive approach, requiring a potential challenger to meet simultaneously participation *and* harm requirements in order to have standing in bid protest and review procedures. However, from a logical perspective, configuring both requirements in a cumulative manner seems superfluous—since it would be very difficult to envisage a situation where a person having had an interest in obtaining a particular contract would not risk being harmed by an alleged infringement of public procurement rules. Moreover, it would seem an overly restrictive measure—particularly in cases where compliance with the first criterion is factually impossible, eg, because a given contract was awarded without tender. Along the same lines, a systematic interpretation of Directive 2007/66 seems to exclude the possibility of restricting the standing for review to the candidates and tenderers that have participated in the tender, which are defined as 'tenderers and candidates concerned' (art 2a(2) Dir 89/665 and art 2a(2) Dir 92/13 (both as amended by Dir 2007/66)). The use of a much broader wording as regards the rule on standing (art 1(3) Dir 89/665 and art 1(3) Dir 92/13 (both as amended by Dir 2007/66)) seems to depart clearly from its narrow construction. Moreover, it is submitted that such a restrictive approach would be undesirable from the perspective of guaranteeing the effectiveness of EU public procurement directives in general—and the embedded principle of competition in particular—and, therefore, would be contrary to the main goal of Directive 2007/66. Therefore, as anticipated, in my view, the best reading of the standing requirements imposed by Directive 2007/66 is that Member States have to adopt a broad approach to the setting of detailed rules regulating active standing to access bid protests and review procedures, and that they have to do so attending both to the criterion of participation in the tender, and to the criterion of the effects actually or potentially generated by the alleged infringement—so that bid protest and review procedures are open to any party that has taken part in the tender or that can otherwise prove that it has been harmed or risks being harmed as a result of the alleged infringement, regardless of its actual participation (or lack of it) in the specific tender that gave rise to it. In this regard, it seems important to confirm that such an approach is compatible with the case law of the EU judicature on this issue, which would seem to offer support to a restrictive approach towards rules granting standing on the basis of the effects of the alleged infringements—that is, to parties other

A Sánchez Graells, *Who Is an Interested Undertaking in Procurement and State Aid Cases? (T-182/10)* (17 January 2013), available at howtocrackanut.blogspot.co.uk/2013/01/who-is-interested-undertaking-in.html.

than candidates and tenderers in the specific procedure. In this regard, the relevant finding of the ECJ indicates that

> although there is no doubt that economic operators in the sector concerned which did not take part in the invitation to tender in question are not individually concerned by that decision since they are affected only in their objective capacity as producers … the same reasoning cannot be applied to the tenderers: they must enjoy a right of recourse to the Community judicature to obtain a review of the legality of the tendering procedure as a whole, whether or not their respective tenders have ultimately been accepted.[667]

Therefore, this ruling could be read as excluding the standing of economic operators that have not participated in the tender, since they are not *individually concerned* (ie, only affected indirectly) by the alleged infringement. However, in this case, such a literal reading would be misleading because the term 'individually concerned' has a special meaning that should not be overlooked. It is important to stress that, in this specific case the ruling regarding the scope of the standing for the review procedure was adopted in relation to a 'Decision' of the Commission (*stricto sensu*) (as the contracting authority in the case)—which generates limited standing for review to the parties *directly and individually concerned* by it, according to article 263 para 4 TFEU (ex art 230 para 4 TEC)—and referred to a right of recourse to the EU judicature—which is very limited for natural or legal persons (as opposed to Member States and EU institutions).[668] Consequently, the finding of the ECJ excluding the standing of economic operators in the sector concerned that did not take part in the invitation to tender as not being 'individually concerned by that decision' should be properly construed as a jurisdictional requirement derived from the nature of the reviewed act (a 'Decision') and the constraints on access by individuals to the EU jurisdiction, not as a matter of general principle. It is submitted that, in the absence of similar jurisdictional restrictions—which, arguably will not exist in relation to most bid protest and review procedures in Member States' domestic procurement systems—and in order to guarantee important rights of access to justice of all parties potentially harmed by allegedly illegal awards of public contracts, this case law should be interpreted restrictively. Therefore, it is submitted that the narrow approach pursued by the ECJ as a requirement of specific jurisdictional restrictions (imposed by art 263 para 4 TFEU) should not be construed as a general limitation on the rules on active standing in the review procedures designed by Member States, since the drafting of Directive 2007/66 is clearly broader in scope—therefore allowing for Member States to go further than the finding of the ECJ might suggest upon literal interpretation, and to take into account standing both by reason of participation and by reason of actual or potential effects of the alleged infringement of procurement rules (or, even, universal standing rules).

Rules on Standstill Obligations and Declarations of Ineffectiveness of Unlawfully Awarded Contracts as Effective Remedies for Competition Distortions. As has been mentioned, Directive 2007/66 puts special emphasis (i) on the development of effective standstill obligations,

[667] Case C-496/99 P *Succhi di Frutta* [2004] ECR I-3801 59–66.

[668] The restrictive approach to the standing of natural and legal persons only if they are directly and individually concerned was expressed in very clear terms by the ECJ in Case C-50/00 P *UPA* [2002] ECR I-6677 44. For a recent reference to these requirements in the field of competition law, see Case T-151/05 *NVV and Others v Commission* [2009] ECR II-1219 44. In general, on general standing rules for non-privileged applicants (ie, applicants other than Member States and EU institutions), see P Craig and G de Búrca, *EU Law: Texts, Cases and Materials*, 4th edn (Oxford, Oxford University Press, 2007) 487–520.

with the purpose of ensuring the effectiveness of the decisions adopted at bid protest stage prior to the conclusion of the contract, and (ii) on the use of declarations of ineffectiveness, as the most effective way to restore competition that has been prevented or distorted as a result of the unlawful award of a public contract.[669] Both remedies seem particularly well suited to the preservation of undistorted competition and, consequently and upon due transposition by Member States, they should significantly improve the means to prevent or correct most of the anti-competitive effects generated by public procurement activities.[670] Moreover, these remedies need to be applied in a way that ensures their functionality and, ultimately, in a way that avoids the circumvention of the applicable rules.[671]

In this regard, Directive 2007/66 introduces significant amendments to regulate a general *standstill obligation* to defer by at least ten days the conclusion of the contract after award—in order to provide interested parties with the opportunity to challenge the award decision.[672] In the event of the decision being challenged (which can take place either in one or two stages, depending on whether the application for review to the contracting authority or entity is mandatory prior to the challenge before an independent review body), the conclusion of the contract will be suspended until a decision is taken on the application either for interim measures or for review (depending, again, on Member States' decisions regarding the transposition of Dir 2007/66) (see art 2a Dir 89/665 and art 2a Dir 92/13 (both inserted by Dir 2007/66)), unless a specific derogation of the standstill period applies (which is mainly restricted to contracts that do not require the prior publication of a notice and instances of participation of a sole tenderer) (see art 2b Dir 89/665 and art 2b Dir 92/13 (both inserted by Dir 2007/66)).[673]

It seems clear that—in its basic design—the system envisaged by Directive 2007/66 requires the creation of a general standstill obligation and, if the award decision is challenged within that specified standstill period, the suspension of the conclusion of the contract until an independent review body specifically determines the need to maintain this suspension or to waive it in view of the circumstances of the case. In this case, the principle of competition seems to require the independent review body to evaluate not only the effects of the suspension of the conclusion of the contract for the contracting authority, the successful tenderer and the challenger—but, most importantly, to assess and take into due account the effects that the award of the contract would generate in the competitive dynamics of the market concerned. In this regard, it is submitted that the mandatory suspension of the award of the contract imposed by Directive 2007/66 should

[669] Golding and Henty (n 660) 146–47. See also A Brown, 'Applying *Alcatel* in the Context of Competitive Dialogue' (2006) 15 *Public Procurement Law Review* 332; and G Fimerius and JM Hebly, 'Direct Award of Contracts under the New Remedies Directive' in Piga and Thai (n 121) 157.

[670] For interesting discussion about remedies in several areas of EU economic law, looking in particular at competition and public procurement and their integration, see M Andenas, and K Lilleholt, *Remedies and Substantive Law–European Dimensions of Economic and Private Law* (University of Oslo Faculty of Law Research Paper No 2011-18, 2011) available at http://ssrn.com/abstract=1916592.

[671] Case C-19/13 *Fastweb* [2014] pub electr EU:C:2014:2194 52.

[672] However, it should be noted that the 10-day standstill period can be reduced in cases of exceptional urgency (see rec (8) Dir 2007/66), which will need to be evaluated according to the principle of proportionality, and with a view to ensuring a reasonable possibility to disappointed bidders of filing a request for preliminary injunction; see Case C-327/08 *Commission v France* [2009] ECR I-102 36–46. See also Case C-212/02 *Commission v Austria* [2004] ECR (unpub) 23; and Case C-444/06 *Commission v Spain* [2008] ECR I-2045 39.

[673] For further details, particularly regarding the specific derogations of the standstill period, or secondary obligations of information to interested tenderers, see Golding and Henty (n 660) 148–50.

not be lifted by the independent review body if doing so risks preventing, restricting or distorting competition in the market in an appreciable manner—particularly if restoring the competitive situation would be difficult or almost impossible if the award decision gets finally set aside.

Similarly, Directive 2007/66 emphasises the need to ensure that *declarations of ineffectiveness* of contracts unlawfully awarded are available and deter the award of contracts in disregard of the most fundamental public procurement rules. In this vein, it sets a regime that mandatorily imposes the ineffectiveness of (i) contracts directly awarded with total disregard of the applicable tender procedures (ie, the illegal direct award of contracts, or the award of contracts impermissibly without prior publication of a notice), (ii) contracts concluded in breach of the standstill obligation, and (iii) contracts concluded in breach of mandatory suspension requirements (see art 2d Dir 89/665 and art 2d Dir 92/13 (both inserted by Dir 2007/66), which regulate a relatively large number of exceptions to the automatic ineffectiveness of contracts under specific circumstances). In the case of other (less serious) breaches of EU law that determine the unlawfulness of contract awards (*cf* rec (13) Dir 2007/66), decisions regarding the effectiveness of the contracts seem to be left to the decision of independent review bodies—which should reach a determination in the light of the specific circumstances of the case, subject to the rules of Member States' domestic public procurement (or other general) regulations. In this regard, Member States can restrict the possibility of declaring the ineffectiveness of contracts unlawfully awarded and, except where a decision must be set aside prior to the award of damages, they may provide that the powers of the body responsible for review procedures shall be limited to awarding damages to any person harmed by an infringement (art 2(7) Dir 89/665 and art 2(6) Dir 92/13 (both as amended by Dir 2007/66)).[674] Therefore, other than in the cases in which ineffectiveness is mandated by the rules inserted by Directive 2007/66, Member States seem to retain a relatively large degree of flexibility to determine the scope of the principle of ineffectiveness. Generally, it should be taken into account that

> a procedural defect can lead to the annulment in whole or in part of a decision only if it is shown that, *but for that defect*, the administrative procedure could have had a different outcome and that, consequently, the [relevant] decision might have been substantively different.[675]

However, even in these circumstances, the possibility for Member States to prevent declarations of ineffectiveness and to substitute them with compensations for damages seems to have been eroded by the case law of the EU judicature and should be used sparingly. As mentioned previously (above §II.C.iv), the ECJ ruled that although the EU remedies system

> permits the Member States to preserve the effects of contracts concluded in breach of directives relating to the award of public contracts and thus protects the legitimate expectations of the parties thereto, its effect cannot be, unless the scope of the EU Treaty provisions establishing the internal market is to be reduced, that the contracting authority's conduct vis-à-vis third parties

[674] For further details, particularly as regards the application of the rules on mandatory ineffectiveness and their exceptions, see Golding and Henty (n 660) 150–54.

[675] See, to that effect, Case T-345/03 *Evropaïki Dynamiki v Commission (CORDIS)* [2008] ECR II-341 147 (emphasis added) and Case T-332/03 *European Service Network v Commission* [2008] ECR II-32 130. See also Case T-443/11 *Gold East Paper and Gold Huasheng Paper v Council* [2014] pub electr EU:T:2014:774 113.

> is to be regarded as in conformity with Community law following the conclusion of such contracts.[676]

Therefore, in certain circumstances, a declaration of ineffectiveness of the contract (ie, its termination) might be required as a matter of EU law (and, particularly, to ensure the full effectiveness of the TFEU provisions establishing the internal market), even in cases in which such a remedy has been expressly excluded as a matter of domestic law following the authorisation of article 2(7) of Directive 89/665 and article 2(6) of Directive 92/13 (both as amended by Dir 2007/66).[677] Along the same lines, it is submitted that, in the exceptional circumstances in which maintaining a given contract that has been unlawfully awarded generates material and irreversible distortions of competition—at least, irreversible by any other means than contract termination and, particularly, through damages awards—independent review bodies might be obliged to declare the contract ineffective, even in disregard of the domestic public procurement legislation—which must be constructed and applied in conformity with the principle of competition (see above chapter five, §III.C).

To sum up, it is submitted that the provisions of Directive 2007/66 in relation to standstill and suspension periods, and the declaration of the ineffectiveness of contracts, should be interpreted in light of the principle of competition so as to inform their regulation and application in a manner that contributes to preventing the distortion of competition prior to the award of the contract and that ensures that all required measures are available in order to restore competitive situations that have been (materially) distorted by the unlawful award of a public contract—particularly in those cases in which the maintenance or restoration of the competitive situation by any other means would be particularly difficult or almost impossible to attain.

Rules Preventing Excessive Disclosure of Business Secrets and Other Sensitive Information in Protest Debriefings and Review Procedures. A relatively secondary issue to be analysed in relation to bid protest procedures relates to the need to ensure that, while receiving the information necessary to review the decisions of the contracting authority and to defend their rights (particularly within the bid protest or review procedure), tenderers do not have access to information that should remain confidential because it contains business secrets or other sensitive information belonging to its competitors (see art 21 Dir 2014/24).[678] In this regard, the risk for a strategic use of bid protest mechanisms seems at least twofold. On the one hand, tenderers could try to gain access to confidential information which could be used later to compete unfairly with the affected tenderers.[679] On the other hand, excessive disclosure of information can increase market transparency and be used as

[676] Case C-503/04 *Commission v Germany* [2007] ECR I-6153 33; and Joined Cases C-20/01 and C-28/01 *Commission v Germany* [2003] ECR I-3609 39.

[677] For a critical analysis of this case law and the circumstances under which termination (or a declaration of ineffectiveness) of the contract would be required; see Treumer (n 646) 377–78.

[678] See Case C-450/06 *Varec* [2008] ECR I-581. In general, on record keeping, debriefing and disclosure of information in public procurement processes, and the necessary balancing of transparency and the interests of firms in preserving the confidentiality of commercial information, see Arrowsmith et al (n 50) 453–57. See also Arrowsmith (n 28) 634–36. It is important to note that basic recommendations by international organisations clearly run against excessive disclosure; OECD (n 148) 19.

[679] See: Lipari (n 314) 265–72. In similar terms, see A Bertron, 'Conflicts between the Sunshine Law and Trade Secret Protection in Public Procurement' (2002) 76 *Florida Bar Journal* 36.

a means to collude or to reinforce collusion by tenderers (above chapter two, §V.D).[680] Therefore, rules on disclosure of information should take into account their potentially restrictive or distortive effects on competition.[681]

Interestingly, Directive 2014/24 contains a specific rule addressing this issue. Article 55(3) of Directive 2014/24 allows contracting authorities to withhold certain information

> regarding the contract award, the conclusion of framework agreements or admittance to a dynamic purchasing system, where the release of such information would impede law enforcement or would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of a particular economic operator, whether public or private, *or might prejudice fair competition between economic operators*. (emphasis added)

Therefore, in the exercise of such discretion and as a mandate of the principle of competition, contracting authorities are bound to restrict the disclosure of information given to tenderers to prevent instances of subsequent unfair competition or collusion—and, in order to do that properly, must identify and properly justify the negative effects which the withholding of the information seeks to avoid.[682]

Along the same lines, and although there is no equivalent provision in Directive 89/665 and Directive 92/13 (both as amended by Dir 2007/66), it is submitted that the same restrictions to the disclosure of information apply in bid protests and review procedures, so that contracting authorities (in the case of mandatory reviews prior to challenges, or otherwise) and independent review bodies are bound to prevent disclosures of information that could result in restrictions or distortions of competition.[683] In such cases, limiting the access of information to the minimum extent required to ensure the effective protection of the rights of the applicants in review procedures will require a balancing of interests by the competent authority—which, in my view, should take into due consideration the potential impact on competition of the disclosure of certain information. Such an obligation can be stressed or reinforced by general rules on the treatment of business secrets and other commercially sensitive information of general application according to Member State domestic legislation.

Proper Evaluation of the Competition Effects of the Reviewed Decisions: Design of the Institutional Bid Protest Structure. A final issue to be considered is the need to ensure that the effects of the challenged contract award decisions—or other interim measures through the tendering procedure—on the competitive dynamics of the market are duly taken into consideration, especially by the independent review bodies competent to adjudicate bid

[680] Carpineti et al (n 214) 27; and Albano et al (n 51) 352–53. Similarly, Kovacic et al (n 51) 402. See also RA Miller, 'Economy, Efficiency and Effectiveness in Government Procurement' (1975–76) 42 *Brooklyn Law Review* 208, 215–33. The effect would be particularly clear if the disclosed information referred to prices in specific transactions; see S Albæk et al, 'Government-Assisted Oligopoly Coordination? A *Concrete* Case' (1997) 45 *Journal of Industrial Economics* 429.

[681] For a review of recent cases, see A Sánchez Graells, *The Difficult Balance between Transparency and Competition in Public Procurement: Some Recent Trends in the Case Law of the European Courts and a Look at the New Directives* (University of Leicester School of Law Research Paper No 13-11, 2013), available at ssrn.com/abstract=2353005.

[682] In this regard, stressing the obligation to give reasons that binds contracting authorities, see Case T-89/07 *VIP Car Solutions* [2009] ECR II-1403 86–94.

[683] See A Sánchez Graells, *Three recent cases on EU Institutions' procurement and one common theme: good administration and confidential information (T-498/11, T-91/12 & T-199/12)* (2 October 2014), available at howtocrackanut.blogspot.co.uk/2014/10/three-recent-cases-on-eu-institutions.html.

protests. In this regard, it seems particularly interesting to consider in which ways competition authorities could be involved in the process or, in the last resort, whether it would be desirable to appoint competition authorities as the independent review bodies entrusted with bid protest and review procedures in all or some public procurement issues. These options are discussed in chapter seven, §III.

III. Two Examples of Potential Distortions Derived from the Exercise of Public Entities' Market Power

After having analysed the majority of the types of potential distortions of competition that can be generated at different stages of the tendering process (above §II), this section has the more limited purpose of focusing on instances of the exercise of public buyer power that do not necessarily have a specific link to the tendering process—because they can appear at different stages (particularly in competitive procedures with negotiation and competitive dialogue procedures, where this type of restriction can be generated in any of the formal or informal rounds of negotiations with the candidates and tenderers) or in connection to different tender documents, or even the public contract itself—and that are closer to the types of (abusive) exercise of market power that non-public power buyers can conduct. As anticipated, the two instances or examples of this type of abuse that will be analysed relate to the 'squeeze' of public contractors (§III.A) and to certain rules on the transmission of intellectual property rights or know-how to the public buyer (or to third parties) (§III.B). In both cases, the analysis is based on the assumption that the contracting authority holds a dominant (buying) position in the market and/or that candidates and tenderers are in a position of economic dependence vis-a-vis the public buyer.[684] To be sure, in any specific case, the analysis will have to be based on the actual circumstances of the market, and a determination of the existence of buying power in the hands of the public buyer can only be reached after applying the type of competitive analysis described above in chapter two. Therefore, if abuses of a dominant (buying) position could be sanctioned by competition law,[685] the analysis hereby conducted should be performed on the second step of analysis, after having reached a finding of dominance. However, for the purposes of this study and in the light of the objective of guaranteeing the effectiveness of the principle of competition in the public procurement setting and

[684] This assumption has been made previously by some commentators analysing competition issues in the public procurement setting; see PA Trepte, 'Public Procurement and the Community Competition Rules' (1993) 2 *Public Procurement Law Review* 93, 106; and Bovis (n 315) 20. See also OECD, *Policy Roundtables: Monopsony and Buyer Power* (2009) 22ff. Also, the element of economic dependence has been raised by the Commission and/or the CJEU in several occasions related to buyer power in general. See, eg: Commission Decision of 14 July 1999 relating to a proceeding under Article 82 of the EC Treaty (IV/D-2/34.780: *Virgin/British Airways*) [2000] OJ L30/1 32; Commission Decision of 3 July 2001 declaring a concentration to be incompatible with the common market and the EEA Agreement (Case No COMP/M.2220: *General Electric/Honeywell*) 227; Commission Decision of 13 December 2000 relating to a proceeding under Article 82 of the EC Treaty (COMP/33.133-D: *Soda-ash ICI*) [2003] OJ L10/33 128; and Case T-66/01 *Imperial Chemical Industries v Commission* [2010] ECR II-2631 276–277.

[685] On the rules that restrict such a possibility and a proposal to amend them, see above chapter four, §III and §VI.

to develop a more competition-oriented public procurement system, the analysis of this section should be of interest as a means of identifying potential distortions of market dynamics that—in the absence of overriding reasons of general interest (see above chapter four, §VII.C.ii)—should be avoided by the public buyer (even in the absence of a properly defined dominant buying position).

A. 'Squeezing' Public Contractors

One of the instances of potential (abusive) exercise of buying power by contracting authorities is the imposition of unjustifiedly low economic conditions, or terms otherwise excessively favourable to the public buyer.[686] Such restrictions can be implemented in several ways, such as the imposition of awarding constraints (particularly in terms of maximum prices or maximum budgets; above §II.B.vi) that do not reflect market conditions or do not allow public contractors to earn a reasonable profit (for instance, by limiting the acceptable prices in a tender procedure to the prices at which a previous contract was awarded);[687] or through the conduct of an (unknown) and unjustified number of rounds of negotiations where contractors are forced (either by the rules applicable to the tender or for purely commercial reasons) to continue improving their previous offers (such as the conduct of several rounds of '*best and final offers*'—which in the case of competitive dialogue seems to be excluded, at least in principle, by art 30(7) Dir 2014/24).[688]

The reasons for candidates to participate in the tender (or not to drop their previous offers) and take on the detrimental economic effects (including potential losses derived from the contract) are manifold—such as the existence of formal or informal rules on the need to have participated in previous (unfavourable) tenders in order to be able to participate in the subsequent (more favourable) tendering of other contracts (notably, constraints imposed by previous experience requirements, above §II.A.viii); the need to try to recover project and participation costs (which might be hard to internalise as *sunk costs* at any point of the tendering process where the candidate would still have a chance to get the contract awarded); or the fact that obtaining a contract would allow the undertaking to gain some strategic advantage, generate reputational effects, enter new markets, etc (above chapter two, §II.E).[689]

[686] The abusive character of unfairly low purchase prices was raised in one instance (although not specifically in relation to public procurement procedures), but the ECJ dismissed the action on procedural grounds. See Case 298/83 *CICCE* [1985] ECR 1105. Notably, the possibility that unfairly low purchase prices are considered abusive was not excluded as such by the EU judicature and, consequently, seems to remain as one of the potential conducts covered by art 102(a) TFEU. See also Trepte (n 428) 275–76 and (n 23) 47–48; and Jones and Sufrin (n 16) 594.

[687] Such restrictions can derive, for instance, from general budgetary regulations, which 'freeze' the prices that contracting authorities can pay for their supplies—eg, as a measure to fight inflation or to restrict public expenditure. Therefore, the negative effects on competition and the potential for squeezing public contractors can be considered an instance of unexpected consequences and compliance with the general regulation can clash with the development of proper public procurement practices. In other cases, where the decision is specific to the public buyer, the situation might be easier to identify and to correct.

[688] The risk that providers may be unduly squeezed and may not perform the contract properly in such cases is identified by Arrowsmith (n 28) 835.

[689] These seem to be some of the reasons why undertakings can be legitimately interested in submitting very low tenders and so the adoption of rules for the treatment of abnormally low tenders on the basis of a straightforward analysis of coverage of costs (at a level to be properly defined, such as avoidable costs or long-run

In these instances, by extracting unduly low economic conditions or otherwise excessively advantageous contract terms, the public buyer would be restricting the normal development of market competition amongst tenderers and, most likely, would generate externality-like effects (or knock-on effects) on other buyers (above chapter two, §V) and/or squeeze the margins of public contractors—thereby restricting their profitability and eroding their viability and, in extreme cases, forcing them to exit the market. Even if, in the short term, such a strategy could seem appropriate to obtain value for money, it could generate undesired long-run effects, such as a strategic reaction by candidates to submit excessively high bids in order to have a sufficient margin for the eventual subsequent (unexpected) rounds of renegotiations—so that, as a result, public buyers could end up paying an additional *risk-of-(re)negotiation premium*—or the impossibility of satisfying some of their needs by the total lack of suitable tenders—since potential candidates could be completely deterred from participating in procedures conducted in excessively unfavourable (economic) conditions, particularly if reasonable profits could not be earned under the contract terms. Hence, in order to ensure that sufficient competition for public contracts exists (not only in one particular instance, but also in subsequent tendering procedures) and that competition in the market concerned is not distorted, contracting authorities seem to be under a duty to ensure that the conditions in which public contracts are awarded are reasonable (ie, are not unduly and disproportionately advantageous),[690] and that they do not result in the squeezing of public contractors. Such an obligation can be constructed by analogy with the mirror reasoning developed by the ECJ as regards the prices paid by undertakings to public suppliers in those instances in which tendering procedures are not for the procurement but for the provision of goods or services by the public entity. In such circumstances, EU case law has established that the fact that these prices were proposed by undertakings in response to a call for tenders (and, therefore, apparently unilaterally by the undertaking) does not exclude their analysis as potentially abusive (discriminatory) prices applied by the public entity.[691] Along the same lines, the fact that public contractors submit offers in unduly advantageous terms for the contracting authority (as a result of tender restrictions, of the conduct of an excessive number of renegotiation rounds, or otherwise) should not preclude the possibility of analysing them as potential instances of abusive exercise of public buying power.

In these cases, if the conditions of the contract are proven to result in an excessive advantage for the public contractor and/or in squeezing the contractor, a breach of the principle of competition embedded in the EU public procurement directives should be

average incremental costs) could be unnecessarily restrictive of competition (see above §II.B.v). Along these lines, see the economic reasoning of the ECJ in C-388/12 *Comune di Ancona* [2013] pub electr EU:C:2013:734 51, where it held that: 'In the context of an economic strategy to extend part of its activities to another Member State, an undertaking may take the tactical decision to seek the award in that State of a concession despite the fact that that concession is incapable as such of generating sufficient profit, since that opportunity could nevertheless enable the undertaking to establish itself on the market of that State and to make itself known there with a view to preparing its future expansion.'

[690] This restriction is consistent with the approach adopted to discard the existence of state aid in the award of public contracts that result in normal commercial transactions and reflect market conditions; see above chapter four, §II.A. Therefore, from a general perspective, the set of rules applicable to the conduct of public procurement activities and their competitive impact seem to be clearly orientated towards preventing the award of contracts in terms that unduly benefit either of the parties and that, to the maximum possible extent, reflect normal market conditions.

[691] See: Case T-128/98 *Aéroports de Paris* [2000] ECR II-3929 165–70.

declared and the contractual terms adjusted accordingly, so as to ensure that competition is not altered by the extraction of unjustified economic advantages by the public buyer (subject to rules on negotiations, cancellation, termination and re-tendering).

B. Rules on Transmission of Intellectual Property Rights or Know-How Related to or Derived from the Procurement Process

Another example of the possible imposition of disproportionate or abusive contract terms by the public buyer concerns the rules or contractual clauses regulating the transmission of intellectual property (IP) rights and/or know-how related to or derived from the procurement process,[692] which can have significant knock-on impacts on innovation.[693] To be sure, there will be numerous instances in which the transmission of IP rights and know-how to the public buyer is reasonable or necessary for the proper completion of the contract, particularly if the development of such IP rights or know-how is the subject-matter of the contract or an essential element thereof, such as under the new innovation partnership created by article 31 Directive 2014/24.[694] Also, there can be exceptional cases in which the protection of overriding public interests (such as national security) require a restriction on the uses of the IP rights and know-how related to public procurement activities and the subject matter of those contracts (although such concerns will rarely apply in fields other than defence procurement and must be interpreted in a restrictive way). Finally, the transmission of IP rights can be instrumented in a non-distorting manner by recourse to non-exclusive or other types of limited licences that allow the contractor to retain ownership and full use of the technology concerned, while also permitting the contracting authority to develop certain activities (such as repair and maintenance, or the subsequent tendering of contracts based on that technology where the incumbency advantage is neutralised; above §II.B.vii and §II.B.viii) without improperly altering the development of ordinary activities or the regular exploitation of the technology by the contractor. In any case, it must also be taken into account that all arrangements concerning the transfer of IP rights to the contracting authority now need to be made clear as part of the technical specifications applicable to the procedure (art 42(1) Dir 2014/24) and that special requirements on the assignment, management and protection of IP rights apply to those connected to an innovation partnership (art 31(6) Dir 2014/24).

However, regardless of the generally neutral approach followed by Directive 2014/24, it seems important to stress that there can be some instances where the rules regarding the transfer of IP rights and know-how to the contracting authority can result in abusive

[692] Similarly, see Trepte (n 327) 275–76. Generally, on this issue—with reference to US law—see HG Rickover, 'Government Patent Policy' (1978) 60 *Journal of the Patent Office Society* 14; WC Anderson, 'Comparative Analysis of Intellectual Property Issues Relating to the Acquisition of Commercial and Non-Commercial Items by the Federal Government' (2003–04) 33 *Public Contract Law Journal* 37; Keyes (n 599) 575–93; and JG McEwen et al, *Intellectual Property in Government Contracts. Protecting and Enforcing IP at the State and Federal Level* (Oxford, Oxford University Press, 2009) 1–186.

[693] E Uyarra et al, 'Barriers to Innovation through Public Procurement: A Supplier Perspective' (2014) 34(10) *Technovation* 631, 634. See also C Edquist and JM Zabala-Iturriagagoitia, 'Pre-Commercial Procurement: A Demand or Supply Policy Instrument in Relation to Innovation?' (2015) *R&D Management* forthcoming, available at 10.1111/radm.12057.

[694] See Davey (n 50); and Cerqueira Gomes (n 50).

or disproportionately restrictive terms.[695] That would be particularly the case where, as a result of the transfer, the public contractor would be unnecessarily constrained to use the technology concerned in its regular activities (be it for the purposes of participating in the tendering of other public contracts, or in the development of other types of economic activity), or would find the value of the technology disproportionately reduced by its subsequent (uncompensated) use by the public buyer.[696] It would also be the case in other situations where the contracting authority acquired unlimited rights to disclose the technology to third parties (especially to those that would not be able to obtain a licence or equivalent right to the technology, or if they are granted access in ways that do not generate the corresponding royalties or revenues for the original owner of the technology) and, consequently, could jeopardise the IP rights strategy of the public contractor or render it largely ineffective.[697] A further instance of distortions of competition derived from the rules regarding the transfer of IP rights and know-how could arise from the accumulation or *pooling* of licences by the public buyer, particularly if a similar accumulation of IP rights by non-public undertakings would raise competition issues—depending on the use given to such technology by the public buyer and, particularly, if it could result in instances of technical levelling or undue disclosure (above chapter two, §V.E). In short, there are several instances in which the rules applicable to the transfer of IP rights and know-how to the public buyer might generate competition distortions or restrictions.

It is submitted that, in order to prevent such potential distortions of competition and to ensure compliance of the rules regulating the transfer of IP rights and know-how to the public buyer with the principle of competition, contracting authorities should not impose or require the transfer of IP rights in other than market conditions. Therefore, contracting authorities shall not leverage their buying power in order to obtain licences or equivalent rights in more favourable terms than equivalent buyers can obtain in the market. Put differently, public contractors should not be obliged to accept terms and conditions regarding the transfer of their IP and know-how that are more restrictive than the terms applied in regular market transactions—unless there is an overriding justification in the public interest and, if so, the transfer of additional rights is duly compensated so as to prevent a devaluation of the value of the technology for its original owner (and, in the last resort, an undue disproportion of the economic conditions of the contract; above §III.A). Moreover, in order to prevent subsequent distortions of competition derived from the use of the IP rights acquired by the contracting authority, a scrupulous respect for the terms of the licences is particularly important, especially as regards the obtention of authorisation for the disclosure of IP-protected technology to actual or potential competitors of the original owner. In this regard, and independently of the terms in which the technology has

[695] Trepte (n 23) 48.

[696] See generally: MK Greene, 'Patent Law in Government Contracts: Does It Best Serve the Department of Defense's Mission' (2006–07) 36 *Public Contract Law Journal* 331.

[697] A situation exactly like the one mentioned gave rise to Case C-103/11 P *Commission v Systran and Systran Luxembourg* [2013] pub electr EU:C:2013:245. It is important to stress that the EGC had granted a significant compensation to the affected undertaking, which the ECJ later quashed. For discussion on the implications of the case, see A Sánchez Graells, *Protection of IPR and limits of contractual relationships: AG Opinion in Case C-103/11 P* (21 November 2012), available at howtocrackanut.blogspot.co.uk/2012/11/protection-of-ipr-and-limits-of.html. More generally, see C Hlavka, 'Contractor Patent Bandits: Preventing the Government from Avoiding 28 USC 1498 Liability for its Contractors' Unauthorized Use of Patented Material by Outsourcing One or More Steps of the Process Abroad' (2007–08) 37 *Public Contract Law Journal* 321.

been acquired or licensed (which could be excessively permissive) contracting authorities should ensure that they do not generate restrictions of competition by permitting or fostering exchanges of proprietary information that would either violate IP rights or result in (or generate the same effects as) unlawful exchanges of information. In this regard, it seems desirable that contracting authorities seek prior authorisation from the original public contractor—which will be bound by general competition law criteria, particularly as regards exclusive rights and essential facilities. This is now partly regulated, but only in relation to the innovation partnership in article 31(6) of Directive 2014/24, which stresses that, where the IP rights of several economic operators are concerned, the contracting authority shall not reveal solutions proposed or other confidential information communicated by a partner in the framework of the partnership without that partner's agreement, and further requires that such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.

To sum up, it is submitted that contracting authorities are under a special duty to ensure that the rules regulating the transfer of IP rights and know-how by public contractors and the subsequent use of such technology are aligned with market conditions and do not generate direct or subsequent distortions of competition.

IV. Conclusions to this Chapter

The analyses conducted in this chapter have served the purpose of specifying or operationalising the general principles and considerations extracted from previous parts of the study and, particularly, chapter five. The review of the different types of competition distortions that can arise from public procurement rules and practices has primarily been governed by competition considerations and, consequently, some criteria can be extracted in order to ensure compliance with the principle of competition and the development of a more competition-oriented public procurement system.[698]

Despite the Increased Possibilities to Avoid Having Recourse to the Market, Contracting Authorities Should Carefully Assess their Decisions to Cooperate or Keep Procurement In-House. Contracting authorities are under no obligation to resort to the market or to call on undertakings to carry on public interest activities, and there is no obligation under EU law to carry on competitions between the public and the private sector. Directive 2014/24 creates significant opportunities for contracting authorities to cooperate in the discharge of their obligations in the public interest, to retain procurement *in-house* and to engage in other sorts of 'soft' cooperation, such as centralisation or occasional joint procurement, including those with a cross-border component. These possibilities could create the impression that contracting authorities have significant freedom to avoid interacting with the market. However, given that those arrangements also allow the *in-house* instrumentalities and central purchasing bodies to offer a significant part of their goods or services in the market and to act as market-makers, it is submitted that contracting

[698] More detailed conclusions are provided in each of the sub-sections. The purpose of this concluding section is to gain an overall perspective and some general insights from the consideration of all the issues previously discussed, taken together. Therefore, some degree of simplification is required.

authorities need to assess carefully the competition implications of engaging in any of these public–public or *in-house* cooperation mechanisms. Excessive recourse to them or distortions of competition in the 'open' market can severely damage the efficiency of the procurement process as a whole and, consequently, it is submitted that those decisions are not completely free after all.

The Design of the Tender Procedure Should Ensure Broad Access by All Potentially Interested Undertakings. As regards the rules regulating access to the public procurement process, preliminary conclusions have clearly indicated that public tenders and the applicable requirements should be designed in such a way that access to the tender is as unrestricted as possible and that the procedure is as open as possible—subject to compliance with basic proportionality requirements, so as not to impose excessively burdensome obligations on contracting authorities. Once the contracting authority decides to entrust the development of any activities to undertakings—in general, to source goods, works or services from the market—it should do so in accordance with EU public procurement rules or their basic principles (particularly avoiding strategic behaviour oriented towards circumventing those rules and principles by means of their jurisdictional limitations and, more specifically, by avoiding the value thresholds that trigger their application) and not resort to closed or non-competitive procedures in cases other than those expressly regulated by public procurement directives. Moreover, the conditions that allow contracting authorities to award contracts through other than open and restricted procedures should be interpreted narrowly. In general, contracting authorities should conduct their decisions regarding the applicable tender procedures with the main aim of avoiding the generation of negative impacts on market dynamics. Consequently, they should tend to run tender procedures in the most open possible manner, subject to an analysis of proportionality between the costs and difficulties associated to conducting the tender according to the rules of open or restricted procedures and the eventual restrictions of competition derived from resorting to other types of (less competitive) procedure.This is now potentially jeopardised by the significant flexibility that Directive 2014/24 has created regarding the use of competitive procedures with negotiation and competitive dialogue procedures. It has been submitted that, in order to avoid procurement resorting to non-(fully) competitive procedures in most instances, the criteria that enable recourse to procedures involving negotiations should be interpreted strictly through a very restrictive objective assessment of the actual need to procure not-readily available or innovative solutions and, in any case, the foreseeable competition impacts should be taken into due consideration.

Also, in order to keep access to the public procurement process as open as possible, contracting authorities must minimise the cost of participation—particularly in the form of entry fees, such as charges associated with the sale of bid documents. These charges should be set at the lowest possible level and, in any case, be proportionate to the real cost of document preparation. Furthermore, contracting authorities should ensure that all relevant information is available and promptly disclosed to all potentially interested participants in the tender on a non-discriminatory basis and—except where exceptional circumstances concur—ready from the outset, so that no tender procedure is unnecessarily launched before all the relevant documentation is in place. Along the same lines, and with the purpose of reducing the costs and barriers to access the tender procedure, requirements of bid securities should be minimised and adjusted to a level that is proportionate to the actual risks intended to be covered and, as a complementary criterion, to the value

of the contract. By reducing administrative burdens and financial costs of participation, contracting authorities can foster competition—particularly by SMEs—and, consequently, their decisions should avoid imposing disproportionate and unnecessary requirements.

Along the same lines, and in order not to limit unduly participation in the tender procedure by potentially interested undertakings, contracting authorities shall minimise the grounds for exclusion of potential bidders to those circumstances that can generate actual distortions of competition. In this regard, the grounds specifically regulated in the directives should be interpreted and applied in a proportionate manner (ie, narrowly constructed, particularly if there is no significant competitive advantage to be gained by tenderers affected by the potential ground for exclusion) and the generation of additional grounds for the exclusion of tenderers should be oriented towards ensuring that competition is not distorted. In this regard, breaches of competition law should always be considered instances of grave professional misbehaviour and, consequently, offer an adequate basis for the exclusion of tenderers (subject to suspension and debarment rules). As regards the qualitative selection of candidates, particularly in the cases where a restriction on the number of participants applies or where contracting authorities set up official lists of contractors or systems of certification of contractors, the directives clearly impose an obligation to keep the applicable requirements to a minimum, so that they are proportionate and directly related to the subject-matter of the contract, and tend to ensure participation by a number of tenderers that generates genuine competition. Such proportionality requirements not only affect each of the requirements individually taken, but also the set of qualitative selection requirements analysed together. In particular, requirements regarding the previous experience of candidates have to be proportionate, take into account all proven experience that can be of relevance for the development of the contract, and they cannot include criteria related to the specific past performance of contractors with this or other contracting authorities. In general, contracting authorities should adopt a neutral and possibilistic approach to the determination of economic operators' compliance with qualitative selection criteria, and guide their decisions by the need to ensure that candidates are able to deliver to the minimum (proportional) specified standards. In order to avoid early restrictions of competition, other considerations such as their ability to excel in the performance of the contract or to offer particularly interesting or advantageous solutions should be deferred to tender evaluation and analysis according to the set award criteria.

In relation to the establishment of technical specifications, the directives clearly adopt an anti-formalist approach based on technical neutrality that has as its main objective avoiding the creation of unjustified obstacles to the opening up of public procurement to competition. Therefore, contracting authorities should refrain from using excessively specific or discriminatory technical specifications, avoid setting excessively demanding technical specifications ('gold plating'), and adopt a neutral and flexible (ie, 'possibilistic') approach in the determination of technical and/or functional equivalence of (alternative) solutions. The same general approach applies to the increasingly relevant use of eco-labels, labels certifying social elements of the production of goods or provision of services, and the assessment of the life-cycle costs of products for the purposes of evaluation of the technologies proposed by candidates and tenderers. Along the same lines, where it does not generate a disproportionate increase in the complexity or cost of the procedure, contracting authorities should allow for the submission of variant tenders, so as to allow for the maximum possible technical openness of the tender procedure.

Similarly, in order to allow for the participation of the maximum number of interested bidders, contracting authorities must adopt a flexible approach towards teaming and joint bidding—subject to compliance with general competition rules by the bidders. In this regard, as long as teaming and joint bidding contribute to intensifying competition within the tender without generating significant distortions to competition in the market concerned, contracting authorities should promote them. In the particular instance of participation by consortia, this flexible approach should be made extensive to the rules regulating their composition, changes in the consortia, etc—unless its implementation is materially negative for the development of the tender process—so that participation by consortia is fostered to the maximum extent permitted by competition law. A similarly flexible approach should be adopted as regards the prohibition on multiple bidding by a single entity or by entities amongst which a relationship of control exists, so that all the tenders in which they participate are not unnecessarily excluded—at least where the analysis of the specific circumstances of the case shows that competition is not altered in a material way.

A further set of requirements that has a major impact on the openness or accessibility of the tender procedure—and, hence, should be interpreted in a pro-competitive way—concerns the decisions regarding the aggregation of requirements into single contracts, the division of contracts in lots, and the rules regulating 'package' bidding for different lots by a single tenderer. In this regard, the general criteria should be that—whenever feasible and as long as it does not generate excessive complexity or disproportionate costs to the contracting authority—contracts should be divided into an appropriate number of lots (having in mind the effects on potential collusion by tenderers) and conditional and packaging bidding should be permitted, so as to promote competition for the contract. The opposite approach should be adopted as regards induced or mandatory subcontracting—which is a substitutive device for the 'break-up' of the object of the contract. Given the potential distortions of competition that can arise from subcontracting requirements, contracting authorities should largely refrain from mandating or inducing subcontracting.

Finally, as regards contractual systems that are based on the aggregation of contracts (over time)—such as framework agreements and dynamic purchasing systems—and the electronic auctions and electronic catalogues through which they can be implemented, similar criteria should be applied in their design, so as to ensure that they do not distort competition and that the restrictions applicable to the design of all other tender procedures are not circumvented.

The Rules Regarding the Evaluation of Bids and the Award of the Contract Should Ensure Equality of Opportunity, Neutrality of Assessment and Undistorted Competition. There are several aspects of the evaluation and award process that seem particularly prone to the generation of distortions of competition—both *within* the tender procedure, and *in* the market concerned. In this regard, the inquiry has stressed the importance of respect for the principle of competition to ensure that the evaluation of bids and the award of the contract is conducted in a neutral and impartial way, and that these activities are not unnecessarily constrained by formalistic requirements but rather tend to ensure the proper appraisal of tenders on substantive grounds. This is now complemented by the specific treatment of conflicts of interest under Directive 2014/24, which reinforces the neutrality obligations imposed on evaluation teams and participating undertakings, which could be excluded if there was no satisfactory alternative solution to remedy the conflict of interest.

In order to guarantee such neutrality and equality of opportunity, it has been concluded that contracting authorities are under a special duty when assessing the tenders submitted by apparently advantaged parties to ensure that competition has not been altered. In the same vein, contracting authorities should ensure that evaluation and award decisions are conducted on an arm's length basis, particularly as regards the appraisal of tenders submitted by incumbent contractors (in order to avoid path dependence or the unwarranted consolidation of commercial relationships). In this regard, the treatment of switching costs in public procurement procedures poses a specific difficulty and, as has been revealed by the analyses conducted, it would be fully compliant with the principles of competition and non-discrimination to establish a clear non-absolute duty to neutralise avoidable incumbency advantages (mainly, switching costs), particularly by adapting award criteria to take them into due account.

Award criteria, for their part, generate the biggest possibilities for departure from the required neutral and pro-competitive approach to public procurement. The selection and weighting of the criteria for the award of the contract largely determine the outcome of tender procedures and, consequently, merit special consideration from a competition perspective. Hence, it comes as no surprise that EU public procurement directives expressly require that award criteria ensure compliance with the principle of equal treatment and guarantee that tenders are assessed in conditions of effective competition. In order to limit the possibilities of distortions of competition arising (even inadvertently), award criteria should be relevant, specifically linked to the subject-matter of the contract, allow contracting authorities to assess overall which is the most economically advantageous offer (unless the contract must be awarded to the lowest-priced tender) in an objective, transparent and non-discriminatory way, and be weighted in a clear manner that adequately reflects their relevance for the specific contract. Moreover, they should be interpreted and applied in a neutral and objective fashion and according to evaluation rules that properly reflect the degree of compliance of each tender with the set criteria. In particular, the proper application of the rules regulating award criteria and their application should exclude restrictions derived from award criteria that result in the de facto exclusion of tenderers or the advantage of some tenderers over others, and that depart from the general requirement of technical neutrality. Moreover, award criteria should generally not be based on non-quantifiable or subjective requirements and, where required, such subjective considerations should be treated as objectively as possible. Finally, given the uncertainties that they generate, the use of forward-looking award criteria should also be avoided inasmuch as possible.

As closely related issues, the treatment of non-fully compliant bids and the admission of variant tenders can contribute to introducing flexibility in the application of the award criteria regulating a given tender. In this regard, contracting authorities should allow for the submission of variants and not automatically reject non-fully compliant bids, as long as it is feasible and proportionate in relation to the subject-matter of the contract and the applicable award criteria. Along the same lines, but from the opposite perspective, when the variance between bids and tender requirements is significant and generates a risk of non-compliance or of financial instability for the contracting authority, the contracting authority is bound to reject such materially non-compliant tenders—also in case of apparently abnormally low tenders, including those tainted by state aid. In these cases, the principle of diligent administration requires the authority to reject the tender unless it

can justify a decision to accept it on the basis of overriding legitimate reasons and as long as that does not generate discrimination or distortions of competition. Finally, it has been found that—subject to strict necessity and proportionality requirements—contracting authorities can impose *absolute* award criteria, or awarding constraints, so that no tender that does not meet those particular requirements (in full) can be accepted. The imposition of such constraints should, in any case, comply with the same requirements as other award criteria, particularly as regards the need to guarantee that tenders are assessed in conditions of effective competition.

In order to prevent the circumvention of the previous restrictions, and to continue ensuring neutrality of approach and equality of opportunity, contracting authorities have a very limited capacity to modify the terms of the call for tenders and to require or authorise modifications of the tenders submitted prior to or immediately after the award of the contract. As a result of those restrictions, contracting authorities could find it in their interest to cancel the tendering procedure. However, such a decision cannot be made without due consideration and should be based on sufficient objective reasons.

After the Award of the Contract, the Rules Regarding its Implementation, its Revision and Eventual Re-tendering, as Well as the Procedures for the Challenge of Award Decisions Should Continue to Ensure Undistorted Competition. Once the contract is awarded, the principle of competition basically requires that the regime applicable to the contract—particularly as regards the amendment of its basic elements—does not allow for the circumvention of the restrictions applicable to the design of the procurement process and the award of the contract. In this regard, it has been seen that some of the restrictions applicable in previous phases of the tender procedure are equally applicable—in amended or adjusted form—post-award. More specifically, contracting authorities are under similar duties to minimise the financial burden of the contract, have very limited power to renegotiate and amend substantial elements of the contract—including its scope, price and delay, which are subject to special rules that must be construed narrowly—and also have limited discretion as regards the (early) termination of the contract and its re-tendering. The treatment given to modification of contracts during their term and to their termination in Directive 2014/24 generally align with these wide remarks, but it has been stressed that their interpretation and application needs to be guided by the principle of competition. Moreover, the system should ensure the existence of effective bid protest mechanisms and remedies that guarantee that competition considerations are taken into due account and that distortions of competitive dynamics can be prevented or corrected effectively.

The Exercise of Public Buyer Power Should Be Limited as Necessary to Avoid its Abusive Exercise, so that Public Contracts Reflect Normal Market Conditions. Finally, even where there is no clear connection to particular procedural aspects of the public procurement activity, the exercise of public buyer power should be constrained by the general obligation of contracting authorities not to prevent, restrict or distort competition in the markets concerned. In general, contracting authorities are under a duty to ensure that public contracts reflect normal market conditions to the maximum possible extent. In particular, contracting authorities should refrain from '*squeezing*' tenderers by obtaining disproportionately advantageous conditions, and should be particularly careful not to distort competition through the rules regarding the transfer of IP rights and know-how and their subsequent use and disclosure of such technology.

Therefore, the *overall conclusion* that could be extracted from the analysis conducted in

this chapter is that almost every step in the procurement process has potentially distorting implications (of a different degree of relevance) and can be oriented in a pro-competitive fashion. Therefore, in order to promote the development of a more competition-oriented public procurement system, contracting authorities should change perspective (or rather, adopt a more competition-oriented perspective) and take into due consideration the potential effects of their decisions on competition for the contract and in the market concerned, placing special emphasis on not unduly restricting access to the tendering procedure, on not unnecessarily pre-determining the outcome of the tender procedure, and on guaranteeing that the result of the competitive process is not distorted or circumvented post-award, especially through the conduct of undue renegotiation, amendment, termination or re-tendering of the contract.

7

Complementary Proposals for the Development of a More Competition-Oriented Public Procurement Framework

I. Introduction

In chapter six the study focused on the critical appraisal of the new 2014 public procurement rules in the light of the general principles previously analysed in other parts (chiefly, in view of the competition principle now also consolidated in art 18(1) Dir 2014/24, above chapter five), with the purpose of highlighting those phases of the tendering process and those criteria used in public procurement that are more prone to generate anti-competitive effects and/or distort market dynamics, and proposed guiding criteria to interpret and apply them in a more pro-competitive fashion. This chapter goes one step further and focuses on the research question: *how can that functional set of competition-oriented public procurement rules and practices be complemented or further developed to achieve better results?*

In order to do so, the following sections will be dedicated to summarising different aspects—both substantive and institutional—that, in my view, could complement existing rules and reinforce the pro-competitive orientation of the public procurement system. In addition, some measures that, in principle, could seem to promote such an objective but could actually defeat the purpose will also be discussed. Some of these rules and institutional features currently exist in procurement systems other than the EU (primarily the US). In these cases, a brief comparative description of the mechanisms and their functioning in the legal order *of origin* will serve as the basis for the analysis of the desirability of their *transplant* into the EU public procurement system. The ordering criterion will be the focus of these groups of possible reforms or additional measures, and will distinguish between those mainly aimed at limiting publicly created restraints of competition (§II), those mainly aimed at tackling privately created restraints of competition (§III) and, finally, those that can contribute to the development of a more competition-oriented institutional framework in general (§IV). The chapter will close with some conclusions on the measures discussed (§V).

II. Complementary Proposals Aimed at Limiting Publicly Created Restraints of Competition

As has probably transpired from the detailed analysis of each of the phases and relevant decisions to be adopted by contracting authorities along a tender procedure (above chapter six), publicly created restrictions of competition can arise or be avoided in relation to several elements of one and the same tender—as well as in relation to the overall design of the rules and requirements applicable to that procedure. Indeed, the exercise of the discretion left to contracting authorities in accordance with the principles of competition, equal treatment and transparency (or contrary to them), can generate significantly diverging outcomes. Therefore, it is difficult to envisage a single mechanism that can limit or avoid publicly created restrictions of competition at once. This objective seems to be better served by the adoption of general guidelines or criteria to orient and assess the procurement activities of the public buyer, and to bind contracting authorities to the development of more competition-oriented procurement activities. In furtherance of the criteria already discussed (above chapter six), some complementary policies (capable of being specified through legal rules) could be foreseen to reinforce the general requirements of the principle of competition—which, ultimately, requires contracting authorities to design, structure and run tender procedures in the most pro-competitive possible way (above chapter five).

It is submitted that, out of all the possible developments of EU public procurement rules, there are three potential ones, which, together with their ensuing practices, seem to merit further scrutiny. Firstly, measures oriented towards the dynamic enhancement of competition requirements might bring an incremental or dynamic component to the assessment of procurement activities with the aim of making them progressively more pro-competitive (§II.A). Secondly, the adoption of an explicit policy of dual or secondary sourcing—other than as an instrument to reduce supplier dependence by the contracting authority—could be envisaged as a mechanism oriented towards guaranteeing the maintenance of a minimum level of competition amongst public contractors (§II.B). However, as shall be shown, such techniques seem to be more oriented towards industrial policy goals and are difficult to make compatible with the principles of the TFEU—and, therefore, do not seem desirable. Finally, the development of a comprehensive *market economy buyer test*—for purposes other than, although compatible with, state aid control (above chapter four, §II.A)—could be considered a valuable yardstick for the appraisal of the procurement activities of the public buyer from a competition perspective (§II.C). Each of these possible complementary policies is analysed succinctly in turn in what follows.

A. Progressive or Incremental Enhancement of Competition Requirements in Public Procurement

As a matter of general policy, it seems important to stress that public procurement activities are usually recurring for most contracting authorities. Therefore, a *dynamic element* can be identified in public procurement policy and practice that, in my view, has been largely neglected in the design of public procurement rules—which remain substantially *static*, other than in exceptional cases such as those of framework agreements and dynamic

purchasing systems (above chapter six, §II.A.xvii and §II.A.xviii). Placing an emphasis on dynamic considerations related to public procurement activities seems to give leeway to the development of progressively more competition-oriented rules and practices—or, at least, to the appraisal of public procurement activities from a perspective that exceeds the narrow limits of each individual tender.[1]

Most contracting authorities have been conducting procurement activities for several years (or will conduct them for a relatively long time span, in the case of contracting authorities of recent creation or recently entrusted with procurement functions). Therefore, a *procurement record* for each relevant authority and category of goods, works or services can be put together and analysed from a competition perspective in search for relevant trends. If, for example, a contracting authority's procurement record shows increasing recourse to other than open and negotiated procedures, such a trend should be analysed in order to determine whether the evolution of its needs and of the relevant market conditions support such a shift in procurement practice or, on the contrary, whether the contracting authority has been unwarrantedly resorting to less competitive procedures. Similarly, trends of the repeated award of contracts to a particular tenderer could be scrutinised in order to determine whether the specific conditions and requirements of the calls for tenders and the offers presented by competing tenderers endorse such a result or, on the contrary, the contracting authority is affected by path dependence or any other type of bias in favour of the incumbent contractor, whether it falls clearly within the scope of the rules on conflicts of interest or not (above chapter six, §II.B.vii and §II.B.viii).

In all these cases, the analysis of trends in procurement practice could help identify publicly created long-term or *dynamic* distortions of competition—which could remain undetected in short-term analyses limited to each of the tender procedures separately. In all these cases, unless the contracting authority can justify the apparently competition-restrictive trend on the basis of overriding reasons in the public interest—or prove that it is simply a circumstantial or random result derived from the competitive situation in the market concerned—a correction of the public procurement practice would be highly desirable from a competition perspective. In this regard, a specific regime could be designed to restrict the discretion of contracting authorities to develop such competition-restrictive procurement trends—for instance, by appointing a competition advocate to oversee their activities for a given period of time and to monitor the change in procurement trends by that contracting authority (below §IV.A).

To go a step further, as a matter of systematic or incremental improvement of public procurement practices, contracting authorities could commit to—or be forced to comply with—a policy of progressive enhancement of competition requirements or of progressive development of more pro-competitive practices. In this regard, quantitative limits or objectives could be set, so that on a yearly or bi-annual basis contracting authorities should reduce their recourse to procedures other than open and negotiated (as regards

[1] Generally, on the limits of a *static* analysis, see Commission Staff Working Document, *Annual Public Procurement Implementation Review 2012* (SWD(2012) 342 final); and *Annual Public Procurement Implementation Review 2013* (SWD(2014) 262 final). In that regard, the elements of public oversight included in art 84 of the 2011 *Proposal for a Directive of the European Parliament and of the Council on public procurement* (COM(2011) 0896 final) would have made a difference and their abandonment during the legislative procedure is lamentable. The reasons provided for that abandonment in rec (122) of Dir 2014/24 are unconvincing, as they mix up issues of strong and systematic oversight and assessment of procurement practices by professional bodies with other issues of broader citizen participation and transparency of the system—which, in my opinion, is an error.

the number and/or value of the tenders) or should increase supplier variety in a given proportion—or, at least, develop actual efforts in that direction. Such a general policy should not lead contracting authorities to adopt a *market-planning* role (eg, by spreading work among several contractors; see below §II.B), nor to have recourse to open or negotiated procedures when doing so is disproportionate or jeopardises the effectiveness of the procurement activity. Nonetheless, it would force contracting authorities to reassess the need to resort to less competitive procedures or to impose certain requirements that might not be indispensible in relation to each tender procedure in order to meet the overall goal in the relevant period. Moreover, given the recurring nature of most procurement activities, it would allow for a *trial and error* approach towards the development of more competition-oriented public procurement activities—so that contracting authorities could exploit those new solutions that foster competition and meet their requirements better or generate any other additional advantages, while discarding those measures that eventually failed to produce any superior results to previous less competitive solutions. Ideally, a set of *best practices* could emerge and, in time, they could even guide reforms of public procurement rules.

To sum up, it is hereby submitted that stressing the long-term or dynamic element of most (recurring) public procurement activities makes way for the development of complementary policies to reinforce and further promote the development of a more pro-competitive public procurement system. The options in this regard seem to be both *reactive* (to a relatively or increasingly restrictive procurement record or trend by a given contracting authority) and *proactive* (in order to foster the progressive adoption of more competition-oriented practices that, eventually, can be incorporated into future reforms of public procurement rules). However, the limits to such additional policies seem to be encountered in the avoidance of a market-planning approach by contracting authorities and the principle of proportionality—which should exclude these policies if they jeopardise or make excessively burdensome the development of procurement activities by the contracting authorities concerned.

B. Secondary or Dual Sourcing Policies in Public Procurement

As briefly mentioned, in order to ensure the existence of a minimum level of competition amongst public contractors, a specific policy on secondary or alternative procurement could be developed to allow contracting authorities (or force them) to depart from ordinary rules on the award of public contracts in order to ensure a minimum level of supplier diversity—even if that required excluding certain contractors (incumbents) from participating in some tendering procedures, or even (artificially) splitting contracts that would otherwise be tendered as a single unit. By doing so—other than reducing their dependence on a single supplier for a given type of goods, works or services—contracting authorities could be able to promote competition for future contracts (ensuring that more than one potential supplier remained in business or developed the required know-how) and, eventually, competition in the market concerned.[2] Therefore, a closer analysis of such a possibility is relevant for the purposes of this study.

[2] However, the circumstances in which that will be the case are relatively limited, and so these concerns are

From a comparative perspective, it is important to stress that such a policy exists in other legal systems, especially in the US. Indeed, the US FAR allows contracting entities to develop secondary sourcing activities by running *competitive procedures after exclusion* of certain (potential) contractors. In this regard, it establishes that

> agencies may exclude a particular source from a contract action in order to establish or maintain an alternative source or sources for the supplies or services being acquired if the agency head determines that to do so would—(1) increase or maintain competition and likely result in reduced overall costs for the acquisition, or for any anticipated acquisition.[3] (US FAR 6.202(a)(1))

However, the decision has to remain tender-specific, as such a determination 'shall not be made on a class [of contracts] basis', and it 'shall include a description of the estimated reduction in overall costs and how the estimate was derived'[4] (US FAR 6.202(b)(1) and (3)). Therefore, it is submitted that the exclusion of contractors prior to running competitive tendering procedures should be conceptualised as an extraordinary mechanism, and limited to the specific cases where it is efficient to do so—in terms of short or medium-term savings for the contracting entity. Exclusion of contractors does not seem possible where the net effect imposes additional costs on the contracting authority (*rectius*, where it does not generate savings). Also, it cannot cover more than one tender at a time—and, arguably, cannot result in the systematic exclusion of a given contractor. It is also important to stress that the exclusion of a particular contractor does not waive the obligation to conduct a competitive procedure with full and open competition. Therefore, the contracting authority cannot (directly) decide to which alternative or secondary contractor the contract should be awarded—which will be determined by the rules regulating the tender and will depend on the competition developed by non-excluded tenderers. Clearly, then, the contracting authority cannot decide which alternative supplier to have, but only to have an alternative or secondary supplier.

A different rule that also allows contracting entities to resort to alternative or secondary contractors is *dual sourcing*, which is generally implemented through so-called leader-follower arrangements.[5] *Leader company contracting* mechanisms are defined as

> an extraordinary acquisition technique that is limited to special circumstances and utilized only when its use is in accordance with agency procedures. A developer or sole producer of a product

mainly applicable where the public buyer is the sole or a de facto indispensible buyer, and where offer in that market is highly concentrated and there are barriers to entry. Therefore, as already indicated, in these cases a 'purely' regulatory solution could be preferable (see above chapter two, §II.B.ii).

[3] This provision includes other possible justifications for the adoption of secondary sourcing decisions, particularly in cases of the protection of national defence interests (sub-sections (2) and (3)); or in order to secure continuous availability of a reliable source of supply (sub-section (4)); to satisfy projected needs in cases of high demand (sub-section (5)); or, in cases of procurement of medical supplies, safety supplies, or emergency supplies, in order to satisfy critical needs (sub-section (6)).

[4] On rules regarding recourse to such competitive procedures after exclusion, see WN Keyes, *Government Contracts under the Federal Acquisition Regulation*, 3rd edn (Eagan, Thomson-West, 2003) 169–71; and ABA, *Government Contract Law. The Deskbook for Procurement Professionals* 3rd edn (Chicago, ABA Section of Public Contract Law, 2007) 63–64.

[5] See: WB Burnett and WE Kovacic, 'Reform of United States Weapons Acquisition System: Competition, Team Agreements, and Dual-Sourcing' (1989) 6 *Yale Journal on Regulation* 249, 254, 287. See also BR Sellers, 'A Model for Enhancing Second Sourcing and Production Competition in Major Weapon Systems Acquisition' (1981–82) 15 *National Contract Management Journal* 27.

> or system is designated under this acquisition technique to be the leader company, and to furnish assistance and know-how under an approved contract to one or more designated follower companies, so they can become a source of supply. (US FAR 17.401)

In a simplified manner, dual sourcing can be conceived of as a mechanism that allows the contracting authority to split its supply requirements between the incumbent contractor (who has generally undertaken a previous task in the development of the goods to be supplied and, arguably, should be entrusted with the production of the entire requirement) and one or more secondary or alternative contractor(s) (who will be entrusted with the production of part of the goods, as designed by the incumbent, after transfer or disclosure of the relevant technology[6]) with the aim of 'developing' competition for the supply of those goods. Indeed, one of the objectives (out of several others) that can be used to justify having recourse to this technique is that it can be used to 'facilitate the transition from development to production and to subsequent *competitive acquisition* of end items or major components'[7] (US FAR 17.401(g), emphasis added). Therefore, it can be seen as an extraordinary technique available to contracting authorities to create competition after the phase of development of the required goods, or for the supply of goods otherwise protected by IP rights, where competition would otherwise not be generated by market mechanisms—given that one of the requirements for having recourse to this technique is that 'no other source can meet the Government's requirements without the assistance of a leader company' (US FAR 17.402(a)(2)).[8]

This is a (semi)regulatory technique used to avoid lock-in of the purchasing authority with a single supplier,[9] and it can be undertaken even if it results in the payment of a (diversification) premium (as a result of limited economies of scale).[10] It also contributes to the reduction of exposure to bankruptcy risk,[11] and other tenderer-specific risks by the contracting authority. However, it may have a negative impact on the incentives of public contractors to innovate (particularly depending on the rules regarding transfer

[6] Transfer of technology is a complex issue and might give rise to substantial derivative issues that would merit a detailed scrutiny that exceeds the scope of this study—for a brief overview, see above chapter six, §III.B. Suffice it to indicate here that US FAR 17.403(b) expressly requires that 'any contract awarded under this arrangement contains a firm agreement regarding disclosure, if any, of contractor trade secrets, technical designs or concepts, and specific data, or software, of a proprietary nature'.

[7] Other objectives include (a) reduction of delivery time, (b) promotion of geographic dispersion of suppliers, (c) maximisation of the use of scarce tooling or special equipment, (d) achievement of economies in production, (e) insurance of uniformity and reliability in equipment, compatibility or standardisation of components, and interchangeability of parts, and (f) the elimination of problems in the use of proprietary data that cannot be resolved by more satisfactory solutions.

[8] Generally, see KM Manuel, *Competition in Federal Contracting: An Overview of the Legal Requirements* (CRS Report for Congress, 2011), available at fas.org/sgp/crs/misc/R40516.pdf.

[9] On the issue of lock-in, and some techniques that public buyers can implement to avoid reaching that situation over recurring procurements (mainly, co-sourcing and suppliers' rotation), see V Grimm et al, 'Division into Lots and Competition in Procurement' in N Dimitri et al (eds), *Handbook of Procurement* (Cambridge, Cambridge University Press, 2006) 168, 186–90. Similarly, RP McAfee and J McMillan, *Incentives in Government Contracting* (Toronto, Toronto University Press, 1987) 84.

[10] A DeLuca, 'Requirements for Competition' (1988) 57 *Antitrust Law Journal* 511, 512. Indeed, dual sourcing may not always result in savings; WN Washington, 'A Review of the Literature: Competition versus Sole-Source Procurements' (1997) 4 *Acquisition Review Quarterly* 173, 183; and J Leitzel, 'Competition in Procurement' (1992) 25 *Policy Sciences* 43, 53. *Contra*, E Lovett and M Norton, 'Determining and Forecasting Savings Due to Competition' (1979) 13 *National Contract Management Journal* 18.

[11] AR Engel et al, 'Managing Risky Bids' in Dimitri et al (n 9) 322, 330–31.

or disclosure of proprietary IP and *know-how*, above chapter six, §III.B),[12] and can raise procurement costs.[13] Therefore, the desirability of this instrument remains controversial.

Regardless of the specific requirements for their application (which are significantly restrictive and limit their availability in most common circumstances), it seems clear that US public procurement regulations include devices oriented to the development of alternative or secondary sources that guarantee the existence of a minimum level of competition through extraordinary techniques that allow contracting authorities to ensure (a minimum) diversity of suppliers—by excluding certain contractors from the award of specific contracts that are therefore set aside or reserved to non-incumbent contractors—or to 'generate' competition for the supply of specific types of goods specially developed to meet the contracting authorities' needs or otherwise protected by proprietary rights that confer a de facto monopoly. In these cases, it is submitted that, even if the objectives pursued by such mechanisms might seem to be related to the development of more competition in the public procurement setting (ie, related to a prime objective of public procurement), in most cases they actually result in the pursuit of industrial policy objectives (ie, secondary policy objectives) that are primarily focused on work-spread and the development or strengthening of the industrial base by non-market means. Therefore, these mechanisms assign a (semi-)regulatory role to the contracting authority that seems to exceed the bounds and objectives of public procurement regulation—which, as has been stressed previously, should not be used as a tool of economic planning. Moreover, even if their use is restricted to a set of relatively clearly defined exceptional circumstances, they grant contracting authorities the discretion to distort significantly the '*ordinary*' competitive dynamics of the market and to create competition 'artificially'—while the unexpected consequences of such an intervention could be major and generate 'second-degree' distortions that are difficult to quantify and, eventually, correct (above chapter two, §V).

Furthermore, even disregarding that such 'instrumentalisation' of public procurement to attain industrial policy goals departs from its core principles and function (above chapter three, §IV), the development of equivalent instruments as a part of the EU public procurement system would face significant impediments derived from the principles of equal treatment and proportionality. It has already been submitted that partial neutralisation of incumbency advantages in order to prevent path dependence or the undue consolidation of commercial relationships does not violate the requirements of the principle of equality because the incumbent and the rest of the tenderers are not in an equal position (above chapter six, §II.B.viii). However, introducing rules that allow the contracting authority to completely exclude the incumbent from the tender seems to be a disproportionately restrictive measure. Similarly, as has already been stressed, in the absence of overriding

[12] Second sourcing policies may have a negative impact on innovation; WP Rogerson, 'Profit Regulation of Defense Contractors and Prizes for Innovation' (1989) 97 *Journal of Political Economy* 1284; and MH Riordan and DEM Sappington, 'Second Sourcing' (1989) 20 *RAND Journal of Economics* 41.

[13] TP Lyon, 'Does Dual Sourcing Lower Procurement Costs?' (2006) 54 *Journal of Industrial Economics* 223. See also GL Albano et al, 'Procurement Contracting Strategies' in Dimitri et al (n 9) 82, 109–10. The limitations of split awards under certain cost structure conditions have also been highlighted by WE Kovacic et al, 'Bidding Rings and the Design of Anti-Collusive Measures for Auctions and Procurements' in Dimitri et al (n 9) 381, 408. Indeed, this policy might not be adequate in all cases, as it may tend to increase procurement costs and, hence, other benefits deriving from dual sourcing are needed to generate a net gain; see Sellers (n 5) 27; and MN Beltramo, *Dual Production Sources in the Procurement of Weapon Systems: A Policy Analysis* (RAND, Paper P–6911–RGI, 1983), available at stinet.dtic.mil/cgi–bin/GetTRDoc?AD=ADA152517andLocation=U2anddoc=GetTRDoc.pdf.

public interests (such as national security), rules regarding mandatory transmission or disclosure of IP rights and know-how such as those required to implement dual-sourcing-like techniques could often result in naked abuses of market power by contracting authorities (above chapter six, §III.B).

In light of all the above, even if there might be instances in which a selective and limited implementation of a policy of alternative or secondary sourcing could serve the purposes of guaranteeing the existence of a minimum level of competition (or a minimum diversity of suppliers) in a given market, the drawbacks generated by the potential distortions of competition derived from the pursuit of such secondary goals of industrial policy seem not to make the adoption of these mechanisms advisable. Furthermore, those techniques seem to be at significant divergence with the requirements of the principles of equal treatment and proportionality and, consequently, do not seem to fit within the general framework of the EU public procurement system. To sum up, even if this is somewhat contrary to expectations, the adoption of secondary or dual sourcing techniques does not necessarily further the competition principle (at least if understood as *undistorted* competition, because it derives in a quasi-regulatory market intervention by the contracting authority) and is largely at odds with the principles of equal treatment and proportionality. Therefore, even if these techniques could contribute towards the maximisation of the theoretical level of competition, they do not seem desirable—in what constitutes another instance where the trade-off between the basic principles of the public procurement system (ie, equality and competition) requires a restraint on the, at least theoretically, most pro-competitive alternatives (chapter three, §IV).

C. The 'Market Economy Buyer Test' as a Yardstick for the Evaluation of Public Procurement Decisions

As developed previously (see above chapter four, §II.A), a test based on the concept of a *market economy buyer* is key to the analysis of state aid in the field of public procurement (and elsewhere), since it determines whether the award of a public contract confers an economic advantage on the public contractor or not.[14] In general terms, there will be no undue economic advantage—and, hence, no state aid—if the same purchasing decision would have been made by a 'market economy buyer' or a 'disinterested buyer'. Therefore, the market economy buyer test sets the substantive standard for review in state aid control in the public procurement arena. The focus of such a test is, however, mainly restricted to the *compensatory* elements of procurement decisions—ie, it is narrowly conceived to appraise whether the contracting authority pays reasonable levels of compensation for the goods, services or works that it is actually procuring (therefore determining the inordinate character of compensation above market levels; or compensation for goods, services or works not actually supplied by the public contractor, or not actually needed by the public buyer). Hence, as it currently stands, the test offers limited possibilities for its extension to non-compensatory elements of public procurement decisions.

[14] For additional discussion, see A Sánchez Graells, 'Public Procurement and State Aid: Reopening the Debate?' (2012) 21(6) *Public Procurement Law Review* 205; and id, 'Bringing the 'Market Economy Agent' Principle to Full Power' (2012) 33 *European Competition Law Review* 35.

However, if broadened to catch non-compensatory elements, the market economy buyer test could be useful more generally for the appraisal of other aspects of the decisions adopted by contracting authorities in the exercise of their discretion in carrying on procurement activities. However, the test cannot be extended to cover all decisions adopted by contracting authorities. It should be stressed that the public buyer is not entirely free to develop procurement activities exactly in the same way as a market economy buyer would. Public procurement rules and principles limit its discretion and impose specific duties and obligations (mainly of a procedural nature) from which other buyers are free. Therefore, the market economy buyer test shall be limited to those decisions affecting aspects of the procurement process where the discretion of the contracting authority is not limited or restricted by public procurement rules in a way that forces the authority to depart from *standard* market purchasing behaviour. Nonetheless, in my view, that still leaves significant room for the development and enforcement of a broad market economy buyer test.

The type of situations that seem prone to trigger the application of the market economy buyer test involve discretional decisions related to 'more commercial' elements of the offers submitted by the tenderers, as well as key aspects of the award procedure. These include, for instance: decisions on whether to accept non-fully compliant bids or variants that offer a better aggregate value than fully compliant or standard tenders (subject to the prerequisites regarding prior disclosure of that possibility, etc; see above chapter six, §II.B.iv); or, in cases of a significant change of market conditions, decisions as to whether to assign additional works, supplies or services under a pre-existing contract or (re)open competition, depending on the favourable or unfavourable market trends (on extension and award of additional works, see above chapter six, §II.C.iii). Similarly, decisions regarding the selection of award criteria and their weighting (above chapter six, §II.B.iii) seem to lend themselves to this analysis, in that they should result in a set of criteria that makes economic and commercial sense and that allows the contracting authority to determine which is the most economically advantageous offer. In these cases, the discretion to be exercised by the public buyer highly resembles that of other market economy buyers. Therefore, it seems desirable to submit its appraisal to a common standard.

In substance, the market economy buyer test would result in a comparison of the behaviour of the public buyer and the behaviour to be expected from a purchaser that, when faced with similar market conditions and comparable choice, adopts its decisions on the basis of *value for money* considerations. It is important to stress that the concept of developing market activities for profit or not for profit is irrelevant here,[15] and that value for money criteria should apply equally to the decision-making process of the public, or any other, buyer.[16] In a nutshell, then, the market economy buyer test should determine whether contracting authorities base their decisions on value for money criteria.

Therefore, the market economy buyer test could be used as a yardstick to determine whether a given decision adopted by a contracting authority is aligned or at variance with *standard* commercial practices. In the case of the decision being compatible with

[15] As recently stressed in Case C-574/12 *Centro Hospitalar de Setúbal and SUCH* [2014] pub electr EU:C:2014:2004.

[16] On the fundamental character of value for money as one of the main goals of the public procurement system, see above chapter three, §IV.A. On the principle of the 'market economy tenderer' and its implications, see GS Ølykke, *Abnormally Low Tenders—with an Emphasis on Public Tenderers* (Copenhagen, Djøf Forlag, 2010) 301–45.

the behaviour of the notional market economy buyer, the contracting authority will be deemed to have exercised its discretion in a proper way (ie, to have pursued value for money). On the contrary, in the case of material divergence between the decision that a market economy buyer would have taken and the decision actually adopted by the contracting authority, the latter should lift the burden of proving that there are either specific public procurement rules (or other mandatory rules imposed by compatible legislation), or overriding reasons of public interest that prevented it from adopting a market oriented decision. If it failed to do so, the contracting authority should be found to have used its discretion improperly. In such cases, if the adoption of a value-for-money oriented decision changed the outcome of the tender (or otherwise resulted in a more pro-competitive outcome), the original decision of the contracting authority should be annulled and replaced, in order to avoid undue distortions of competition derived from the improper exercise of administrative discretion in the field of public procurement.

The adoption of the market economy buyer test would contribute to ensuring that, where public procurement rules do not impose specific constraints on the exercise of discretion by the public buyer, its decisions are adopted on the basis of the same criteria that would guide the purchasing decisions of any buyer behaving in a market context—ie, on the basis of value for money considerations. By aligning the criteria that guide the decisions of public buyers with those that determine the behaviour of market economy buyers, undue distortions of competition should be avoided—while, at the same time, the achievement of one of the basic goals of the public procurement system (ie, again, value for money) would be fostered. Moreover, the extension of the market economy buyer test to other aspects of public procurement than the potential grant of state aid through the award of public contracts would contribute to developing a *consistent* set of rules for the appraisal of the market behaviour of the public buyer from a competition perspective. Therefore, the adoption of this test is desirable and can contribute to a more competition-oriented public procurement system.

III. Complementary Proposals Aimed at Limiting Privately Created Restraints of Competition

This section changes perspective and focuses on potential developments of the EU public procurement system that could limit or reduce privately created restraints of competition in the public procurement setting. However, the approach to such developments is not general, in the sense that only instruments that involve public procurement rules and practices are considered—whereas general competition law institutions that can (indirectly) contribute to attaining the same goal (eg, leniency programmes or streamlined private enforcement mechanisms) are left outside the scope of the analysis conducted here.

Therefore, this section will analyse possible measures that impose obligations on the public buyer in order to limit or prevent (or, maybe more accurately, to detect and deter) distortions of competition generated by tenderers (mainly, through bid-rigging

schemes).[17] In this regard, the establishment of an obligation of contracting authorities to report suspected competition law violations to competition authorities (§III.A), and the establishment of mandatory suspension and debarment regimes for infringers of competition law (§III.B) will be discussed in turn. To be sure, some of these instruments might already be available or mandatory as a matter of Member States' domestic legislation (on public procurement and/or competition, or even as a matter of general administrative or other public laws). Nonetheless, the analysis will focus on their desirability in abstract terms and the proposals for adoption will recommend their inclusion in an eventual revision of the EU public procurement directives, so as to ensure their existence and uniform enforcement in all Member States.

A. Mandatory Reporting of Suspected Competition Law Violations

It is submitted that a potentially interesting development of current EU rules would consist of the introduction of an obligation on contracting authorities to report suspected competition law violations to competition authorities. Such a development could be unnecessary or redundant if some of the proposals for the reinforcement of the relationship between public procurement and competition authorities were implemented (below §IV). Nonetheless, it merits a separate discussion, particularly as regards its importance for the mechanisms of suspension and debarment (discussed below §III.B).

As EU public procurement rules currently stand, contracting authorities are under no (express or specific) obligation to report possible infringements of competition law to the relevant authorities—although they can do so of their own accord or following the mandates of domestic legislation. The inclusion, as a matter of EU law, of an express obligation to report suspected infringements of competition law would contribute to raising awareness of possible competition law violations by tenderers amongst contracting authorities, and would generate additional deterrent effects on potential infringers.[18]

Moreover, it could clarify the consequences of this obligation to report infringements on the tender procedure—which, eventually, might have to be suspended or even cancelled (for lack of valid tenders or effective competition for the contract), depending on the eventual existence of non-infringing tenderers and on the effects that not suspending or cancelling the tender could have on competition in the market concerned.

Interestingly, such mandatory reporting of suspected competition law violations is expressly regulated by the US FAR, which requires contracting authorities 'to report to the Attorney General any bids or proposals that evidence a violation of the antitrust laws' (US FAR 3.303(a)).[19] Moreover, the same subpart of the US FAR contains an indicative list of

[17] In general, on the measures that can be adopted to detect and prevent collusion in public procurement, OECD, *Recommendation on Fighting Bid Rigging in Public Procurement* (2012). See also A Sánchez Graells, 'Prevention and Deterrence of Bid Rigging: A Look from the New EU Directive on Public Procurement' in GM Racca and CR Yukins (eds), *Integrity and Efficiency in Sustainable Public Contracts* (Brussels, Bruylant, 2014) 137.

[18] OECD, *Guidelines for Fighting Bid Rigging in Public Procurement* (2009) 10.

[19] See: DJ Riley, *Federal Contracts, Grants and Assistance* (Colorado Springs, Shepard's-McGraw-Hill, 1983) 112–16; and ABA, *Antitrust Law Developments* 4th edn (Chicago, ABA Section of Antitrust Law, 1997) 1254–55. See also DOJ, *Think Antitrust: The Role of Antitrust Enforcement in Federal Procurement* (undated) available at www.oecd.org/dataoecd/41/1/2491618.pdf. However, a cautionary note is required, since not all instances of apparent collusion necessarily derive from the existence of actual anticompetitive practices; see WS Comanor and MA Schankerman, 'Identical Bids and Cartel Behavior' (1976) 7 *Bell Journal of Economics* 281.

indicia of violations of competition laws, and extends the reporting obligation to foreign authorities in the case of offers from foreign contractors for contracts to be performed outside the US—thereby also attempting to deter the violation of US antitrust laws in deals even between non-US entities.[20] As a consequence of the reporting of a suspected offence against the competition rules, the affected tenderer(s) risk(s) being suspended (ie, temporarily excluded from the tender) and eventually debarred (ie, excluded from *all* tenders for a given period of time) (for details, see below §III.B).

Therefore, the consequences of reporting an instance of suspected collusion are clear, in the sense that the tender procedure itself is not affected by suspected violations of competition laws—at least as long as there remain tenderers that are not suspected of infringements (or which, despite having been reported, are not suspended), and so the contracting authority can proceed with the award of the contract to the best amongst those offers. Therefore, the obligation to report suspected violations of competition law generates important effects and brings certainty both for the tenderers (whether they are affected or not by the report of any suspected violation) and the contracting authority.

The situation is different under Directive 2014/24, as it is clear only that contracting authorities can exclude infringers of competition law at any point of the procedure (art 57(4)(d) and 57(5)), but it is not clear that a reporting obligation emerges from that fact. Contrary to that, contracting authorities must report (perceived) violations of state aid rules to the European Commission under article 69(4) of Directive 2014/24 if they determine that an offer is abnormally low. Consequently, it is submitted that the inclusion in the EU public procurement directives of a similar rule of mandatory reporting of infringements of competition law is desirable, particularly as a trigger for the application of the regime of suspension and debarment of competition infringers discussed in the next sub-section. In this regard, it would be an improvement to complement current EU public procurement rules with an express reporting obligation which would require contracting authorities to report suspected instances of violation of EU or national competition laws to national competition authorities—which could in turn alleviate some of the difficulties in the interpretation and enforcement of article 57(4)(d) of Directive 2014/24. Moreover, the reporting obligation could be complemented with a rule similar to that contained in article 65 *in fine* of Directive 2014/24, in the sense of expressly allowing the contracting authority to proceed with the candidate or candidates that are not affected by the suspected violation (and the ensuing eventual exclusion, see below §III.B), even if it means that the number of candidates has been reduced below the minimum established by the directive or the call for tenders for the specific contract. The inclusion of such rules would clarify the current situation and eliminate the legal uncertainty that contracting authorities and tenderers may currently face in cases of suspected violation of competition laws in public tenders.

B. Suspension and Debarment of Competition Infringers

As mentioned in passing (above, chapter six), as well as raising the possibilities of detection

[20] On the international range of the US suspension and debarment regime (which ensues from the reporting of such suspected violations), see DA Churchill and LJ O'Connell, 'New International Consequences of Suspension and Debarment' (1989) 7 *International Tax and Business Lawyer* 239.

of collusion and other competition law violations, the establishment of an obligation of mandatory reporting of suspected competition law violations has particular relevance in relation with the potential suspension and debarment of infringers (above §III.A). Current EU public procurement rules—and, particularly, articles 57(4)(d) and (c), 57(5) and 57(6) of Directive 2014/24—do not regulate suspension and debarment mechanisms as such, but create the regulatory space for Member States to do so. The new rules empower contracting authorities to exclude candidates or tenderers at any point of the tender procedure up to award of the contract (art 57(5)) if they make *agreements with other economic operators aimed at distorting competition* (art 57(4)(d)), or *are guilty of grave professional misconduct*, which renders its integrity questionable (which includes competition law violations, or at least some of them; see above chapter six, §II.A.vi).

As was analysed previously, except in highly unlikely circumstances, breaches of competition law should always be considered instances of grave professional misbehaviour and, consequently, should qualify indistinctly under both paragraphs (c) and (d) of article 57(4) of Directive 2014/24, to enable contracting authorities to take them into account at the qualitative selection stage in order to disqualify the (infringing) undertakings concerned from a given tendering procedure—unless the irrelevance of the previous breach can be proven.

However, as mentioned already, this regime falls short of instituting a fully fledged system of suspension and debarment of competition infringers. Firstly, because the non-automatic effects of article 57(4) of Directive 2014/24 leave it to the discretion of the contracting authorities themselves to decide whether or not to exclude competition law infringers from participating in a given tender (unless Member States reconfigure those grounds as mandatory). Second, because the lack of express regulation at EU level can give rise to different regimes across different Member States (*cf* art 57(7) Dir 2014/24) and, consequently, might facilitate strategic behaviour by infringing undertakings—thereby reducing deterrence. And, third, because it does not apply easily to all phases of the tender procedure in which breaches of competition law can become evident to the contracting authority (and, particularly, after the award of the contract). As a result of this lack of regulation in EU public procurement directives, legal uncertainty can arise in these circumstances. It is submitted that a stricter and uniform system of suspension and debarment of competition law infringers would contribute to strengthening the pro-competitive orientation of the public procurement system and to limiting privately created distortions of competition.[21]

From a comparative perspective, it seems important to highlight that the US FAR establishes a clearer regime of suspension and debarment of competition infringers.[22] At

[21] To be sure, such a system would not be without costs for the contracting authority, since it reduces competitive pressures for the award of public contracts (at least from the excluded contractor); GL Albano et al, 'Preventing Collusion in Public Procurement' in Dimitri et al (n 9) 347, 368. Nonetheless, they seem desirable for their highly deterrent effects and because regulation at EU level can prevent disparity of regimes across Member States, ensuring a more uniform enforcement of competition and public procurement law.

[22] The institutions of suspension and debarment (as two aspects of a more general regime of exclusion of potential contractors) have been in place in the US for a long time. See PH Gannt and IRM Panzer, 'The Government Blacklist: Debarment and Suspension of Bidders on Government Contracts' (1956–57) 25 *George Washington Law Review* 175; id, 'Debarment and Suspension of Bidders on Government Contracts and the Administrative Conference of the United States' (1963–64) 5 *Boston College Industrial and Commercial Law Review* 89; and S Horowitz, 'Looking for Mr Good Bar: In Search of Standards for Federal Debarment' (1983–84) 14 *Public Contract Law Journal* 58. In general, on suspension and debarment, see EJ Tomko and KC Weinberg,

the very least, it is remarkable that a 'violation of Federal or State antitrust statutes relating to the submission of offers' constitutes both a cause for suspension (US FAR 9.407-2(a)(2)) and for debarment (US FAR 9.406-2(a)(2)) of the offending contractor. Thus, the infringer can be suspended for a temporary period pending the completion of investigation and any ensuing legal proceedings (US FAR 9.407-4(a)) and, eventually, debarred (ie, prevented from participating in all public tenders) for a period commensurate with the seriousness of the cause, and generally of up to three years (US FAR 9.406-4(a)(1)). The decisions on suspension and debarment are not taken by the contracting authority itself, but by a previously designated suspension and debarment official (US FAR 9.406-3(a) and US FAR 9.407-3(a)).[23] Generally, debarment will exclude the contractor from all public tenders conducted during its extension, unless it is restricted to certain types of contracts or certain contracting authorities (US FAR 9.406-3(e)(1)(iv) in relation with US FAR 9.406-1(c)). It is worth noting that suspension and debarment decisions are not meant to punish contractors, but to protect the public interest in the proper functioning of the procurement system (US FAR 9.402(b)).

In a nutshell, the general features of the regime established in the US FAR make it seem superior to the current EU public procurement rules, at least in that (i) the decision on the exclusion of the affected tenderer is not discretional for the specific contracting authority (which might have a conflict of interest, particularly if the competition infringer is a well-known or an incumbent contractor), but adopted by a previously designated authority within the same agency;[24] and (ii) debarment can be set for a given period of time and

'After the Fall: Conviction, Debarment, and Double Jeopardy' (1991–92) 21 *Public Contract Law Journal* 355; BD Shannon, 'The Government-Wide Debarment and Suspension Regulations after a Decade—A Constitutional Framework—Yet, Some Issues Remain in Transition' (1991–92) 21 *Public Contract Law Journal* 370; WJ DeVecchio and D Angel, 'EPA Suspension, Debarment, and Listing: What EPA Contractors Can Learn from the Defense Industry (and Vice Versa)' (1992–93) 22 *Public Contract Law Journal* 55; SD Gordon, 'Suspension and Debarment from Federal Programs' (1993–94) 23 *Public Contract Law Journal* 573; and JJ McCullough and AJ Pafford, 'Government Contract Suspension and Debarment: What Every Contractor Needs to Know' (2004) 13 *Public Procurement Law Review* 240. See also JW Whelan and JF Nagle, *Federal Government Contracts. Cases and Materials*, 3rd edn (New York, Foundation Press, 2007) 691–707; and JC McBride and TJ Touhey, *Government Contracts: Cyclopedic Guide to Law, Administration, Procedure* (Newark, LexisNexis, 2007) 511–24. The system, however, is not free from criticism and presents room for improvement. See SL Schooner, 'The Paper Tiger Stirs: Rethinking Suspension and Debarment' (2004) 13 *Public Procurement Law Review* 211; CR Yukins, 'Suspension and Debarment: Re-Examining the Process' (2004) 13 *Public Procurement Law Review* 255; RJ Bednar, 'Emerging Issues in Suspension and Debarment: Some Observations from an Experienced Head' (2004) 13 *Public Procurement Law Review* 223; D Brian, 'Contractor Debarment and Suspension: A Broken System' (2004) 13 *Public Procurement Law Review* 235; SM Collins, 'What the MCI Case Teaches about the Current State of Suspension and Debarment' (2004) 13 *Public Procurement Law Review* 218; MG Madsen, 'The Government's Debarment Process: Out-of-Step with Current Ethical Standards' (2004) 13 *Public Procurement Law Review* 252; SA Shaw, 'Access to Information: The Key Challenge to a Credible Suspension and Debarment Programme' (2004) 13 *Public Procurement Law Review* 230; JS Zucker, 'The Boeing Suspension: Has Increased Consolidation Tied the United States Department of Defence's Hands?' (2004) 13 *Public Procurement Law Review* 260; and EN Seymour, 'Refining the Source of the Risk: Suspension and Debarment in the Post-Andersen Era' (2004–05) 34 *Public Contract Law Journal* 357. However, most of the criticisms and proposals for reform advanced by these authors are unrelated to the issues discussed here and, consequently, will not be analysed in detail.

[23] According to FAR 9.403, suspending and debarring officials are agency heads or designees authorised by the agency head to impose suspension and debarment. These officials are different from those directly involved in the procurement process and, consequently, should be more independent—although they are not completely independent, as they belong to the same agency and remain in a relatively close position.

[24] Although, as mentioned, the independence of the suspending and debarring officials could be further increased by appointing a separate or independent authority, in order to avoid conflicts of interest that might affect the agency concerned in its entirety.

applies to all tender procedures conducted during that period (unless restricted on the basis of overriding reasons in the public interest)—which is not necessarily a given under the EU rules due to the flexibility that Member States retain in the further specification of their debarment regimes.

Therefore, in light of the US regime, it is submitted that it is desirable to strengthen the rules contained in the current directives by adopting a mandatory system whereby competition infringers could be suspended and/or debarred by an authority different from the contracting authority—and, subject to Member States' internal organisation, the best alternative seems to be the competition authority or, eventually, the courts—and for a pre-established period of time (of up to three years, or above if possible under the domestic rules, as allowed for under art 57(6) Dir 2014/24)—during which the offending undertaking would be prevented from participating in all public tenders, unless the scope of the debarment is limited. Suspension and debarment should be triggered particularly by mandatory reporting of competition law breaches (above §III.A), but should also be available as a self-standing sanction in case the investigation is initiated by any other means—particularly, competition authorities should be empowered to adopt debarment decisions as a complement of any other competition sanctions and remedies (such as criminal sentences, fines and damages awards).

Such a regime should apply to all breaches of substantive competition law rules (not only collusion in public procurement processes), unless it can be proven that they are irrelevant in the public procurement setting:[25] ie, they should not be automatically limited to cases of bid-rigging, and the burden of proving the irrelevance of the anti-competitive practices in the public procurement setting should rest with the infringers. However, in the case of violations of competition law other than collusion in public procurement contracts, the duration and scope of the debarment could be more limited than in the case of the former, and clearly aimed at protecting the public interest in the proper functioning of procurement procedures—ie, not as an additional or substitutive competition sanction. An exception to the suspension and debarment regime could be created to avoid reducing disproportionately or completely eliminating competition in highly concentrated markets[26]—where the exclusion of a potential contractor would render the procurement procedure largely ineffective. However, in these highly exceptional cases, a waiver of suspension or debarment should only be granted at the request of the affected contracting authorities (which should advance sufficient reasons in the public interest associated to the participation of the suspended or debarred tenderer) and, in any case, it should be substituted with an alternative sanction, such as the imposition of fines or a deferral or extension of the debarment period after market conditions allow for the development of competition (if this is plausible). This is now in line with the 'public interest' exception regulated in article 57(3) of Directive 2014/24.

To sum up, it is submitted that the rules on the exclusion of tenderers for violations

[25] Although, as already mentioned, it is very unlikely that infringements of competition law, even if conducted in settings other than public tenders, will be irrelevant in the public procurement arena; see above chapter six, §II.A.vi.

[26] US FAR 9.405. In practice, such exemptions or waivers are granted by the US Department of Defence; see Zucker, The Boeing Suspension (2004) 261 fn 6. For a criticism of this practice, see RE Kramer, 'Awarding Contracts to Suspended and Debarred Firms: Are Stricter Rules Necessary?' (2004–05) 34 *Public Contract Law Journal* 539.

of competition law currently included in the EU public procurement directives are insufficient, at least because they grant full discretion to contracting authorities (which should, however, be modulated in view of their general obligation to avoid artificial restrictions of competition under art 18(1) Dir 2014/24). After briefly considering the system applicable in the US, it seems desirable to review the current EU rules by granting the competence to suspend and debar infringers to an authority other than the contracting authority (and, preferably, to the competition authority) and to make suspension and debarment decisions mandatorily enforceable by contracting authorities. Suspension and debarment should not only be triggered by mandatory reports of suspected competition violations, but should also be configured as self-standing competition remedies aimed at protecting the public interest in the proper functioning of the procurement system. Limited waivers of the suspension and debarment regime could be introduced to avoid situations in which competition for public contracts might be excessively restricted—subject to adequate substitutive measures.

IV. Complementary Measures Aimed, in General, at Strengthening the Relationships between Competition and Procurement Authorities

A final point that merits consideration for its potential positive impact on the development of a more competition-oriented public procurement system regards the relationship and interaction between competition and public procurement authorities. The current EU public procurement system and the main relevance of the competition principle embedded therein impose contracting and supervisory authorities particularly demanding oversight responsibilities and, amongst them, a general duty to ensure that procurement activities do not distort competition (above chapter five).[27] Indeed, as suggested during the present study, there are numerous instances in which a close cooperation between competition and public procurement authorities can result in more pro-competitive results[28]—such as the evaluation of teaming and multiple bidding decisions, the evaluation of apparently abnormally low tenders (whether tainted by state aid or not) or, more generally, as regards most claims raised in bid protest procedures. Furthermore, given the specialisation of competition authorities and their detachment from procurement processes, they seem to be particularly well situated to assume competences or at least provide substantial input (through mandatory or non-binding guidance) for the review of those aspects of public procurement processes that have clear competition implications or that are most prone to generate distortions in the markets concerned. Moreover, competition authorities seem to be in an advantageous position to assume competences as regards suspension and debarment of undertakings that infringe competition laws—be it upon report from contracting

[27] Along the same lines, see GA Benacchio and M Cozzio, 'Presentazione' in id (eds), *Appalti pubblici e concorrenza: La difficile ricerca di un equilibrio* (Trento, Universita degli studi di Trento, 2008) 2.

[28] Interaction between procurement agencies and national competition authorities takes place often, although with a variety of forms and different levels of intensity; L Carpineti et al, 'The Variety of Procurement Practice: Evidence from Public Procurement' in Dimitri et al (n 9) 14, 38.

authorities, or on their own initiative (above §III.B). Therefore, from a general perspective, exploring mechanisms that contribute to strengthening the relationships between competition and public procurement authorities seems desirable.

To be sure, it lies within the competence of Member States to determine their internal organisational structures and levels of authority and, consequently, there is limited room for the adoption of (binding) measures at the EU level.[29] However, at least two possible developments for the strengthening of the relationship between procurement agencies and competition authorities seem to merit further scrutiny: the appointment of competition advocates or liaison officers in some or all contracting authorities, either on a permanent or a temporary basis (§IV.A), and granting competition authorities competences to oversee some or all procurement decisions (§IV.B). Both measures could be introduced in the EU public procurement system as either voluntary mechanisms for Member States to adopt, or as mandatory institutions whose implementation still allows Member States a substantial degree of discretion. Either way, it is submitted that they would contribute to reinforcing the institutional framework for a more competition-oriented public procurement system.

A. Appointment of Competition Advocates or Liaison Officers

One possible way to strengthen the relationships between competition and public procurement authorities is for the latter to appoint officers entrusted with the specific task of ensuring that procurement activities do not generate distortions of competition within the tender procedures and in the markets concerned.[30] Such officers would oversee the procurement activities and decisions of contracting authorities internally—at least in relation to contracts above certain (value) thresholds, as well as general practices or trends in procurement in the given agency—and would maintain a close relationship with competition authorities—particularly as regards the reporting of suspected competition law violations (above §III.A). Given that there would probably be restrictions in the resources available, the appointment of such officers could be limited to certain types of contracting authorities. For instance, permanent appointments could be made by central purchasing authorities and by contracting authorities running framework agreements and dynamic purchasing systems (over a certain value threshold, if justified)—since these are the types of contracts and contracting entities that can more easily generate distortions of competition. Also, temporary appointments could be made in special cases, such as those of contracting authorities that have been found to have a *bad* procurement record (for

[29] The EU case-law has been clear in stressing that when applying EU provisions Member States can use their national administrative law and that they are free to decide on the internal organisation of their administration; see Case 151/78 *Sukkerfabriken Nykøbing* [1979] ECR 1 22; Case 240/78 *Atalanta* [1979] ECR 2137 5; Case 96/81 *Commission v Netherlands* [1982] ECR 1791 12; and Case C-8/88 *Germany v Commission* [1990] ECR I-2321 13. This has recently been discussed in general terms in Case C-213/13 *Impresa Pizzarotti* [2014] pub electr EU:C:2014:2067. See also N Fenger and MP Broberg, 'National Organisation of Regulatory Powers and Community Competition Law' (1995) 16 *European Competition Law Review* 364; and SE Hjelmborg et al, *Public Procurement Law—The EU Directive on Public Contracts* (Copenhagen, Djøf Forlag, 2006) 51.

[30] A similar proposal has been advanced in relation to regulated industries, where the presence of an 'advocate for market forces' is thought to contribute to the design and enforcement of more market-orientated regulatory regimes; see LAW Hunter et al, 'Changing the Presumption of When to Regulate: The Rationale of Canadian Telecommunications Reform' (2008) 4 *Journal of Competition Law and Economics* 775, 788.

instance, as a result of independent reviews conducted by the competition authority or by any other supervisory bodies; above §II.A), or contracting authorities facing particularly demanding procurement procedures—such as those run through technical dialogue. In all these cases, the existence of increased risks for the maintenance of undistorted market competition conditions seems to justify the appointment of officers specifically entrusted with the oversight of tender procedures and public procurement activities from a competition standpoint.

From a comparative perspective, it is important to stress that the figure of the *competition advocate* is regulated by the US FAR.[31] All federal agencies (which are roughly comparable to central purchasing agencies) 'shall designate a competition advocate for the agency and for each procuring activity of the agency' (US FAR 6.501). It is worth noting that, in order to guarantee that they can properly develop such a highly demanding task, they must be 'provided with staff or assistance (eg, specialists in engineering, technical operations, contract administration, financial management, supply management, and utilization of small business concerns), as may be necessary to carry out the advocate's duties and responsibilities' (US FAR 6.501(c)). Competition advocates

> are responsible for promoting the acquisition of commercial items, promoting full and open competition, challenging requirements that are not stated in terms of functions to be performed, performance required or essential physical characteristics, and challenging barriers to the acquisition of commercial items and full and open competition such as unnecessarily restrictive statements of work, unnecessarily detailed specifications, and unnecessarily burdensome contract clauses. (US FAR 6.502(a))

They have special responsibilities as regards some task and delivery orders issued under multiple award contracts (the US equivalent of framework agreements) (US FAR 6.502(b)(2)(vii)).[32] Also, their activities include recommending 'goals and plans for increasing competition on a fiscal year basis' (US FAR 6.502(b)(3)). Competition advocates report to the senior management of the contracting agency, which is then responsible for taking the appropriate decisions.[33]

Generally, the US model seems to be particularly fit for the purpose of reinforcing internal competition oversight by contracting authorities. As anticipated, the creation of an equivalent institution within the EU public procurement system—whose specific features, such as the rank of the officer, its specific tasks and reporting relations and obligations, or the possibility of creating a centralised *body* of competition advocates within an already existing oversight agency, should be established by each Member State according to its institutional structure—could contribute to the development of more competition-oriented public procurement practices and, arguably, could improve the system without increasing litigation levels (as it should be largely dedicated to developing a preventative role and to avoiding competition distortions in procurement processes ex ante). Moreover, competition advocates should be assigned the responsibilities derived from the obligation

[31] See: Keyes, *Government Contracts under FAR* (2003) 181. A similar figure, that of *liaison officers*, seems to exist in Japan; see OECD, 'Procurement Markets' (1999) 1 *OECD Journal of Competition Law and Policy* 83, 116.

[32] For further details on the role and responsibilities of competition advocates, see DOT, *Handbook for Competition Advocates on the Competition in Contracting Act of 1984* (Washington, DOT, 1985).

[33] ABA, *Government Contract Law* (2007) 72–73.

of mandatory reporting of suspected competition law infringements (above §III.A) and, hence, develop a close relationship with competition authorities.

In my opinion, there is room in the EU public procurement system for the creation of an institution equivalent to the US competition advocate. Such competition advocates should be entrusted with guaranteeing the absence of competitive distortions derived from public procurement activities of the public buyer and work as liaison officers between public procurement and competition authorities. Their specific regime and regulating rules should be left to Member States to develop, but a requirement that an equivalent institution be created—permanently, at least in some contracting entities (such as central purchasing agencies), and temporarily in special cases (of contracting authorities with particularly restrictive procurement records or facing particularly demanding procurement processes, such as technical dialogue)—should be imposed as an obligation on all Member States. Such a development would contribute to unrolling more competition-oriented public procurement practices and, arguably, could do so without generating a significant impact on the level of litigation.

B. Granting Competition Authorities Oversight Competences over All or Some Public Procurement Decisions

Another possible development that would reinforce the institutional framework for a more competition-oriented public procurement system is the granting of competences for the oversight and review of (all or some) public procurement decisions to competition authorities.[34] This development is not foreign to the systems of some Member States and their experiences seem to offer solid grounds for the extension of this institutional arrangement to other Member States. In this regard, it is important to stress that some Member States have integrated their competition authorities and central public procurement authorities entrusted with oversight responsibilities, or (almost identically) have granted oversight competences in public procurement matters to their national competition authorities—which become public procurement tribunals or bid protest bodies. This is currently the case, at least, in Germany,[35] Sweden, Denmark, and the Czech Republic—and it used to be the case in Finland until 2002 (when a Market Court took over the handling of public procurement issues).[36] It is also the case in certain EEA countries, such as Norway.

However, a full integration of competition and public procurement (oversight) authorities in all cases would not be desirable in those instances in which competition elements are not relevant to the substance of the case—which can be based on issues of pure administrative law or in due process considerations. In this regard, the assignment of

[34] Along these lines, it has been proposed that such bid protest functions be attributed to competition authorities as independent agencies; see J Berasategi, 'La integración de la contratación pública en la defensa de la competencia' (2007) 247 *Gaceta jurídica de la UE y de la competencia* 35, 39–40; and id 'El control administrativo independiente de la contratación pública' (2007) 6650 *Diario LaLey* 1. These proposals were discussed in the recent reform of Spanish public procurement law, but were not adopted.

[35] OECD (n 31) 112; id, *Competition in Bidding Markets* (2006) 123.

[36] Each national system presents its peculiarities, but they share basic institutional arrangements in that the competition authority is entrusted with the general oversight of public procurement activities and decides bid protest procedures. See Public Procurement Network, *Public Procurement in Europe* (2005), available www.publicprocurementnetwork.org/pdf/11_public_procurement_in_europe.pdf.

competences for the review of all public procurement cases by the competition authority could result in submitting some cases to the consideration of an authority that might lack the required expertise (at least, in the initial phases), and could drain significant resources that the competition authority could use more efficiently in the development of other tasks. Therefore, an intermediate model seems preferable, where competition authorities should file guidance opinions (preferably, of a binding character) in bid protest procedures to be decided by specialised public procurement oversight authorities or by the courts (ie, an *amicus curiae*-like device). Alternatively, a system of case assignment between both bodies (competition and general public procurement oversight authorities, or the courts) could be implemented, so that competition authorities were competent only in cases where competition-related issues were preponderant. Be it as it may, this issue seems to remain fully within Member States' competences and the adoption of a uniform solution at EU level seems problematic. Nonetheless, the suggested developments seem worth considering.

V. Conclusions to this Chapter

This chapter has focused on possible developments of current EU public procurement rules to achieve more competition-oriented outcomes. The analysis has been divided into three groups of potential developments: those mainly concerned with publicly created distortions of competition, those related to privately created restrictions of competition and, finally, those that could strengthen the institutional public procurement framework in general.

As regards the possible developments oriented at limiting or avoiding *publicly originated distortions* of competition, the assessment hereby conducted has shown that stressing the dynamic character of most public procurement activities can give leeway to the development of policies oriented towards the progressive enhancement of the competition requirements applicable to public procurement activities. Similarly, the extension of the market economy buyer test to areas of the public procurement field other than state aid control can contribute to appraising the exercise of administrative discretion by the public buyer in a manner that could both reduce competition distortions and further one of the main values of the public procurement system: ie, value for money. On the contrary, other potential developments oriented at ensuring a minimum diversity of suppliers or a minimum level of competition in the markets concerned, such as secondary or dual sourcing policies (similar to those existing in the US), would seem to depart from the core objectives of public procurement in pursuance of industrial policy goals. Moreover, they would be difficult to reconcile with the general principles of equal treatment and proportionality. Therefore, they do not seem to be desirable developments of the EU public procurement system.

Changing perspective, and focusing on the prevention of *privately originated restrictions* of competition, it has been argued that it is desirable to establish a mechanism of mandatory reporting by contracting authorities of suspected violations of competition law, as well as a subsequent system of suspension and debarment of infringing undertakings.

In my view, it would be an improvement to complement current EU public procurement rules with an express obligation to report infringements, so that contracting authorities would have to report suspected instances of violation of EU or national competition laws to national competition authorities. Contracting authorities could then proceed with the candidate or candidates that are not suspected of this infringement. Moreover, reported tenderers (ie, those involved in the suspected infringement) would be subjected to a suspension and debarment procedure. In this regard, it has been proposed to empower competition authorities (or the courts) to issue debarment decisions in cases of competition law violations, as long as it constitutes an appropriate remedy to protect the public interest in the proper functioning of public procurement mechanisms—which will be particularly true for infringements involving bid-rigging schemes, but should not be automatically limited to those instances. Exceptionally, waivers of suspension or debarment could be granted by virtue of compelling and extraordinary reasons in the public interest, which should be accompanied by substitute fines or other compensatory mechanisms.

Finally, as regards *strengthening the institutional framework* for a more competition-oriented public procurement system, the study has briefly considered two potential developments that could foster the introduction of more pro-competitive public procurement practices and enforcement. Along these lines, it has been submitted that the creation of the figure of the *competition advocate* could serve as a useful preventative instrument to avoid publicly created restrictions of competition by means of internal oversight at the contracting agency level—at least in relation to certain contracting authorities and pre-determined types of contracts or contracts that exceed certain (value) thresholds. Moreover, competition advocates could develop an important liaison function with competition authorities. It has also been suggested that entrusting independent competition authorities with oversight competences for some public procurement decisions—through the assignment of decision or guidance responsibilities in bid protest procedures—could also contribute to generating better results. However, this alternative lies within the exclusive competence of Member States and, consequently, has not been analysed in depth.

Part V

General Conclusions

8

Conclusions: Towards a More Competition-Oriented Procurement System

This study has attempted to provide answers to the general question of how publicly generated competitive distortions in the public procurement field can and should be addressed under EU economic law and, particularly, under the general framework of competition and public procurement law. As anticipated in the introduction, the study of this macro-legal question has been attempted by breaking down the complex object of the inquiry into several of its multiple (minor) topics, and then focusing gradually on each of these different and more specific aspects at a time.

As a first approximation, the *economic foundations* and rationale of the competition analysis of public procurement have been explored. After advancing a taxonomy of procurement markets aimed at refining and eventually overcoming the traditional approach to the phenomenon of procurement activities under the paradigm of 'public markets'—and one which focuses the enquiry on 'publicly dominated' (not exclusive) markets where no particular geographic, temporal or other elements concur—and after clarifying the types of functions and roles covered by the analysis of public procurement from a competition perspective—ie, the appraisal of procurement activities as a 'working tool' of the government, regardless of whether it acts as an 'agent', a 'gatekeeper' or a 'market-maker'—the study has centred on the appraisal of the competition effects of public procurement activities and regulations.

On the basis of an extension of the monopsony model (ie, a model of a single dominant buyer with fringe competition), several potential competition-restrictive effects (or distortions of market dynamics) have been identified. On the one hand, the market behaviour of the public buyer can generate a truncation of the offer in the market that results in waterbed effects that harm other buyers and (some or most of) the suppliers in the market—and, ultimately, in a reduction of social welfare due to the generation of a deadweight loss equivalent to that of monopoly. On the other hand, public procurement regulations generate incentives for the collusion of all agents present in the market—not only amongst suppliers in a prototypical instance of bid-rigging, but also for public buyers to collude amongst themselves (and with suppliers)—particularly as a result of the price signalling and repeated interactions that they create. In addition, certain procurement procedures that imply an increased exchange of information or (closer) contact between tenderers and the public buyer generate additional risks of other competitive distortions, such as technical levelling, or further incentives to collude. All these potentially anticompetitive effects are exactly of the kind that competition law aims to prevent and deter and,

consequently, in my view, they constitute the economic foundation (and ultimately, the final normative justification) for the development of a more competition-oriented procurement system.

Continuing on this relatively abstract or general level of analysis, the *legal basics and goals* of competition and public procurement law have been studied. The point of departure has been to consider both as sets of economic regulation of a horizontal nature and primarily aimed at the correction of perceived (albeit different) forms of market failure—and, reversely, as potentially apt to generate regulatory or non-market failures if they exceed their proper scope. Building on this common ground, the specific objectives of each of these sets of economic regulation have been explored, in search for commonality and eventual conflicts. As far as competition law is concerned, and after substantial debate, a general consensus on its ultimate goal has been identified: it aims to protect competition as a process, in order to maximise economic efficiency (in a difficult trade-off between allocative, productive and dynamic aspects) and, consequently, social welfare—understood as total welfare (not strictly as consumer welfare). In the case of public procurement, this issue has been substantially less controversial and it is generally accepted that its main goals are competition (as a means to attain value for money or best value), transparency and (administrative) efficiency.

Both competition law and public procurement have been the object of a certain instrumentalisation and have sometimes been used to promote 'secondary' policies or goals, eminently of a social or industrial nature. In the case of competition law, these goals have been almost unanimously dropped in recent years and a 'more economic' approach has clearly been embraced (particularly in the EU). In public procurement, the issue of the pursuit of secondary or horizontal policies is still unsettled—but, in my view, a growing consensus towards minimising this instrumental use of public procurement is identifiable (and, at any rate, seems the preferable option from a normative perspective). Finally, in the case of the EU, both sets of economic regulation have traditionally been significantly influenced by the goal of market integration—however, given the completion of the internal market process and the relative maturity of the system, the relevance of this goal is fading away in both cases, and is (re-) opening spaces that permit focusing on their 'core' objectives. In view of the substantial commonality of objectives, the protection of competition as a means to maximise economic efficiency and, ultimately, social welfare has been identified as the core common goal of both sets of economic regulation and as the ultimate foundation or aim for the development of a more integrated approach towards competition and public procurement law. Even if it may require a certain adjustability and trade-offs with complementary goals of public procurement (such as the transparency and efficiency of the system), a revision from a competition perspective is consistent with the basic goals and functions of public procurement.

In view of the results of these preliminary or more general aspects of the study, it has been concluded that *there exists a solid economic and legal justification for the development of the law as it currently stands at the intersection of the traditional fields of competition and public procurement regulation—in search of more competition-oriented procurement*. To do so, the study has then centred on each of these two blocks of the framework for the analysis of public procurement from a competition perspective.

From a 'strict' *competition law perspective*, the study has shown how public procurement activities remain substantially under the radar screens, and that current competition

rules and their interpretation are badly equipped to prevent and deter publicly generated distortions of market dynamics in the public procurement setting. EU rules on state aid (art 107 TFEU) are limited by the concept of 'undue economic advantage' and its current relationship with tender procedures—with the result that only cases where competition distortions are caused by a blatant disproportion in the consideration paid by the public buyer to the public contractor will be captured, which, in my view, seriously limits the efficacy of the rules on state aid as an instrument to protect competition in the public procurement arena. Likewise, EU rules on the granting of special and exclusive rights (art 106 TFEU) are limited by the concept of such rights (which only captures a limited fraction of public procurement activities; mainly, the granting of *concessions*, loosely defined) and by their forward-looking nature (that limits the effectiveness of the rules to discipline the behaviour of the public buyer prior to the award of the contract; ie, does not cover most of public procurement activities). For their part, EU 'core' competition rules (arts 101 and 102 TFEU) are not directly applicable to the public buyer as such, due to the *FENIN–Selex* case law, which excludes 'pure' procurement activities from the concept of 'economic activity' for these purposes—and, hence, prevents the classification of the public buyer as an 'undertaking' (unless it develops *subsequent* economic activities in which the procured goods or services are used). Finally, these core competition rules are equally inapplicable indirectly, due to the limited and formal approach to the 'state action doctrine' (arts 3(3) TEU, 4(3) TEU, 3(1)(b) TFEU, 119 TFEU and Protocol (No 27) TFEU, together with arts 101 and 102 TFEU; ex arts 3(1)(g), 4, 10(2) and 81 and 82 TEC jointly) by the EU judicature—which mainly leaves unilateral regulatory and non-regulatory acts of the state off-bounds for EU competition law.

Therefore, under current EU competition law, restrictive or distorting public procurement can only be tackled if it has a very strong element of state aid (which is unlikely), to a certain extent, in the case of *concessions* (which, even if of economic importance, remain a marginal type of public contracts), or if the public buyer develops a *subsequent* economic activity. In general, this results in an *unsatisfactory situation* and prevents the development of proper competition criteria applicable to the public buyer—because such a circumstantial analysis of procurement activities will be strongly influenced by relatively abnormal circumstances or by the competitive situation of the public buyer in the 'downstream' market—and, hence, no satisfactory independent test for 'pure' buying activities can be expected to be developed in this analytical framework. In order to try to overcome this perceived insufficiency of current EU competition law, two lines of action have been researched. First, we have considered a *revision of the concept of 'pure' procurement as an 'economic activity'* (and the twin classification of the public buyer as an 'undertaking') for the purposes of the delimitation of the scope of articles 101 and 102 TFEU. The *FENIN–Selex* doctrine has been criticised for departing from the prior practice and case law of some Member States and Opinions of Advocate General Jacobs, which advanced a more *effects-based and functional* approach to this issue; this approach rules the general interpretation of the concepts of 'economic activity' and 'undertaking' under EU law, but the EU judicature has departed from it without a proper economic justification and with the apparent aim of providing a differential competition treatment to the development of social and other activities in the public interest (which is both criticisable and inappropriate, at least as a matter of jurisdictional delimitation of EU competition rules; and, as opposed to a question of justification, which remains highly controversial). In view of the

weak justification for the current law, a proposal has been made to *redirect* or *complement* the *FENIN–Selex* case law by adding a caveat that triggers the application of EU 'core' prohibitions (ie, arts 101 and 102 TFEU) when 'the purchasing activity is by itself capable of reducing or distorting competition in the market, or to generate the effects which competition rules seek to prevent' (which, as has already been said, will be a common situation). What is important to note is that the present study proposes that this approach can be maintained in those Member States that have a different approach (and can be adopted by others) in the case of unilateral conduct (ie, for the application of their equivalents of art 102 TFEU), as it does not conflict with article 3(2) of Regulation 1/2003. Secondly, and as a complementary way to subject public procurement to competition law—and, admittedly, to develop rules regarding the unilateral intervention of the state in the market that could have far-reaching implications—*a more-economic or less formal approach to the 'state action doctrine'* has also been discussed. Using the equivalent doctrine in the US as a benchmark—and on the basis of the *classic* differential treatment granted to the exercise of *imperium* and *commercium* by the state—the possibility of developing a 'market participant exception' to bring unilateral non-regulatory activities under the scope of EU 'core' competition rules (applied *indirectly*) has been identified. In this regard, the study has shown that the development of public procurement activities and the adoption of decisions in this field typically takes place at a low level of the governmental structure and, consequently, its diminished democratic legitimacy makes it fall under the 'bottom boundary' of the 'state action doctrine'—and, thus, public procurement activities should be subjected to standard competition rules. Additionally, as regards public procurement legislation and regulations, a substantive test has been advanced to appraise the pursuit of economic and non-economic goals—which distinguishes the criteria for the analysis on the basis of the principles of subsidiarity and supremacy, and boils down to subjecting all public procurement regulations whose *effects* may jeopardise 'core' EU economic policies (ie, competition goals) to a very strict proportionality test. In my view, the coordinated development of both lines of current EU competition rules is desirable and could contribute to the establishment of enhanced rules for the appraisal of publicly generated distortions of competition—in the public procurement setting, and elsewhere (although, admittedly, such developments are relatively unlikely, due to their major political, social and economic implications).

Changing perspective, *from the public procurement law standpoint*, the study has shown that—regardless of the insufficiencies identified in current EU competition law to tackle publicly generated distortions of competition—the market behaviour of the public buyer and its impact on market competition are not completely unrestricted or unregulated. The inquiry has shown—after reviewing current EU legislation and its interpretative case law—how the EU public procurement directives have an embedded competition principle that constitutes a specification and makes direct reference to competition as a general principle of EU law—which serves the fundamental purpose of establishing the fundamental link between EU competition law and EU public procurement law (which are to be seen as complementary sets of regulation that do not hold a special relationship *stricto sensu*). The competition principle offers the formal legal basis for the introduction and full enforcement of competition considerations in the public procurement setting, but the substance or content of that principle (ie, its requirements and implications) need to be determined according to the general principles and criteria of EU competition law.

In this regard, it has been submitted that, according to this principle of competition, *EU public procurement rules have to be interpreted and applied in a pro-competitive way, so that they do not hinder, limit, or distort competition—and contracting entities must refrain from implementing any procurement practices that prevent, restrict or distort competition*. This proposal has been assessed in light of the consolidation of this principle of competition in article 18(1) of Directive 2014/24. The interpretative difficulties created by the drafting of this provision have also been critically assessed and a proposal for its objective application has been advanced. It has been submitted that article 18(1) of Directive 2014/24 creates a general obligation for contracting authorities to avoid artificial restrictions of competition and to adopt a pro-competitive approach to public procurement activities.

This finding has far-reaching consequences, since the competition principle becomes a rule of self-construction for EU Directives and imposes a pro-competitive mandate on Member States in their transposition to domestic procurement law. Most importantly, in view of the doctrine of *consistent interpretation*, the competition principle imposes specific pro-competitive requirements in Member States in the interpretation and enforcement of EU and domestic public procurement law—which extends to public procurement activities developed outside the blueprint of the EU Directives and sets a residual principle of interpretation (*in dubio, pro concurrentia*) to overcome eventual legal lacunae derived from new public procurement situations. It has also been stressed how the competition principle should be distinguished from the principle of equal treatment and non-discrimination identified in public procurement law. In short, the overall conclusion of this part of the study is that the competition principle becomes a key instrument (a keystone or *clef de voûte*) of public procurement regulations, and imposes the development of a competition-oriented public procurement system.

Building on this premise, the next part of the study has focused on how this pro-competitive mandate can be *operationalised* and, with that aim, has conducted a *critical assessment of current EU public procurement directives from a competition perspective*. Very briefly, the analysis conducted can be synthesised in streamlined recommendations—which are further developed and more detailed in the study (and only briefly sketched here to avoid unnecessary repetition). Summarily, it has been found that (i) the design of the tender procedure must ensure broad access by all potentially interested undertakings; (ii) the rules regarding the evaluation of bids and the award of the contract must ensure equality of opportunity, neutrality of assessment and undistorted competition; (iii) post-award, the rules regarding the implementation of the contract, its revision and eventual re-tendering, as well as the procedures for the challenge of award decisions must continue to ensure undistorted competition; and (iv) the exercise of public buyer power must be limited as much as necessary to avoid its abusive exercise, so that public contracts reflect normal market conditions. The overall conclusion of the detailed analysis of public procurement rules indicates that, in order to promote the development of a more competition-oriented public procurement system, contracting authorities should change perspective (or rather, adopt a more competition-oriented perspective) and take into due consideration the potential effects of their decisions on competition for the contract and in the market concerned, placing special emphasis on not unduly restricting access to the tendering procedure, on not unnecessarily pre-determining the outcome of the tender procedure, and on guaranteeing that the result of the competitive process is not distorted

or circumvented post-award, especially as a result of undue renegotiation, amendment, termination or re-tendering of the contract.

As a *complement to the previous analysis* (and in view of the US experience), some proposals to develop a more-competition oriented system have been advanced, in relation to: (i) the avoidance of publicly originated restrictions (through an incremental or dynamic analysis of the 'competition-orientedness' of procurement practices, and the refinement of the 'market economy purchaser' test in areas other than state aid control); (ii) the prevention of privately created distortions (by making it mandatory to report suspected competition violations and by implementing a complete suspension and debarment regime for competition violators); and, in general, (iii) the development of a more competition-oriented institutional framework by strengthening the relationships between competition and procurement authorities (by appointing *competition advocates* and, eventually, granting oversight and review competences to competition authorities, mainly by means of the issuance of guidance in bid protest procedures).

It is to be hoped that, when they are considered all together, the prior analyses of public procurement from a competition perspective have shed some light on the primary object of the study and offer the reader a general view of how I consider that publicly generated competitive distortions in the procurement field should be addressed under EU economic law in order to attain better results and promote social welfare.

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