EU COMPETITION LAW AND PUBLIC PROCUREMENT: THE COMPETITION-DRIVEN LIMITS IMPOSED TO PUBLIC BODIES WHEN THEY SOURCE WORKS, GOODS AND SERVICES

Derecho de la competencia de la Unión Europea y contratación pública: los límites del Derecho de la competencia impuestos a los entes públicos cuando proveen obras, bienes y servicios

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DERECHO DE LA COMPETENCIA DE LA UNIÓN EUROPEA Y CONTRATACIÓN PÚBLICA: LOS LÍMITES DEL DERECHO DE LA COMPETENCIA IMPUESTOS A LOS ENTES PÚBLICOS CUANDO PROVEEN OBRAS, BIENES Y SERVICIOS

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INTRODUCTION

Traditionally, practices conducted by economic operators –either public or private– have been subjected to competition scrutiny. Nowadays, it cannot be denied that public actors are well positioned to impede, harm or reduce competition, not only when they intervene in the market as economic operators, but also when they act within the realm of their procuring activities.

Procurement activities, albeit being of a clear economic nature, are not considered 'economic' in and by themselves. It has been extensively discussed the submission to competition constraints of practices carried out by public entities when they resort to the market (a) due to their need to comply with their operational needs –buyer– or (b) to accomplish the tasks in the public interest they have been vested with –offeror–. That is so because, in principle, competition rules are intended to assess the performance of undertakings in the market. However, it is undebatable that when a contracting authority sources goods, works or services –either in the public interest or to meet its operational needs–, it may generate competitive distortions. All in all, anticompetitive behaviors do negatively impact the competitive dynamics of a procuring process. In conclusion, contracting authorities must remain observant in order not to unwillingly harm the competitive conditions under which their works, goods and services are procured.

In any case, practice shows that contracting authorities often fail to identify the practices that, when procuring a particular good, work or service, may be considered to hamper competition. Furthermore, contracting authorities may be tempted to hinder the establishment of an EU-wide procurement market working under conditions of vigorous competition and they may ultimately be captured by national tendencies towards protectionism or preferential treatment, to the detriment of an efficient expenditure of public funds.

With a view of underlying the importance of our study, one is obliged to address the relevance of public procurement in the EU. Within the EU, public procurement represents an annual expenditure of around 14% of GDP on the purchase of services, works and supplies by over 250.000 public authorities. In this scenario, the design of

healthy public procurement processes comes as essential for the maintenance of the single market. In this very same line, the EU judicature has expressed that competition rules also are fundamental provisions for the functioning of the single market. Consequently, Member States must remain vigilant in order to deter any procuring practice that may not be compliant with the requirements of a system operating under undistorted competition.

1. Purpose of the study

Contracting authorities may feel tempted, within their discretionary limits, to reduce the competitive tension in the different stages of the procurement of a good, work or service, impeding hence the establishment of a competitive EU-wide procurement market that guarantees the access of all European firms to public contracts. However, the analysis of what practices are capable of distorting or reducing competition may not be straightforward, as it involves an evaluation of the concurring circumstances in order to discern whether –and, if so, in what way– the competitive dictates shape the discretion of a contracting authority.

Therefore, in our research, we will answer the following research questions:

1. Within the EU, to what extent do the interactions between market integration and competition condition the procurement of a good, work or service?

2. To what extent is the discretion of contracting authorities in their procuring endeavors actually limited by competitive concerns?

Competition and market integration are both place at the same level, as they serve to enhance consumer welfare and ensure an efficient allocation of resources. However, competition cannot be ensured at the expense of market integration. The necessary opening-up to undistorted EU-wide competition of the execution of works, the supply of products and the provision of services to public authorities requires limiting contracting authorities' discretion.

It comes as essential the identification of the decisions that may harm the competitive dynamics and of those that, even if they may reduce competition, are allowed, as they are proportionate to the object of the public procurement process and

are duly justified. Otherwise, market dynamics would be willfully distorted to the detriment of social welfare and economic efficiency. Restrictions that, as a result of the decisions taken by public contracting authorities within their discretionary limits, reduce the competitive tension, either in the market or in the tender itself, may vitiate the maintenance of a competitive level playing field that enables market access to all operators under healthy and free competitive conditions.

All in all, in the socially responsible and sustainably growing EU, it is paramount to ensure the maintenance of a competitive level playing field that enables market access to all operators under healthy and free competitive conditions. Only in so far as the competitive dynamics are not distorted is best value for money to be attained and growth to be ensured. Indeed, when sourcing their works, services and goods, procuring public authorities must accommodate the various –often divergent– goals.

In the light of the aforementioned considerations, we will conduct our research on the basis of the following hypothesis: **within the EU single market, in so far as best value for money and an efficient expenditure of public funds are to be attained, the discretion of public authorities when they source goods, works or services is actually limited by competitive concerns.**

2. Theoretical framework

Up to date, several research projects have been conducted in relation with the interaction between competition law and public procurement. The Literature has offered valuable insights aimed at proving that the two disciplines, which had traditionally been considered unrelated, may actually interact with each other.

For all, it must be recalled the groundbreaking study carried out by prof. SÁNCHEZ GRAELLS, who, in his book *Public Procurement and the EU Competition Rules*, demonstrated that practices carried out by public entities do fall under the scope of Competition law and must not hence remain exempted from its scrutiny. He succeeded in evidencing their interaction and overlapping in the creation of the internal market.

In this study, we deepen into the identification of the specific elements that a contracting authority must take into account in order to procure a given good, work or service and, in particular, to design a competitively compliant public procurement process. We focus on the process of drafting a tendering procedure and, in the light of the case law of the EU judicature, we narrow down the apparently vast discretion of the contracting authorities to the decision that, in their procuring endeavors, ensures the attainment of best value for money.

Consequently, considering undisputed that practices carried out by public authorities must observe the dictates of Competition law, we specify such assumption and explore the different decisions that, from a Competition law standpoint, a contracting authority must take when it aims at sourcing a good, work or service. Whereas, in theory, in the different stages of the public procurement process several equally valid options are at contracting authority's disposal, in practice, competitive concerns point towards a single option, which ensures that best value for money is encompassed. We provide contracting authorities with the tools to adequately identify that referred single option.

Attention is placed on the goods, works and services that are procured by contracting authorities in order either to satisfy the public interest or to serve their operational needs. In our research we will not deal with the utilities sector –water, energy, transport and postal services–, whose specificities may impact on the conclusions drawn therefrom, and should, thus, be subject of a differentiated analysis. Notwithstanding, despite the differences, some findings may be of value.

Furthermore, unlike previous studies, we will not just limit our analysis to the optimal decisions when drafting the specific tendering procedure; rather, we will also reflect on the decision itself of procuring a good, work or service. In doing so, we will also analyze whether there exist alternatives –other than the resort to the design of a public procurement procedure– that, albeit having the potential of reducing the competitive tension, must be regarded as competitively compliant.

Finally, given the comprehensiveness of our research, the decisions that, once a contract is awarded, may harm competition in the market of the good, work or service or in the tender itself are to remain outside the scope of this study, and, if appropriate, they will be subject of future further studies.

3. Methodology

In order to provide with an answer to our research questions, we will first analyze EU public procurement regulations to discern the impact that the interdependence between the market integration process and competition has had in the design of the EU public procurement legal corpus. To do so, we have opted for a rigorous evolutionary analysis of the EU public procurement regulations, focusing on the underlying principles that have ultimately conditioned their approval.

Consequently, both EU primary law and EU secondary law will be examined and contrasted in order to extract conclusions from the divergences in the gradual codification of the public procurement processes. While doing so, it will come as essential to reflect on the linkage between the progressive expansion of the market integration process and the specific codification of public procurement regulations, in the light of the increasing concerns about ensuring the establishment and maintenance of an EU-wide level playing field.

Finally, it will be for the case law of the EU judicature to provide us with the hints of, first, how EU Law needed to be interpreted throughout the different stages of the market integration process and, second, to what extent the accomplishment of the single market has had an impact on the design of EU public procurement regulations.

In a second stage, we will carry out a practical analysis, from a legal standpoint, of the anticompetitive restrictions that a contracting authority may introduce when designing its public procurement processes. We will mainly base our research on the extensive experience of the EU judicature –contained in their case law– when assessing the compliance of a given behavior with respect to the competitive dictates. In doing so, we will identify the competitive concerns that lead to narrowing down the discretion of the contracting authorities throughout the drafting of their public procurement processes.

4. Research plan

In the first part we are going to research on the bases of EU Public Procurement and EU Competition Law to prove the linkage between them, what intrinsically glues

them together. It comes out that Competition law constitutes the paramount basis for the design of proper welfare-oriented public procurement instruments that aim, primarily, at fulfilling the public interest and, additionally, other public policy concerns that, without harming the attainment of the public interest, may appear to be desirable at a particular time.

Our research will hence be divided as follows:

First, we are going to analyze the importance of an adequate EU public procurement regulation that, aiming at achieving the public interest through an efficient investment of public funds, may encounter the difficulty of potentially contradictory common societal goals whose measurement may obstruct a straightforward assessment of the option that is best value for money (Chapter I.1).

Then, we will study the genesis and evolution of the legal environment, intrinsically linked to the progression, in terms of integration, towards the ultimate achievement of the European Union, which unfailingly impacted on and led to the actual configuration of the EU public procurement rules –some of the Directives mentioned in this section regulate aspects of public procurement that do not fall under our subject matter of study (namely, Remedies Directives), but are deemed to be worth mentioning at this stage of the research to have a complete picture of the EU public procurement system and of the prominent role that competition concerns play in the design and application of public procurement rules– (Chapter I.2).

In a third step, we are going to research on the incremental concerns about ensuring a competition-oriented approach within the development of the single market and, more specifically, on the potential implications on a public procurement process of assuming that consumer welfare and economic efficiency are, beyond any other consideration, the final objectives of EU competition policy –as set forth by the European Commission–. A principled approach to the case law of the EU Courts will allow us to discern the evolution of competition policy within the EU and we would be therefore able to draw the foundations that underpin the competition standard that must guide contracting authorities throughout the design and execution of their procuring instruments (Chapter II.1).

Finally, we will move onto the analysis of EU competition law, that is, the concrete provisions contained in the EU Treaties that, as interpreted by the EU Courts, show the profound divergence between the objective pursued by the Commission through its policy on competition –e.g., the search for consumer welfare through economic efficiency– and the traditional objective of EU competition law –e.g., the protection of competition as such–. This leaves us at a crossroad where, on one side, EU institutions do not always row in the same direction when it comes to incontestably stating what the final objective of competition is; and, on the other side, contracting authorities have to conduct stringent, yet instinctive, balancing tests to measure the adequacy of the decisions taken throughout the whole design and application of their procurement processes to competition concerns.

Competition is the base. But as the unstable base it nowadays appears to be, it needs to be converted to a firm, unwavering base-block. Clarity is needed. An integrative approach to the EU case law, read in the light of the path outlined by the Commission, is thus crucial. All in all, contracting authorities must be granted certainty when suffling concepts like ‘consumer welfare’, ‘economic efficiency’, ‘competition as such’, ‘public interest’ and ‘public policy goals’. (Chapter II.2).

In the III and IV Chapters we are going to deepen into the analysis of the drafting of a specific public procurement process. While contracting authorities are granted with discretion when designing their public procurement processes, they must obey the dictates of EU Competition law in order to ensure an EU-wide level playing field where all competitors can fiercely compete to be awarded the provision of the service, good or work.

First, we will research about the decisions that must be taken by a contracting authority before deciding to submit the provision of the work, service or good to a procurement process. From a Competition law perspective, provided that certain criteria are met, a contracting authority may well opt for cooperating –horizontally or vertically– as an alternative to the issuance of a public procurement process (Chapter III.1). Further, it may also organize its services in a way that, in the pursuit of the general interest, they are exempted from competition scrutiny (Chapter III.2). In any case, while it is for the contracting authorities to organize the fulfillment of its needs in the way it deems more appropriate, they must bear in mind that, from a Competition

policy perspective, to the extent that an efficient expenditure of public funds and an adequate allocation of resources are crucial to enhance consumer welfare, a level playing field must always be ensured.

Second, we will reflect on the conditions for a competitively compliant drafting of the public procurement documents. Once the contracting authority has decided to submit the provision of the work, service or good to a procurement process, it has to be cautious not to unduly foreclose either the market concerned or the access to the specific tender by including conditions that are neither proportionate nor justified by the object of the public procurement process. We will provide with the tools that any contracting authority should be equipped with in order to discern beforehand whether a given decision taken within its process of designing a particular public procurement procedure is to be regarded as anticompetitive.

Incidentally, some lines must be devoted to the analysis of whether, viewed the specific needs of a contracting authority, it is advisable to seek the conclusion of a contract or of a concession contract. Albeit having the potential to foreclose a market, concession is the best mechanism for the provision of complex, long, high-value projects, as they allow reaping private investment that undertakes the operational risk of performing projects that involve a greater level of uncertainty. However, as stated, certain conditions have to be met in order to avoid the foreclosure of an otherwise competitive market (Chapter IV.1).

The decision about the type of public procurement will impact the degree of competition for that contract. Hence, contracting authorities must, viewed the concurring circumstances of each case, select the type of procedure that will ensure best that their needs will be efficiently met at best value for money. But there exists no perfect type of procedure as even open procedures –which constitute the paradigm of transparency– may appear, in some circumstances, to be inefficient (Chapter IV.2.A).

With regard to the object of the procurement procedure, there exists increasing exigency to divide the contract of a public procurement process into lots; even if, from a Competition law standpoint, it is desirable, as it fosters competition, it may also facilitate collusion of potential tenderers. Therefore, contracting authorities are under a duty of remaining observant in order to detect any tendency in the allocation of lots that

might indicate the existence of a pattern and, hence, of a potential agreement between tenderers (Chapter IV.2.B).

As for the subject eligible to take part in the procedure, an incorrect design of the procurement documents may lead to the anticompetitive exclusion of otherwise compliant or suitable tenderers. It is undisputed that the mere design of a public procurement process has the potential of reducing competition, but, at this stage of the public procurement procedure, focus is placed on whether access to the public procurement procedure is not unnecessarily, disproportionately or excessively restricted (Chapter IV.2.C).

Finally, in relation with the criteria to choose the awardee of the procedure, both price and quality (or an interaction between them) constitute the guiding interests for the contracting authorities when they design the fundamental rule that is intended to identifying the most economically advantageous tender – that is, the solution that the contracting authority considers to be the economically best solution among those offered (Chapter IV.2.D).

RESUMEN

Tradicionalmente, las prácticas llevadas a cabo por los operadores económicos, sean públicos o privados, han sido sometidas al escrutinio del Derecho de la competencia. Hoy en día, además, es innegable que las conductas de los actores públicos, en tanto que poderes adjudicadores, también pueden conllevar la distorsión de la competencia. En este sentido, los actores públicos pueden falsear la competencia en el mercado no sólo cuando estos intervienen en él como operadores económicos, sino también cuando proveen bienes, obras y servicios para satisfacer el interés general o cuando lo hacen para para cubrir sus necesidades operativas.

En el seno de la contratación pública, los poderes adjudicadores pueden sentir la tentación de, dentro de los límites de la discrecionalidad de que gozan, reducir la tensión competitiva en las diferentes fases de la licitación de un bien, una obra o un servicio, impidiendo, así, el establecimiento de un mercado único europeo que garantice de manera efectiva el acceso de todas las empresas comunitarias a los contratos públicos. En una Unión Europea socialmente responsable y que crece de manera sostenible es fundamental garantizar el mantenimiento de unas condiciones de competencia equitativas que permitan el acceso a todos los operadores a las licitaciones en condiciones de plena competencia. Sólo en la medida en que ello se garantice, podrá asegurarse la consecución de la mejor relación calidad-precio en los diversos procedimientos de licitación. En conclusión, la necesaria apertura de la contratación pública a una competencia a nivel europeo exige limitar la discrecionalidad de los poderes adjudicadores.

El marco jurídico de la contratación pública de la UE ha experimentado una evolución constante hacia la consecución del mercado único mediante el diseño y mantenimiento de unas condiciones de competencia que permitan el acceso a todos los operadores en igualdad de condiciones. Asimismo, el proceso de integración del mercado europeo explica la creciente remisión de cuestiones al Derecho de la competencia de la UE. En el ámbito de la UE, si bien la competencia y la integración del mercado se sitúan al mismo nivel –ya que ambas sirven para mejorar el bienestar del consumidor y garantizar una asignación eficiente de los recursos–, la jurisprudencia de la UE ha demostrado que ambas se sitúan al mismo nivel, siempre y cuando no entren

en conflicto entre sí y en la medida en que ambas sirvan al mismo objetivo: el establecimiento, siguiendo los dictados de una economía social de mercado altamente competitiva, de un espacio en el que se promueva la paz, los valores de la UE y el bienestar de los pueblos.

Sea como fuere, reiteramos, si se pretende mantener el mercado único, el principal objetivo de los procedimientos de contratación debe ser preservar las dinámicas competitivas del mercado. El logro de una UE sostenible y socialmente responsable requiere el diseño de normas adecuadas de contratación pública orientadas al bienestar que cumplan tanto con sus objetivos funcionales como con otras preocupaciones de política pública. Sólo si se preservan las dinámicas del mercado y no se distorsiona la competencia se alcanzará el crecimiento. De otro modo, un recurso sin restricciones a los procedimientos de contratación pública para promover fines sociales o ambientales –distintos de la mera eficiencia económica– podría obstaculizar el mercado único, pues supondría una distorsión anticompetitiva deliberada en detrimento del bienestar social y la eficiencia económica. Los diferentes intereses en juego deben ponderarse a lo largo del procedimiento de contratación pública, aceptando aquellas ineficiencias (económicas) que sean proporcionales al objeto del proceso de adquisición y estén objetivamente justificadas.

Todo comportamiento anticompetitivo que pueda falsear la tensión competitiva en el mercado en el que un determinado bien, obra o servicio es licitado es reprochable por cuanto supone menoscabar las dinámicas competitivas de dicho mercado, generando distorsiones e impidiendo disfrutar de los beneficios –en términos económicos– que se derivarían de una intensa competencia. Ello no obstante, en la práctica de la contratación pública nos encontramos con comportamientos que, aunque son susceptibles de reducir la competencia, están permitidos porque están justificados y son proporcionales al objeto de la contratación.

Los poderes adjudicadores tienen a su disposición diferentes alternativas, competitivamente aceptadas, para suministrar bienes, obras y servicios, sin que ello implique necesariamente la aplicación de las normas de contratación pública, ya sea porque utilizan sus prerrogativas de auto-organización o porque califican sus servicios como de interés general con el fin de eximirlos del control de la competencia. En este sentido, la definición de los límites de lo que constituye el interés general ha sido

utilizada por los poderes adjudicadores para escapar del escrutinio de la competencia. Sin embargo, los Estados miembros no han llegado a un consenso para codificar los servicios específicos que deben considerarse en todos los territorios como servicios de interés general. En consecuencia, el juez de la UE ha tenido que interpretar el Derecho de la UE para conciliar los intereses, en ocasiones contrapuestos, de la UE con los de los Estados miembros, y definir qué tiene cabida dentro de 'servicios de interés general' y escapa al Derecho de la competencia.

Para la provisión de proyectos complejos, largos y de un elevado coste es esencial recabar inversiones privadas que asuman el riesgo operacional de realizar tales proyectos. Su mayor complejidad técnica, mayor coste y más larga duración implica un mayor nivel de incertidumbre, por lo que se requiere una mayor flexibilidad que la estricta aplicación de las normas de contratación pública. En este escenario, los poderes adjudicadores pueden recurrir a la técnica concesional, en lugar de optar por un contrato en sentido estricto, aunque ello suponga una cierta reducción del nivel de competencia en ese mercado. En cualquier caso, dado que la calificación de un contrato como concesión puede generar restricciones injustificadas a la competencia, siempre que se cuestione la naturaleza del riesgo transferido, el órgano de contratación deberá calificarlo como contrato en sentido estricto, pues, así, el órgano de contratación estará en disposición de obtener los mayores beneficios (en términos de calidad y precio) de la existencia de una competencia abierta y no distorsionada, garantizando que el adjudicatario sea, precisamente, el que ofrezca el bien, obra o servicio en las mejores condiciones.

Del mismo modo, la selección del tipo de procedimiento de contratación –abierto, restringido, negociado– afecta el nivel de competencia por el contrato en el mercado en el que los licitadores compiten. Los poderes adjudicadores, vistas las circunstancias concurrentes de cada caso, deberán seleccionar el tipo de procedimiento que garantice que sus necesidades se satisfarán eficientemente para la provisión del bien, obra o servicio, de forma que se optimice la calidad y se minimice el coste de adquirir el bien, obra o servicio con esa calidad. Por un lado, el procedimiento abierto es el paradigma de la transparencia, pero los costes de evaluación vinculados son superiores en comparación con los costes de un procedimiento restringido. Asimismo, los licitadores contarán con menos alicientes para mejorar sus ofertas, pues, debido a la mayor intensidad de la competencia, perciben menos probabilidades de ser

adjudicatarios. Por otro lado, el procedimiento restringido es más susceptible de ser capturado por tendencias colusorias o incluso por prácticas corruptas. Finalmente, las causas que justifican el uso de los procedimientos negociados son *numerus clausus*, por lo que, de no verificarse alguna de esas causas, los poderes adjudicadores tendrán vedado su uso. En todo caso, no existiendo un tipo perfecto desde el punto de vista de la competencia, la selección del tipo específico de procedimiento exigirá, como hemos señalado, una ponderación de las circunstancias concurrentes y de la situación del mercado por parte del poder adjudicador.

Los poderes adjudicadores están habilitados para dividir los contratos en tantos lotes como consideren adecuados u objetivamente justificados, siempre que no los desagreguen artificialmente para evitar la aplicación de la normativa de contratación pública; esto es, si los objetos de varios contratos constituyen una sola unidad económica y técnica, suficiente para cumplir la misma función económica o técnica, deben considerarse como lotes de un mismo contrato. Desde un punto de vista competitivo, la división del contrato en lotes es deseable porque incrementa la competencia entre los potenciales licitadores; sin embargo, también puede facilitar la colusión entre licitadores. Por ello, los poderes adjudicadores están obligados a permanecer vigilantes para detectar y prevenir cualquier tendencia en la asignación de los lotes que pueda revelar la existencia de un acuerdo anticompetitivo entre licitadores.

El diseño de los documentos específicos del procedimiento de contratación pública reviste una especial importancia dado que puede suponer la exclusión de licitadores que, de otro modo, podrían haber resultado adjudicatarios. Es innegable que el mero diseño de un procedimiento de contratación pública tiene el potencial de reducir la competencia ya que el número máximo potencial de competidores es limitado, pero el acento debe ponerse, de un lado, en que el acceso al procedimiento no esté innecesaria, desproporcionada o excesivamente restringido, y, de otro, en que los criterios de adjudicación sirvan efectivamente el objetivo de identificar cuál es la solución económicamente más ventajosa de entre las propuestas. En definitiva, el principio de igualdad de trato que debe inspirar el diseño de los documentos exige que se conceda a todos los licitadores una igualdad de oportunidades al formular sus ofertas. Por ello, todas las condiciones del procedimiento de contratación pública deben redactarse de forma clara, precisa e inequívoca en todos los documentos de la contratación. Además, toda la información técnica pertinente a efectos de una buena comprensión de los

documentos de la contratación debe ponerse lo antes posible a disposición de todas las empresas que participan en el procedimiento de contratación pública de modo que, primero, se garantice que todo licitador razonablemente informado y normalmente diligente entienda el alcance preciso e interprete de la misma manera los documentos y, segundo, se permita al órgano de contratación verificar si las ofertas de los licitadores cumplen los criterios del contrato en cuestión.

En este estudio profundizaremos en la identificación de los elementos específicos que un poder adjudicador debe tener en cuenta para diseñar el procedimiento de licitación de un determinado bien, obra o servicio. En particular, analizaremos el impacto de las exigencias competitivas emanadas del Derecho de la Unión Europea en el diseño de los procedimientos de contratación de bienes, obras y servicios. A la luz de la jurisprudencia de la UE, nos centraremos en reducir la aparentemente amplia discreción de los poderes adjudicadores con vistas a singularizar la decisión que, desde el punto de vista del Derecho de la competencia de la UE, supondría, en cada procedimiento, la obtención de la mejor relación calidad-precio. Mientras que, en teoría, en las diferentes etapas del procedimiento de contratación pública, los poderes adjudicadores tienen a su disposición diversas opciones igualmente válidas, el Derecho de la competencia apunta hacia una única opción.

Para ello, en primer lugar analizaremos los instrumentos legales de la UE en materia de contratos públicos para discernir el impacto que la interdependencia entre el proceso de integración del mercado y la competencia ha tenido en el diseño del *corpus* jurídico de la contratación pública de la UE. En consecuencia, tanto el Derecho primario de la UE como el Derecho derivado de la EU serán examinados y contrastados para extraer conclusiones de las divergencias en la codificación gradual de los procedimientos de contratación pública. Al hacerlo, resultará esencial reflexionar sobre el vínculo entre la progresiva expansión del proceso de integración y la codificación específica de la normativa de contratación pública, a la luz de la creciente preocupación por establecer y mantener un marco a nivel europeo en el que los licitadores puedan competir en pie de igualdad. Además, la propia jurisprudencia comunitaria nos permitirá conocer, en primer lugar, cómo debe interpretarse el Derecho de la Unión a lo largo de las distintas fases del proceso de integración y, en segundo lugar, en qué medida la consecución del mercado único ha tenido repercusión en el diseño de las normas de la UE en materia de contratación pública. En todo caso, concluiremos que

una regulación óptima de la contratación pública de la UE es clave para garantizar la obtención de la mejor relación calidad-precio, esto es, para alcanzar una inversión eficiente de los fondos públicos que preserve el interés público mediante el logro de objetivos comunes de la sociedad.

En segundo lugar, realizaremos un análisis práctico desde el punto de vista jurídico de las restricciones anticompetitivas que un poder adjudicador puede –deliberadamente o inintencionadamente– introducir al diseñar sus procedimientos de contratación pública. Basaremos nuestra investigación en la amplia experiencia de los tribunales de la UE, que, a través de su jurisprudencia, han evaluado el cumplimiento de las prescripciones competitivas por parte de los procedimientos diseñados por los poderes adjudicadores para la provisión de bienes, obras y servicios. En definitiva, identificaremos los criterios competitivos que conllevan la modulación de la aparentemente vasta discrecionalidad de los poderes adjudicadores en la redacción de sus procedimientos de contratación pública.

PART 1 - EU PUBLIC PROCUREMENT AND COMPETITION LAW: A PRINCIPLED APPROACH TO PUBLIC PROCUREMENT REGULATIONS

CHAPTER I - EU PUBLIC PROCUREMENT: CONTRACTING AUTHORITIES AS BOTH INTERPRETERS AND GUARANTORS OF THE PUBLIC INTEREST WHILE IDENTIFYING THE TENDER THAT REPRESENTS BEST VALUE FOR MONEY WITHIN THE SINGLE MARKET

Appropriate regulation of public procurement represents best practice in the delivery of public services and the accomplishment of public goals and interests; all in all, an adequately oriented regulation facilitates the accountability for how public expenditure is disposed, as well as it prevents public bodies from practices that harm (or do not benefit) the public interest, such as corruption and political manipulation[1].

Public bodies are constraint to conduct their activities cautiously observing the legal constraints enacted to ensure its good governance; in comparison to private entities, they find themselves in a more delicate situation due to the fact that, firstly, their procuring decisions are not necessarily based on technical or efficiency considerations and, secondly, they may be particularly sensitive to the promotion of various goals in order to attain the so-sought public interest – innovation, environmental protection or employment, to name some[2]. Additionally, no matter what the form in

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[1] EUROPEAN COMMISSION. *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions - Towards a Single Market Act: For a highly competitive social market economy - 50 proposals for improving our work, business and exchanges with one another*, COM(2010) 208 final/2, Brussels, 11 November 2010, p. 15; MONTI, M. *A new strategy for the Single Market - at the service of Europe's economy and society*. Report to the President of the European Commission, 9 May 2010, p. 13; OECD. *Fighting corruption and promoting competition*. Global Forum on Competition, DAF/COMP/GF/WD(2014)53, 17 February 2014.

[2] On this issue, *vide* ANDERSON, R.D. and KOVACIC, W.E. "Competition Policy and International Trade Liberalisation: Essential Complements to Ensure Good Performance in Public Procurement Markets", in *Public Procurement Law Review*, vol. 18, 2009, pp. 67-101; BROADMAN, H.G. and RACANATI, F. "Seeds of corruption: do market institutions matter?", in *World Bank,* World Bank Policy Research Working Paper no. 2368, 2000; CLARKE, G.R.G. and XU, L.C. "Privatization, Competition and Corruption: how characteristics of bribe takers and payers affect bribe payments to utilities", in *FEEM*, Working Paper no. 82, 2002; EMERSON, P.M. "Corruption, competition and democracy", in *Journal of Development Economics*, vol. 81, 2006, pp. 193-212; JENNY, F. "Competition and Anti-Corruption Considerations in Public Procurement", in OECD. *Fighting corruption and promoting*

which the Public Administration intervenes in the market is, public sector management principles have to be implemented: transparency, accountability, fiscal prudency and competition[3].

However, to comply with the welfare-enhancing standards that, if the public interest is to be achieved at the best value for money, should inspire the procurement activity of public bodies, practice shows that just the respect of the referred public sector management principles turns out to be insufficient; instead, it results imperative that public bodies overtly promote effective competition through their procurement activities[4]. Moreover, it does not suffice with confining one-self to the design of competition-oriented public procurement regulations and practices, but competition has to be actively promoted in order to guarantee that the option selected by the public body in the course of its procurement process is, from a perspective of economic efficiency, the one that enhances best the public interest. It must be borne in mind that the maximization of social welfare, as a means to encompass the public interest, entitles, in any case, a proper investment (or expenditure, depending, once again, on the view of the reader) of public funds.

Competition becomes, then, a major concern for public bodies when designing and conducting their public procurement processes.

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integrity in Public Procurement. Paris, OECD Publishing, 2005, [pp. 29-36], p. 30; KOVACIC, W.E. and ANDERSON, R.D. "Collusion and corruption in public procurement", in *OECD*, Global Forum on Competition, DAF/COMP/GF/WD(2010)27, 26 January 2010; SCHOONER, S.L. "Commercial purchasing: the chasm between the United States Government's evolving policy and practice", in *George Washington University Law School, Public Law and Legal Theory*, Working Paper no. 25, 2001, pp. 40-49.

[3] CANEDO ARRILLAGA, M.P. "An attempt to increasing competition in public procurement: one example in the Basque Country", in BENEYTO, J.M. and MAILLO, J. (Dirs.). *Fostering Growth in Europe: Reinforcing the Internal Market*. Madrid, CEU Ed., 2014 [pp. 365-389], pp. 365-366.

[4] CHAKRAVARTHY, S. "Benefits of competition policy in public procurement with special reference to India", in DREXL, J. and BAGNOLI, V. *State-initiated restraints of competition*. Cheltenham, Edward Elgar Publishing, 2015, pp. [277-295] p. 278.

1. EU Public Procurement policy: public procurement regulations, designed to channel the anticompetitive discretionality of contracting authorities, as the base of a sustainably growing EU

Public procurement is just one of the various ways in which the State may act; indeed, the State creates organizations to shape its activity and, in doing so, facilitates the attainment of its own objectives, as well as those mandated by law – hence the *raison d'être* of the Public Administration[5]. Each of such organizations –hereinafter, public bodies–, in the course of their action, may conduct procurement processes in order to source goods, works and/or services, either for themselves or to offer them to the citizens[6].

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[5] CANEDO ARRILLAGA, M.P. "An attempt to increasing competition in public procurement: one example in the Basque Country"… *op. cit.,* pp. 365-366; CANEDO ARRILLAGA, M.P. "La Administración frente a la aplicación descentralizada del Derecho de la Competencia", en CANEDO ARRILLAGA, M.P. and GORDILLO PÉREZ, L.I. (Dirs.). *La autonomía local en tiempos de crisis: reformas, fiscalidad y contratación pública*, Cizur Menor, Thomson Reuters - Aranzadi, 2015, [pp. 343-356] p. 343. By Public Administration we refer collectively to all the public administrative bodies whose activity will be included in the subject-matter of the present research. In this same sense: « l'Administration - au sens organique, le mot est souvent mis en majuscule - peut être identifiée à l'ensemble des institutions publiques chargées de faire fonctionner des services d'intérêt public » *vide* PARADA, R. *Derecho Administrativo I - parte general*. Madrid, Marcial Pons, 2012, 19th edition, pp. 29-30; SEILLER, B. "Acte administratif (I-Identification)", in *Répertoire des contentieux administratif*, Dalloz, January 2010 [last update: October 2014], § 11.

[6] « *L'Administration,* au sens organique*, ne désigne donc que l'ensemble des institutions qui composent le pouvoir exécutif en y associant, par extension, les collectivités locales. Ainsi conçu, le terme vise toutefois chacune de ces institutions, quelle que soit son activité. S'il est également indifférent que les services composant ces institutions soient dotés de la personnalité morale, il convient de souligner que le sens organique, ici présenté, implique que les institutions en cause soient elles-mêmes des personnes publiques (État, collectivités locales et établissements publics rattachés à eux)* », and « *Le* point de vue matériel *confirme, en premier lieu, que les pouvoirs législatif et exécutif ne sauraient appartenir à la notion d'administration. Légiférer, c'est-à-dire élaborer et édicter les règles générales qui régissent l'ensemble des activités publiques ou privées, diffère profondément de la mission de faire fonctionner les services d'intérêt public. De la même façon, juger, c'est-à-dire appliquer la règle de droit à des litiges et en énoncer les conséquences, se distingue de la mission d'administrer qui, si elle aussi est soumise au droit, y est soumise comme à un cadre et non comme à un but* » (emphasis added), in SEILLER, B. "Acte administratif (I-Identification)"… *op. cit.*, §§ 15-17. Therefore, by 'public bodies' we will refer to public

In this scenario, public bodies are granted a certain margin of discretion when undertaking their provision of goods, services and works[7]. This, in the light of the above-mentioned considerations, implies that, in order to determine the limits within which public bodies may conduct their procurement activities, competition-oriented analysis has to be necessarily carried through to set the boundaries of the administration's margin of discretion. Such an *ex ante* competition analysis envisages guaranteeing that the margin of discretion granted to public bodies will be narrowed down to the options that ensure that public funds would be adequately invested, that is, the options that would allow the public body to achieve the most economically efficient alternative when provisioning goods, services and works to meet, generally, the public interest, and, particularly, the specific public policies indicated by the legislator.

In conclusion, when public bodies intervene in the market to procure goods, services and works, they are compelled to determine the *undeterminable* – they are obliged to exercise a « *pouvoir de vouloir* »[8]. From the moment they come to note the

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administrative entities that are the executive power and whose objective is the accomplishment of the public interest.

On the increasingly important role of the governments as an active participant in the market, *vide* MCCRUDDEN, C. *Buying social justice: equality, government procurement and legal change*. Oxford, Oxford University Press, 2007.

[7] On the administrative margin of discretion, *vide* FERNÁNDEZ ESPINAR, L.C. "El control judicial de la discrecionalidad administrativa. La necesaria revisión de la construcción dogmática del mito de la discrecionalidad y su control", in *Revista jurídica de Castilla y León*, no. 26, January 2012, pp. 211-258; GARCÍA DE ENTERRÍA, E. and FERNÁNDEZ, T.R. *Curso de Derecho Administrativo I*. Madrid, Civitas, 2011, 15th edition; PARADA, R. *Derecho Administrativo I - parte general… op. cit.*, pp. 100-107; RIALS, S. "Pouvoir discrétionnaire", in *Dalloz*, 1985 [last update: March 2009].

[8] The margin of discretion or « *pouvoir discrétionnaire* » granted to public bodies is a consequence of the « *indéterminabilité* » of the rules; such rules are not just *undetermined*, but they are *undeterminable* instead. While the former would imply that the rule can be determined, specified, by a mere intellectual activity (interpretation), the latter involves not only an *a priori* undetermination, but also the need to resort to an absolutely subjective choice, to an exercise of the « pouvoir de vouloir », in order to discern which option will be selected. *Vide* RIALS, S. "Pouvoir discrétionnaire"… *op. cit.*, pp. 3-4.

As a consequence, « l'obligation imposée à l'autorité administrative d'examiner les circonstances de l'affaire vise, lorsqu'elle s'applique à un acte exercice d'un pouvoir de vouloir, à assurer que ce pouvoir s'exerce librement et en toute connaissance de cause », in PY, P. *Le rôle de la volonté dans les actes administratifs unilatéraux*. Paris, Librairie générale de droit et de jurisprudence, 1976, p. 127.

necessity to resort to a public procurement mechanism –pre-tender– until they have already decided who they are going to award the contract (if any) to –tender–, or even after the award itself –post-award–, they find constantly themselves at a crossroad to decide which of the options is best suited to achieve the public goals that they have been mandated to protect; among all, the promotion and protection of a genuinely functioning single market where the maximization of social welfare at the best value for money is the end[9]. Competition concerns come into play throughout the entire procuring process – only through the design and application of actual pro-competitive public procurement rules and practices economic efficiency will be lastly attained, social welfare maximize and, ultimately, the public interest properly met; however, to date, public procurement regulation is not as pro-competitive as it should be[10].

The regulation of public procurement is a priority in public policy matters for the European Union[11]. Public procurement –together with competition law– is considered instrumental to the achievement and maintenance of the single market, that is, of the place where people, goods, services and capitals are able to circulate with the

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[9] «[T]he single market is not an end in itself. It is a tool for implementing other policies. […] challenges concerning growth, social cohesion and employment, security and climate change will become more likely to succeed if the single market works as it should», as stated in EUROPEAN COMMISSION. *Communication from the Commission - Europe 2020: A strategy for smart, sustainable and inclusive growth*, COM(2010)2020, Brussels, 3 March 2010, p. 4. All the quoted policies are nothing but a substantialization of the broader social welfare.

Given the relevance for the research to keep an eye on the interplay between competition, as the 'must' for public procurement to properly function, and public procurement, as the means to achieve the public interest, *vide*, on a discussion over social welfare as, also, the goal of competition law, DREXL, J.; KERBER, W. and PODSZUN, R. *Competition policy and the economic approach: foundations and limitations*. Cheltenham, Edward Elgar Publishing, 2011, pp. 11-80.

[10] SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules… op. cit.*, pp. 6-15. Prof. MONTI noted that a reason that might explain why benefits to consumers are late to materialize is that there is still insufficient competition, or that access to the single market is precluded or difficult, *vide* MONTI, M. *A new strategy for the Single Market… op. cit.,* p. 25.

[11] The European Commission has stated that «Public procurement plays an important role in the overall economic performance of the European Union», in EUROPEAN COMMISSION. *Green Paper on the modernisation of EU public procurement policy - Towards a more efficient European Procurement Market - Synthesis of replies*. Brussels, 2011, p. 2.

same freedom as within one country[12]. Thus, the economic importance of its regulation is, in fact, a direct consequence of the identification of public procurement as a significant non-tariff barrier[13].

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[12] In this sense, public procurement is viewed as the responsible for creating the legal environment that guarantees, on one hand, the access for all European firms to public contracts and, on the other hand, the efficient spend of public funds, in *supra*. *Vide,* also, CANEDO ARRILLAGA, M.P. "An attempt to increasing competition in public procurement… *op. cit.,* p. 365; EUROPEAN COMMISSION. "The Single Market Act", in *Growth - Internal Market, Industry, Entrepreneurship and SMEs*, available at http://ec.europa.eu/growth/single-market/smact/index_en.htm (last consulted: 20.05.2015), p. 3.

The enter into force of the Treaty of Lisbon, amending the Treaty on European Union and the Treaty establishing the European Community, *Official Journal of the European Union*, C 306/1, 17 December 2007, brought about a change in terminology. Its article 2.1 introduced the main change) – it set forth that the Treaty establishing the European Community (TEC) would be replaced by "Treaty on the Functioning of the European Union" (TFEU). In consequence, European Union's (EU) legal instruments will be broadly referred to as "EU law"; however, when, based on materials written prior to the terminological change, it is deemed necessary, references to "EC law" will be kept. In such cases, if possible, correspondence between old and new numbering of Treaty articles will be provided.

The references to EU law instruments will be made to their consolidated versions: Consolidated version on the Treaty on European Union, *Official Journal of the European Union*, C 326/13, 26 October 2012 (hereinafter, TEU); Consolidated version of the Treaty on European Union and the Treaty on the Functioning of the European Union, *Official Journal of the European Union*, C 326/13, 26 October 2012 (hereinafter, TFEU).

As for the EU market, the already coined expression "single market", an step forward –in relation to the common market– in the economic integration, was popularized and finally introduced in (at the time) European Communities' day-to-day terminology by Jacques Delors, President of the Commission, when he launched, together with Lord Cockfield, Vice President and Commissioner for the internal market, the Single Market Project on following Report: COMMISSION OF THE EUROPEAN COMMUNITIES. *Completing the internal market - White Paper from the Commission to the European Council,* COM (1985) 310 final, 14 June 1985, particularly, recitals 2 to 4. It is also referred to as "internal market". However, given the welfarist approach of our research, "single market" seems more conceptually appropriate than "internal market" – the term "internal" may suggest to EU citizens that it refers to their own domestic country, it may convey a flavor of closure and, regardless of the fact that the market for a particular good or service within the EU is "internal" by definition, it requires actions by policy makers and market participants to be really "single", as opposed to fragmented. *Vide* CAMERON, F. "The European Union as a model for regional integration", in *Council on Foreign Relations*, Working Paper, September 2010; EUROPEAN COMMISSION. "The Single Market Act"… *op. cit.*; MONTI, M. *A new strategy for the Single Market… op. cit.,* p. 13 and fn 1; SURANOVIC, S.M. "Economic integration: overview", in ID. *International Trade Theory and Policy*. 4 January 1998, chapter 110-2.

The single market is conceived, together with the opening of borders, as the main driving force behind growth in the EU[14]. Therefore, growth comes intrinsically linked to the accomplishment of the single market. In the light of these considerations, it is worth noting that public procurement policy plays a crucial role in the creation and preservation of the single market, as it is the tool that, if it observes the dictates of another set of economic regulation –i.e., competition law–, ensures the most efficient use of public funds and the EU-wide openness of the procurement market, as well as it allows the single market to remain open, preserving equal opportunities for undertakings, combating national tendencies towards protectionism and providing the right environment to incentivize the absolutely indispensable innovation[15].

In any case, "internal market" and "single market" are nowadays interchangeably used by the European Commission; nevertheless, it seems that the Commission has a preference for the use of "single market" when it links it to consumers, *vide* EUROPEAN COMMISSION. "Internal market: from crisis to opportunity - putting citizens and companies on the path to prosperity", in *The EU explained*, Brussels, November 2014, pp. 3 and 9-10. Consequently, for the reasons above-mentioned, despite acknowledging their synonymous character, we will bend towards the preferential use of "single market" in this research.

[13] BOVIS, C.H. *EU Public Procurement Law*. Cheltenham, Edward Elgar Publishing, 2012, 2nd edition, pp. 1 and 5. For a definition of non-tariff measures (NTMs), which are currently considered to be major determinants of market access and to bring about important distortionary and restrictive effects, *vide* UNCTAD. *Non-tariff measures to trade: economic and policy issues for developing countries*. Geneva, 2013, pp 1-2 and 106 (government procurement restrictions).

[14] EUROPEAN COMMISSION. COM(2010) 208 final/2… *cit.,* p. 2 and fn 16; EUROPEAN COMMISSION. "The Single Market Act"… *op. cit.*, pp. 4-5.

About the following steps to take in the EU to persevere with the initiated growth path, but in a more sustainable way, that is, securing future economic growth, *vide* EUROPEAN COMMISSION. *Communication from the Commission - Europe 2020: A strategy for smart, sustainable and inclusive growth*, COM(2010)2020, Brussels, 3 March 2010, specially p. 19.

[15] BOVIS, C.H. *EU Public Procurement Law… op. cit.*, p. 489; EUROPEAN COMMISSION. COM(2010) 208 final/2… *cit.,* p. 15; EUROPEAN COMMISSION. COM(2010) 2020… *cit.*, pp. 19 and 24; in relation to public procurement and the single market, *vide,* in particular, MONTI, M. *A new strategy for the Single Market... op. cit.,* p. 76: «[Public procurement law] ensures that suppliers and service providers from other Member States are not excluded from the market of public purchases and that public authorities' natural preference for keeping the purchases within their own country does not partition the EU market».

If the EU is to continue growing at the pace it has been doing lately, it must be borne in mind that healthy public procurement policy alone cannot sustain such growing pace in the long run; open competition is, thus, indispensable to guarantee the principle of an open market economy with free competition as required by article 119 TFEU (ex article 4 TEC)[16].

In this line, one must admit that adequately designed EU public procurement rules constitute the base-block of the internal market regulation; they sustain the pillars –if we are allowed to exhume the three-pillared image widespread to graphically picture the structure of the old European Union, before the entry into force of the Treaty of Lisbon (see *Figure 1*)– over which a competitive and sustainably growing EU will be erected, namely, the single market and a social market economy[17]. Public procurement regulation may seek to attain other objectives –e.g., environmental concerns, employment considerations or consumer welfare–, but such other objectives will raise no concerns as long as they do not conflict with the 'stability' –going on with the metaphor– of the pillars that hold up EU's highly competitive market[18].

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[16] Article 119 TFEU reads as follows:

«1. For the purposes set out in Article 3 of the Treaty on European Union, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition.

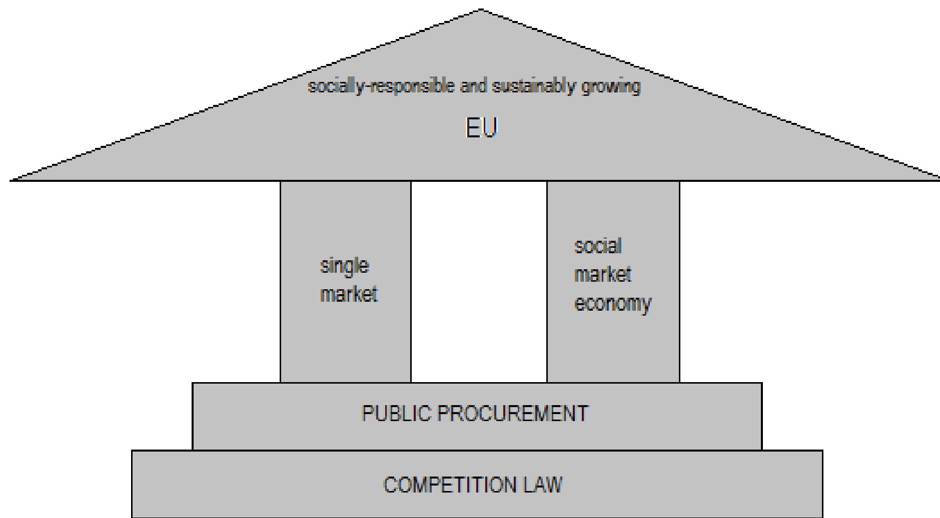
2. Concurrently with the foregoing, and as provided in the Treaties and in accordance with the procedures set out therein, these activities shall include a single currency, the euro, and the definition and conduct of a single monetary policy and exchange-rate policy the primary objective of both of which shall be to maintain price stability and, without prejudice to this objective, to support the general economic policies in the Union, in accordance with the principle of an open market economy with free competition.

3. These activities of the Member States and the Union shall entail compliance with the following guiding principles: stable prices, sound public finances and monetary conditions and a sustainable balance of payments».

[17] The social market economy approach entails that all market players –businesses, consumers and workers– will support the single market, insofar as it allows Europe to become collectively competitive, *vide* EUROPEAN COMMISSION. COM(2010) 208 final/2… *cit.*, p. 3.

[18] Article 3(3) of the TEU reads as follows:

Figure 1. Structure of the sustainably growing EU



SOURCE: Elaborated by the author

The appropriateness of paying genuine attention to the design of suitable public procurement regulations has become clearer with the emergence of the crisis – following the crisis, while the limits to what the market can deliver have become more visible, the market itself has been perceived as inefficient and unfair, as a source of inequalities[19]. One could say that the EU is experiencing a certain *market fatigue*.

«The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance».

Vide also EUROPEAN COMMISSION. *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions - Single Market Act II - Together for new growth*, COM(2012) 573 final, Brussels, 3 October 2012, p. 4; LIANOS, I. "Competition law in the European union after the Treaty of Lisbon", in ASHIAGBOR, D.; COUNTORIS, N. and LIANOS, I. *The European Union after the Treaty of Lisbon*. London, Cambridge University Press, 2012, [pp. 252-283], pp. 261-262; MONTI, M. *A new strategy for the Single Market... op. cit.*, pp. 13 and 16-17.

[19] Prior to the crisis, a certain *integration fatigue* could be sensed: on one side, some were reluctant to see the logic of the single market go deeper into the heart of economic power at the national level; on the

This *market fatigue* risks to turn into a *reform fatigue*, generated by the continuous structural reforms that, although they are being undertaken first and foremost in each Member State's interest, blame on the EU and the single market the guilt of resorting to that many reforming measures. Thus, it becomes of major importance the imperative necessity to resort to shrewd regulatory techniques that, by means of credibly emphasizing the benefits of promoting more market, more competition, more integration, prevent the public opinion from vividly aligning against the single market; indeed, all project to vouch for the maintenance of the single market is condemned to collapse if it fails to show citizens, consumers and SMEs that it works first and foremost for them[20].

Any intervention of the State in the market may distort competition. Furthermore, public procurement should be deemed as an economic activity that directly impacts on the competition dynamics of the markets in which the public buyer acquires goods, services and works[21].

Despite the fact that, in some jurisdictions, the State –broadly conceived– and the market have been traditionally considered to belong to different spheres, in the realm of comparative competition law, it was the adoption of the Treaty of Rome what triggered the idea that also public entities may hamper competition, be it willingly or

other side, others raised concerns on some basic aspects of the single market, such as free movement of people or services, converting principles that had been introduced half a century before the Treaty of Rome, and largely practiced ever since, sources of tensions and anxieties. *Vide* MONTI, M. *A new strategy for the Single Market… op. cit.,* pp. 23-24.

[20] In fact, it is for those who want to promote more market to be more genuinely responsive to the concerns that the crisis has amplified, *vide supra*, p. 24 and 37.

[21] HEALEY, D. "Competitive neutrality: addressing government advantage in Australian markets", in DREXL, J. and BAGNOLI, V. *State-initiated restraints of competition*. Cheltenham, Edward Elgar Publishing, 2015, [pp. 3-39] p.3; SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules… op. cit.*, p. 31; and SZYSZCZAK, E. "State Intervention and the Internal Market", in TRIDIMAS, T. and NEBBIA, P. *European Union Law for the Twenty-first Century: Internal market and free movement community policies*, Hart Publishing, 2004, [pp. 217-238] p. 217.

unconsciously[22]. It was acknowledged that protecting competition by focusing solely on private restraints was just not enough[23].

The domestic political and economic situation of some of the Member States that adopted the Treaty of Rome played a crucial role in the acknowledgment of the necessity to monitor (Member) States' activity in the market: at the time, in several of those Member States, the State owned most of the major firms and, not surprisingly, it granted its own domestic firms a preferential –when not, exclusive– treatment[24]. However, in spite of what was believed at first, public restraints to competition might not only be originated by its intervention in the market through publicly owned enterprises; instead, they can also be grounded on any activity that may have an impact

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[22] By way of example, antitrust law in the United States was designed to discipline the anticompetitive acts of private firms; only occasionally were seriously anticompetitive public bodies' acts challenged, and, even though these challenges were filed after conscious and serious reflections, they used to failed, *vide* FOX, E.M. and HEALEY, D. "When the State Harms Competition — The Role for Competition Law", in *Law and Economics Research Paper Series*, Working Paper no. 13-11, 14 April 2014, p. 3.

On the applicability of competition rules to state activity, prof. TRIANTAFYLLOU recognizes that even the competition rules « *[fusent] conçues initialement pour régler le comportement des entreprises* » it may not be « *exclu* a priori *que les règles de concurrence [...] puissent être d'une certaine application à l'activité étatique* », in TRIANTAFYLLOU, D. "Les règles de la concurrence et l'activité étatique y compris les marchés publics", in *Revue trimestrielle de droit européen*, 1996, pp. 57 et sic.

[23] Prof. MURIS pictured it through the following simile: «protecting competition by focusing solely on private restraints is like trying to stop the water flow at a fork in a stream by blocking only one channel», *vide* MURIS, T.J. "Principles for a successful competition agency", in *University of Chicago Law Review*, Vol. 72, no. 1, Winter 2005, [pp. 165-187] p. 171.

Prof. FOX and Prof. HEALEY set forth five key historical and intellectual developments that led to the redefinition of the boundaries between the market and the state; but, while, from a global perspective, the rethinking of the 'private paradigm' required the five developments to happen, when it comes to the EU –our subject-matter of research–, it was the approval of the Treaty of Rome what brought about the idea of tearing to pieces the classical immunity of the State in matters related to competition law. Treaty establishing the European Economic Community (EEC), of 3 March 1957, not published in the Official Journal (collectively, *Treaty of Rome*)

[24] FOX, E.M. and HEALEY, D. "When the State Harms Competition… *op. cit.*, pp. 4-5.

on the market dynamics; hence the importance of submitting the whole public bodies' behavior to competition rules[25].

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[25] The, at the time, Court of Justice of the European Communities [nowadays, CJEU] had already clarified that competition law rules are to be applied to firms, regardless of their legal status –that is, be them private or public– as long as they perform an economic activity, *vide* Judgment of the Court (Sixth Chamber) of 23 April 1991, case C-41/90, *Klaus Höfner and Fritz Elser v Macrotron GmbH* [ECLI:EU:C:1991:161], § 21; however, the idea, as expressed by prof. BAZEX, is to apply competition rules not only to the practices developed within the economic activity of public firms, but also to the effects that public authorities' intervention may deploy over the market: « *Ainsi se trouve reconnue l'existence d'une règle de concurrence visant non pas les entreprises mais les autorités publiques, faisant partie de la légalité administrative et relevant des contrôles ordinairement exercés sur les pouvoirs publics* » and, he keeps on, « *dès lors qu'on admet l'existence d'un principe supérieur de liberté de la concurrence, l'autorité publique est tenue de ne pas porter atteinte aux droits et obligations que cette norme crée à l'égard des intervenants sur les marchés* », in BAZEX, M. "Le droit public de la concurrence", in *Revue française de droit administratif*, 1998, [p. 781 *et seq*.] §§ 1 and II.B.

The French literature refers to this phenomenon as " *l'opposabilité* " of competition rules to public bodies, since competition rules, albeit, in theory, not being directly applicable to them when they act within the limits of their " *publique puissance* ", oblige public entities either way not to take decisions that may hamper the achievement of a competitively working market, insofar as « *les décisions administratives peuvent avoir pour effet de structurer le comportement de ces dernières, d'induire de leur part une pratique anticoncurrentielle, de les mettre en situation d'abuser automatiquement de leur position dominante ou de réaliser nécessairement une entente illicite* »; consequently, competition concerns are " *opposable* " to the regulatory activities of the public bodies, and, thus, to its whole course of action, *vide* CLAMOUR, G. "Personnes publiques et droit de la consommation", in *JurisClasseur Administratif*, Fasc. 150-10, 18 April 2013, §§ 62-64; DUMONT, G. "Application du droit de la concurrence aux activités publiques", in *JurisClasseur Administratif*, Fasc. 292, 15 November 2005, § II.B.1.b-II.B.2.

As for the CJEU case law, on the duty of Member States not to adopt of maintain in force any measure which could deprive the EU competition rules of their effectiveness, *vide* Judgment of the Court of 16 November 1977, case C-13/77, *SA G.B.-INNO-B.M. v Association des détaillants en tabac (ATAB)* [ECLI:EU:C:1977:185], §§ 31-32; and, specifying previous case law, Judgment of the Court of 21 September 1988, case C-267/86, *Pascal Van Eycke v ASPA NV* [ECLI:EU:C:1988:427], § 16: «It must be pointed out in that regard that Articles 85 and 86 of the Treaty [nowadays, articles 101 and 102 TFUE] *per se* are concerned only with the conduct of undertakings and not with national legislation. The Court has consistently held, however, that Articles 85 and 86 of the Treaty [101 and 102 TFEU], in conjunction with Article 5 [nowadays, article 3(4) TEU], require the Member States not to introduce or maintain in force measures, even of a legislative nature, which may render ineffective the competition rules applicable to undertakings»

Still, as the Green Paper on the modernization of EU public procurement policy stated, experience over the years has shown that the mere existence and functioning of antitrust is not sufficient to guarantee that the objectives envisaged by legislators when they trace the boundaries for public bodies' activity are achieved: public bodies will unfailingly succumb to the temptation of protecting nationalistic interests, they will invariably deploy a costly preferential treatment in favor of national or local operators, instead of promoting other public interests that, unlike the irrational and unreasonable claim for the protection of the national/local product, do result in a direct benefit for citizens – i.e., the promotion of innovation, or of environmental and social concerns, among others[26].

The mentioned Green Paper was launched following the requests of stakeholders, who demanded a review of the EU public procurement system, who claimed public purchases to be made in the most rational, transparent and fair manner, in order to increase its efficiency and effectiveness, with a view to getting the Europe 2020 Strategy specified goals achieved – the Europe 2020 Strategy was adopted in an environment of crisis, which compelled the EU to fix its roadmap to make true the envisaged 21st century's social market economy, that is, a smart, sustainable and inclusive economy delivering high levels of employment, productivity and social cohesion; all in all, the crisis had not only wiped out years of economic and social

[26] The referred Green Paper put forward that public procurers often were (and, actually, are) bound to buy on markets with anti-competitive market structures; therefore, it continued, it was (and, logically, is) compulsory that procurement decisions are taken with regard to market structures, are taken smartly, adapting the procurement strategies in accordance with the structure of the market in question, in order to prevent the risk of consolidating or even aggravating such anti-competitive structures. *Vide* EUROPEAN COMMISSION. *Green Paper on the modernisation of EU public procurement policy. Towards a more efficient European Procurement Market*, COM(2011) 15 final, Brussels, 27 January 2011, pp. 6-30.

Prof. MONTI referred to the necessity to resist nationalisms, which, instead of making the single market stronger, more consistent with other concerns and policy objectives, they would weaken it; indeed, he emphasized, the economic, social and environmental welfare of European citizens would not be defended with economic disintegration and purely national measures, but with economic union, *vide* MONTI, M. *A new strategy for the Single Market… op. cit*, pp. 9 and 21.

progress, but also, and more importantly, it has exposed structural weaknesses in Europe's economy[27].

The Commission, thus, committed itself to make legislative proposals to guarantee transparent and non-discriminatory public procurement procedures, where economic operators compete on a level-playing field and, in doing so, benefit fully from the basic freedoms. At all events, increasing the efficiency of public spending is the main objective of the Commission as this will ultimately enable public contracts to be put to better use in support of other policies since public procurement ought to be used as an strategic tool to support common societal goals, such as innovation, environmental protection and employment, to name some[28]. In fact, as mentioned, public procurement was deemed to play a crucial role in the attainment of the goals defined in the Europe 2020 Strategy – i.e., developing an economy based on knowledge and innovation – smart growth–; promoting a low-carbon, resource-efficient and competitive economy – sustainable growth–; and fostering a high-employment economy delivering social and

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[27] Therefore, a stronger economic governance was, and, indeed, is, absolutely essential to deliver results, in EUROPEAN COMMISSION, COM(2011) 15 final… *cit.*, pp. 3 and 6, with reference to the already mentioned EUROPEAN COMMISSION. COM(2010)2020… *cit,* pp. 3-4.

[28] EUROPEAN COMMISSION. COM(2010) 208 final/2… *cit.*, Proposal No. 17; EUROPEAN COMMISSION, COM(2011) 15 final… *cit.*, pp. 3-5. Among those common societal goals the Commission compiled the following: protection of the environment, higher resource and energy efficiency and combating climate change, promoting innovation and social inclusion, and ensuring the best possible conditions for the provision of high quality services. The EU, in its efforts to become a more resource-efficient economy, launched the 'Green Public Procurement' initiative, a voluntary instrument to help stimulate public authorities to seek to procure goods, services and works with a reduced environmental impact throughout their life cycle, *vide* EUROPEAN COMMISSION. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Public procurement for a better environment,* COM(2008) 400 final, Brussels, 16 July 2008.

Additionally, for many public authorities across the EU the Green Public Procurement initiative is just part of a broader approach to sustainability in their purchasing activities. The latter addresses the economic and social aspects, *vide* EUROPEAN COMMISSION. "Green and sustainable public procurement", in *Environment*, http://ec.europe.eu/environment/gpp/versus_en.htm, September 2015 [last consulted: 07.09.2015].

territorial cohesion –inclusive growth–[29]. In this evolving political, social and economic context, it is vital, then, to generate the strongest competition possible that grants operators access to the market and, all at once, enhances public bodies' search for best possible procurement outcomes, that is, best value for money[30].

Therefore, to ensure optimal procurement outcomes, public markets require a positive regulatory approach in order to enhance, on one side, market access and, on the other, a relentless search for the public interest, by virtue of legislatively prioritizing what particular common public goal will be sought – the existence of diverse (or, in some cases, opposing, common societal goals) may, however, lead to an scenario where those different goals will be translated into policy options that might point in different directions and could even lead to the pre-emption of some other public policies, to the detriment of competition-standards[31]. In any case, as explained, competition comes out

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[29] EUROPEAN COMMISSION. COM(2010) 2020… *cit.*, p. 3; EUROPEAN COMMISSION, COM(2011) 15 final… *cit.*, p. 3.

[30] EUROPEAN COMMISSION, COM(2011) 15 final… *cit.*, p. 4.

[31] While public procurement is intended to achieve the highest degree of competition, which would ultimately enable the contracting authority to source works, goods and services at best value for money, the majoritarian view is in favor of an instrumental use of public procurement to promote certain horizontal policies. *Vide* on the use of public procurement to advance social justice, MCCRUDDEN, C. *Buying social justice… op. cit.*; on the use of public procurement to achieve 'horizontal' procurement policies –also refered to as 'secondary' or 'collateral' policies–, appart from its purely functional objective, ARROWSMITH, S. and KUNZLIK, P. "Public procurement and horizontal policies in EC law: general principles", in ID (Ed.). *Social and environmental policies in EC Procurement Law*. London, Cambridge University Press, 2009, pp. 9-54; ARROWSMITH, S. "Horizontal policies in public procurement: a taxonomy", in *Journal of Public Procurement*, vol. 10, issue 2, 2010, pp. 149-186; KUNZLIK, P. "Green public procurement - European law, environmental standards and 'what to buy' decisions", in *Journal of Environmental Law*, vol. 25, issue 2, 2013, pp. 173-202; and on the use of public procurement to achieve the broader aims of government, SEMPLE, A. *A practical guide to public procurement*. Oxford, Oxford University Press, 2015

Conversely, some authors claim that public procurement must be shackled to protect market dynamics from distortions, leaving the identification and direct enforcement of other policy goals to specific regulatory regimes –labor, environmental, tax legislation–; otherwise, if it is abusively used as a regulatory tool, it may create barriers to the internal market and reduce its effectiveness as a mechanism to grant the proper functioning of the public sector. Insofar as «any form of regulation is aimed at modifying the behavior of those subject to [it] in order to generate the desired outcome», they consider that specific sectorial regulators are best placed to directly influence the behavior of market actors to

to be indispensable to grant economic efficiency in the investment and expense of public funds for the further achievement of the public interest within the single market; thus, if efficient competition is to be enhanced, be it tempered by the attainment of other public policy concerns or not, market access is, ultimately, what must be fostered in the realm of *public competition law*[32].

In this scenario, the Court of Justice of the European Union (hereinafter, CJEU) has allowed for a flexible policy-oriented application of public procurement; consequently, public bodies are prompted to balance an economic exercise –i.e., the provision of goods, works and services– with a policy choice; all in all, no matter how

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efficiently enforce the envisaged policies, *vide* SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules… op. cit.*, pp. 101-104; SCHOONER, S.L. "Commercial purchasing… *op. cit.,* p. 57; YEUNG, K. "The private enforcement of competition law", in MCCRUDDEN, C. (Ed.). *Regulation and Deregulation: policy and practice*. Oxford, Oxford University Press, 1999, pp. 37-67.

In any case, the highest degree of competition cannot be achieved at all costs. It has to be tempered. The public character of contracting authorities implies that they do have limitations when fulfilling their functional objectives. In the attainment of efficient purchases while making both sort of objectives meet –functional ones and horizontal ones– lies the hurdle.

[32] BOVIS, C.H. *EU Public Procurement Law… op. cit.*, p. 490. In line with his train of thought, public procurement regulation requires «a system which primarily safeguards market access», rather than just ensuring price competition.

The French were pioneer in the development, mainly in the mid-90's, of a " *Droit public de la concurrence* ", that is, a legal compendium of rules addressed to guarantee, maintain and preserve a free competition in the market among operators, and applicable to all administrative action or activity that deploys an explicit or implicit effect over competition. It supposed the inclusion of competition law and policy concerns in the block of legality used by French administrative courts in the assessment of public bodies' intervention in the market; it implies that « *des personnes publiques, dans leur activité, [ont] une obligation positive de préserver, d'assurer, voire de mettre en oeuvre une libre concurrence entre opérateurs sur le marché, et une obligation négative de ne pas inciter, autoriser ou favoriser une pratique anticoncurrentielle* »; therefore, emphasis would be placed on the consequences of public bodies' intervention in the market, rather than on the intervention itself since « *[l]a décision publique est simplement hypothéquée d'une obligation générale de préserver la libre concurrence, héritage du constat des insuffisances du marché à se réguler seul* », *vide*, for all, NICINSKI, S. "Les évolutions du droit administratif de la concurrence", in *l'Actualité Juridique, Droit Admnistratif*, 2004, p. 751 *et seq.*

economically efficient we try public procurement to be, it remains one of the most influential instruments of policy choice in the hands of Member States' legislators[33].

2. EU Public Procurement law: towards the achievement of a Single Public Procurement Market

According to the European Commission, and confirmed by the Court of Justice, both the Directives –secondary legislation– and the standards directly derived from the Treaties –primary legislation– apply only to contract awards having a sufficient connection with the functioning of the internal market; that is, the contract award must be of interest to economic operators located in other Member States in order for EU competition standards to be applicable[34]. In theory, this implies, in short, (a) the inclusion –and submission to the Treaties' provisions– of certain public procurement procedures excluded from the scopes of the Directives, and (b) the exclusion –even from the Treaties' provisions– of public procurement procedures that do not have internal market relevance.

As for the first public procurement procedures –with internal market relevance–, in relation to certain contracts, although excluded from the scope of application of the Directives, the contracting entities are bound to comply with the fundamental rules of the Treaties[35].

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[33] Judgment of the Court of 19 May 1993, case C-320/91, *Criminal proceedings against Paul Corbeau* [ECLI:EU:C:1993:198], §§ 16-17; also, BOVIS, C.H. *EU Public Procurement Law... op. cit.*, pp. 490-491.

After having analyzed the case law of the Court of Justice, prof. BAZEX concludes that « *[l]a possibilité est ainsi ouverte à l'autorité publique, dans l'exercice de sa compétence normative, de concilier les préoccupations de concurrence avec les autres exigences d'intérêt général de l'action administrative* », in BAZEX, M. "Le droit public de la concurrence"… *op. cit.,* § II.C.

[34] Commission interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, *Official Journal of the European Union*, C 179/2, 1 August 2006, p. 3.

[35] Judgment of the Court (Sixth Chamber) of 7 December 2000, case C-324/98, *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG, joined party: Herold Business Data AG* [ECLI:EU:C:2000:669], § 60; Order of the Court (Second Chamber) of 3 December 2001, case C-59/00,

On the other side, in relation to public procurement procedures –without internal market relevance–, public procurement processes where the contracting public entity considers that, having evaluated the individual circumstances of the case –subject-matter of the contract, estimated value, specifics of the sector concerned (size and structure of the market, commercial practices) and the geographic location of the place of performance–, the intended contract award is not of interest to economic operators located in other Member States –in other words, that the contract in question is irrelevant to the internal market, since its effects are to be regarded as too uncertain and indirect– there would no need for the contracting public entity to respect the basic standards derived from EU law[36].

However, the absence of internal market relevance must not preclude the observance of the principles that inspire EU public procurement rules[37]. They have been ultimately designed –and it has been made clearer with the approval of the successive generations of secondary legislation– to promote the economic efficiency of public expense in the realm of a level playing field inspired by a competitive social market economy. Thus, in this research, although we will primarily focus on the rules directly applicable to EU-wide tenders –that is, public procurement processes with internal

Bent Mousten Vestergaard v Spøttrup Boligselskab [ECLI:EU:C:2001:654], § 20; Judgment of the Court (Sixth Chamber) of 18 June 2002, case C-92/00, *Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI) v Stadt Wien* [ECLI:EU:C:2002:379], § 47; Judgment of the Court (Third Chamber) of 20 October 2005, case C-264/03, *Commission of the European Communities v French Republic* [ECLI:EU:C:2005:620], §§ 32-33.

[36] Judgment of the Court (Second Chamber) of 7 March 1990, case C-69/88, *H. Krantz GmbH & Co. v Ontvanger der Directe Belastingen and Netherlands State* [ECLI:EU:C:1990:97], § 11; Judgment of the Court of 14 July 1994, case C-379/92, *Criminal proceedings against Matteo Peralta* [ECLI:EU:C:1994:296], § 24; Judgment of the Court (Sixth Chamber) of 5 October 1995, case C-96/94, *Centro Servizi Spediporto Srl v Spedizioni Marittima del Golfo Srl*. [ECLI:EU:C:1995:308], § 41; Judgment of the Court (Fifth Chamber) of 18 June 1998, case C-266/96, *Corsica Ferries France SA v Gruppo Antichi Ormeggiatori del porto di Genova Coop. arl, Gruppo Ormeggiatori del Golfo di La Spezia Coop. arl and Ministero dei Trasporti e della Navigazione* [ECLI:EU:C:1998:306], § 31; Judgment of the Court (Fifth Chamber) of 21 September 1999, case C-44/98, *BASF AG v Präsident des Deutschen Patentamts* [ECLI:EU:C:1999:440], § 31;

[37] EUROPEAN COMMISSION, "Rules and procedures", in *Your Europe*, http://europa.eu/youreurope/business/public-tenders/rules-procedures/index_en.htm (last consulted: 08.06.2015), May 2015.

market relevance–, the conclusions drawn will be also applicable to those public procurement procedures that do not necessarily wield internal market relevance.

In relation to EU public procurement rules, the case law of the CJEU has clearly stated that the public procurement directives are intended, by means of guaranteeing an efficient investment of public funds, to create a common market that ensures free movement of goods, persons, services and capitals; in particular, Directives on public procurement promote the development of effective competition in the fields to which they apply and, also, lay down the criteria to ensure such competition, as well as the attainment of other specific public policies, when awarding contracts[38].

By resorting to public procurement proceedings, public bodies carry out an intervention policy in the economic, social and political life of their country: those firms willing to take part in a public procurement procedure will be forced to comply with the requirements set forth by the contracting public entity[39]. Public procurement has to be viewed, then, as a legal tool in the hands of public bodies for the effective achievement of their goals and other public policies; it is, thus, a technique that, when accomplishing its functional goal, facilitates the accomplishment of social, environmental and research objectives.

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[38] Judgment of the Court of 22 June 1993, case C-243/89, *Commission of the European Communities v Kingdom of Denmark* [ECLI:EU:C:1993:257], § 33; Judgment of the Court of 17 September 2002, case C-513/99, *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne* [ECLI:EU:C:2002:495], § 81; Judgment of the Court (Second Chamber) of 3 March 2005, joined cases C-21/03 and C-34/03, *Fabricom SA v Belgian State* [ECLI:EU:C:2005:127], § 26; Judgment of the Court (Grand Chamber) of 16 December 2008, case C-213/07, *Michaniki AE v Ethniko Symvoulio Radiotileorasis and Ypourgos Epikrateias* [ECLI:EU:C:2008:731], § 45; Judgment of the Court (Tenth Chamber) of 10 October 2013, case C-336/12, *Ministeriet for Forskning, Innovation og Videregaende Uddannelser v Manova A/S* [ECLI:EU:C:2013:647], § 28; Judgement of the Court (Second Chamber) of 10 July 2014, case C-213/13, *Impresa Pizzarotti & C. Spa v Comune di Bari and Others* [ECLI:EU:C:2014:2067], § 63. Also, *vide* GIMENO FELIU, J.M. "Las nuevas Directivas de contratación pública: principales novedades y efectos prácticos", in *El nuevo paquete legislativo comunitario de contratación pública: principales novedades. La orientación estratégica de la contratación pública*, Bilbao, 21-22 May 2015, pp. 2-3.

[39] *Supra*, p. 6.

As for a specific public procurement procedure, efficiency considerations require that the award process itself is conducted in a timely and cost-effective manner; therefore, when designing procurement procedures, financial and other costs must be balanced against the benefits to be obtained in terms of better value for money[40]. In the end, while best value for money is probably the primary goal of most procurement systems, there is always a trade-off between value for money and considerations of efficiency[41].

The system is configured in a way that allows the concerned public body to achieve the best possible value for money; to put it in other words, the public procurement rules, as designed, grant the contracting entity with the possibility to successfully and efficiently acquire the works, goods or services that it needs on the best available terms[42]. Notwithstanding, value for money considerations require that the contractor that has turned out to be the chosen one is able not only to offer, but also to deliver: he has to be able to provide what is required on the terms agreed[43].

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[40] Prof. ARROWSMITH uses valuable examples to illustrate the importance of time and cost-effective evaluations. We will succinctly explain them. First, given the necessity of buying a single computer lase printer, a contracting entity may be able to obtain the best possible price by contacting several hundred suppliers and asking them to submit bids; however, the cost of contacting suppliers and assessing the bids would outweigh any possible savings to be obtained. Second, given the case of a wall unexpectedly collapsing and blocking a rock, a formal tendering procedure might result more effective; however, as inconvenience is being caused to the public, an agreement after a brief and informal negotiations is preferable, since the delay that a regular tendering procedure would cause may outweigh any financial benefit. *Vide* ARROWSMITH, S.; LINARELLI, J. and WALLACE, D. *Regulating Public Procurement: National and International Perspectives*. London, Wolters Kluwer International, 2000, pp. 31-32.

[41] In fact, «considerations of efficiency explain many of the exceptions made to the requirement to use formal tendering procedures in the procurement process», *vide* ARROWSMITH, S.; LINARELLI, J. and WALLACE, D. *Regulating Public Procurement: National and International Perspectives… op. cit.*, pp. 31-32.

[42] ARROWSMITH, S.; LINARELLI, J. and WALLACE, D. *Regulating Public Procurement: National and International Perspectives… op. cit.*, p. 28; MESTRE DELGADO, J.F. "Contratos públicos y políticas de protección social y medioambiental", in *Revista de Estudios de la Administración Local*, Vol. 291, 2003, [pp. 705-730], p. 706

[43] When assessing the option that fits best value for money, the contracting body may take into account the ability for the contractor to do the job on the terms offered. *Vide* ARROWSMITH, S.; LINARELLI, J.

The principles that (must) inspire public procurement rules and by which the referred aims –common market and effective competition– are to be achieved are (1) equal treatment of all economic operators; (2) transparent behavior, and (3) no discrimination whatsoever[44]. By ensuring their observance, a more efficient use of

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and WALLACE, D. *Regulating Public Procurement: National and International Perspectives… op. cit.*, p. 30.

[44] Article 18 of the 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, *Official Journal of the European Union*, L 94/65, 28 March 2014, reads as follows:

«1. 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 is made with the intention of unduly favoring or disadvantaging certain economic operators.

2. Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labor law established by Union law, national law, collective agreements or by the international environmental, social and labor law provisions listed in Annex X» (emphasis added).

In similar terms, article 3 of the Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, *Official Journal of the European Union*, L 94/1, 28 March 2014, and article 36 of the 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, *Official Journal of the European Union,* L 94/243, 28 March 2014.

The previous Directives –namely, article 3 of the 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, *Official Journal of the European Union*, L 134/114, 30 April 2004– made express reference to discrimination based on nationality grounds, while IV generation Directives do not qualify the discrimination and proscribe any kind of non-justified unequal treatment.

From a comparative perspective, the general interest or public interest has been for decades the main element that shaped the principles inspiring the Spanish public procurement regulation. However, following the influence exerted by EU law, nowadays the principles that inspire it are those of free competition, no-discrimination and transparency, *vide* Decision 121/2012 of the Spanish Central Administrative Tribunal, in the case 98/2012, of 23 May, point of law 7.

public funds is guaranteed and, not only competition, but also cross-border trading would be increased; all in all it will lead to a better value for money for public bodies, while increasing the productivity in the supply industries and the participation in and access to such markets to a wider range of competitors, above all, to SMEs[45].

The CJEU has had the chance, which it had not missed at all, to make known its view on the principles that inspire the public procurement rules.

The equal treatment principle –together with the transparency principle– constitutes the base of the public procurement proceedings, as well as of the directives for the award of public contracts[46]. Being a specific variant of the equal treatment principle, the principle of equal treatment among tenderers implies that tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the contracting entity[47]. Therefore, an with the ultimate

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[45] EUROPEAN COMMISSION. *Economic efficiency and legal effectiveness of review and remedies procedures for public contracts*, Draft Final Report (revised), MARKT/2013/072/C, April 2015, p. 14.

[46] *Vide* Judgment of the Court (Sixth Chamber) of 12 December 2002, case C-470/99, *Universale-Bau AG, Bietergemeinschaft: 1) Hinteregger & Söhne Bauges.m.b.H. Salzburg, 2) ÖSTÜ-STETTIN Hoch- und Tiefbau GmbH v Entsorgungsbetriebe Simmering GmbH* [ECLI:EU:C:2002:746], § 73; Judgment of the Court of 18 June 2002, case C-92/00, *HI… cit.*, § 45; Judgment of the Court (Sixth Chamber) of 19 June 2003, case C-315/01, *Gesellschaft für Abfallentsorgungs-Technik GmbH (GAT) v Österreichische Autobahnen und Schnellstraßen AG (ÖSAG)* [ECLI:EU:C:2003:360], § 73.

[47] On the characterization of the principle of equal treatment among tenderers as an specific variant of the equal treatment principle, *vide* Judgment of the Court of 5 December 1989, case C-3/88, *Commission of the European Communities v Italian Republic* [ECLI:EU:C:1989:606], § 8; Judgment of the Court (First Chamber) of 13 October 2005, case C-458/03, *Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG* [ECLI:EU:C:2005:605], §§ 46 and 48; Judgment of the Court of First Instance (Third Chamber) of 12 March 2008, case T-332/03, *European Service Network (ESN) SA v Commission of the European Communities* [ECLI:EU:T:2008:66], § 72; Judgment of the General Court (First Chamber) of 16 September 2013, case T-402/06, *Kingdom of Spain v European Commission* [ECLI:EU:T:2013:445], § 66.

On the implications of the principle of equal treatment among tenderers, *vide* Judgment of the Court (Fifth Chamber) of 25 April 1996, case C-87/94, *Commission of the European Communities v Kingdom of Belgium* [ECLI:EU:C:1996:161], § 54; Judgment of the Court (Fifth Chamber) of 18 October 2001, case C-19/00, *SIAC Construction Ltd v County Council of the County of Mayo* [ECLI:EU:C:2001:553], § 34; Judgment of the Court (Sixth Chamber) of 4 December 2003, case C-448/01, *EVN AG and Wienstrom GmbH v Republik Österreich* [ECLI:EU:C:2003:651], § 47; Judgment of the Court of 16 December 2008,

aim of promoting the development of healthy and effective competition between firms taking part in a public procurement:

> [A]ll 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[48].

It is, then, a duty of the contracting entities to guarantee that those principles are respected at each stage of the public procurement procedure[49].

The CJEU has also held that the principle of equal treatment implies, in particular, an obligation of transparency in order to enable contracting entities to verify whether the mandatory equal treatment principle has been complied with[50]. Transparency is, thus, the corollary of the principle of equal treatment, essentially intended to preclude any risk of favoritism or arbitrariness on the part of the contracting authority, who may face the risk of giving unjustified (and unjustifiable) preference to

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case C-213/07, *Michaniki... cit.*, § 45; Judgment of the Court (Fourth Chamber) of 12 November 2009, case C-199/07, *Commission of the European Communities v Hellenic Republic* [ECLI:EU:C:2009:693], § 37; Judgment of the Court (Second Chamber) of 17 February 2011, case C-251/09, *European Commission v Republic of Cyprus* [ECLI:EU:C:2011:84], § 39.

[48] Judgment of the Court (Sixth Chamber) of 29 April 2004, case C-496/99 P, *Commission of the European Communities v CAS Succhi di Frutta SpA* [ECLI:EU:C:2004:236], § 110; Judgment of the General Court of 16 September 2013, case T-402/06, *Kingdom of Spain v European Commission… cit.*, § 66.

[49] Judgment of the Court of 22 June 1993, case C-243/89, *Commission of the European Communities v Kingdom of Denmark… cit.*, § 33; Judgment of the Court of 17 September 2002, case C-513/99, *Concordia Bus Finland... cit.*, § 81; Judgment of the Court of 3 March 2005, joined cases C-21/03 and C-34/03, *Fabricom SA v Belgian State... cit.*, § 26; and Judgment of the Court of First Instance (Fourth Chamber) of 17 December 1998, case T-203/96, *Embassy Limousines & Services v European Parliament* [ECLI:EU:T:1998:302], § 85.

[50] Judgment of the Court (First Chamber) of 18 November 1999, case C-275/98, *Unitron Scandinavia A/S and 3-S A/S, Danske Svineproducenters Serviceselskab v Ministeriet for Fødevarer, Landbrug og Fiskeri* [ECLI:EU:C:1999:567], § 31; Judgment of the Court of 7 December 2000, case C-324/98, *Telaustria and Telefonadress... cit.*, § 61; Judgment of the Court of 18 June 2002, case C-92/00, *HI… cit.,* § 45; Judgment of the Court of 12 December 2002, case C-470/99, *Universale-Bau... cit.*, § 91; Judgment of the Court of 17 February 2011, case C-251/09, *European Commission v Republic of Cyprus… cit.*, § 38.

national tenderers or of choosing to be guided by considerations other than economic ones[51].

Furthermore, transparency is, from a practical perspective, the main instrument to guarantee, for the benefit of all potential tenderers; an adequate publicity that opens the market to competition and that allows tenderers to monitor whether the contracting entity has thoroughly respected impartiality throughout the awarding process[52]. The CJEU has set forth the practical implications of the principle of transparency in the following terms:

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[51] On the prohibition of preference of national tenders, *vide* Judgment of the Court of 10 November 1998, case C-360/96, *Gemeente Arnhem and Gemeente Rheden v BFI Holding BV* [ECLI:EU:C:1998:525], §§ 41-43; Judgment of the Court of 15 January 1998, case C-44/96, *Mannesmann Anlagenbau Austria AG and Others v Strohal Rotationsdruck GesmbH* [ECLI:EU:C:1998:4], § 33; Judgment of the Court (Fifth Chamber) of 3 October 2000, case C-380/98, *The Queen v H.M. Treasury, ex parte The University of Cambridge* [ECLI:EU:C:2000:529], §§ 16-17; Judgment of the Court (Fifth Chamber) of 1 February 2001, case C-237/99, *Commission of the European Communities v French Republic* [ECLI:EU:C:2001:70], §§ 41-42; Judgment of the Court (Sixth Chamber) of 27 November 2001, joined cases C-285/99 and C-286/99, *Impresa Lombardini SpA - Impresa Generale di Costruzioni v ANAS - Ente nazionale per le strade and Società Italiana per Condotte d'Acqua SpA (C-285/99) and Impresa Ing. Mantovani SpA v ANAS - Ente nazionale per le strade and Ditta Paolo Bregoli (C-286/99)* [ECLI:EU:C:2001:640], § 36; Judgment of the Court of 29 April 2004, case C-496/99 P, *Commission of the European Communities v CAS Succhi di Frutta SpA… cit.*, § 111; Judgment of the General Court of 16 September 2013, case T-402/06, *Kingdom of Spain v European Commission… cit.*, § 67.

[52] GIMENO FELIU, J.M. "Las nuevas Directivas de contratación pública: principales novedades y efectos prácticos"… *op. cit.*, p. 4. Also *vide* Judgment of the Court of 18 November 1999, case C-275/98, *Unitron Scandinavia... cit.*, § 31; Judgment of the Court of 7 December 2000, case C-324/98, *Telaustria and Telefonadress... cit.*, §§ 61-62; Judgment of the Court of 27 November 2001, joined cases C-285/99 and C-286/99, *ANAS... cit*., § 38; Judgment of the Court of 18 June 2002, case C-92/00, *HI… cit.,* § 45; Judgment of the Court of 12 December 2002, case C-470/99, *Universale-Bau... cit.*, § 91; Judgment of the Court of 13 October 2005, case C-458/03, *Parking Brixen cit.*, § 49; Judgment of the Court (First Chamber) of 6 April 2006, case C-410/04, *Associazione Nazionale Autotrasporto Viaggiatori (ANAV) v Comune di Bari and AMTAB Servizio SpA* [ECLI:EU:C:2006:237], § 21; Judgment of the Court (Third Chamber) of 15 October 2009, case C-196/08, *Acoset SpA v Conferenza Sindaci e Presidenza Prov. Reg. ATO Idrico Ragusa and Others* [ECLI:EU:C:2009:628], § 49; Judgment of the Court (Second Chamber) of 17 February 2011, case C-251/09, *European Commission v Republic of Cyprus* [ECLI:EU:C:2011:84], § 38; Judgment of the Court of First Instance (Third Chamber) of 12 March 2008, case T-345/03, *Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v Commission of the European Communities* [ECLI:EU:T:2008:67], § 142.

> [The principle of transparency] implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract[53].

Consequently, the correct observance of the principle of transparency brings about several practical obligations on the side of the contracting entity, who is obliged to draw up the notice and contract document in a clear, precise and unequivocal manner. The parameters to measure the compliance with such obligation will be, on the one hand, the ability of a reasonably informed tenderer exercising ordinary care to, first, understand exact significance of the rules of the award procedure, and, second, interpret them in the same way; and, on the other hand, the capacity of the contracting entity to, in the course of the award process, assess whether the criteria set for that specific procurement procedure had been satisfied by the tenders submitted[54].

The principle of non-discrimination, on its side, aims at preventing equal treatment rules from being obviated, no matter what the grounds for such differential treatment are – it does not matter whether the unequal treatment is based on nationality grounds or otherwise[55]. In this line, it has been long time since the CJEU clear and undoubtedly stated the following:

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[53] Judgment of the Court of 29 April 2004, case C-496/99 P, *Commission of the European Communities v CAS Succhi di Frutta SpA… cit.*, § 111.

[54] On the actually timited effects of lack of compliance with transparency when it comes to disappointed bidders claiming loss of profit compensation, *vide* Judgment of the General Court (Fifth Chamber) of 6 June 2013, case T-668/11, *VIP Car Solutions SARL v European Parliament* [ECLI:EU:T:2013:302], § 38; and its comments in SÁNCHEZ GRAELLS, A. "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", in *University of Leicester School of Law*, Research Paper No. 13-11, 2013, pp. 21-24.

[55] MESTRE DELGADO, J.F. "Contratos públicos y políticas de protección social y medioambiental"… *op. cit.*, p. 706.

> [The Treaty] forbids not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result[56].

Notwithstanding, in *Überschär*, the Court envisaged the possibility of treating comparable situations in a different way or different situations in a similar way, as long as such differentiation can be objectively justified.

> *Ce principe veut que les situations comparables ne soient pas traitées de manière différente, à moins qu'une différenciation ne soit objectivement justifiée*[57].

In conclusion, the acceptance of an exception to the principle of non-discrimination requires the objective justification of such a differential treatment, and, as for the burden of proving such justifications, it will be on the side who alleges that, being the circumstances of the cases comparable, it is objectively justified to deploy a different treatment to bear the referred burden of proof.

All the inspiring principles are so intrinsically linked that it is possible to close the circle that pictures the existing nexuses between the principles that must be observed both in the design of public procurement rules and in the development of the awarding processes themselves (see *Figure 2*). Henceforth, the prohibition on discrimination is, on one side, a specific expression of the general principle of equal treatment, and, on the other side, it implies an obligation of transparency in order to, as well as it happened with the principle of equal treatment, allow, this time to the contracting authority, to ensure that the principle of non-discrimination has been complied with[58].

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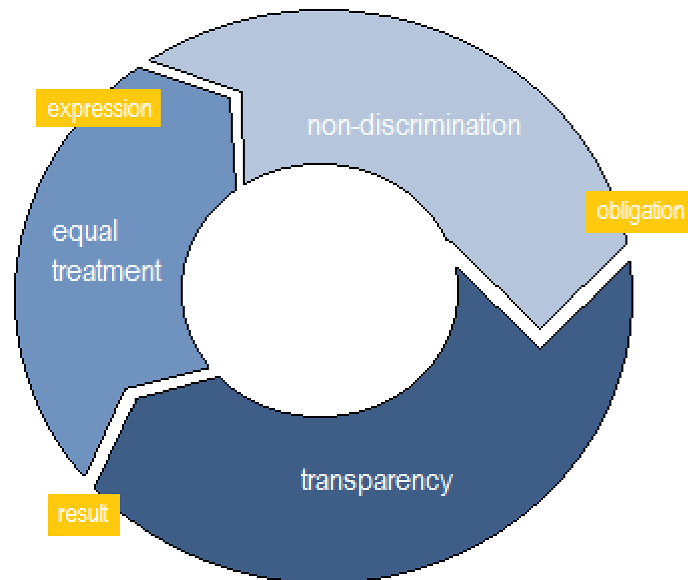
[56] Judgment of the Court of 29 October 1980, case 22/80, *Boussac Saint-Frères SA v Brigitte Gerstenmeier* [ECLI:EU:C:1980:251], § 9.

[57] Judgment of the Court of 8 October 1980, case 810/79, *Peter Überschär v Bundesversicherungsanstalt für Angestellte* [ECLI:EU:C:1980:228], § 16.

[58] Judgment of the Court of 18 November 1999, case C-275/98, *Unitron Scandinavia... cit.*, § 31; Judgment of the Court of 27 November 2001, joined cases C-285/99 and C-286/99, *ANAS... cit.*, § 38; Judgment of the Court (Grand Chamber) of 21 July 2005, case C-231/03, *Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti* [ECLI:EU:C:2005:487], § 17.

Figure 2. Linkage between the principles inspiring public procurement rules



SOURCE: Elaborated by the author on the basis of the ECJ case law

In conclusion, and resuming the ideas previously stated, such a configuration is not fortuitous: it aims at ensuring a more efficient use of public funds by fostering a healthy and effective competition among the firms that may take part in the tendering, in order for the contracting entity to get the best value for money, while increasing their productivity and their achievement of common societal goals[59]. In doing so, the careful respect to all the inspiring principles comes as an essential undertaking since, otherwise, the so-ambitioned achievement of an efficient use of public funds would be hampered.

A. Primary legislation: the basis for EU public procurement rules

European public procurement rules find their basis in the provisions contained in the Treaties of the European Union (both TEU and TFEU), which prohibit barriers to

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[59] On the setting of the principle of competition as the baseblock of a regulatory framework that succeeds at getting the best value for money in public procurement, *vide* UNCTAD. "Competition policy and public procurement", in *Trade and Development Board,* Interngovernmental Group of Experts on Competition Law and Policy, TD/B/C.I/CLP/14, Geneva, 24 April 2012. It also stresses the adherence to competitive procurement methods.

intra-Union trade and, relying on a competitively functioning single market, aim at the completion of the four freedoms[60].

However, those provisions come as insufficient to grant undistorted competition in the field of public procurement and, thus, Member States kept on with their tendency towards holding a preferential treatment to domestic firms. As a consequence, it emerged the unfailing need to resort to positive regulation –through secondary legislation– as a means to harmonize, once and for all, the procurement laws of Member States[61].

B. Secondary legislation: the EU public procurement rules

The current Directives on public procurement –V Generation– belong to an ambitious program of the European Commission, initiated by the Green Paper on the modernization of EU public procurement, above mentioned. The program, welcomed by the European Parliament, entitles the in-depth re-examination of the public procurement system in the EU, in order to convert it into more effective and to design public policies that allow for a higher growth in the context of economic globalization[62]. Only by a

[60] It is imperative to make brief comment about the lifetime of the Constitutional Treaty before focusing on the circumstances that led to the adoption of the Treaty of Lisbon, which brought about the approval of a reformed TEU and of the TFEU. The entry into force of the Treaty establishing a Constitution for Europe had to be ratified by all the Member States in accordance with the constitutional rules of each Member State, namely either parliamentary ratification or referendum (article IV – 447 of the Constitutional Treaty); however, the ratification problems encountered in certain Member States made the European Council launch a period of reflection (meeting of 16 and 17 June 2005), which culminated with the compromise to convene an Inter-Governmental Conference to adopt, not a Constitution, but a reform treaty for the EU – this final treaty (the Treaty of Lisbon) was approved at the informal European Council in Lisbon on 18 and 19 October, and it was signed by the Member States on 13 December 2007, *vide* EUROPEAN COMMISSION. "A Constitution for Europe", in *Europa: uniting Europe step by step - the Treaties*, available at http://europa.eu/scadplus/constitution/introduction_en.htm (last consulted: 21.05.2015).

[61] ARROWSMITH, S. "The past and future evolution of EC Procurement Law: from framework to common code?", in *Public Contract Law Journal*, Vol. 35, no. 3, Spring 2006, [pp. 337-384] p. 340.

[62] «If the Commission intends, by means of this revision, to make European public procurement law simpler and more flexible, that is to be welcomed», *vide* EUROPEAN PARLIAMENT. *Draft Report on*

properly functioning procurement market will the single market fostered, competition and innovation stimulated, high level of environmental and climate protection and social inclusion promoted, and optimal value for citizens, businesses and taxpayers achieved[63].

However, an all-encompassing analysis of the main aspects of the current Directives requires, first, to draw our attention to the previous generations of Directives. We will perceive a trend towards the harmonization of all aspects relating to public procurement procedures, even in relation to below-threshold contracts –that is, contracts in principle excluded from the scope of application of the directives due to the fact that their amount is below the thresholds set forth in the directives–, moving away, thanks to the interpretative role of the Court of Justice, from their initial commitment to merely set the framework while leaving a wide margin of discretion on the hands of Member States to adopt further detailed rules to implement their own national procurement policies[64].

Nonetheless, before immersing ourselves into the analysis, it has to be stated that this stage of the research aims at identifying the main fundamental drivers of the actual EU public procurement legal framework. Therefore, whilst attention might momentarily be paid to the scopes of application of the Directives, it would be as a means to better ascertain the foundations of the EU public procurement rules.

In conclusion, as it will entail no change in our search for the identification of the competition standards that, in order for the contracting public body to optimize the expense of public funds, are indispensable at the different stages of a public procurement process in the realm of the EU procurement legal framework, we will not

modernisation of public procurement, 2011/2048(INI), 29 June 2011, p. 8; GIMENO FELIU, J.M. "Las nuevas Directivas de contratación pública: principales novedades y efectos prácticos"… *op. cit.*, p. 4.

[63] EUROPEAN PARLIAMENT. 2011/2048(INI)… *cit.*, p. 4.

[64] ARROWSMITH, S. "The past and future evolution of EC Procurement Law… *op. cit.,* pp. 370-384. On the obligation of below-threshold contracts and, in general, public procurement contracts outside the scope of application of the Directives to respect principles of EU law, *vide* Commission interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives.

embark, unless strictly necessary for the reasons mentioned, upon the description of the set of contracts that fall into the scope of application of the Directives.

The communitarian regulation of public procurement was based on Directives 66/683/EEC (public procurement) and 70/32/EEC (public supply contracts) –First Generation–[65]. They were adopted within the framework of the General Program, of 18 December 1961, for the suppression of restrictions to freedom of establishment, although they actually had an impact on all the basic freedoms – henceforth, they disallowed rules giving preferential treatment to national products or supplies, or prohibiting the procurement of foreign products or supplies[66].

They were followed by Directives 77/62/EEC (public supply contracts), 80/767/EEC (amendment of the previous one) and 71/305/EEC (public works contracts), which aimed at coordinating procedures for supply, utilities and works contracts, respectively[67]. They supposed the introduction of three fundamental

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[65] Both Directives, bearing in mind the Member States that, at the time, were part of the European Communities (Belgium, France, (West) Germany, Italy, Luxembourg, Netherlands), were just officially published in French, Dutch, German and Italian – Directive 66/683/CEE de la Commission, du 7 novembre 1966, portant élimination de toute différence de traitement entre les produits nationaux et les produits qui, en vertu des articles 9 et 10 du traité, doivent être admis à la libre circulation, en ce qui concerne les dispositions législatives, réglementaires et administratives qui interdisent l'utilisation desdits produits importés et qui imposent l'utilisation de produits nationaux ou qui subordonnent un bénéfice à cette utilisation, *Journal Officiel des Communautés Européennes*, no. 220, 30 November 1966 and Directive 70/32/CEE de la Commission, du 17 décembre 1969, concernant les fournitures de produits à l'État, à ses collectivités territoriales et aux autres personnes morales et droit public, *Journal Officiel des Communautés Européennes*, L 13/1, 19 January 1970.

[66] *Vide* Programme général pour la suppression des restrictions à la liberté d'établissement, du Conseil de la Communauté Économique Européenne, *Journal Officiel des Communautés Européennes,* no. 2, 15 January 1962; EUROPEAN COMMISSION. MARKT/2013/072/C… *cit.* p. 15; MESTRE DELGADO, J.F. "Contratos públicos y políticas de protección social y medioambiental"… *op. cit.*, p. 705.

[67] Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts, *Official Journal of the European Communities*, L 13/1, 15 January 1977; Council Directive 80/767/EEC of 22 July 1980 adapting and supplementing in respect of certain contracting authorities Directive 77/62/EEC coordinating procedures for the award of public supply contracts, *Official Journal of the European Communities*, L 215/1, 18 August 1980; and Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts, *Official Journal of the European Communities,* L 185/5, 25 August 1971.

principles: the obligation of community-wide publicity of contracts; the prohibition of discriminatory technical specifications; the obligation to base tendering and award procedures on objective criteria[68].

The amendment by the Directive 80/767/EEC of the Directive 77/62/EEC supposed the enlargement of the scope of application of the Directive to products originated outside the European Communities, as consequence of the approval in 1979, under the auspices of the General Agreement of Tariffs and Trade (hereinafter, GATT), of the Agreement on Government Procurement (hereinafter, GPA)[69]. The aim of the

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[68] All those principles, mentioned in the statement of reasons of the Directive 77/62/EEC, are expressly contained in its text in the following provisions: obligation of advertising the procurement procedure community-wide, article 9(2); prohibition of discriminatory technical specifications, article 2(3) with reference to article 7(2); obligation to base tendering and award procedures on objective criteria, article 25.

[69] In relation to utilities, *vide* the statement of reasons of the Directive 77/62/EEC: «whereas it is necessary to avoid subjecting the production, distribution and transmission or transport services for water and energy and telecommunications services to different supply contract systems, depending on whether they come under the state, regional or local authorities or other legal persons governed by public law or whether they have separate legal personality; whereas it is therefore necessary to exclude from the scope of the Directive those services referred to above which by reason of their legal status would fall within its scope until such time as a final solution can be adopted in the light of experience».

In relation to products originated outside the EC, *vide* the statement of reasons of the Directive 77/62/EEC: «whereas access to public supply contracts for products originating in countries other than the member states is the subject of the Council Resolution of 21 December 1976 and of the Commission statement of 21 December 1976», with reference to Council Resolution of 21 December 1976 concerning access to Community public supply contracts for products originating in non-member countries, *Official Journal of the European Communities*, C 11/1, 15 January 1977 and Commission Statement concerning Article 115 of the Treaty, *Official Journal of the European Communities*, C 11/2, 15 January 1977, which, in accordance with the provisions of Article 115 of the Treaty [of Rome, ex article 134 TEC, but repealed by the Treaty of Lisbon], opened the possibility for Member States to seek for an authorization of the Commission over their measures that, shielding themselves behind national commercial policy concerns, account for the exclusion from their public contracts of certain goods or categories of goods originating in third countries, until the conclusion of the international negotiations with regard to the negotiations that were taking place within the OECD and, later, within the GATT.

The GATT, a multilateral agreement regulating international trade, was signed in Geneva on 30 October 1947 (GATT 1994, https://www.wto.org/english/docs_e/legal_e/06-gatt_e.htm, last consulted: 03.06.2015, which must be read together with GATT 1947,

GPA was to establish a multilateral framework of balanced rights and obligations relating to public contracts with a view of achieving the liberalization and expansion of world trade[70].

The arrival of the mid-80's entitled a strong commitment towards the promotion of the single market: on one side, the European Commission adopted a White Paper on the completion of the Internal Market and, on the other, the Single European Act was approved[71].

The White Paper highlighted that, whilst the Directives that were, at the time, in force intended to open the awarding procedures to Community-wide competition, statistics indicated a minimal application of the Directives and a tendency to favor national providers, thereby sheltering national markets from competition and distorting trade patterns[72]. Consequently, it committed itself to stimulate a wider opening up of

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https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm, last consulted: 03.06.2015), and it lasted until the signature of the Uruguay Round Agreements, in Marrakesh on 14 April 1994 (available at https://www.wto.org/english/docs_e/legal_e/marrakesh_decl_e.pdf, last consulted: 03.06.2015), which established the World Trade Organization on 1 January 1995 (available at https://www.wto.org/english/docs_e/legal_e/04-wto.pdf, last consulted: 03.06.2015). The GPA was approved by the Council Decision 94/800/EC of 22 December 1994 oncerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994), *Official Journal of the European Communities*, L 336/1, 23 December 1994. In 2012, the GPA parties reached an agreement and adopted a Protocol amending the 1994 GPA, *vide* Council Decision of 2 December 2013 on the conclusion of the Protocol Amending the Agreement on Government Procurement, *Official Journal of the European Union*, L 68/1, 7 March 2014.

[70] Directive 2014/25/EU, recital 27.

[71] COMMISSION OF THE EUROPEAN COMMUNITIES. COM (1985) 310 final… *cit.*; Single European Act, *Official Journal of the European Communities*, L 169/1, 29 June 1987. The real aim of the Member States that, at the time, constituted the European Communities, was to give some steps further in order to achieve what today is a reality: the European *Union*. Consequently, article 1 of the Single European Act reads as follows: «The European Communities and European Political Co-operation shall have as their objective to contribute together to making concrete progress towards European unity».

[72] COMMISSION OF THE EUROPEAN COMMUNITIES. COM (1985) 310 final… *cit.*, §§ 82-83. This line of action had already been marked by the Commission in its communication of December 1984, which was followed by the issuing of the Programme of the Commission for 1985 – Statement by Jacques

tendering for public contracts and to actively work for the erase of any quantitative restriction between Member States, or any measure having equivalent effect, that may hamper the free movement of goods in the common market[73].

The Single European Act, on its side, embodied in its text what the European Council, in line with the appreciations of the Commission gathered in its "Programme of the Commission for 1985", had already announced: the importance of achieving a single market by creating a more favorable environment for stimulating enterprise, competition and trade[74].

Consequently, a new generation of Directives –the Second Generation– was introduced for setting the rules for award procedures, requiring prior publication of notices and details of awards, making national technical standards mutually recognizable, clarifying exempted sectors and removing international barriers in the utilities sector while harmonizing the rules relating to services[75].

In relation to public supply contracts, Directive 88/295/EEC was adopted[76]. It set that open tendering procedures were the norm, while restricted or negotiated procedures were allowed in exceptional circumstances and subject to prior justification[77].

Delors, President of the Commission, to the European Parliament and his reply to the ensuing debate, Strasbourg, 12 March 1985, *Bulletin of the European Communities*, Supplement 4/85, pp. 20-21.

[73] COMMISSION OF THE EUROPEAN COMMUNITIES. COM (1985) 310 final… *cit.*, § 82 and 85; Programme of the Commission for 1985… *cit.,* p. 20.

[74] COMMISSION OF THE EUROPEAN COMMUNITIES. COM (1985) 310 final… *cit.*, § 2, with reference to the opinion expressed by the European Council, who broadly endorsed the view of the Commission, defined in the "Programme of the Commission for 1985".

[75] EUROPEAN COMMISSION. MARKT/2013/072/C… *cit.* p. 15.

[76] Council Directive 88/295/EEC of 22 March 1988 amending Directive 77/62/EEC relating to the coordination of procedures on the award of public supply contracts and repealing certain provisions of Directive 80/767/EEC, *Official Journal of the European Communities*, L 127/1, 20 May 1988**.**

[77] Article 6 of the Directive 88/295/EEC amended article 5 of the Directive 77/62/EEC and left it as follows: «[…] 5. In all other cases, the contracting authorities shall award their supply contracts by the open procedure. 6. In the case of restricted or negotiated procedures, the contracting authorities shall draw up a written report which shall contain the justification for the use of that procedure […]».

As for public works contracts, Directive 89/440/EEC was passed[78]. It broaden the scope of application of the Directive 71/305/EEC to cover concession contracts, due to their increasing importance in the public works area, and some works subsidized by the Member States[79].

In the realm of public utilities –energy, telecommunication, transport and water sectors– the most important milestone was the adoption of the Directive 90/351/EEC[80]. Until the Directive 90/351/EEC, utilities were deliberately excluded from the scope of application of the directives, mainly because of the strongly divergent domestic legal regimes governing them –sometimes, they were governed by public law; others, by private law–, but, also, because of the various ways in which national authorities could influence the behavior of those entities and the closed nature of the markets in which they operate, due to the existence of special or exclusive rights granted by the national authorities, concerning the supply to, provision or operation of, networks for providing the service concerned[81]. It was perceived that utilities were not subject to the kind of commercial pressures that would enable them to resist the governmental influence, and, thus, more flexible award procedures were established, in comparison to those applicable to the awarding procedures falling under the other directives[82].

Finally, the communitarian legislator adopted the first Remedies Directives, so that the Member States were compel to ensure rapid and effective judicial review of the decisions adopted by contracting entities in relation to their public procurement processes – hence, Directive 89/665/EEC (public works and supply contracts) and

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[78] Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts, *Official Journal of the European Communities*, L 210/1, 27 July 1989 (repealed).

[79] Statement of reasons of the Directive 89/440/EEC.

[80] Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, *Official Journal of the European Communities*, L 297/1, 29 October 1990

[81] Statement of reasons of the Directive 90/351/EEC.

[82] ARROWSMITH, S. "The past and future evolution of EC Procurement Law… *op. cit.*, p. 341.

Directive 92/13/EEC (public utilities)[83]. In doing so, both Directives coordinated national review systems by imposing common standards intended to guarantee that redress is available in all Member States, that is, to ensure access to justice for aggrieved contractors and interested parties in cases where they consider that the contracting entities have unfairly or illegally awarded contracts[84]. Moreover, they contain an attestation system that allow for a declaration on the correct application of the procurement rules, since contracting entities that comply with the procurement rules may make it known[85].

In 1992, the single market project was officially accomplished: the Treaty on the European Union –for the first time it was possible, and appropriate, to refer to the result of the European integration process as "European Union"[86].

Whereas, until that day, the achievement of the single market required symmetrically focusing on the protection of the free movement of goods, persons, services and capital, one of them had been largely set aside in the realm of public procurement rules – i.e., the service sector. However, the action program contained in

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[83] Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, *Official Journal of the European Communities*, L 395, 30 December 1989 and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, *Official Journal of the European Communities,* L 76, 23 March 1992. Two directives have been adopted because some of the rules governing the utilities sector are more flexible; in fact, to date, both directives are, albeit amended, in force, *vide* EUROPEAN COMMISSION. "Remedies", in *Growth: Internal market, industry, entrepreneurship and SMEs*, available at http://ec.europa.eu/growth/single-market/public-procurement/infringements/remedies/index_en.htm (last consulted: 03.06.2015).

[84] EUROPEAN COMMISSION. "Remedies"… *op. cit.*; BOVIS, C.H. *EU Public Procurement Law… op. cit.*, p. 61.

[85] The referred system is articulated through the inclusion of notices in the *Official Journal of the European [Union]*, after an examination, by independent persons, of procurement procedures and practices applied by those entities, as explained in the statement of reasons and in the Chapter 2 of the Directive 92/13/EEC.

[86] Article A of the Treaty on European Union, together with the complete text of the Treaty establishing the European Community, *Official Journal of the European Communities*, C 224/1, 31 August 1992.

the White Paper on the completion of the Internal Market did include a timetable for the opening up of public procurement in the field of services; therefore, it was just a matter of time to follow the path set by the Commission[87]. It was this the scenario when the Directive 92/50/EEC was adopted[88]. Still, despite the novelty that supposed the adoption of a Directive on the field of public service contracts, the legislator intently included that the rules for the award of public service contract should resemble those concerning public supply contracts and public works contracts[89].

One year later, in 1993, seeking for making the legal framework of public procurement secondary rules more homogeneous, three new Directives were adopted: Directive 93/36/EEC (public supply contracts), Directive 93/37/EEC (public works contracts) and Directive 93/38/EEC (utilities contracts)[90]. In relation to the envisaged alignment to be achieved through a attentive drafting of the Directives, the legislator stated the following:

> [T]he alignments to be introduced relate, in particular, to the introduction of the functional definition of contracting authorities, the option of recourse to the open or restricted procedure, the requirement to justify the refusal of candidates or tenderers, the rules for drawing up reports on the execution of the different award procedures, the conditions for referring to the common rules in the technical field, publication and participation, clarifications concerning award criteria and the introduction of the Advisory Committee procedure[91].

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[87] COMMISSION OF THE EUROPEAN COMMUNITIES. COM (1985) 310 final… *cit.,* §§ 95-123.

[88] Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, *Official Journal of the European Communities*, L 209/1, 24 July 1992.

[89] Statement of reasons of the Directive 92/50/EEC.

[90] Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, *Official Journal of the European Communities*, L 199/1, 9 August 1993; Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, *Official Journal of the European Communities*, L 199/54, 9 August 1993; Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, *Official Journal of the European Communities*, L 199/84, 9 August 1993.

[91] Directive 93/36/EEC, recital 4.

In fact, the forthright acknowledgment of the need to homogenize all the Directives set the foundations for the next generation of Directives: being the problem already identified –over complicated and non-unified procurement procedures–, it was just a matter of sorting it out – a simplification and modernization was imperative.

It was as late as in 2004 when the calls for simplification and modernization were answered. The Directive 2004/17/EC (utilities contracts) was adopted to govern utilities procurement, while the Directive 2004/18/EC (public work, supply and service contracts) was adopted to govern all the other sectors procurement – i.e., works, supplies and services[92].

The Directives, apart from simplifying the existing law, introduce a new procurement procedure: the competitive dialogue. Its use allows contracting entities to seek or accept advice –which may be used in the preparation of the specifications– by means of a technical dialogue; in any case, contracting entities are prevented from resorting to advice that has, or may have, the effect of precluding competition[93].

Additionally, a process to revise the Remedies Directives ended up in the enactment of Directive 2007/66/EC, which amended both previous Remedies Directives in order to adapt and improve certain provisions contained therein, with the view of clarifying the legislative framework by establishing greater precision[94]. The reform also envisaged guaranteeing that sanctions do actually have a deterrent effect on infringements of EU public procurement law[95].

The review of the Remedies Directives was due to consultations carried out by the Commission, which brought to light the existing weaknesses in the review

[92] For an indepth analysis of the Fourth Generation of public procurement directives and the clear-cut dichotomy between the public sector and the utilities that their enactment brought about, *vide* BOVIS, C.H. *EU Public Procurement Law… op. cit.*, pp. 49-62.

[93] Sector Directive, recital 15; Directive 2004/18/EC, recital 8.

[94] 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, *Official Journal of the European Union*, L 335/31, 20 December 2007; ARROWSMITH, S. "The past and future evolution of EC Procurement Law… *op. cit.*, pp. 342-344.

[95] BOVIS, C.H. *EU Public Procurement Law… op. cit.*, pp. 61-61.

mechanisms in the Member States[96]. Among those weaknesses that hardened the compliance with EU public procurement law, one was claimed to be particularly pernicious:

> The weaknesses which were noted include in particular the absence of a period allowing an effective review between the decision to award a contract and the conclusion of the contract in question[97].

Consequently, a standstill period was set. It obliges contracting entities to wait for at least 10 days after deciding who has won the public contract before the contract can actually be signed. During this 10-day period, tenderers may examine the awarding decision and decide whether to initiate a review procedure. Be it the case that they decide to initiate it, this leads to the automatic suspension of the procurement process until the review body takes its decision, otherwise, national review bodies may render the signed contract ineffective[98].

Furthermore, embedding the view of the Court of Justice, more stringent rules against illegal direct awards were introduced by the Directive 2007/66/EC[99]. While the unlawful direct award of contracts is the most serious breach of EU law in the field of public procurement, the declaration of the ineffectiveness of a contract may danger the

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[96] The results of the consultations where compiled in the following Commission Staff Working Document: COMMISSION OF THE EUROPEAN COMMUNITIES. *Impact assessment report - remedies in the field of public procurement - annex to the Proposal for a Directive of the European Parliament and of the Council amending Council Directives 89/665/EEC and 92/13/EEC CEE with regard to improving the effectiveness of review procedures concerning the award of public contracts (presented by the Commission) {COM(2006) 195}*, SEC(2006) 557, Brussels, 4 May 2006.

[97] Directive 2007/66/EC, recital 3; in any case, a mandatory standstill period was set by the Court of Justice after its Judgment of the Court (Sixth Chamber) of 28 October 1999, case C-81/98, *Alcatel Austria AG and Others, Siemens AG Österreich and Sag-Schrack Anlagentechnik AG v Bundesministerium für Wissenschaft und Verkehr* [ECLI:EU:C:1999:534], §§ 33 and 43.

[98] Article 2(2) of the Directive 2007/66/EC, inserting new articles in the to-be amended Remedies Directives.

[99] Judgment of the Court (Fifth Chamber) of 10 April 2003, joined cases C-20/01 and C-28/01, *Commission of the European Communities v Federal Republic of Germany* [ECLI:EU:C:2003:220], §§ 36-38 and 44; Judgment of the Court (Second Chamber) of 18 July 2007, case C-503/04, *Commission of the European Communities v Federal Republic of Germany* [ECLI:EU:C:2007:432], §§ 33 and 42.

legal certainty that assists the firm selected; as a consequence, whilst it is acknowledged that the ineffectiveness should not be automatic –although it is the most effective way to restore competition–, there is an obligation on the side of the contracting entity to prove that there are grounds for the direct award in order to avoid the characterization of the direct award as illegal [100].

The referred two additional flanking measures are intended to achieve an actually effective implementation and enforcement of the Directives, which would unfailingly increase competition and cross-border trading, resulting in a better value for money, while improving the participation and access of economic operators to such markets across the EU[101].

Finally, in 2009, another Directive was adopted, tailored for the specificities of defense and security equipment and markets, since it was introduced to set EU rules for the procurement of arms, munitions and war materials (plus related works and services) – Directive 2009/81/EC[102]. The Directive was adopted after the resolution of the European Parliament on the Green Paper on defense procurement, which, if a European defense equipment market was to be satisfactorily created, underlined the necessity, also in this area, of coordinating the awarding procedures while preserving the security interests of Member States[103].

It must be borne in mind that the traditional sensitivity towards purchases of goods and services in the defense and security sectors is due to the fact that defense and security equipment is, on one side, vital for the security and sovereignty of Member States, and, on the other, it is also crucial for the autonomy of the Union; consequently,

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[100] Judgment of the Court (Fifth Chamber) of 11 September 2014, case C-19/13, *Ministero dell'Interno v Fastweb SpA* [ECLI:EU:C:2014:2194], §§ 43-47; Directive 2007/66/EC, recitals 13-14.

[101] EUROPEAN COMMISSION. MARKT/2013/072/C… *cit.*, p. 16.

[102] 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, *Official Journal of the European Union*, L 216/76, 20 August 2009.

[103] Directive 2009/81/EC, recitals 3-7; COMMISSION OF THE EUROPEAN COMMUNITIES. *Green Paper on Defence procurement*, COM(2004) 608 final, Brussels, 23 September 2004.

there exist specific requirements with respect to security of supply and security of information (especially in relation to purchases of arms, munitions and war material for the armed forces and to particularly sensitive purchases in the field of non-military security)[104].

The Single Market Act, adopted by the Commission in 2011, envisages, among its twelve levers to boost the growth and strengthen confidence, the revision of public procurement rules[105]. Such revision of the public procurement legislative framework will be undertaken with the aim of providing contracting entities with simpler and more flexible procurement procedures, which, encouraged by the failure to use public procurement strategically, enables underpinning a balanced policy within which it becomes possible to improve the efficiency and quality of public services while addressing other major societal challenges – to put it in other words, public procurement rules that foster demand for environmentally sustainable, socially responsible and innovative goods, services and works, and that encourages innovation[106].

The Green Paper on the modernization of the EU public procurement policy, launched following the unremitting requests of stakeholders to review the EU public procurement system due to its high complexity and burdensome administrative compliance procedures, had already announced the necessity to update public procurement rules with a view to enable the achievement, on the basis of a competitive social market economy, of a single market – that is, an internal EU-wide public procurement market where healthy and effective competition makes possible the accomplishment of public policy goals[107].

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[104] Directive 2009/81/EC, recitals 8 and 9.

[105] EUROPEAN COMMISSION. *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions - Single Market Act - Twelve levers to boost growth and strengthen confidence: working together to create new growth*, COM(2011) 206 final, Brussels, 13 April 2011, p. 17.

[106] EUROPEAN COMMISSION. COM(2011) 206 final, pp. 19-20; EUROPEAN COMMISSION. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Europe 2020 Flagship Initiative - Innovation Union*, COM(2010) 546 final, Brussels, 6 October 2010, pp. 7 and 17.

[107] EUROPEAN COMMISSION, COM(2011) 15 final… *cit.*, p. 3. By then, the Commission had already announced the importance of evolving from a better regulation objective, to a smart regulation one, and,

The European Parliament, on its side, published a Report on the same issue – modernization of public procurement[108]. In this Report the European Parliament seized the opportunity to highlight the position of a properly functioning EU public procurement market in the sustenance of the already achieved single market:

> [A] properly functioning EU public procurement market is a key driver of growth and a cornerstone of the single market, and is, furthermore, fundamental to stimulating competition and innovation and to addressing fast-emerging environmental and social public-policy challenges, as well as quality-of-work issues including adequate pay, equality, social cohesion and inclusion, while achieving optimal value for citizens, businesses and taxpayers[109].

In line with, and mainly because of, that ambitioned objective of designing a properly functioning EU public procurement market, the Parliament set forth six tasks: improving legal clarity, developing the full potential of public procurement (best value for money), simplifying the rules and allowing more flexible procedures; improving access for SMEs, ensuring sound procedures and avoiding unfair advantages, and expanding the use of e-procurement[110].

The new Directives are the following: Directive 2014/23/EU (concession contracts), Directive 2014/24/EU (public work, supply and service contracts) and Directive 2014/25/EU (utilities contracts). They provide the EU public procurement market with the largely claimed simplification of rules and procedures by means of broadening the possibilities for negotiation, reducing the required documentation – standardized self-declarations from bidders will be compulsorily accepted and only the winner will have to submit formal certificates and attestations–, shortening the

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in doing so, the significance of delivering the full range of public policy objectives – that is, «from ensuring financial stability to tackling climate change», *vide* EUROPEAN COMMISSION. *Communication from the Commission to the European Parliament, the Council, the Economic and Social Commitee and the Committee of the Regions - Smart Regulation in the European Union*, COM(2010) 543 final, Brussels, 8 October 2010, p. 2; EUROPEAN PARLIAMENT. *Resolution of 25 October 2011 on modernisation of public procurement*, 2011/2048(INI), 25 October 2011, § 2.

[108] EUROPEAN PARLIAMENT. 2011/2048(INI)… *cit.*

[109] EUROPEAN PARLIAMENT. 2011/2048(INI)… *cit.*, § A.

[110] EUROPEAN PARLIAMENT. 2011/2048(INI)… *cit.*, §§ 4-53.

minimum deadlines to submit tenders –insofar as they create undue barriers to access for economic operators– and establishing the mandatory use of means of electronic information and communication –as, with the exception of those cases where communications concerned can only be handled using specialized office equipment, non-discriminatory electronic means of communication greatly contribute to the simplification of the publication of contracts and they increase the efficiency and transparency of procurement processes; this, however, does not intend to oblige contracting entities to carry out electronic processing of tenders, electronic evaluation or automatic processing–[111].

While the first beneficiary from the general simplification of the public procurement system will be the local and regional authorities, since they will be able to advertise their contracts through a less burdensome prior-information notice –instead of contract notices–, SMEs will also benefit from the modernization and simplification of the EU public procurement system[112]. Two are, particularly, the SME-specific measures: (1) the division of contracts into lots and (2) in relation to the proof of financial capacity, the turnover requirements are limited to a maximum of twice the estimated value of the contract –but for duly justified cases–[113].

The enactment of the Directive 2014/24/EU has brought about the consolidation of the principle of competition, which has been deliberately recognized in the article 18 of the Directive 2014/24/EU and article 36 of the Directive 2014/25/EU:

> 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 is made with the intention of unduly favouring or disadvantaging certain economic operators[114].

[111] Directive 2014/24/EU, recitals 52, 53, 80 and 86.

[112] Directive 2014/24/EU, article 48

[113] Directive 2014/24/EU, recital 83 and article 58(3).

[114] 2nd indent of the article 18(1) of the Directive 2014/24/EU, 2nd indent of the article 36(1) of the Directive 2014/25/EU and it has been also included, in equivalent terms, in the recital 67 of the Directive 2014/23/EU.

The problem of the actual formulation of the articles is that it incorporates a subjective element –namely, by the inclusion of the wording *with the intention*–, which leaves the door open to an interpretation driven by the identification and determination of the wilfull elements that shaped the so-blamed anticompetitive practice[115].

As one may realize, it becomes crucial to further guarantee sound public procurement procedures[116]. Having identified three sources of problems that may hamper the objectives of the public procurement processes, the new modern rules tackle and solve them: first, in relation to the concerns that conflicts of interest engender, the new simplified regime seeks to ensure that contracting entities take appropriate measures to effectively prevent, identify and remedy those potential conflicts of interest, so as to avoid any distortion of competition and ensure equal treatment of all economic operators[117]. Second, rules governing the modifications of contracts have been broadly simplified[118]. And, thirdly, in relation to abnormally low tenders, the Directives provide for their compulsory exclusion in cases due to non-compliance with EU law in the field of social and labor law and environmental law[119].

The Directives include, for the first time, explicit legislative rules determining the contract that, concluded between public sector entities (public-public cooperation),

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[115] This may be interpreted as, in cases where a restriction of competition has been factually introduced, establishing a rebuttable presumption of restrictive intent that is for the contracting authority to disapprove based on the existence of objective, legitimate and proportionate reasons for the adoption of such restrictive criteria; *vide* SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules.* Portland, Hart Publishing, 2015, pp. 208-210, and case law analyzed therein. Also, SÁNCHEZ GRAELLS, A. "El 'nuevo' principio de competencia en la Directiva 2014/24: ¿un nuevo juego de presunciones?", in *Observatorio de la Contratación Pública*, 9 June 2014, p. 2.

[116] Directive 2014/24/EU, recital 126

[117] Directive 2014/23/EU, recital 61 and article 35; Directive 2014/24/EU, recital 16 and article 24; Directive 2014/25/EU, recital 26, article 42.

[118] Directive 2014/23/EU, recital 75 and article 43; Directive 2014/24/EU, recital 107 and article 72; and Directive 2014/25/EU, recital 113 and article 89.

[119] Article 69 of the Directive 2014/24/EU and article 84 of the Directive 2014/25/EU.

does not need to observe public procurement procedures, either because an exception can be raised –*public-public exception*– or because they are exempted[120].

Keeping on with the exemptions, and in relation to the special sectors, it is worth noting that the Directive 2014/25/EU excludes procurement made for the purpose of exploring for oil and gas based on the fact that the referred sector has consistently been found to be subject to such competitive pressure that the procurement discipline brought about by the EU procurement rules is no longer needed[121].

As for the Concessions Directive, the absence of clear rules at EU level governing the award of concession contracts led to the adoption of the Directive[122]. Until its enactment, only certain concession contracts were regulated – more specifically, the award of public works concessions was subject to the Directive 2004/18/EC, while the award of services concessions with a cross-border interest was subject to the principles of the TFEU (free movement of goods, freedom of establishment, freedom to provide services) as well as to the principles deriving therefrom (equal treatment, non-discrimination, mutual recognition, proportionality and transparency)[123].

In this scenario prone to generate strong economic inefficiencies due to the absence of clear and unambiguous provisions, a uniform application of the principles of the TFEU, as well as the elimination of discrepancies in the understanding of those principles, across all Member States turns out to be essential in order to eliminate

[120] In relation to the public-public exception: on in-house relationships (vertical cooperation), *vide* Directive 2014/23/EU, article 17(1); Directive 2014/24/EU, recital 32 and article 12(1); Directive 2014/25/EU, recital 11 and article 28(1); on the cooperation between contracting authorities without creating a controlled undertaking (horizontal cooperation), *vide* Directive 2014/23/EU, article 17(1); Directive 2014/24/EU, article 12(1); Directive 2014/25/EU, article 28(4).

In relation to the activities exempted, because they consist on a mere transfer of power and responsibilities, *vide* Directive 2014/23/EU, article 1(4); Directive 2014/24/EU, article 1(6).

[121] Directive 2014/25/EU, recital 25.

[122] Directive 2014/23/EU, recital 1.

[123] Directive 2014/23/EU, recital 4.

persisting distortions of the internal market and favor the efficiency of public spending – hence, the adoption of the Concessions Directive[124].

Finally, and before moving onto the next section, given that this research is been conducted when the transposition period of the Directives has not expired in its entirety, some clarifications must be made[125]. In relation to the effect of the Directives, the EU judicature has consistently stated that Member States are confined to apply and interpret their national law in a way that it does not hamper the attainment of the intended results of the EU Directives – i.e., Member States' authorities and courts have the duty of (a) observing the principle of consistent interpretation, once the transposition period is expired, and (b) refraining from adopting any measure that could seriously compromise the achievement of the envisaged purpose, during the transposition period[126].

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[124] Directive 2014/23/EU, recital 4.

[125] Pursuant to articles 90 and 106 of the Directive 2014/24/EU and Directive 2014/25/EU, respectively, the transposition period expires the 18 April 2016, but for some articles, related to electronic means of communication, which are due either on 18 October 2018 or on 18 April 2018.

[126] In relation to the principle of consistent interpretation, both national authorities and courts must interpret all pieces of internal legislation consistently with EU law, and they can even declare, by virtue of the principle of supremacy, inapplicable domestic legislation, adopted either before or after the directive, to the extent that it contradicts EU law; moreover, in the case that the Directive has not been (correctly) transposed once the transposition period has expired, provided that its provisions are unconditional and sufficiently precise, they can be claimed to be directly applicable. *Vide*, among others, Judgment of the Court of 10 April 1984, case 14/83, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [ECLI:EU:C:1984:153], § 26; Judgment of the Court of 10 April 1984, case 79/83, *Dorit Harz v Deutsche Tradax GmbH* [ECLI:EU:C:1984:155], § 26; on the submission of *all* the national authorities to the duty, Judgment of the Court (Sixth Chamber) of 8 October 1987, case C-80/86, *Criminal proceedings against Kolpinghuis Nijmegen BV* [ECLI:EU:C:1987:431], § 12; on the need to interpret consistently *all* pieces of internal legislation, have them be adopted either before or after the directive, Judgment of the Court (Sixth Chamber) of 13 November 1990, case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentacion SA* [ECLI:EU:C:1990:395], §§ 8 and 13; Judgment of the Court (Fifth Chamber) of 16 December 1993, case C-334/92, *Teodoro Wagner Miret v Fondo de Garantía Salarial* [ECLI:EU:C:1993:945], § 20; Judgment of the Court of 14 July 1994, case C-91/92, *Paola Faccini Dori v Recreb Srl* [ECLI:EU:C:1994:292], § 26; Judgment of the Court of 11 July 1996, joined cases C-71/94, C-72/94 and C-73/94, *Eurim-Pharm Arzneimittel GmbH v Beiersdorf AG (C-71/94), Boehringer Ingelheim KG (C-72/94) and Farmitalia Carlo Erba GmbH (C-73/94)* [ECLI:EU:C:1996:286], § 26; Judgment of the Court (Fourth Chamber) of 26 September 1996, case C-168/95, *Criminal proceedings against Luciano Arcaro* [ECLI:EU:C:1996:363], § 41; Judgment of the

Lastly, some lines must be devoted to the public procurement processes that either are below the thresholds of the EU directives or fall outside their scope of application[127]. In this research, it is our ultimate purpose to identify the competition

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Court of 17 September 1997, case C-54/96, *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH* [ECLI:EU:C:1997:413], § 43; Judgment of the Court (Sixth Chamber) of 24 September 1998, case C-76/97, *Walter Tögel v Niederösterreichische Gebietskrankenkasse* [ECLI:EU:C:1998:432], § 25; Judgment of the Court of 23 February 1999, case C-63/97, *Bayerische Motorenwerke AG (BMW) and BMW Nederland BV v Ronald Karel Deenik* [ECLI:EU:C:1999:82], § 22; Judgment of the Court (Fifth Chamber) of 11 July 2002, case C-62/00, *Marks & Spencer plc v Commissioners of Customs & Excise* [ECLI:EU:C:2002:435], § 24; Judgment of the Court (Sixth Chamber) of 12 February 2004, case C-218/01, *Henkel KGaA* [ECLI:EU:C:2004:88], § 60; Judgment of the Court (Sixth Chamber) of 29 April 2004, case C-371/02, *Björnekulla Fruktindustrier AB v Procordia Food AB* [ECLI:EU:C:2004:275], § 13; on the case whether there is a lack of implementation or it has not been correctly transposed, but the provisons are unconditional and sufficiently precise, Judgment of the Court of 22 June 1989, case 103/88, *Fratelli Costanzo SpA v Comune di Milano* [ECLI:EU:C:1989:256], §§ 29-31; on the inapplicability of national law to the extent that it cannot be interpreted in accordance with EU law, Judgment of the Court of 4 February 1988, case 157/86, *Mary Murphy and others v An Bord Telecom Eireann* [ECLI:EU:C:1988:62], § 11; Judgment of the Court (Fifth Chamber) of 15 May 2003, case C-160/01, *Karen Mau v Bundesanstalt für Arbeit* [ECLI:EU:C:2003:280], §§ 34-36; Judgment of the Court (Third Chamber) of 11 January 2007, case C-208/05, *ITC Innovative Technology Center GmbH v Bundesagentur für Arbeit* [ECLI:EU:C:2007:16], §§ 68-69; Judgment of the Court (Fourth Chamber) of 18 December 2007, case C-357/06, *Frigerio Luigi & C. Snc v Comune di Triuggio* [ECLI:EU:C:2007:818], §§ 28-29; on the respect of a time limit after which the interpretation of the national legislation and case law must be done in line with the aims of the Directives, Judgment of the Court (First Chamber) of 13 July 2000, case C-456/98, *Centrosteel Srl v Adipol GmbH* [ECLI:EU:C:2000:402], § 17.

Regarding the prohibition of adopting any measure that may compromise the attainment of the objective pursued, Judgment of the Court of 18 December 1997, case C-129/96*, Inter-Environnement Wallonie ASBL v Région wallonne* [ECLI:EU:C:1997:628], § 45; Judgment of the Court (Sixth Chamber) of 5 February 2004, case C-157/02, *Rieser Internationale Transporte GmbH v Autobahnen- und Schnellstraßen-Finanzierungs- AG* (Asfinag) [ECLI:EU:C:2004:76], § 66; Judgment of the Court (Grand Chamber) of 4 July 2006, case C-212/04, *Konstantinos Adeneler and Others v Ellinikos Organismos Galaktos (ELOG)* [ECLI:EU:C:2006:443], § 123.

[127] Chapter I, section 2, articles 4 to 6 of Directive 2014/24/EU state the thresholds; the value of the public procurement procedures that is estimated to be less than those thresholds renders the Directive inapplicable to such procedures. Chapter I, section 3, articles 7 to 12 contain the exclusions, while section 4, articles 13 to 17, some specific situations.

standard that must guide the contracting authorities in their procuring activities and to discern how the discretionality of the contracting authorities is therefore limited by the principle of competition when they source goods, works and services. It does not matter how costly the good, work or service is. Moreover, *all* public procurement activities must be conducted in compliance with the basic principles of the TFEU, among them, competition[128]. Consequently, although contracts excluded from the scope of the EU procurement directives are not subject to the procedural rules laid down therein, as long

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As for the Directive 2014/25/EU, which strictly falls outside our subject-matter of study, contains its thresholds in the Chapter III, section 1, articles 15 to 17; the exclusions, in the Chapter III, section 2, subsection 1; some specific situations, in the Chapter III, section 2, subsections 2, 4 and 5, articles 24 to 27, 32 and 33, and 34 and 35, respectively; and some special relations, in the Chapter III, section 2, subsection 3, articles 28 to 31.

[128] Recital 3 of the Directive 2014/25/EU points out the following: «For procurement the value of which is lower than the thresholds triggering the application of the provisions of Union coordination, it is advisable to recall the case-law of the Court of Justice of the European Union regarding the proper *application of the rules and principles of the TFEU*» (emphasis added). According to the referred case law, 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, *vide* Order of the Court of 3 December 2001, case C-59/00, *Vestergaard, cit.*, §§ 21-24; Judgment of the Court of 7 December 2000, case C-324/98, *Telaustria and Telefonadress… cit.*, § 60; Judgment of the Court of 21 July 2005, case C-231/03, *Coname… cit.*, §§ 16-19; Judgment of the Court of 13 October 2005, case C-458/03, *Parking Brixen cit.*, §§ 46 and 49; Judgment of the Court (Second Chamber) of 21 February 2008, case C-412/04, *Commission of the European Communities v Italian Republic* [ECLI:EU:C:2008:102], § 94; on the need to guarantee equality of opportunity between economic operators in order to establish a system of undistorted competition, Judgment of the Court of 19 March 1991, case C-202/88, *France v Commission… cit.,* § 51; Judgment of the Court (Fifth Chamber) of 13 December 1991, case C-18/88, *Régie des télégraphes et des téléphones v GB-Inno-BM SA* [ECLI:EU:C:1991:474], § 25; Judgment of the Court (Fifth Chamber) of 22 May 2003, case C-462/99, *Connect Austria Gesellschaft für Telekommunikation GmbH v Telekom-Control-Kommission, and Mobilkom Austria AG* [ECLI:EU:C:2003:297], § 83; Judgment of the Court (Grand Chamber) of 1 July 2008, case C-49/07, *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* [ECLI:EU:C:2008:376], § 51; Judgment of the Court (Third Chamber) of 17 July 2014, case C-553/12 P, *European Commission v Dimosia Epicheirisi Ilektrismou AE (DEI)* [ECLI:EU:C:2014:2083], § 43; Judgment of the Court of First Instance (Fourth Chamber) of 12 July 2007, case T-250/05, *Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v Commission of the European Communities* [ECLI:EU:T:2007:225], § 46; Judgment of the Court of First Instance (First Chamber) of 12 November 2008, case T-406/06, *Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v Commission of the European Communities* [ECLI:EU:T:2008:484], § 84.

as there is a certain cross-border interest, contracting authorities are indeed bound to comply with the EU primary law – i.e., with the fundamental substantive rules laid down in the Treaties[129]. Furthermore, even in cases where the existence of such a cross-border interest is dubious, where the object of the contract is, in terms of economic value, small, public procurement processes have still to be designed and conducted in a non-discriminatory, transparent and pro-competitive manner; all in all, the principles embedded in the EU primary law are part of and inform the internal legal orders, touching upon all the contracting authorities when they carry out their procuring activities[130].

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[129] Judgment of the Court (Grand Chamber) of 13 November 2007, case C-507/03, *Commission of the European Communities v Ireland* [ECLI:EU:C:2007:676], §§ 27-29; Judgment of the Court (Fourth Chamber) of 15 May 2008, joined cases C-147/06 and C-148/06, *SECAP SpA (C-147/06) and Santorso Soc. coop. arl (C-148/06) v Comune di Torino* [ECLI:EU:C:2008:277], §§ 20-21.

[130] The attainment of the internal market has favorized an increase in the participation of firms from other Member States in the domestic public procurement processes. This reality places contracting authorities in the need to foresee whether their contract would trigger a cross-border interest and, if so, act accordingly, in order to comply with EU law requirements: further advertising costs and put efficient remedies in place for aggrieved suppliers. *Vide* SUNDSTRAND, A. "How do we deal with cross-border interest in public procurement? (I)", in *Public Procurement Podcast*, 22 July 2015, available at: http://www.publicprocurementpodcast.eu/new-blog-avenue/2015/7/22/5-andrea-sundstrand-stockholm-university (last consulted: 27.10.2015). However, we do not intend to analyze in detail whether a particular procurement process stirs cross-border interest up; instead, in our research we aim at exposing how EU competition law does actually limit the discretionality of *all* the contracting authorities, even when the activities of the latter are of a minor value and, thus, fall outside the scope of the EU directives.

As we will see in the Chapter II of our research, when dealing with the different procedures that contracting authorities can opt for, in the case of 'minor' public procurement contracts, the criteria to meet the transparency requirement may be more lenient, as well as those to guarantee a minimum level of competition; but, in any case, this is not tantamount to acknowledging a discriminatory or competition-distorting behavior to contracting authorities in relation to minor public procurement processes; *vide* SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules... op. cit.*, pp. 225-226.

CHAPTER II – FREE COMPETITION IN THE EU: AN APPROACH TO THE GRADUAL EXPANSION OF COMPETITION AS A MEANS TO ENSURE THE PEREMPTORY COMPETITIVE LEVEL PLAYING FIELD WITHIN THE MARKET INTEGRATION PROCESS

Free competition is the main tool to optimize the investment and/or expenditure of public funds; therefore, deficient competition standards imply, on one hand, a higher economic effort –for the public bodies that procure goods, services and works, as well as, ultimately, for the citizens– and, on the other hand, impede a proper maximization of social welfare[131]. Therefore, competition and economic efficiency should be regarded as the central values of public procurement.

In relation with public procurement, it must be borne in mind that competition authorities are in charge of detecting and prosecuting cases of bid-rigging (competition law), but the design and implementation of public procurement procedures falls outside their jurisdiction[132]. However, they have a leading role in the advocacy of rules for public procurement that ensure a regulatory framework where competition standards are met (competition policy).

In order to better understand the rationale behind the promotion of competition, as well as the utmost importance of its protection, it comes as indispensable to refer to its genesis and evolution within the EU legal experience.

It has been extensively believed that EU competition law is heir to the US antitrust experience; however, the emergence of a worry about the protection of

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[131] BELLIS, J.F. *Droit européen de la concurrence*. Bruxelles, Bruylant, 2014, p. 4; COMISIÓN NACIONAL DE LA COMPETENCIA. *Guía sobre Contratación Pública y Competencia*. Madrid, 27 April 2010, p. 4; COMISIÓN NACIONAL DE LOS MERCADOS Y LA COMPETENCIA. *PRO/CNMC/001/15: Análisis de la contratación pública en España: oportunidades de mejora desde el punto de vista de la competencia*. Madrid, 5 February 2015, in *CNMC*, http://www.cnmc.es/Portals/0/Ficheros/Promocion/Informes_y_Estudios_Sectoriales/2015/201502_Informe_ContratacionPublica.pdf (última consulta: 19.05.2015), pp. 3-4; and SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules... op. cit.*, p. 15.

[132] UNCTAD. "Competition policy and public procurement"… *op. cit.*, p. 3.

competition within the EU cannot be simply attributed to a need of copying what was being done on the other side of the Atlantic, instead, it obeys to the social and intellectual movements that took place in the European landscape of the XIX and XX centuries[133].

Artificially granted economic prerogatives to the ruling elites surrendered to the liberal idea that economic freedom was also a right[134]. Following this outburst of groundbreaking thinking, it was acknowledged that the competitive interaction of free individuals seeking personal gain might produce wealth[135]. Consequently, the market was seen as a self-regulating mechanism in the realm of which competition would distribute economic benefits according to the impartial and objective laws of the market, and not according to the discretion of rulers; however, albeit opposing to government intervention in the economy, the use of law was not drastically set aside, instead, rules were accepted to grant individual competitors with, at least, formal equality, to protect them from unfairness[136]. Liberals had set the foundations of the free market theory[137].

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[133] For a comprehensive analysis of the environment that fostered the concern about competition within the EU, *vide* GERBER, D.J. *Law and Competition in Twentieth Century Europe: protecting Prometheus*. Oxford, Clarendon Press, 1998.

[134] GERBER, D.J. *Law and Competition in Twentieth Century Europe… op. cit.*, pp. 18-19.

[135] *Vide* GERBER, D.J. *Law and Competition in Twentieth Century Europe… op. cit.*, p. 19, commenting on the famous SMITH, A. *An Inquiry into the Nature and Causes of the Wealth of Nations.* MetaLibri Digital Library, 29 May 2007, pp. 348-350: «Every individual is continually exerting himself to find out the most advantageous employment for whatever capital he can command. It is his own advantage, indeed, and not that of the society, which he has in view. But the study of his own advantage naturally, or rather necessarily, leads him to prefer that employment which is most advantageous to the society […]. [E] every individual necessarily labours to render the annual revenue of the society as great as he can. He generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. By preferring the support of domestic to that of foreign industry, he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention […]. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it. I have never known much good done by those who affected to trade for the public good».

[136] GERBER, D.J. *Law and Competition in Twentieth Century Europe… op. cit.*, p. 37.

[137] Free market economy is «an economic system in which the allocation of resources is determined by supply and demand in free markets and is not directed by government regulation»; the basis of a free

The irruption of the industrialization brought about a heavy rationalization of the production: competitive decisions started to be made at a managerial level and the cornerstone of the competitive success was to increase profits to the detriment of previous values that had once constrained the search for profits[138]. Additionally, not only the industrialization did cloud liberal dreams by its social consequences, which stimulated calls for governmental intervention, but also the economic crises that began in 1873 and lasted until the mid-1890s discredited liberalism and blamed competition for its apparent failure to accomplish the stated goals[139].

The dominant disillusionment urged businesses to turn away from competition and, on one side, cooperate one with each other in order to maintain prices and avoid 'excessive' competition; and, on the other side, ally with the government as it was in a position to influence the market by (a) subsidies and loan guarantees, to aid troubled firms (subsidies and loan guarantees), and (b) higher tariffs, to protect the national market by limiting the access to the domestic market to foreign competitors. This supposed (a) a heavy cartelization of markets that had traditionally worked under conditions of vigorous competition, (b) a rise of nationalisms –governments and firms began to work together for the sake of the national welfare–, and (c) a race to annex as many foreign territories as possible since they were conceived as a source of competitive advantage over other European imperialistic rivals[140]. The social issues were left unattended.

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market is competition between firms, and competition is considered to deliver efficiency and welfare, *vide* JONES, A. and SUFRIN, B. *EU Competition Law: text, cases and materials*. London, Oxford, 2014, 5th edition, p. 2.

[138] With the arrival of the industrialization, «owners began their long journey toward the peripheries of economic decision-making, whereas managers made competitive decisions»; all in all, «managers were paid to make money for owners and they could ill afford to consider other values [different from the calculus of profit]», and competition lost its image «as a contest among individuals based on talent, effort and resourcefulness», *vide* GERBER, D.J. *Law and Competition in Twentieth Century Europe… op. cit.*, pp. 22-23.

[139] It became clear that «competition was not a magical potion that would eventually produce economic well-being for all», *vide* GERBER, D.J. *Law and Competition in Twentieth Century Europe… op. cit.*, p. 24 and 32.

[140] GERBER, D.J. *Law and Competition in Twentieth Century Europe… op. cit.*, pp. 26-27.

By the end of XIX, although there was a palpable need to remedy the social consequences of industrialization and liberalism, competition's benefits could not be denied. However, its fragility and dangers were also unquestionable; this reality led to admit that the referred benefits would not be achieved unless the legal system was used to protect the competitive process: it was vital to protect competition, but also to control it[141].

Not surprisingly, having appraised the importance of competition, the first European competition rules date back to the Treaty of Paris, of 1951, which created the European Coal and Steel Community[142]. Chapter VI of the Treaty of Paris, on agreements and concentrations (articles 65 and 66), inserted those rules into the *acquis communautaire*. The Treaty of Rome, which came into force in 1958, having detected that the process of competition was imperious to market integration as restrictions of competition might lead to the partition of the common market, opted for the maintenance of competition rules in its text[143]. Nevertheless, it was not until the approval of Regulation 17/62, four years later, that the Community institutions enforced the European Economic Community's competition rules; in fact, it was for the Commission, which was given wide powers to enforce and apply competition rules, to play a significant role in the development of competition law[144].

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[141] «[I]n the competition context regulatory rules are necessary to deal with market imperfections», otherwise firmes tend to collude in a way that is profitable for them but to the detriment of society, *vide* JONES, A. and SUFRIN, B. *EU Competition Law... op. cit.*, p. 4. Also, GERBER, D.J. *Law and Competition in Twentieth Century Europe... op. cit.*, pp. 34, 41-42 and 417-418.

[142] Treaty establishing the European Coal and Steel Community, of 18 April 1951, not published in the Official Journal (collectively, *Treaty of Paris*).

[143] NAZZINI, R. "Article 81 EC between time present and time past: a normative critique of 'restriction of competition' in EU Law", in *Common Market Law Review*, Vol. 43, no. 2, April 2006, [pp. 497-536] p. 498.

[144] Through Regulation 17, First Regulation implementing Articles 85 and 86 of the Treaty, *Official Journal of the European Communities*, no. 204, 21 February 1962, the Council conferred power on the Commission to enforce competition law, and Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *Official Journal of the European Communities*, L 1/1, 4 January 2003, which replaced Regulation 17/62 and took effect on 1 May 2004, widened and also conferred competence over the enforcement of EU competition

1. EU Competition policy: efficiency in the market in the light of a consumer welfarist approach

Policy serves to guide, explain –even, when necessary, justify– and, in any case, understand how and what for a concrete decision is taken or why the adoption of such a decision is conducted by a specific body; consequently, *competition policy* is, mainly, about questioning –and trying to give an answer– how EU competition rules are effectively applied –whether they comply with the objectives in light of which they were enacted–, but it is also about raising the issue of what the underlying reasons for the adoption of these particular articles or those specific regulations were[145]. Competition policy is concerned, thus, (1) with all the aspects regarding the formulation and enforcement of competition law and (2) with competition advocacy[146].

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law to competition authorities of the Member States, *vide* JONES, A. and SUFRIN, B. *EU Competition Law… op. cit.,* pp. 36, 96

[145] CALVO CARAVACA, A.L. *Derecho antitrust europeo - tomo I. Parte general, la competencia*. Madrid, Colex, 2009, pp. 141-142.

Although competition *law* and competition *policy* are often used as synonyms, competition policy is broader as it encompasses within it a system of competition law; competition law can be thus defined as «the means by which competition policy is implemented in respect of firms operating in the marketplace», *vide* JONES, A. and SUFRIN, B. *EU Competition Law… op. cit.,* pp. 1-2.

[146] Competition advocacy enables competition authorities to have a say on how public policies should be shaped and it enlarges the benefits accrued from competition law enforcement in order to reduce barriers to entry, facilitate deregulation, promote trade liberalization and enhance competition or, at least, ensure that competition will not be harmed by the government action; in doing so, competition authorities may propose alternatives to governmental or legislative proposals that would be less detrimental to competition. Despite the clear benefits of competition advocacy, several jurisdictions remain silent on the role of competition authorities regarding competition advocacy; in such cases, competition authorities, provided that they are not prevented from taking part in the legislative procedures, should look for opportunities to make the case for competition, *vide* DABBAH, M.M. *International and comparative competition law*. Cambridge, Cambridge University Press, 2010, pp. 12-13, 60-62, and 65-70.

On an effective form of competition advocacy, *vide* EMBERGER, G. "How to strengthen competition advocacy through competition screening", in *Competition Policy Newsletter*, no. 1, Spring 2006, pp. 28-32. According to the article, it consists in the active involvement of competition authorities in he regulatori impact assessment process leading to the adoption of of new laws and regulations, or in the

In the EU, the task to monitor the compliance with competition policy is entrusted to the European institutions, and, primarily, to the European Commission, who is responsible for the application of competition rules to the particular cases, as well as for working towards an effective and harmonized set of competition rules *vis-à-vis* other principles and objectives of the Treaties[147].

In this same line, the Court of Justice has stated the following:

> [T]he Commission's power to impose fines on undertakings which, intentionally or negligently, commit an infringement of the provisions of Articles 85 (1) or 86 of the Treaty [nowadays, 101 and 102 TFEU] is one of the means conferred on the Commission in order to enable it to carry out the task of supervision conferred on it by Community law. That task certainly includes the duty to investigate and punish individual infringements, but it also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to guide the conduct of undertakings in the light of those principles[148].

Therefore, in line with the Treaties, as interpreted by the case law of the Court of Justice, it is for the European Commission to guide and adopt the necessary decisions in relation to competition policy within the EU. Not surprisingly, the decisions taken in the exercise of this task will always enjoy a political character, that is, the Commission will be granted with a wide margin of action to design the EU competition policy, bearing in mind that its nature of horizontal policy –its radio of action touches, in principle, upon

hearings before sector regulators or parliamentary committees, or as an *amicus curiae* in court proceedings.

[147] CALVO CARAVACA, A.L. *Derecho antitrust europeo - tomo I… op. cit.*, p. 142.

[148] Judgment of the Court of 7 June 1983, case 100/80, *SA Musique Diffusion française and others v Commission of the European Communities* [ECLI:EU:C:1983:158], § 105. In the same terms, Judgment of the Court of First Instance (Third Chamber, extended composition) of 20 April 1999, joined cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, *Limburgse Vinyl Maatschappij NV, Elf Atochem SA, BASF AG, Shell International Chemical Company Ltd, DSM NV, DSM Kunststoffen BV, Wacker-Chemie GmbH, Hoechst AG, Société artésienne de vinyle, Montedison SpA, Imperial Chemical Industries plc, Hüls AG and Enichem SpA v Commission of the European Communities* [ECLI:EU:T:1999:80] (collectively, *PVC II*), § 149.

any economic activity– may oblige the Commission to ponder it with other EU policies whose radio of action may collude with the competition policy[149].

In relation to public bodies, competition policy seeks to constrain their capacity to intervene in the market through sectorial regulation by obliging them to respect the level competitive playing field[150]. In the end, it is about subduing public entities to the same rules applicable to private firms in order to grant the same opportunities to all market operators and to guarantee that public services will be, from an economic efficiency perspective, adequately provided and, thus, the public interest and other common societal goals will be satisfied[151].

In conclusion, whereas competition policy is an integral part of the European economic policy as, in line with the aforementioned considerations, it touches upon all the economic activities, public procurement is a set of economic regulation directly related to the internal market, and it should be, then, included in the larger framework of European economic law[152]. All in all, competition law and public procurement have to be approached integratively – both branches of EU economic law are so intrinsically linked that isolating one from the other would just lead to the limitation of their potentialities[153].

Nowadays, turning its back on the utopian principle of *perfect competition* inherit from the classical liberal economic theory, competition policy seeks to achieve

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[149] CALVO CARAVACA, A.L. *Derecho antitrust europeo - tomo I… op. cit.*, pp. 142-143.

[150] CANEDO ARRILLAGA, M.P. "La Administración frente a la aplicación descentralizada del Derecho de la Competencia"… *op. cit.*, p. 344.

[151] CANEDO ARRILLAGA, M.P. "El derecho de la competencia ante la globalización y la crisis", in GÓMEZ, F.; HERRÁN, A.I.; ATXABAL, A. *Retos del Derecho ante una economía sin fronteras*. Bilbao, Universidad de Deusto, 2012, [pp. 231-240] pp. 231-238.

[152] SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules… op. cit.*, pp. 3, 23 and fn 72; MONTI, M. *A new strategy for the Single Market… op. cit.,* p. 12.

[153] MONTI, M. *A new strategy for the Single Market… op. cit.,* pp. 12-15; SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules… op. cit.*, pp. 4-5.

an *effective competition*[154]. Competition policy plays ultimately a decisive role in the achievement of its main objective: the maximization of consumer welfare within a

[154] This principle of effective competition is perfectly compatible with the existence of a limited –as long as it is sufficient– number of competitors in the market, *vide* BELLIS, J.F. *Droit européen de la concurrence… op. cit.,* p. 4.

The model of perfect competition, used in economics courses, proved to bear little resemblance with any industry in the real world, as it described the structure of no actual industry; besides, while perfect competition is simply impossible, if knowledge was complete, perfect and instantaneous, it could stimulate the collusion of market operators, *vide* CHESSLER, D. *Determining when competition is 'workable': A handbook for state commissions making assessments required by the Telecommunications Act of 1996*. Georgia, National Regulatory Research Institute, July 1996, pp. 3-4, fn 11; JOHNSTON, J. *Statistical cost analysis*. New York, McGraw-Hill, 1960, pp. 168-193. For a rigorous definition of perfect competition, *vide* EDGEWORTH, F.Y. *Mathematical physics: an essay on the application of mathematics to the moral sciences*. London, C. Kegan Paul & Co., 1881, pp. 18-19; and JEVONS, W.S. *Theory of Political Economy*. Macmillan, 3rd ed., p. 87. For the ultimate applicability of the model of perfect competition to the real world as a gauge, *vide* KNIGHT, F.H. *Risk, uncertainty and profit*. New York, Augustus M. Kelley, 1964, re-issue.

Prof. J.B. CLARK, a defendant of the character of final equilibrium point of perfect competition, rather than conceiving it as a yardstick for the actual, dynamic economic world, added more restrictions to the Edgeworth definition of perfect competition; *vide* CLARK, J.B. *The distribution of wealth: a theory of wages, interests and profits*. New York, The MacMillan Company, 1899.

Finally, his son, Prof. J.M. CLARK, based on the doctrine funded by his father, brought forth the concept of workable competition, which, when revising his work, renamed as 'effective' in 1961: he realized that 'workable' implied that the kind of competition is inferior to the 'pure and perfect' norm, when, actually, the theory of effective competition is dynamic theory, it makes for progress, it sometimes needs to depart from 'pure and perfect' to attain progress; competition is an active, dynamic process, consisting of a series of 'gentle' competitive moves and responses; *vide* BASKOY, T. "Effective competition and EU Competition Law", in *Review of European and Russian Affairs*, vol 1, no. 1, December 2005, [pp. 1-21] p. 6; BENDER, C.M.; GÖTZ, G. and PAKULA, B. "Effective competition: the importance and relevance for network industries", in *Intereconomics: review of European economic policy*, vol. 46, issue 1, 2011, pp. 4-10; CLARK, J.M. "Towards a concept of workable competition", in *American Economic Review*, vol. 30, issue 2, 1940, pp. 241-256; CLARK, J.M. "Competition: static models and dynamic aspects", in *The American Economic Review*, vol. 45, no. 2, 1955, [pp. 450-462] p. 457; CLARK, J.M. *Competition as a dynamic process*. Washington, The Brookings Institution, 1961; MANCHESTER, A.C. "Book review: Competition as a dynamic process, by J.M. Clark", in *Journal of Farm Economics*, vol. 45, issue 1, [pp. 233-235] p. 233.

The ECJ, on its side, referred to workable competition in 1976: it is «the degree of competition necessary to ensure the observance of the basic requirements and the attainment of the objectives of the EEC

single EU market that works under conditions of vigorous competition[155]. Thus, effective competition is not to be viewed as an end in itself, but as a means of maximizing welfare and promoting the objectives of the EU; all in all, competition is thought to achieve efficiency and produce the greatest benefits in society in the form of welfare[156].

Treaty», Judgment of the Court of 25 October 1977, case 26/76, *Metro SB-Großmärkte GmbH & Co. KG v Commission of the European Communities* [ECLI:EU:C:1977:167], § 20.

It is worth noting that before the definitive acceptance of the effective competition theory, the theory of monopolistic competition was put forward as a middle ground between perfect competition and monopoly. On its evolution, *vide* for all BELLANTE, D. "Edward Chamberlin: monopolistic competition and pareto optimality", in *Journal of Business and Economics Research,* vol. 2, no. 4, 2004, pp. 17-26; KEPPLER, J.H. *Monopolistic competition theory: origins, results and implications.* Baltimore: The John Hopkins University Press, 1994. To a great extent, the downfall of the theory of monopolistic competition was due to the ambition to develop a practice and reputation for exactness in economics; however, it does result of great value as a tool to predict firm behavior under realistic market conditions, *vide* KEPPLER, J.H. "The genesis of 'positive economics' and the rejection of monopolistic competition theory: a methodological debate", in *Cambridge Journal of Economics*, vol. 22, issue 3, 1998, [pp. 261-276] pp. 267 and 273.

[155] *Vide* BELLIS, J.F. *Droit européen de la concurrence… op. cit.,* p. 14: « *Sur le plan des principes, la Commission s'est ralliée dans un certaine mesure à la philosophie développée par l'école de Chicago selon laquelle l'objectif principal assignée au droit de la concurrence est de maximiser le bien-être général du consommateur (*consumer welfare*), quoique le concept ne soit pas lui-même dépourvu d'ambiguïté* »; MONTI, M. *A new strategy for the Single Market… op. cit.,* pp. 12-13: «When the market is regarded as a superior entity, as if it were always able to deliver efficiently and did not need appropriate regulation and rigorous supervision, dangers are likely to lie ahead, as shown by the financial crisis».

Paraphrasing the Court of First Instance: effective competition is «the degree of competition necessary to ensure the attainment of the objectives of the Treaty», Judgment of the Court of First Instance (Fourth Chamber, extended composition) of 27 September 2006, case T-168/01, *GlaxoSmithKline Services Unlimited v Commission of the European Communities* [ECLI:EU:T:2006:265], § 109. In the same line, in *Hoffmann-La Roche,* the Court of Justice clarified that article 3(f) of the EEC Treaty [renumbered as article 3(g), and 3(1)(g) after the inclusion of a second paragraph, by the Treaties of Maastricht (the TEU) in 1993 and of Amsterdam in 1999] envisages the establishment and maintenance of an effective competitive market structure, in Judgment of the Court of 13 February 1979, case 85/76, *Hoffmann-La Roche & Co. AG v Commission of the European Communities* [ECLI:EU:C:1979:36], § 38. Nowadays, the provision, as we will study, is contained in a Protocol.

[156] JONES, A. and SUFRIN, B. *EU Competition Law… op. cit.*, pp. 4 and 34-35. EU competition law, as we will see, aims at the promotion and protection of effective competition as long as effective

In practice, competition policy should aim at granting competing firms a level-playing field where they enjoy the freedom to discover more efficient ways of production to find out what consumers want[157]. However, it must be borne in mind that granting a level-playing field –that is, defending competition– is not tantamount to defending competitors: from a welfare perspective, the defense of competitors could lead to protect inefficient firms, which would turn out utterly detrimental[158].

But, what does 'welfare' means? Or more specifically, what do we refer to by 'consumer welfare'?[159]

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competition delivers benefits to European consumers; consequently, the attention will be drawn to the outcomes for consumers that competition in a particular market delivers, *vide* BISHOP, S. and WALKER, M. *The economics of EC Competition law*. London, Sweet & Maxwell, 2010, 3rd ed., pp. 20-21.

[157] BENDER, C.M.; GÖTZ, G. and PAKULA, B. "Effective competition… *op. cit*., p. 4.

[158] If competitors were to be defended, an increase in an opponent's market power would be counter to their interests; however, as explained by prof. MOTTA, the prospect of having some market power –that is, profit– encourages firms to innovate and invest; thus, if welfare is to be attained, the process of competition must be protected, not competitors; firms may have the same initial opportunities within the marketplace (*ex ante* equity), but this does not necessarily mean that they will obtain equal outcomes from market competition (*ex post* equity); *vide* MOTTA, M. *Competition policy - Theory and practice*. Cambridge, Cambridge University Press, 2004, pp. 26 and 89. All in all, an efficient undertaking will inevitably be able to defeat less efficient competitors and, therefore, a competition authority is not properly placed to underwrite the position of the less efficient firm based on a political preference or sentimentality, *vide* WHISH, R. and BAILEY, D. *Competition Law*. Oxford, Oxford University Press, 2012, 7th ed., p. 22.

[159] As appropriately stated in 2011 by the Vice President of the European Commission responsible for Competition Policy at the time, ALMUNIA: «Consumer welfare is not just a catchy phrase. It is the cornerstone, the guiding principle of EU competition policy», in ALMUNIA, J. "Competition – What's in it for consumers?", in *European Competition and Consumer Day*, Speech 11/803, Poznan, 24 November 2011, available at: http://europa.eu/rapid/press-release_SPEECH-11-803_en.htm (last consulted: 23.09.2015).

A shortcoming of our study must be acknowledged: in this section we will refer to and analyze the normative decisions taken by the EU institutions with respect to the goals of competition policy; however, from a constitutional economics point of view, which is significantly wider than the present study, the State (a monopolist of legitimate power in relation to its central functions: protective, productive and redistributive) derives its central functions consistently from the preferences of the members of a society since all the relevant values and goals have to be derived from the preferences and

First of all, it must be noted that, whereas competition rules are currently applied within the EU in a more economically rigorous way, there has been an undeniable shift of the EU towards a more social market stance[160]. Purely economic objectives are duly combined with the observance of social values and aims[161]. Notwithstanding this more

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values of individual members of that society. Therefore, we will refrain from examining whether market rules do actually correspond to citizens' preferences and values, as well as whether competition policy goals do truly reflect them.

[160] JONES, A. and SUFRIN, B. *EU Competition Law… op. cit.*, pp. 1 and 41-43. The amendments to the Treaties brought about by Lisbon entitled the inclusion of the following wording in article 3(3): «The Union […] shall work for the sustainable development of Europe based on balanced economic growth and price stability, a *highly competitive social market economy*, aiming at full employment and social progress […] (emphasis added). ALMUNIA, in his mandate statement, of February 2010, stated the following: «My vision for competition policy in Europe is linked to my political vision of Europe as an area of peace and stability, freedom and democracy. I see competition policy as a means of strengthening our *social market economy*, and enhancing its efficiency and fairness» (emphasis added), *vide* ALMUNIA, J. "Mandate Statement", in *Commission 2010-2014,* February 2010, available at: http://private-ip.appspot.com/ec.europa.eu/archives/commission_2010-2014/almunia/about/mandate (last consulted: 21.09.2015).

Despite the more economical approach when applying competition rules, some authors consider that the emergent dominance of economics is dubious: if economics dominated, a total welfare standard –different from, and sometimes even opposed to, consumer welfare– would apply and take into consideration dynamic efficiencies, *vide* MONTI, G. "EC Competition law: the dominance of economic analysis?", in ZÄCH, R.; HEINENMANN, A. and KELLERHALS, A. (Eds.). *The development of Competition law: global perspectives*. Cheltenham, Edward Edgar, 2010, [pp. 3-28] p. 27.

[161] Some authors have argued that nowadays both the Commission and the ECJ are consciously pushing for the modernization of European economies along the lines of the Anglo-Saxon models, *vide* for all HÖPNER, M. and SCHÄFER, A. "A new phase of European integration: organized capitalisms in post-Ricardian Europe", in *Max Planck Institut für Gesellschaftsforschung*, Discussion Paper 07/4, 2007, p. 8; and MCCANN, D. "Transforming European capitalism? The European Union and the governance of companies", in *Perspectives on European Politics*, vol. 15, no. 1, [pp. 19-32] pp. 20-21.

However, in a scenario where the essential features and core assumptions of liberal market economies cannot be longer easily attained (unrestricted access to resources, markets and capital), the quoted concern about social aspects might be interpreted as a shift away from Anglo-American free market model towards a new organized capitalism model, inspired by the coordinated market economy (first organized capitalist model) and the social market economy (second organized capitalist model) that characterized the pre and inter world wars Germany, which, in any case, cannot be viewed as superior or deficient to liberal market models, ; *vide* ALLEN, C.S. "Ideas, institutions and organized capitalism: the

social stance of the EU, within the realm of antitrust, economic efficiency is certainly at the center of competition policy: in practice, the coexistence of competition concerns together with non-welfare or non-efficiency enhancing –i.e. socio-political– issues does not imply that competition authorities can force undertakings to take positive action to increase welfare or, let alone, any other socio-political goal[162]. Furthermore, while competition authorities cannot oblige market operators to actively promote welfare and economic efficiency, they must also refrain from willfully using competition law to direct the activity of market actors towards the accomplishment of an objective other than economic efficiency and consumer welfare[163]. This is so because practice shows that competition authorities are ill-positioned to pursue socio-economic goals; thus, a multi-purposed antitrust policy would undoubtedly entitle a reduction in the for-so-long sought but just recently achieved rigor of competition analysis, as well as it would sink into arbitrariness and politicization of this field of law and economics[164]. All in all,

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German Model of political economy twenty years after", in *German Politics and Society*, Vol. 28, issue 2, Summer 2010, [pp. 130-151] pp. 143 and 145-147; ALBERT, M. *Capitalisme contre capitalisme*. Paris, Seuil L'Histoire Immediate, 1991, pp. 146, 219 and 230; JONES, A. and SUFRIN, B. *EU Competition Law... op. cit.*, p. 41, fn. 151; HALL, P. "Gentler capitalism should win the day", in *Regeneration & Renewal*, October 3, 2008, p. 16; ROSENTHAL, J. "On two 'models' of capitalism", in *Science & Society*, vol. 64, no. 4, Winter 2000/2001, [pp. 424-459] p. 439.

[162] JONES, A. and SUFRIN, B. *EU Competition Law... op. cit.*, pp. 43 and 51; SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules... op. cit.*, p. 90. Prof. MONTI underlines there are legitimate, non-efficiency related objectives that could be pursued and it undeniably affects the application of competition law, *vide* MONTI, G. "EC Competition law… *op. cit.*, p. 9; however, this does not imply that, under the current modern economic approach, the focus of competition policy should be placed on the attainment of such non-efficiency goals.

[163] On this same idea, prof. MOTTA warns that if a government was to achieve objectives or public policy considerations other than economic efficiency, it should not use competition policy, but resort to policy instruments that distort competition as little as possible; *vide* MOTTA, M. *Competition policy - Theory and practice… op. cit.*, p. 30. Also, on the implications of a more modern 'economic' approach to competition policy – i.e., that it should be concerned only with welfare and efficiency, *vide* JONES, A. and SUFRIN, B. *EU Competition Law... op. cit.*, p. 48.

[164] SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules... op. cit.*, pp. 97-99 and fn 103. As Prof. SÁNCHEZ GRAELLS points out, competition authorities do not have adequate tools to protect the interests that they have been traditionally balancing *vis-à-vis* the protection of competition; to name some, the protection of small businesses, the redistribution of income and the promotion of labor-keeping policies. The attainment of all those policies through competition come at a significant cost for

competition authorities' interventions are not of a general scope; they reach a limited number of firms each time, instead. In conclusion, if socio-political –i.e., non-efficiency related– goals are to be achieved, it is for competition authorities to constrain themselves to the analysis of whether the conduct is desirable from a competition perspective – that is, whether it is a efficiency-enhancing behavior; then, once such cost and benefit analysis is concluded –once the competition assessment is over– the conduct would be ultimately prohibited or accepted based on other governmentally set political and social grounds[165]. As a result, in some cases, due to goals alien to a proper efficiency-enhancing approach –i.e., alien to competition policy–, agreements, conducts or mergers that would have been otherwise considered anticompetitive will be cleared or admitted: some matters are specifically excluded from the scope of competition law while others may be exempted from its application after the completion of a balancing test[166].

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the society, either because there are other fields of regulation better placed to achieve them (tax or labor law), or because they are openly anticompetitive and efficiency-reducing objectives, more naturally related to centrally planned economies rather to open-market economy.

[165] On the boundaries of an adequate competition analysis, *vide* SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules… op. cit.*, p. 97.

[166] There are in practice two ways in which non-welfare or non-efficiency issues or other Union policies can be taken into account:

(a) They can be excluded from the scope of competition law altogether: by the Treaties themselves – e.g., national security connected with the production or trade in arms –article 346 TFEU–; nuclear energy – inasmuch as it is covered by the Euratom Treaty–; three exceptions set out in Regulation 1184/2006 in relation with agricuture –pursuant to articles 42 and 43 TFEU (ex articles 36 and 37 TEC–; and firms entrusted with Services of General Economic Interest (SGEI) –article 106(2)–.

(b) They may be subject to competition law but other considerations must be taken into account in their application (balancing exercise):

- with respect to the interpretation of the article 101(1) TFEU, albeit they are a narrowly limited group of cases, they worth being mentioned (for a brief comment on them, *vide* SCHOLES, J. "Chapter III - Competition Law", in REICH, N.; NORDHAUSEN SCHOLES, A. and SCHOLES, J. *Understanding EU internal market law*. Cambridge, Intersentia, 2015, [pp. 221-368] p. 234): (1) collective bargaining agreements, for their social importance and Member States' traditional respect for them, as in the Judgment of the Court of 21 September 1999, case C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [ECLI:EU:C:1999:430], § 60; (2) or the pursuit of public interest objectives when there has been an act of state delegation in favor of a professional association for its self-

Further still, a 'more economics' oriented approach suggests that non-efficiency considerations must have less prominence –whether not eliminated altogether– since a extended reliance on economic analysis –that is, an efficiency-oriented antitrust policy that enables a reassessment of decision making in the light of economic principles– accounts for the adoption of significantly better decisions as it provides adequate tools for consistent and systematic analysis of business behavior and market dynamics[167].

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regulation – such transfer implies that the same criteria that would apply to Member State regulation itself –exceptions to the free-movement rules– is transferred to the self-regulation of the professional association, as in the Judgment of the Court of 19 February 2002, case C-309/99, *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, intervener: Raad van de Balies van de Europese Gemeenschap* [ECLI:EU:C:2002:98], § 68 and 110; but, in the absence of an act of state delegation, no exception could be granted and article 101(1) applies, as in the Judgment of the Court of First Instance (Fourth Chamber) of 26 January 2005, case T-193/02, *Laurent Piau v Commission of the European Communities* [ECLI:EU:T:2005:22], §§ 76-78; *vide* also SCHWEITZER, H. "Competition law and public policy: reconsidering an uneasy relationship - the example of Article 81", in DREXL, J.; IDOT, L. and MONÉGER, J. *Economic Theory and Competition Law*. Cheltenham, Edward Elgar, 2009, [pp. 134-150] p. 138; and Judgment of the Court (Third Chamber) of 18 July 2006, case C-519/04 P, *David Meca-Medina and Igor Majcen v Commission of the European Communities* [ECLI:EU:C:2006:492], §§ 44-45;

- with respect to the article 101(3) TFEU: the efficiency defense –provides for a possibility to declare article 101(1) TFEU non-applicable when the economic benefits of the restriction of competition outweigh the harm caused; this approach implies the assumption that private restraints of competition can have economic benefits that relate to public-policy goals and bring about pro-competitive effects, *vide* SCHWEITZER, H. "Competition law and public policy… *op. cit.,* p. 148–.

[167] FRIEDERISZICK, H.W. "Economic analysis in EU competition cases", in DREXL, J.; IDOT, L. and MONÉGER, J. *Economic Theory and Competition Law*. Cheltenham, Edward Elgar, 2009, [pp. 3-19] pp. 3 and 19; MONTI, G. "EC Competition law… *op. cit.*, p. 11; SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules… op. cit.*, p. 97.

Furthermore, even if Europeans have a political tradition that tended to be less hostile to government as regulator (as compared to that of the US, who aspired to assure an economic opportunity to all), nowadays nearly all economists are reluctant to accept additional goals of competition policy such as economic freedom, fairness and justice, the protection of SMEs, the international competitiveness of domestic firms and (with regard to the EU) economic integration, *vide* FOX, E.M. "Monopolization and dominance in the United States and the European Community: efficiency, opportunity and fairness", in *Notre Dame Law Review*, vol 61, issue 5, 1986, [pp. 981-1020] pp. 983-985; KERBER, W. "Should competition law promote efficiency? Some reflections of an economist on the normative foundations of competition law", in DREXL, J.; IDOT, L. and MONÉGER, J. *Economic Theory and Competition Law*.

In any case, as announced, some considerations must be made with regards to welfare. Welfare is the measure of how well a market is performing; a perfectly competitive market thus maximizes welfare because it leads to efficiency[168]. While the literature distinguishes between total welfare (also referred to as social welfare) and consumer welfare, total welfare does not seem to be the standard use in EU competition: EU competition policy is concerned with consumer welfare, that is, with the transfer of surplus from producers to consumers[169].

One must be aware of the fact that competition policy does not exist in a vacuum; instead, it is an expression of the current values and aims of society[170]. Consequently, to further understand the option taken by the Commission when deciding to bend towards the protection of consumer welfare, we must conduct a research –albeit briefly– on the evolution of Commission's concerns in relation with competition policy. In any case, we are forced to admit a limitation inherent to any science intensely

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Cheltenham, Edward Elgar, 2009, [pp. 93-120] p. 95 and 106-107; MOTTA, M. *Competition policy - Theory and practice… op. cit.*, p. 22-30. For the additional goals pursued by EU competition policy, *vide* GERBER, D.J. *Law and Competition in Twentieth Century Europe... op. cit.*, pp. 418-436; MOTTA, M. *Competition policy - Theory and practice… op. cit.*, pp. 24-26; WHISH, R. and BAILEY, D. *Competition Law... op. cit.*, pp. 21-22.

In relation to the economic integration objective, as Prof. SÁNCHEZ GRAELLS unerringly points out, the EU internal market has become a consolidated reality, thus, EU competition policy is to be regarded as an independent policy and, while it may still be under some influence of integration goals, it has refocused on economic efficiency considerations – more precisely, on consumer welfare, *vide* SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules... op. cit.*, p. 100.

[168] As clarified by Prof. LOWE, an economy is operating at maximum efficiency when society is squeezing the greatest value –the highest level of welfare– out of its scarce resources, *vide* LOWE, P. "Consumer Welfare and Efficiency – New Guiding Principles of Competition Policy?", in *13th International Conference on Competition and 14th European Competition Day*, Munich (Germany), 27 March 2007, p. 2. Also, *vide* JONES, A. and SUFRIN, B. *EU Competition Law... op. cit.*, p. 13.

[169] JONES, A. and SUFRIN, B. *EU Competition Law... op. cit.*, pp. 13 and 47. Conversely, as noted by prof. MONTI, almost all economists underline that the basic norm of economics is the maximization of overall wealth of society (i.e., total welfare), not a concern about a selected group, e.g., consumers, *vide* MONTI, G. "EC Competition law… *op. cit.*, p. 6.

[170] Indeed, different societies come to different conclusions about the appropriate goals of competition laws, *vide* KERBER, W. "Should competition law promote efficiency?... *op. cit.,* p. 119; WHISH, R. and BAILEY, D. *Competition Law... op. cit.*, p. 20.

influence by the political thinking: as heavily biased as it is by social and historical factors, it is susceptible to change[171].

The Community, at its inception, embraced competition policy as a means of integrating the economies of the Member States[172]. Competition policy was viewed as an instrument of single market integration that served two masters: the competition one and the imperative of single market integration[173]. However, once the integration objective advanced and resulted in the establishment of the EU internal market, the Commission changed its focus, released competition policy from its role as the handmaid of market integration, and concentrated on ensuring effective competition[174].

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[171] MOTTA, M. *Competition policy - Theory and practice… op. cit.*, p. 17; WHISH, R. and BAILEY, D. *Competition Law... op. cit.*, p. 20. Nevertheless, this is not tantamount to acknowledging an absolute freedom to politically determine the goals of competition policy: the outcome of those political decisions should reflect citizens' preferences since, from a constitutional economics' perspective, preferences of citizens are viewed as the ultimate normative criterion (consent principle) and, therefore, market rules are optimal if they correspond to citizens' preferences and values; otherwise, the goals of competition might be distorted through the rent-seeking activities of interest groups. *Vide* KERBER, W. "Should competition law promote efficiency?... *op. cit.,* pp. 110-111.

[172] This approach, as only secondarily did the Community endorse competition as a way of strengthen the economy and serve buyers within the Community, explains the initial differentiated path taken by the Europeans, in comparison to that taken by the US, who focused on the assurance of an economic opportunity to all and a distrust on concentrated economic power; however, the evolution of both antitrust systems made them at some point cross and somehow converge: mainly due to a less vigorous control of conduct and structure by the US law and a increasing protection of equity more than efficiency by the EU, *vide* FOX, E.M. "Monopolization and dominance in the United States and the European Community… *op. cit.*, pp. 983-985. Be that as it may, due to the more modernized approach to competition policy, the EU is nowadays going back to the protection of efficiency, while increasingly rejecting equity as a ground for protection.

[173] As late as in 1999, in its Annual Report on Competition Policy, the Commission still claimed that: «the first objective of competition policy is the maintenance of competitive markets […]. The second is the single market objective […]», *vide* EUROPEAN COMMISSION. *European Community Competition Policy - XXIX Report on Competition Policy*, SEC(2000) 720 final, 2000 p. 13. Also, JONES, A. and SUFRIN, B. *EU Competition Law... op. cit.*, p. 42; SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules… op. cit.*, p. 100.

[174] EUROPEAN COMMISSION. *White Paper on the modernisation of the rules implementing articles 85 and 86 of the EC Treaty*, Commission Programme no. 99/027, Brussels, 28 April 1999, p. 5. Also, JONES, A. and SUFRIN, B. *EU Competition Law... op. cit.*, p. 43.

Finally, the consumer welfarist approach that was to be followed by the Commission was consolidated in a variety of soft law instruments it adopted from 2004 to 2010 within this wave of modernization: among others, the 2004 Guidelines on the application of what is now article 101(3), the 2004 Guidelines on horizontal mergers, the 2009 Guidance paper on the Commission's enforcement priorities in applying what is now article 102 and the 2010 Guidelines on vertical restraints[175]. In brief, this consolidation brought about the emplacement of both competition and market integration at the same level: they altogether serve to enhance consumer welfare and ensure efficient allocation of resources since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Union for the benefit of consumers[176].

According to the consumer welfarist approach adopted by the Commission, competition should lead to lower prices, high-quality products, a wider choice of goods

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Some authors place the trigger for the change of approach, for the want to prioritize consumer benefits to take a more economics-based approach, on the greater sympathy with the very significant rethinking of the aims of antitrust policy that took place in the US in the 1980s. They feel sings of the change since the mid-1980s, namely since the XIV Report on Competition Policy of 1984, where the Commission stated that «[w]hen it operates satisfactorily, competition can be expected to perform three functions that help towards a harmonious development of economic activity throughout the Community: a resource allocation function, by encouraging better use of available factors of production, so that firms' technical efficiency is increased and consumers' wants better satisfied; an incentive function, by stimulating firms to better their performance relative to their competitors; and an innovative function, by encouraging the introduction of new products in markets and the development of new production processes and distribution techniques», *vide,* COMMISSION OF THE EUROPEAN COMMUNITIES. *XIV Report on Competition Policy*, Brussels, 1985, p. 11. Also *vide* SCHOLES, J. "Chapter III - Competition Law"… *op. cit.*, p. 231.

[175] Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty, *Official Journal of the European Union*, C 101/97, 27 April 2004; Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, *Official Journal of the European Union*, C 31/5, 5 February 2004; 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, *Official Journal of the European Union*, C 45/7, 24 February 2009; Commission notice - Guidelines on Vertical Restraints, SEC(2010) 411, Brussels, 2010, *Official Journal of the European Union*, C 130/1, 19 May 2010.

[176] 2004 Guidelines on the application of what is now article 101(3), *cit.*, § 13.

and services, and innovation as it is with good reason that consumer welfare is explicitly concerned with the passing on of efficiency gains to consumers (consumer surplus)[177]. Competition policy is therefore concerned with the transfer of surplus from producers to consumers – i.e., with the aggregate measure of surplus of all consumers[178]. Producer

[177] What is more, consumer surplus must compensate consumers for other advantages producers have, namely, better possibilities of lobbying (rent-seeking advantages) or information asymmetries between firms and competition authorities, *vide* EUROPEAN COMMISSION. *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses*, Brussels, December 2005, § 4; KERBER, W. "Should competition law promote efficiency?... *op. cit.,* p. 105; MONTI, M. “The future of competition policy in the European Union”, in *European Commission*, extracts from Speech/01/340, London, 9 July 2001; WHISH, R. and BAILEY, D. *Competition Law... op. cit.*, p. 3. Also, 2004 Guidelines on the application of what is now article 101(3), *cit.*, §§ 16, 21 and 25; 2004 Guidelines on horizontal mergers, *cit.*, §§ 8, 77, 79-81; Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, *Official Journal of the European Union*, C 265/6, 18 October 2008, § 10; 2009 Guidance paper on the Commission’s enforcement priorities in applying what is now article 102, *cit.*, § 5.

[178] In contrast, total welfare or social welfare overlooks the issue of income distribution among consumers and producers and it is not compatible with the Pareto criterion, in accordance with which no one should be worse off; even if a balancing of positive and negative wealth effects between different persons is allowed (Kaldor-Hicks criterion or ‘principle of wealth maximization’), it may still not be compatible with the Pareto criterion. From a total welfare perspective, as long as the increase of producer surplus is larger than the reduction of consumer surplus, the Kaldor-Hicks criterion will be fulfilled; that is, state A is normatively better than state B if A individuals that are better off are able to compensate A individuals that are worse off to such an extent that they are not worse off than they would be in B. In any case, it implies that there would be individuals in A that, albeit compensated, would be worse off; thus, the Pareto criterion is not be fulfilled. *Vide* JONES, A. and SUFRIN, B. *EU Competition Law... op. cit.*, p. 13 and 43; MOTTA, M. *Competition policy - Theory and practice… op. cit.*, p. 18. For a critic on the adoption of a Pareto criterion of efficiency, as it might be overly restrictive because it would trigger the intervention of competition authorities in cases where total wealth could be expanded, *vide* KERBER, W. "Should competition law promote efficiency?... *op. cit.,* p. 104; SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules… op. cit.*, p. 94.

In any case, some authors point out that in the majority of cases the distinction between consumer welfare and total welfare is not significant, and, provided that it matters, the focus is on consumer welfare; *vide,* for all, BISHOP, S. and WALKER, M. *The economics of EC Competition law… op. cit.*, pp. 31-32.

One might not believe that the option of the Commission for the consumer welfare paradigm is based on pure economic reasons: first of all, as Prof. MONTI explains, a total welfare standard is less easily susceptible of scrutiny given the greater number of variables and the long term justifications for allowing certain prices, whereas a consumer welfare standard, where the focus is placed on the anticipated short

surplus is the profit a producer makes by selling goods above the cost of production, whereas consumer surplus is the difference between what consumers would be prepared to pay for and what they actually paid[179]. Moreover, the Commission has stressed that, in order to ensure that citizens enjoy the benefits of a competitive, dynamic market economy, future welfare matters as well as current welfare; thus, dynamic consumer welfare is the paradigm to be followed[180].

'Consumer', as interpreted in EU competition law, encompasses all direct and indirect consumers, not just private end-users; that is, it includes intermediate customers as well[181]. However, the problem arises when the interests of intermediate customers

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run effects on consumers, allows third parties to monitor whether the antitrust agency has done well its job and prices fall after a prohibited transaction; *vide* MONTI, G. "EC Competition law… *op. cit.*, p. 7. Moreover, Prof. NAZZINI insists, consumer welfare, as a test, is easier to apply than social (total) welfare, as it is easier to argue that as a result of the exclusion of a competitor or of an agreement between firms prices will be higher, than to explain that the aggregate producer and consumer surplus will be lower; furthermore, it is a politically acceptable way to disguise a non-interventionist agenda –e.g., imagine a tying practice by a dominant undertaking: it would be easier to argue that it should be allowed because an integrated product is good for consumers than that it makes no difference to the sum of industry profits and consumer surplus–; finally, the very mention of the word 'consumer' evokes ideas of fairness, redistribution and protection of the many and vulnerable; *vide* NAZZINI, R. *Foundations of European Union Competition Law, the objectives and principles of article 102*. Oxford, Oxford University Press, 2011, pp. 44-45. Also KERBER, W. "Should competition law promote efficiency?... *op. cit.,* pp. 105-106.

[179] JONES, A. and SUFRIN, B. *EU Competition Law... op. cit.*, p. 47. Some authors argue that the difference between consumers and producers should not be overstated as in most countries consumers are also owners of the firms either directly (shareholders) or indirectly (through pension or investment funds), *vide* MOTTA, M. *Competition policy - Theory and practice… op. cit.*, p. 18; however, this argument presupposes certain unfulfilled assumptions about the distribution of wealth, *vide* KERBER, W. "Should competition law promote efficiency?... *op. cit.,* p. 105.

[180] KROES, N. "European Competition Policy – Delivering Better Markets and Better Choices", in *European Consumer and Competition Day*, Speech/05/512, London, 15 September 2005; LOWE, P. "Consumer Welfare and Efficiency… *op. cit.* On the suboptimal consequences of seeking to maximize welfare in a static sense, *vide* BISHOP, S. and WALKER, M. *The economics of EC Competition law… op. cit.*, p. 31; MOTTA, M. *Competition policy - Theory and practice… op. cit.*, p. 18.

[181] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), *Official Journal of the European Union*, L 24/1, 29 January 2004, article 2(1)(b); 2004 Guidelines on the application of what is now article 101(3), *cit.*, § 87. Also, Judgment of the Court (Third Chamber) of 23 November 2006, case C-238/05, *Asnef-Equifax, Servicios*

and end-users clash[182]. Still, in practice, the divergence may only be apparent, since, from a dynamic consumer welfare perspective, albeit being in the long run, intermediate customers' interests tend to collude with those of end-users[183].

The EU Courts' case law points in divergent directions: it sometimes sets its focus for the antitrust assessment on the welfare of the final consumers, while many others it is (or has been) concerned with the economic freedom of market participants,

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de Información sobre Solvencia y Crédito, SL v Asociación de Usuarios de Servicios Bancarios (Ausbanc) [ECLI:EU:C:2006:734], § 70. As for the EU Courts, on the indirect prejudice to consumers when a conduct impairs an effective competitive structure, for all, Judgment of the Court of 13 February 1979, case 85/76, *Hoffmann-La Roche… cit.,* § 125; Judgment of the Court of First Instance (Third Chamber) of 7 October 1999, case T-228/97, *Irish Sugar plc v Commission of the European Communities* [ECLI:EU:T:1999:246], § 232; Judgment of the Court of First Instance (Grand Chamber) of 17 September 2007, case T-201/04, *Microsoft Corp. v Commission of the European Communities* [ECLI:EU:T:2007:289], § 664.

[182] On this issue, but leaving ultimately the question unanswered, *vide* AKMAN, P. "'Consumer' versus 'customer': the devil in the detail", in *Center for Competition Policy*, Working Paper 08-34, November 2008. Also, Prof. LOVDAHL underlines that, although the CFI talked about effects and efficiencies in the Microsoft judgment, it is still unclear whether the legal test is harmful effects on consumers (end-users) or on competitors (intermediate customers), *vide* LOVDAHL GORMSEN, L. "The conflict between economic freedom and consumer welfare in the modernisation of article 82 EC", in *European Competition Journal*, vol. 3, no. 2, December 2007, [pp. 329-344] p. 342 and fn 82.

[183] Furthermore, as we will explain shortly afterwards, it seems that the Commission relies on the effects on competitors, rather than on consumers, when assessing the compliance with competition standards of a practice. Lately, its focus has been placed on whether the efficiency gains are ultimately passed on to end-users (distributive effects).

One must be careful not to confuse the interests of –direct or indirect– consumers with those of competitors. As we will see, both the Commission and the EU Courts had been at some point concerned with the protection of competitors –specially in cases falling under the scope of what is now article 102 TFEU– since, generally, by protecting competitors the consumer may benefit through increased choice and reallocation of profits from the dominant supplier to competing suppliers and, as these competitors will probably not have the ability to reap monopoly profits, these profits are expected to be passed back to the consumer through reduced prices; however, this is not guaranteed. It cannot be guaranteed either that productive and dynamic efficiency (as explained below) will be facilitated best in this way. Furthermore, in some circumstances it may be the case that the most productive way of supplying customers and consumers is through fewer suppliers – particularly when economies of scale are great, *vide* LOVDAHL GORMSEN, L. "The conflict between economic freedom and consumer welfare… *op. cit.,* pp. 330-331.

regardless of the actual impact on consumer welfare[184]. Even the Commission could be found guilty for yielding to the temptation of interpreting competition rules in line with

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[184] On the welfare of the final consumer, Judgment of the Court (First Chamber) of 17 February 2011, case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB* [ECLI:EU:C:2011:83], §§ 43, 76 and 79; Judgment of the Court (Grand Chamber) of 27 March 2012, case C-209/10, *Post Danmark A/S v Konkurrencerådet* [ECLI:EU:C:2012:172], § 22; and Judgment of the Court of First Instance (Fifth Chamber) of 7 June 2006, joined cases T-213/01 and T-214/01, *Österreichische Postsparkasse AG and Bank für Arbeit und Wirtschaft AG v Commission of the European Communities* [ECLI:EU:T:2006:151], § 115; Judgment of the Court of First Instance of 27 September 2006, case T-168/01, *GlaxoSmithKline… cit.*, § 118. On the economic freedom of market participants, prohibiting a merger if it strengthens dominance, Judgment of the Court of 21 February 1973, case 6/72, *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities* [ECLI:EU:C:1973:22], §§ 26 and 29; prohibiting a refuse of supply of raw materials if the supplier is a dominant firm, Judgment of the Court of 6 March 1974, joined cases 6/73 and 7/73, *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities* [ECLI:EU:C:1974:18], § 25; allowing reasonable commercial practices as long as they do not interfere with the independence of SMEs in the commercial relations with the dominant firm, Judgment of the Court of 14 February 1978, case 27/76, *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* [ECLI:EU:C:1978:22], § 193; prohibiting conducts if they weaken the structure of competition, Judgment of the Court of 13 February 1979, case 85/76, *Hoffmann-La Roche… cit.,* §§ 106 and 123; prohibiting a refuse of supply that hinders competitors' production, albeit the existence of IP rights, Judgment of the Court of 5 October 1988, case 53/87, *Consorzio italiano della componentistica di ricambio per autoveicoli and Maxicar v Régie nationale des usines Renault* [ECLI:EU:C:1988:472], § 16; also Judgment of the Court of 5 October 1988, case 238/87, *AB Volvo v Erik Veng (UK) Ltd.* [ECLI:EU:C:1988:477], § 9; and Judgment of the Court of 6 April 1995, joined cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities* [ECLI:EU:C:1995:98], § 54; prohibiting a discount if it restricts the buyer's freedom to choose its sources of supply, Judgment of the Court of 9 November 1983, case 322/81, *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities* [ECLI:EU:C:1983:313]**,** § 73; claiming an equality of opportunity of market operators, Judgment of the Court of 19 March 1991, case C-202/88, *French Republic v Commission of the European Communities* [ECLI:EU:C:1991:120], § 51; and prohibiting dominant firms to prevent buyers from sourcing the relevant products from other suppliers, Judgment of the Court of 16 December 1975, joined cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73, *Coöperatieve Vereniging "Suiker Unie" UA and others v Commission of the European Communities* [ECLI:EU:C:1975:174], § 518; Judgment of the Court of First Instance (Second Chamber) of 1 April 1993, case T-65/89, *BPB Industries Plc and British Gypsum Ltd v Commission of the European Communities* [ECLI:EU:T:1993:31], § 120; prohibiting a conduct of a dominant firm that is capable of having, or likely to have, the effect of restricting competition, without the need to demonstrate that the abuse in question had a concrete effect on the

the ordoliberal thought – i.e., in line with the assumption that competition is a value in itself and, thus, competitors and SMEs are to be protected for their own sake, failing sometimes to conduct an assessment on the effects of the practice on consumers[185]. This decision tendency is particularly important in relation with markets where competition is already weakened by the presence of a dominant undertaking –article 102 TFEU–, where the market's economic structure cries for protection in order to guard smaller competitors from aggregation of economic power since dominant firms are likely to use their economic power to undermine the competitive structures[186]. Some, claiming a

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market concerned, Judgment of the Court of First Instance (Third Chamber) of 30 September 2003, case T-203/01, *Manufacture française des pneumatiques Michelin v Commission of the European Communities* [ECLI:EU:T:2003:250], §§ 239-240; Judgment of the Court of First Instance (First Chamber) of 17 December 2003, case T-219/99, *British Airways plc v Commission of the European Communities* [ECLI:EU:T:2003:343], §§ 244-245, 293 and 297; or even if avoiding the abuse would entail increasing the prices to consumers, Judgment of the Court (Second Chamber) of 14 October 2010, case C-280/08 P, *Deutsche Telekom AG v European Commission* [ECLI:EU:C:2010:603], § 182.

[185] Commission Decision of 22 December 1987, IV/30.797 and 31.488, *Eurofix-Bauco v Hilti*, § 79; Commission Decision of 21 December 1988, IV/30.979 and 31.394, *Decca Navigator System*, § 97; Commission Decision of 26 February 1992, IV/33.544, *British Midland v Aer Lingus*, §§ 24-25; Commission Decision of 20 April 2001, COMP D3/34.493 – *DSD*, § 114. *Vide* JONES, A. and SUFRIN, B. *EU Competition Law... op. cit.*, p. 34. Also, Judgment of the Court (Third Chamber) of 4 June 2009, case C-8/08, *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [ECLI:EU:C:2009:343], § 38.

For ordoliberals, the main goal is the limitation of private power, to guarantee individual freedom; thus, economic freedom –the protection of rivals' opportunities to access the market and compete without being restricted by any other firm– is not to be viewed as the actual goal of their competition policy, but as an indirect and derived goal, *vide* LOVDAHL GORMSEN, L. "Article 82 EC: Where are we coming from and where are we going to?", in *Competition Law Review*, vol. 2, issue 2, 2005, [pp. 5-25] p. 15; LOVDAHL GORMSEN, L. "The conflict between economic freedom and consumer welfare… *op. cit.,* p. 329. Not surprisingly, the right to compete protected by competition law was seen almost as an economic human right and, still today, as one may deduct from the tenderness which EU competition law continues to show to SMEs under both articles 101 and 102 TFEU, is visible, *vide* SCHOLES, J. "Chapter III - Competition Law"… *op. cit.*, p. 230.

[186] As remarked by Prof. LOVDAHL, the change from economic freedom to consumer welfare standard aligned what is now article 102 TFEU with the Commission's enforcement policy in article 101 TFEU and merger control, since the vast majority of the cases where it could be suspected that economic freedom was the standard were related to conducts of the article 102; *vide* LOVDAHL GORMSEN, L.

contextual reading of the referred case law and decisions, may argue that neither the EU Courts nor the Commission were trying to protect economic freedom, they were trying to protect consumer welfare, instead; however, the objectionable lack of a thorough economic analysis raises concerns about the straightforward acceptance of such an approach as they conduct no serious assessment on the detrimental consequences –direct or indirect– to consumers of an alteration of the effective competitive structure[187].

In this scenario, the Commission found itself bound to expressly opt for a standard[188]. In doing so –that is, adopting the consumer welfare standard– it set a clear path to be followed when enforcing EU competition law, a unique goal to be pursued, and formally rejected broader objectives such as economic freedom, the social welfare standard and even the increasingly attractive protection of competitors[189]. However,

"Article 82 EC… *op. cit.,* pp. 19 and 24; LOVDAHL GORMSEN, L. "The conflict between economic freedom and consumer welfare… *op. cit.,* pp. 339-340 and 343.

[187] If economic freedom was pursued as a means to an end of consumer welfare, then an assessment on whether the conduct in question would likely have led to a decrease or an increase in consumer welfare was mandatory, *vide* LOVDAHL GORMSEN, L. "Article 82 EC… *op. cit.,* p. 8; LOVDAHL GORMSEN, L. "The conflict between economic freedom and consumer welfare… *op. cit.,* pp. 340, 342-343.

[188] With the exception of State Aid. In the world of State Aid, a consumer welfare standard cannot be directly transposed as it can be justified on the basis of non-economic grounds –e.g., reducing social disparities–, which consumer welfare does not measure. Thus, the correct welfare standard for State Aid policy seems to be social welfare of the EU, which is equivalent to the notion of common European interest found in article 107(3)(b) TFEU, regarding aid that may be found compatible with the internal market. *Vide* LOWE, P. "The design of competition policy institutions for the 21st century — the experience of the European Commission and DG Competition", in *Competition Policy Newsletter*, no. 3, 2008, p. 6.

[189] JONES, A. and SUFRIN, B. *EU Competition Law... op. cit.*, p. 43; LOVDAHL GORMSEN, L. "The conflict between economic freedom and consumer welfare… *op. cit.,* p. 338; MONTI, G. "EC Competition law… *op. cit.*, pp. 3-4.

In relation with the economic freedom, the Commission and EU Courts tended to equate an abuse with a restriction of economic freedom – i.e., restrictions on the rights and opportunities of market operators. Yet economic freedom and consumer welfare are based on different normative values, which conflict. Taking an example given by Prof. LOVDAHL, the exclusion of some SMEs, which lack economies of scale, would not harm *consumer welfare* if they were unable to guarantee consumer welfare in the form of lower prices, better quality and effective choice, but it would harm the individual *economic freedom* of

when it comes down to translating the consumer welfare standard into actual tests to analyze individual cases, the Commission can be blamed, still today, for a continued over-reliance on effects on competitors rather than concentrating solely on harms to consumers[190].

EU Courts, on their side, appear, even today, to remain largely reluctant to abandon their formalistic approach in favor of a more economic one, as mandated by the Commission. But if we make an evolutionary analysis of the past four decades case law, one may notice that, at least, the EU Courts are commencing the route to align their thinking with that declared by the Commission: (a) starting in the mid-1970s, competition was meant to protect an *effective competition structure*; (b) in the late 1980s, the function of competition was to prevent competition being distorted to the

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excluded companies as they would no longer have access to the market, *vide* LOVDAHL GORMSEN, L. "Article 82 EC… *op. cit.,* p. 8; LOVDAHL GORMSEN, L. "The conflict between economic freedom and consumer welfare… *op. cit.,* p. 331.

With reference to the protection of competitors –instead of intermediate customers or final end-users– the Commission, in a controversial move to favor the protection of competition as such, rather than pure consumer welfare, remarked that it may sometimes be in the interest of consumers to protect competitors that are not (yet) as efficient as the dominant firm, *vide* EUROPEAN COMMISSION. *DG Competition discussion paper on the application of Article 82… op. cit.*, § 67; it argued that this could mean more competition in the long run, driving prices down and increasing allocative efficiency to benefit consumers, but it obviated that, on one hand, it may involve a loss of economies of scale –what is inefficient from an economic efficiency point of view– and, on the other hand, it gives the competition authority a wide discretion in assessing whether and when a company is (yet) as efficient as the dominant company. In conclusion, it was dubious whether it would generate any efficiency to the benefit of consumer welfare, *vide* LOVDAHL GORMSEN, L. "The conflict between economic freedom and consumer welfare… *op. cit.,* p. 338.

[190] As Prof. MARSDEN explains, it is about to what extent the competition system tolerates under-enforcement: if the system –as that of the US with respect to monopolization– accepts some under-enforcement so it does not risk chilling some procompetitive activity, there will be no intervention without proof of actual or likely harm to consumers; on the contrary, if the system –as that of the EU with regards to the abuse of dominance– is concerned with an absolute enforcement, it is likely to resort to less proof –and more assumptions– on the actual or likely effects on consumers – regardless of the consequences for procompetitive activity, *vide* MARSDEN, P. "Some outstanding issues from the European Commission's Guidance on article 102 TFEU: not-so-faint echoes of ordoliberalism", in ETRO, F. and KOKKORIS, I. *Competition Law and the Enforcement of Article 102*. Oxford, Oxford University Press, 2010, [pp. 53-72] p. 61.

detriment of *public interest, individual undertakings and consumers*; (c) this approach was maintained until the mid-2000s, where the Courts set that competition had to be *protected as such*, as an institution; (d) in late-2000s, the Courts went back to considering that the *structure of the market* was the focus, and thus, competition as such (again) – there was no need that consumers were deprived of the advantages of effective competition; (e) in 2011, however, a new concern was introduced – i.e., the *well-being of the EU*, that is, a clear reference to the aims of the EU; (f) finally, in 2012, the Courts, when assessing the anticompetitive character of the practices, aligned, as said, with the Commission, and stressed heavily the *effects on consumers* of the practices, since, albeit having many interests to make converge, they are also concerned with consumer welfare[191].

The adoption by the Commission of the consumer welfare standard does embrace an efficient allocation of resources, as consumer welfare and economic efficiency are closely related[192]. Consequently, even if some texts refer to consumer welfare *and* efficient allocation of resources as if the former does not necessarily

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[191] In 1974, Judgment of the Court of 21 February 1973, case 6/72, *Continental Can… cit.,* § 12. In the 1980s, Judgment of the Court of 21 September 1989, joined cases 46/87 and 227/88, *Hoechst AG v Commission of the European Communities* [ECLI:EU:C:1989:337], § 25; repeated in 2002, Judgment of the Court of 22 October 2002, case C-94/00, *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities* [ECLI:EU:C:2002:603], § 42. In 2006, Judgment of the Court of 15 March 2007, case C-95/04 P, *British Airways… cit.*, § 107, which took up the Opinion of the AG Kokott delivered on 23 February 2006, case C-95/04 P, *British Airways… cit.* [ECLI:EU:C:2006:133], § 86. In 2009, which took up the Opinion of the AG Kokott delivered on 19 February 2009, case C-8/08, *T-Mobile… cit.* [ECLI:EU:C:2009:110], §§ 38, 39 and 58; Judgment of the Court (Third Chamber) of 6 October 2009, joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline… cit.*, §63; repeated in 2013, Judgment of the Court (Tenth Chamber) of 7 February 2013, case C-68/12, *Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa a.s.* [ECLI:EU:C:2013:71], § 18. In 2011, Judgment of the Court (First Chamber) of 17 February 2011, case C-52/09, *TeliaSonera… cit.*, § 22. In 2012, Judgment of the Court (Grand Chamber) of 27 March 2012, case C-209/10, *Post Danmark… cit.*

[192] LOWE, P. "Consumer Welfare and Efficiency… *op. cit.* For some authors, economic efficiency is indeed the clear goal of current antitrust policy. For all, *vide* Prof. SÁNCHEZ GRAELLS, who states the following: «[T]he breath of goals formerly attributed to competition law has been significantly reduced and economic efficiency is clearly at the center of contemporary antitrust conceptions», *vide* SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules… op. cit.*, p. 90.

encompass the latter, the economic goal of EU competition is concerned with improving allocative efficiency[193]. For economists, a competitive market is an instrument used to achieve efficient allocation, which results from the fact that goods are produced in the quantities valued by society – that is, the supplier will expand its production to the point where market market price and marginal cost coincide; not more, not less[194].

However, 'efficiency' is not as clear and unambiguous as it might appear at first glance[195]. It may conflict with other efficiency goals, namely productive and dynamic efficiency[196].

Productive efficiency (also known as technical efficiency) implies that output is maximized through the use of the most effective combination of inputs – to put it in other words, goods are produced at the lowest possible cost[197]. Moreover, internal slack (x-inefficiency) is absent – i.e., managers will not pursue goals other than profit maximization[198]. In any case, the goal of productive efficiency is subsumed by that of

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[193] On the non-encompassing of consumer welfare and efficient allocation of resources, *vide* AKMAN, P. "Consumer welfare and article 82: practice and rhetoric", in *World Competition*, vol. 32, 2007, [pp. 71-90] pp. 80-81; DAYAGI-EPSTEIN, O. "The evolution of the notion of consumer interest in the light of the modernisation of article 82 EC", in EZRACHI, A. *Article 82 EC: Reflections on its recent evolution*. Oxford, Hart Publishing, 2009, [pp. 67-86] p. 76. On the protection of allocative efficiency, *vide* BISHOP, S. and WALKER, M. *The economics of EC Competition law… op. cit.*, p. 32.

[194] When the market price equals the marginal cost, the market is in equilibrium, *vide* JONES, A. and SUFRIN, B. *EU Competition Law... op. cit.*, p. 8; KERBER, W. "Should competition law promote efficiency?... *op. cit.,* pp. 97-98.

[195] ZIMMER, D. "Competition law de lege ferenda", in ZÄCH, R.; HEINENMANN, A. and KELLERHALS, A. (Eds.). *The development of Competition law: global perspectives*. Cheltenham, Edward Eldgar, 2010, [pp. 319-331] pp. 322-323.

[196] VAN DEN BERGH, R.J. and CAMESASCA, P.D. *European Competition Law and Economics: a comparative perspective.* London, Sweet & Maxwell, 2006, 2nd edition, pp. 29-30.

[197] JONES, A. and SUFRIN, B. *EU Competition Law... op. cit.*, p. 8; KERBER, W. "Should competition law promote efficiency?... *op. cit.,* p. 97.

[198] KERBER, W. "Should competition law promote efficiency?... *op. cit.,* p. 97; VAN DEN BERGH, R.J. and CAMESASCA, P.D. *European Competition Law and Economics… op. cit.,* p. 29.

allocative efficiency, since an efficient allocation requires all firms to produce efficiently[199].

Dynamic efficiency is achieved through the invention, development and diffusion of new products and production processes that increase social (total) welfare. The high uncertainty and unpredictability of innovation processes lead to the fact that the whole dynamic dimension of the generation and spreading of innovations is excluded from the concept of allocative efficiency[200]. However, competition is to be viewed as a process. Therefore, within a dynamic framework where firms (should) invest and innovate to the ultimate benefit of consumers, the former expect to be reported profits proportionate to the risks taken; consequently, in practice, if both static –allocative– and dynamic efficiency goals are to be attained, it is paramount to preserve adequate incentives to desirable business conduct without deterring firms from investing and innovating[201]. Competition policy must not, for the sole benefit of allocative efficiency, hinder investment and innovation.

Notwithstanding, this should not be understood as a *carte blanche* in the hands of competition authorities allowing them to adopt any specific measure for the sake of increasing competition. Competition should not be aimed at planning the economy, at altering an existing legal situation, unless there are no remedies available of a less interventionist nature than a structural intervention: competition policy should be

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[199] KERBER, W. "Should competition law promote efficiency?... *op. cit.,* p. 97.

[200] While allocative and productive efficiency are static notions, dynamic efficiency refers to the rate of technological process, *vide* KERBER, W. "Should competition law promote efficiency?... *op. cit.,* pp. 98 and 100.

[201] BISHOP, S. and WALKER, M. *The economics of EC Competition law… op. cit.*, pp. 31-32. Some authors consider that the adoption of a Kaldor-Hicks approach (potential Pareto superiority), which enables policy decisions when the different efficiency decisions are not consistent with each other, might be adequate for the development of a sound antitrust doctrine and enforcement; it allows changes in which there are both winners and losers, but requires that gainers gain more than losers lose – the winners can compensate the losers and still have a surplus left for themselves, *vide* SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules… op. cit.*, p. 95; however, this approach presupposes that all persons are both winners and losers in different situations, and that the gains and losses are evenly distributed among the whole population; measured in terms of total welfare –instead of in terms of consumer welfare–, it is irrelevant that producers rather than consumers capture the surplus produced by achieving efficiencies, *vide* KERBER, W. "Should competition law promote efficiency?... *op. cit.,* p. 104.

directed at merely maintaining the level of rivalry that naturally emerges in a given market, unless some element of the market is illegal[202]. Insofar as competition authorities are best placed to know which market structure would theoretically yield optimal results, if a government wants to achieve objectives or public policy considerations other than economic efficiency, it should refrain from resorting to competition policy to achieve them; economic regulation through competition policy has to escape any economic planning temptations[203].

In this scenario, it comes out that the main hurdles with regard to EU competition policy are the following: (1) it does not stand alone in splendid isolation – i.e., it is just one of the whole set of policies undertaken to achieve the objectives of the Treaty; and (2) Member States do pursue objectives that do not fit with the efficiency approach endorsed by the Commission[204]. In brief, public policy considerations other than economic efficiency have been actually taken into account[205]. Conflicts can be

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[202] SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules... op. cit.*, pp. 95-96

[203] MOTTA, M. *Competition policy - Theory and practice… op. cit.*, p. 30; SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules... op. cit.*, pp. 95-96.

[204] A major concern has been the accommodation of EU's and member states' industrial policies to competition policy. Industrial policy includes all State acts and policies that relate to industry (employment, protecting domestic industry from foreign competition, regional development, encouraging 'national champions' and fostering particular sectors). However, article 173(1) TFEU (ex article 157 TEC) clarifies that, although the EU has adopted a competitiveness strategy, ensuring that the conditions necessary for the competitiveness of the Union's industry exists, such strategy cannot be used as a basis for a measure that could lead to distortion of competition. This is so because «competition enforcement and advocacy also serve other wider longer-term objectives such as enhancing consumer welfare, supporting the EU's growth, jobs and competitiveness in line with the Europe 2020 Strategy for smart, sustainable and inclusive growth», *vide* EUROPEAN COMMISSION. *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions – Report on competition policy 2011*, COM(2012) 253 final, Brussels, 30 May 2012, pp. 9-10.

[205] Indeed, until the decentralization of the enforcement of EU competition law, contradictory messages have been sent by EU Courts and the Commission as in their past decisions regarding what is now article 101(3) TFEU they have taken into account public policy considerations, particularly those embodied in other Union policies: environmental goals, Commission Decision of 21 December 1994, IV/34.252 – *Philips-Osram*, § 28; Commission Decision of 24 January 1999, IV.F.1/36.718 – *CECED*, §§ 55-57; cultural policy goals, Commission Decision of 25 November 1981, IV/428 – *VBBB/VBVB*, § 60, upheld

generated either when competing Treaty goals collide (horizontal conflicts) or when Treaty goals collide with those of the Member States (vertical conflicts)[206]. The latter will be deal with in accordance with the principle of conferral of powers, while the former demands the adoption of policy-linking clauses.

On one side, the TFEU itself contains an all-embracing policy-linking clause demanding a general consistency between all the EU policies and activities, taking all the objectives into account (article 7 TFEU). Additionally, the Treaty contains specific

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in Judgment of the Court of 17 January 1984, joined cases 43/82 and 63/82, *Vereniging ter Bevordering van het Vlaamse Boekwezen, VBVB, and Vereniging ter Bevordering van de Belangen des Boekhandels, VBBB, v Commission of the European Communities* [ECLI:EU:C:1984:9]; protection of public health, Commission Decision of 6 October 1994, IV/34.776 – *Pasteur Mérieux-Merck*, § 89; employment, Commission Decision of 29 April 1994, IV/34.456 – *Stichting Baksteen*, § 27; Commission Decision of 23 December 1992, IV/33.814 – *Ford/Volkswagen*, § 23. As long as the public interests did not jeopardize the working of the competitive system in its core, they were accepted.

On the Commission's authority to reconcile competition with objectives of different nature, Judgment of the Court of 25 October 1977, case 26/76, *Metro… cit.*, § 21; Judgment of the Court of First Instance (First Chamber, extended composition) of 11 July 1996, joined cases T-528/93, T-542/93, T-543/93 and T-546/93, *Metropole télévision SA and Reti Televisive Italiane SpA and Gestevisión Telecinco SA and Antena 3 de Televisión v Commission of the European Communities* [ECLI:EU:T:1996:99], § 118.

Some authors claim that the Commission has taken public policy considerations in a complementary fashion (not contradictory) in order to specify the economic benefit of restructure measures; but, in any case, the adoption of the Regulation 1/2003 limited the dual function of the Commission, namely as an enforcement agency and as a policy-making institution, who, until then, had profited of a broad discretion that included the possibility of taking into account public policy goals – even if, in some cases, it was in overt opposition to the logic of competition policy. All in all, the decentralization involved direct applicability and, in a directly applicable system, balancing of conflicting goals –policy discretion– as the Commission used to do is impossible (national competition authorities and courts are just not authorized to make the value judgements –policy choices– that the Commission did): direct applicability presupposes that the addressees of the provision (the firms) are able to self-evaluate the legality of their conduct ex ante with sufficient and uniform clarity. Thus, public policy concerns can only be taken into account insofar as they translate into pro-competitive effects (European 'rule of reason'). *Vide* SCHWEITZER, H. "Competition law and public policy… *op. cit.,* pp. 140-141, 145 and 147-150.

[206] In relation to our subject-matter of study, this potential conflict among horizontal policies that, aiming at protecting a (non-economic) policy objective other than economic efficiency, may ultimately harm competition will be dealt with in the Chapter II, when reflecting on the inclusion of social and/or environmental clauses in the specifications document.

policy-linking clauses with regards to promotion of equality (article 8 TFEU); employment, social protection, education and human health (article 9 TFEU and 168(1) TFEU); consumer protection (article 12 TFEU); combat discrimination (article 10 TFEU); environmental protection and sustainable development (article 11 TFEU); animal welfare (article 13 TFEU)[207]. Furthermore, other EU policies listed are agriculture, fisheries, transport, research and technological development, and space (article 13 TFEU). This wide myriad of goals is to be taken into consideration when competition policy is implemented[208]. In particular, it implies, as we will see in our research, the need to apply a proportionality test when designing and executing the procurement processes in order to analyze and foresee the effects of a given goal (be it economic or non-economic, EU-wide or national) on competition[209].

On the other side, sometimes Member States fall into the temptation of willfully deviating from the efficiency approach adopted by the Commission[210]. In such cases,

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[207] TOWNLEY, C. *Article 81 EC and public policy*. Oxford, Hart Publishing, 2009, pp. 50-51.

[208] While the task of designing effective competition rules that, at the same time, are harmonized with other principles and objectives of the Treaties, has been primarily assigned to the European Commission, this do not hamper other European institutions –mainly the CJEU– taking part in the monitoring of an efficient harmonization and correct prioritization of such principles and objectives.

[209] Competition is, as expressed by the Commission, a key element of a coherent and integrated policy to foster the competitiveness of Europe's industries and it is also crucial for the maintenance of well functioning markets that, together with consumer access, stimulate growth and innovation in order to gear the single market to serve the goals of EU 2020, *vide* COMMISSION OF THE EUROPEAN COMMUNITIES. *Communication to the Spring European Council – Working together for growth and jobs. A new start for the Lisbon Strategy*, COM(2005) 24 final, Brussels, 2 February 2005, p. 18; COMMISSION OF THE EUROPEAN COMMUNITIES. *Commission Working Document – Consultation on the future "EU 2020" Strategy*, COM (2009) 647 final, Brussels, 24 November 2009, pp. 9-10. Also, *vide* SÁNCHEZ GRAELLS, A. "Truly competitive public procurement as a *Europe 2020* lever: what role for the principle of competition in moderating horizontal policies?", in *European Public Law*, vol. 22, issue 2, 2016, pp. 7-13.

[210] The Vice-president of the Commission responsible for Competition Policy, ALMUNIA, warned, back in 2012, about the risks of protectionism that, in response to the financial crisis, threatened the globalized economy to materialize, while leaving the enforcement of competition rules subordinated to other public policy goals. *Vide* ALMUNIA, J. "Industrial policy and competition policy: quo vadis Europa?", in *New Frontiers of Antitrust 2012 – Revue Concurrences*, Speech 12/83, Paris, 10 February 2012, pp. 1-3.

the Commission is empowered to initiate infringement proceedings against the Member State that anticompetitively pursued objectives other than economic efficiency[211].

While EU law is derived from several sources, an oblique reference to the need of adopting a competition policy within the EU may be found in the Treaties themselves (primary source)[212]. Furthermore, the wording of the Treaties reveals the concern of many Member States for the 'social' aspect in competition policy.

Firstly, when it comes to competition as a condition that must inspire the EU economic policy, article 119(1) TEU (ex article 4(1) TEC) reads as follows:

> For the purposes set out in Article 3 of the Treaty on European Union, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the *principle of an open market economy with free competition* [emphasis added].

Moreover, article 3(3) TEU (ex article 2 TEU), on its side, sets forth the objectives of the EU:

> The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a *highly competitive social market economy*, aiming at full employment and social

[211] In 2006, the government of Spain interfered with merger transactions in the energy sector in order to protect national companies from 'foreign' take-overs. The Commission considered the action contrary to the EU Merger Regulation and took infringement proceedings in respect of the conditions the Spanish energy regulator had imposed on the take-over of the Spanish energy company Endesa by the German company E.ON. The ECJ found Spain guilty of not complying with its obligations Judgment of the Court (Third Chamber) of 6 March 2008, case C-196/07, *Commission of the European Communities v Kingdom of Spain* [ECLI:EU:C:2008:146]

[212] The most important sources of EU competition law are TEU and TFEU Treaties (primary legislation), EU acts (secondary legislation and acts adopted by the EU institutions), the case law of the CJEU and the general principles of EU law. *Vide* JONES, A. and SUFRIN, B. *EU Competition Law… op. cit.*, p. 95. As for the CJEU, it is worth noting taht the EU's current judicial system comprises the Court of Justice of the European Union, which includes the Court of Justice (ECJ) and the General Court; the latter was called Court of First Instance until the Treaty of Lisbon came into force on 1 December 2009.

> progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.
>
> It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child [emphasis added].

In the version of the Treaties prior to the enactment of the Treaty of Lisbon, which brought about the entry into force of the current TEU and of the TFEU, this same provision, which is nowadays contained in the article 119(1) TFEU, was contained in article 4 TEC, and, even before, in article 3 A TEC[213]. Additionally, in relation to the objectives of the EU, the Treaty of Lisbon amended the TEU and TEC so as to introduce a single set of objectives applicable to both Treaties and all policies – i.e., article 3 TEU[214].

Additionally, keeping on with the changes introduced by the adoption of the Treaty of Lisbon, the Protocol no. 27, on the internal market and competition, was annexed to the TEU and TFEU, and reproduces the text of the ex article 3(1)(g) TEC[215].

Article 3(1)(g) TEC stated:

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[213] *Vide* Treaty establishing the European Community (Nice consolidated version), *Official Journal of the European Communities*, C-325/33, 24 December 2002.

[214] TOWNLEY, C. *Article 81 EC and public policy*. Oxford, Hart Publishing, 2009, p. 50.

[215] Apparently, the removal from the Treaty provisions of the referrence to competition is due to the insistence of President Sarkozy of France, who, on the night of 21 June 2007 during the final last mi claimed competition to be an ideology, a dogma, which had done nothing so far for Europe, *vide* JONES, A. and SUFRIN, B. *EU Competition Law... op. cit.*, p. 39 and fn 145. However, as underlined by Prof. SCHWEITZER, although it can be read as an attempt to delimit the scope of EU competition rules where they conflict with other public-policy goals –that is, a degradation of competition rules to the status of a mere instrument to achieve the superior goal of an internal market with balanced economic growth, full employment and social progress, a high level of protection for the environment and scientific and technological progress– competition rules continue to be mandatory, directly applicable and part of the *acquis communautaire*, *vide* SCHWEITZER, H. "Competition law and public policy… *op. cit.,* pp. 136 and 139.

> 1. For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:
>
> […]
>
> (g) a system ensuring that competition in the internal market is not distorted;
>
> […]

While Protocol no. 27 reads as follows:

> THE HIGH CONTRACTING PARTIES,
>
> CONSIDERING that the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted,
>
> HAVE AGREED that:
>
> To this end, the Union shall, if necessary, take action under the provisions of the Treaties, including under Article 352 of the Treaty on the Functioning of the European Union.

The Protocols, although they are separate legal instruments, they form part of the main Treaty, as set forth in article 51 TEU:

> The Protocols and Annexes to the Treaties shall form an integral part thereof[216].

Having identified the changes introduced by the Treaty of Lisbon, one cannot avoid reflecting on the justification for altering their location in the wording of the EU Treaties. Organically, in the post-Lisbon version, the provision is included in the Part III of the TEU, that is, 'Union policies and internal actions' –more specifically, in the Title on 'Economic and monetary policy' (Title VIII)–. In contrast, in the Nice consolidated version of the TEC, the provision was included among the 'Principles' (Part I), while

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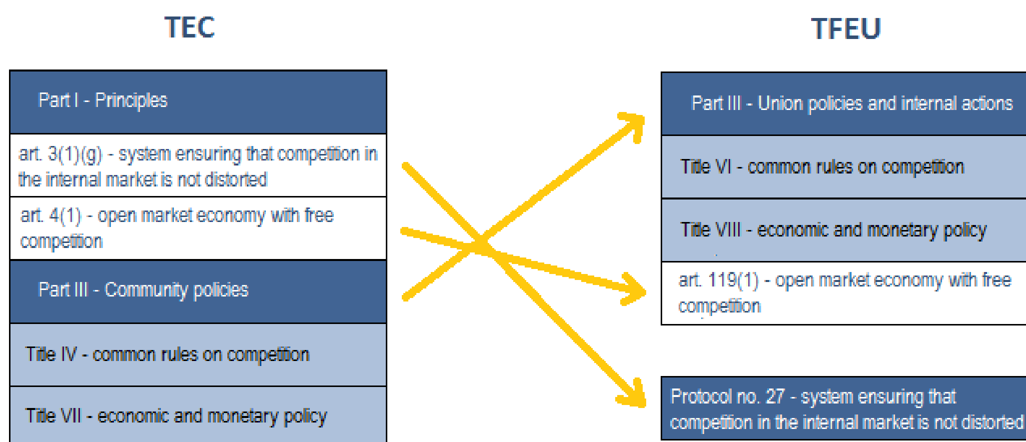
[216] On the use of Protocols in the European legal practice *vide* DENZA, E. "Article 51 - legal status of Protocols and Annexes", in BLANKE, H.J. and MANGIAMELI, S. (Eds.). *The Treaty on European Union (TEU) - a commentary*. Heidelberg, Springer, 2013, [pp. 1419-1432] pp. 1420-1422; LANE, R. "Current developments - European Union law: competition", in *International & Comparative Law Quarterly*, Vol. 59, April 2010, [pp. 489-504] pp. 489-492.

the ‘Common rules on competition’ where consigned in a different section, under the heading ‘Community policies’ (Part III); furthermore, the Title ‘Common rules on competition’ (Title IV) was separated from the Title on ‘Economic and monetary policy’ (Title VII), which, to further complicate an integrative interpretation of the text of the Treaty, set forth the compliance with principles of article 4 – hence, with the principle of an open market economy with free competition (see *Figure 3*)[217]. Substantially, the removal of the reference to undistorted competition from the Treaty provisions, contained in article 3(1)(g) TEC, and its inclusion into a Protocol, may be perceived as implying that competition is placed at the service of the single market[218].

Figure 3 – Pre-Lisbon *versus* post-Lisbon wording of the Treaties with regard to competition



SOURCE: Elaborated by the author

Secondly, with reference to the worry of certain Member States about the social aspect in competition policy, it is worth noting the specific inclusion in the wording of the TFEU of certain services that, due to their nature, are allowed to take advantage of a derogation from competition rules: we are making reference to the services of general

[217] Article 98, TEC – Nice.

[218] JONES, A. and SUFRIN, B. *EU Competition Law… op. cit.*, p. 43.

economic interest (hereinafter, SGEI)[219]. Article 14 TFEU (ex article 16 TEC) states the following:

> Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and *given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion*, the Union and Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfill their missions. […]

The article 14 TFEU itself underlines the role played by the SGEI within the EU and claims the risk of preventing them from fulfilling their missions to be what justifies the derogation of competition rules. In short, SGEI merit the strongest protection and, thus, channeling the social concerns expressed by Member States, if the SGEI and competition are about to collide, the EU has opted for giving an absolute priority to the SGEI, while competition standards back away.

In conclusion, the current post-Lisbon version of the Treaties provides the reader with a clearer perspective on the characterization of competition policy and on its role in the EU. On one side, it consecrates the wording of the first article of the Section on the EU economic policy (Part III, Title VIII) –which indeed was a Title already included in the Nice version of the TEC– to the observance of the free competition principle. On the other side, it inserts in the Treaties themselves the social aspect that, by means of derogating the application from competition rules, delineates competition policy.

[219] Article 106(2) TFEU, acknowledging the non-submission to competition rules of firms entrusted with the operation of SGEI if such submission obstructs the performance of the particular tasks assigned to them. *Vide* JONES, A. and SUFRIN, B. *EU Competition Law… op. cit.*, pp. 564-565.

2. EU Competition law: the inadequacy of the existing tools for the assessment of the market behavior of the public buyer

Competition law is the most effective tool in the hands of the State to protect the interests of consumers and of the more feeble competitors from the abuses of the most powerful market operators that, jointly or unilaterally, seek to obtain the highest benefit possible at the expense of the common economic interests[220]. Competition law has always been central to the EU[221]. It exists to protect competition in a free market economy and comprises all the legal rules enacted by the European institutions to safeguard free competition within the internal market from anticompetitive practices carried out by firms[222]. All in all, competition law seeks, though it may seem ironical, to promote free competition through the control and interference with the freedom of conduct of firms[223].

Competition may be either restricted or distorted; whereas restriction is an effect of a conduct (such as, in relation to our research, the effect deriving from a specific decision by a public contracting body within a public procurement process), distortion is due to differences in the prerequisites to compete or it is due to measures that create such differences (as, for example, in the light of our subject-matter of study, State regulatory measures or acts adopted within the framework of a legislative intervention

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[220] CANEDO ARRILLAGA, M.P. "La Administración frente a la aplicación descentralizada del Derecho de la Competencia"… *op. cit.*, p. 344.

In relation to terminology, competition law is often referred to by its American name, 'antitrust law'; however, the EU Competition Authority, the European Commission, tends to use the term 'antitrust' in a narrower sense, that is to denote the areas of competition law other than cartels, State aid and merger control. *Vide* EUROPEAN COMMISSION. "Competition", in *DG Comp*, available at https://www.ec.europa.eu/competition/index_en.html (last consulted: 22.07.2015), July 2015.

[221] CRAIG, P. and DE BÚRCA, G. *EU Law: texts, cases and materials*. Oxford, Oxford University Press, 2015, 6th edition, p. 1001.

[222] CALVO CARAVACA, A.L. *Derecho antitrust europeo - tomo I… op. cit.*, pp. 31-32; JONES, A. and SUFRIN, B. *EU Competition Law... op. cit.*, p. 1.

[223] JONES, A. and SUFRIN, B. *EU Competition Law... op. cit.*, p. 3.

of the State in the market)[224]. Insofar as State intervention in the market may distort competition, competition rules set forth in the EU Treaties apply to State measures, even to regulatory ones[225]. The Court of Justice, in a ruling of 1998, in line with several previous rulings not absent of controversy, unambiguously stated the following:

> Although Article 85 of the Treaty [nowadays, 105 TFEU] is, in itself, concerned solely with the conduct of undertakings and not with measures adopted by Member States by law or regulation, the fact nevertheless remains that Article 85 of the Treaty [nowadays, article 105 TFEU], in conjunction with Article 5 [replaced in substance by article 4(3) TEU], requires the Member States not to introduce or maintain in force measures, even of a legislative nature, which may render ineffective the competition rules applicable to undertakings[226].

In any case, both overtly generated public distortions and public restrictions to the development of an effective and undistorted market competition are deemed the sources of harm to free market dynamics most pervasive, severe and difficult to combat[227]. In short, the economic freedom of independent tenderers must be protected

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[224] QUITZOW, C.M. *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*. Kluwer Law International, 2001, pp. 4-5.

[225] SZYSZCZAK, E. "State Intervention and the Internal Market"… *op. cit.*, p. 217.

[226] Judgment of the Court (Fifth Chamber) of 18 June 1998, case C-35/96, *Commission of the European Communities v Italian Republic* [ECLI:EU:C:1998:303], § 53. Also, Judgment of the Court of 16 November 1977, case C-13/77, *INNO/ATAB*, *cit.,* § 31; Judgment of the Court of 21 September 1988, case C-267/86, *Pascal Van Eycke/ASPA, cit.,* § 16; Judgment of the Court of 17 November 1993, case C-135/91, *Bundesanstalt für den Güterfernverkehr v Gebrüder Reiff GmbH & Co. KG* [ECLI:EU:C:1993:886], § 14; Judgment of the Court (Sixth Chamber) of 9 June 1994, case C-153/93, *Bundesrepublik Deutschland v Delta Schiffahrts- und Speditionsgesellschaft mbH* [ECLI:EU:C:1994:240], § 14; Judgment of the Court of 5 October 1995, case C-96/94, *Centro Servizi Spediporto/Spedizioni Marittima del Golfo, cit.,* § 20; Judgment of the Court of 9 September 2003, case C-198/01, *Consorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato* [ECLI:EU:C:2003:430], § 45.

[227] SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules… op. cit.*, p. 7.

so as to allow them to interact within a process of healthy undistorted rivalry[228]. Thus, articles 101 and 102 TFEU are also applied to State regulatory measures.

As expressed above, EU competition aims at the promotion and protection of effective competition since effective competition delivers benefits to European consumers in the form of welfare.

The CJEU, on its side, has traditionally pointed out that the design of EU competition law is not intended to protect the interests of individual competitors or consumers, but, instead, it is primarily, intended to protect the structure of the market and, thus, competition as such (as an institution), since, by doing so, consumers, albeit indirectly, will be also protected[229]. In other words, competition rules are intended to monitor both practices that may cause prejudice to consumers directly and, also, those that may cause prejudice to them through their impact on an effective competition structure[230]. Harm to consumers is, thus, assumed if likely harm to rivalry can be established[231]. Such an assumption deems unnecessary, under certain circumstances, any evidence of consumer harm, while not even any evidence of harm to rivals[232].

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[228] NAZZINI, R. "Article 81 EC between time present and time past… *op. cit.,* pp. 497-498.

[229] On the need to defend competition 'as such', Judgment of the Court of 4 June 2009, case C-8/08, *T-Mobile… cit.*, § 38, which endorsed the opinion of the AG Kokott when considering that competition rules are not designed (only or primarily) to protect the individual interests of competitors or consumers, but to protect the structure of the market and, thus, competition as such (as an institution); in this way, consumers are also indirectly protected, since, where competition as such is damaged, consumers will be bound to face the disadvantages, in Opinion of the AG Kokott delivered on 19 February 2009, case C-8/08, *T-Mobile... cit.* [ECLI:EU:C:2009:110], § 58.

[230] Judgment of the Court of 21 February 1973, case 6/72, *Continental Can… cit.,* § 26; Judgment of the Court (Third Chamber) of 15 March 2007, case C-95/04 P, *British Airways plc v Commission of the European Communities* [ECLI:EU:C:2007:166], § 106; Judgment of the Court (Third Chamber) of 20 November 2008, case C-209/07, *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd* [ECLI:EU:C:2008:643], §§ 22-23, Judgment of the Court of 4 June 2009, case C-8/08, *T-Mobile... cit.*, § 38.

[231] MARSDEN, P. "Some outstanding issues from the European Commission's Guidance on article 102 TFEU… *op. cit.,* p. 61.

[232] For all, on the formalistic approach adopted by the CJEU, in direct contrast with the economic approach pressed by the Commission, *vide* Opinion of the AG Kokott delivered on 23 February 2006, case C-95/04 P, *British Airways... cit.* [ECLI:EU:C:2006:133], § 89; and, even further, *vide* Judgment of

A day came for the CJEU, thus, when it was forced to decide whether to apply a more modern consumer-welfare focused interpretation of competition rules or to keep on bending towards the preferential achievement of the internal market, even if this could apparently be, in certain occasions, to the detriment of a proper consumer-welfarist approach. We are referring to the *Glaxo* saga. Giving a definitive answer to the issue raised happened to be an arduous undertaking: at first, the Court of First Instance seemed to acknowledge the pre-emption of consumer welfare[233]. However, the CJEU put an end to the discussion when it clarified and neatly re-affirmed the primary role of the internal market[234].

In the light of the above-mentioned considerations, and making both case law trends match, even if the CJEU has claimed that competition has to be protected 'as such', one cannot help but regard it as a mere means to achieve the objectives of the EU –single market and social market economy–, an incidental mechanism to their completion[235]. This assumption implies that, in the event of a collision between the

the Court of 15 March 2007, case C-95/04 P, *British Airways… cit.*, § 33, where the Court, holding that but for the abuse the competitors' share would have been likely to grow more, simply rejects countervailing evidence of rivals' market share actually growing during the period of abuse.

[233] Judgment of the Court of First Instance of 27 September 2006, case T-168/01, *GlaxoSmithKline… cit.*, § 118.

[234] Judgment of the Court (Grand Chamber) of 16 September 2008, joined cases C-468/06 to 478/06, *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEVE* [ECLI:EU:C:2008:504] (collectively, *Syfait II*), §§ 56-57; Judgment of the Court (Third Chamber) of 6 October 2009, joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services Unlimited v Commission of the European Communities (C-501/06 P) and Commission of the European Communities v GlaxoSmithKline Services Unlimited (C-513/06 P) and European Association of Euro Pharmaceutical Companies (EAEPC) v Commission of the European Communities (C-515/06 P) and Asociación de exportadores españoles de productos farmacéuticos (Aseprofar) v Commission of the European Communities (C-519/06 P)* [ECLI:EU:C:2009:610], § 63.

[235] This statement is backed up by the case law where the ECJ states that by preventing the distortion of competition to the detriment of the public interest, individual undertakings and consumers, the well-being of the EU is ensured. For all, *vide* Judgment of the Court of 22 October 2002, case C-94/00, *Roquette Frères… cit.*, § 42; and Judgment of the Court (First Chamber) of 17 February 2011, case C-52/09, *TeliaSonera… cit.*, § 22.

objectives of competition law –consumer welfare and economic efficiency– and those of the EU, the latter will prevail[236].

The competition law provisions contained in the text of the TFEU are, as we will see in the following sections of our research, various. However, some of them are ill-positioned to assess the market behavior of the public buyer, that is, distortions and restrictions of competition generated by a contracting authority in the course of its procuring activities; namely, merger control rules[237]. Thus, merger control rules are to remain outside the scope of our research.

The wording of the provisions contained in the TFEU regarding competition law has not been significantly altered[238]. However, their application has been quite expanded, mainly thanks to the interpretative task undertaken by the EU Courts, so as to cover –either directly or indirectly– practices that were traditionally left outside the competition assessment, specially in relation to those distortion generated by public

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[236] For a brief analysis on the implications of the *Glaxo* saga, *vide* COUMES, J.M. and LOPEZ GALDÓS, M. "EU court delivers judgment in Glaxo “Spanish” case on parallel imports", in *Lexology*, 23 November 2009; LANE, R. "Current developments - European Union law: competition"… *op. cit.*, pp. 494-496; ODUDU, O. "The last vestiges of overambitious EU competition law", in *The Cambridge Law Journal*, Vol. 69, no. 2, July 2010, [pp. 248-250] pp. 249-250; TUMBRIDGE, J. "Syfait II: Restrictions on Parallel Trade Within the EU", in *Intellectual Property Journal*, Vol. 21, no. 3, March 2009, [pp. 387-400] pp. 399-400; VÖLCKER, S.B. "GlaxoSmithKline Services Unlimited v. Commission", in *Common Market Law Review*, Vol. 48, 2011, [pp. 175-188] pp. 181-185.

All in all, according to the ECJ, as enhancing parallel trade does not necessarily lead to lower prices for consumers, restrictions to parallel imports should not be automatically prohibited; instead, they might involve efficiencies, such as encouraging innovation by protecting pharmaceuticals’ incentives to innovate, which, albeit depriving consumers of certain advantages, benefit consumers in the long term and, then, well deserve an exception under article 101(3) TFEU [ex article 81(3) TEC].

[237] The Treaties do not contain any specific provisions for controlling mergers. Until the adoption of the Merger Control Regulation, which entered into force in 1990, the Commission had to rely on articles 101 and 102 to assess the competitive distortions that may arise from a merger, that is, from a lasting change in the structure of a market. The original Merger Control Regulation was Council Regulation (EEC) 4064/89 of 21 December 1989, *Official Journal of the European Communities*, L 395/1, 30 December 1989. On the history of the European Merger Control Regulation, *vide* JONES, A. and SUFRIN, B. *EU Competition Law… op. cit.*, pp. 860-866.

[238] For example, the wording of article 102 TFEU is that of the article 82 TEC, but for the substitution of ‘internal market’ for ‘common market’.

actors[239]. In any case, it must be admitted that the TFEU contains some provisions specifically related to the assessment of public interventions in the market – i.e., article 106 TFEU, in relation to undertakings granted with special or exclusive rights and with services of general economic interest (SGEI), and articles 107 to 109 TFEU, in relation to State Aid. However, as we will see, those specifically tailored provisions are not best placed to assess the competition-restrictive conduct of the public buyer within a regular public procurement process, aimed at the provision of works, goods or services[240]. Furthermore, it must be submitted that State Aid control provisions are best placed to

[239] The direct application of the competition provisions contained in the TFEU –articles 101 and 102 TFEU– will be dealt with in the Section 1 of the Chapter II, when discussing about the distortions generated by the public buyer. Additionally, in the Section 2 of the referred Chapter we will also analyze the application of the referred articles to colluding tenderers, although it is not usual to come accross serious concerns connected with their applicability to firms active on the seller side – i.e., acting as tenderers.

As for the indirect application of EU competition law provisions to the public buyer, the evolution of the state action doctrine will be likewise commented in the Section 1 of the Chapter II.

[240] The granting of special or exclusive rights will be analyzed in the Section 1.B of the Chapter I, on the occasion of making our research on the grant of SGEI. When it comes to State Aid, as we stated when examining EU competition policy, the standard applicable differs from that dictated by the Commission: a given aid may be considered compliant with the EU competition law requirements as long as it increases social welfare, even if consumer welfare is reduced. However, the award of public contracts seldom meets the cumulative conditions to be qualified as 'Aid': (1) first and foremost, below-threshold procurements would hardly meet the condition of affecting intra-EU trade (which must not be confused with the cross-border interest test, used to discern whether the scope of the EU Procurement Directives is enlarged so as to cover a particular below-threshold public procurement process); and, (2) second, it often results highly controversial whether the award of a particular public contract constitutes an undue economic advantage – i.e., whether there is a disproportion between the obligations imposed on the public contractor and the consideration paid by the public buyer that the public contractor would not have received under normal market conditions. *Vide* Judgment of the Court of First Instance (First Chamber, extended composition) of 28 January 1999, case T-14/96, *Bretagne Angleterre Irlande (BAI) v Commission of the European Communities* [ECLI:EU:T:1999:12], § 72. The problem is that, in a wide range of cases, the procurement process is conducted in a way that the award to the public contractor does not necessarily imply that the latter has obtained an undue economic advantage; thus, in the absence of such undue economic advantage, the award cannot be regarded as a State Aid incompatible with the common market.

monitor, if any, the public procurement processes conducted in the realm of the utilities sector[241].

As for their integration within the domestic legal orders of the Member States, the modernization process brought about within the realm of competition law prompted the direct implementation of EU competition law provisions by national authorities and courts. Consequently, as both national authorities and courts will be fully applying EU law and national law, pure practicality –the ease of applying only one set of rules– pushes these bodies towards convergence, towards identity[242].

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[241] The Commission has embarked on a process of modernization of State Aid. It has acknowledged the importance of the role of the State Aid as an incentive, as a way of inducing the aid beneficiary to undertake activities that it would not have otherwise undertaken, specially in the utilities sector, while it has also stregthen the need of a robust State Aid control that limits competition distortions and keeps the common market open and competitive, *vide* EUROPEAN COMMISSION. *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions – EU State Aid Modernisation (SAM)*, COM(2012) 209 final, Brussels, 8 May 2012, §§ 12 and 15. However, given a competition-distorting public procurement process, as long as its distortive character is not straightforwardly considered to generate a situation that excludes normal market conditions –i.e., to bring about undue economic advantage in favor of the public contractor–, State Aid control is not to be viewed as the adequate tool to deal with distortions of competition caused by the public buyer in the realm of its procuring activities as it would require proving the existence of an undue economic advantage – that is, rebutting the presumption of compliance with the State Aid regime. Such presumption enters into play whenever (a) the contract is a pure procurement transaction and (b) the procurement procedure is compliant with the EU Public Procurement Directives and suitable for achieving best value for money, *vide* SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules… op. cit.*, pp. 126-127. In any case, the utilities sector falls outside the scope of our study.

[242] FOX, E.M. "Modernisation: Efficiency, dynamic efficiency and the diffusion of competition law", in EHLERMANN, C.D. and ATANASIU, I. (Eds.). *European Competition Law Annual 2000: The modernisation of EC Antitrust Policy*. Oxford, Hart Publishing, 2001, [pp. 123-128] p. 125.

In this respect, Member States must completely align with EU competition law as regards collusive behavior –article 101 TFEU–, but may adopt and apply on their territory stricter national laws which prohibit or sanction unilateral conducts –article 102 TFEU–. *Vide* article 3(2) of the Regulation 1/2003.

PART 2 – COMPETITION WITHIN THE PUBLIC PROCUREMENT PROCESS: AN HEURISTIC APPROACH TO ANTICOMPETITIVE PRACTICES WHEN DESIGNING PUBLIC PROCUREMENT PROCESSES

CHAPTER III - BEFORE SUBMITTING THE PROVISION OF THE WORK, SERVICE OR GOOD TO A PROCUREMENT PROCESS: FROM THE SELF-ORGANIZATION OF THE CONTRACTING AUTHORITY TO THE OUTSOURCING OF ITS OPERATIONAL NEEDS AND PUBLIC TASKS

Public procurement must be oriented towards the effective performance of the service required; therefore, public procurement regulations are to be adopted in a way that they ultimately allow enhancing such effectiveness standard[243]. However, effectiveness of public procurement is conditional upon the existence of competition in two separate dimensions: (a) competition within the specific tender and (b) competition in the market[244]. The EU judicature has consistently stated that the principle objective of EU Public Procurement rules is the opening-up to undistorted competition in all Member States with regard to the execution of works, the supply of products and the provision of services[245].

In our research we are not going to deepen into the development of sound competition-oriented public procurement regulations[246]. Instead, we are interested in

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[243] GIMENO FELIU, J.M. "Las nuevas Directivas de contratación pública: principales novedades y efectos prácticos", in *El nuevo paquete legislativo comunitario de contratación pública: principales novedades. La orientación estratégica de la contratación pública*, Bilbao, 21-22 May 2015, p. 8.

[244] SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules.* Portland, Hart Publishing, 2015, pp. 10-12.

[245] Judgment of the Court (First Chamber) of 11 January 2005, case C-26/03, *Stadt Halle and RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna* [ECLI:EU:C:2005:5], § 44; Judgment of the Court (Fifth Chamber) of 8 May 2014, case C-15/13, *Technische Universität Hamburg-Harburg and Hochschul-Informations-System GmbH v Datenlotsen Informationssysteme GmbH* [ECLI:EU:C:2014:303], § 22.

[246] The assessment of public procurement legislation from a Competition law perspective would imply an evaluation of the State Action Doctrine. Passing legislation or regulations of general applicability is an exercise of sovereign powers. Due to the fact that it enjoys a high degree of sovereignty, of democratic legitimacy, it is subject to political review and public accountability; thus, rather than on competition law grounds, it may be scrutinized on competition policy grounds. In contrast, the implementation of such public procurement rules (i.e., the adoption specific purchasing decisions) implies an exercise of administrative discretion in order to complement the general criteria contained in the rules. Moreover, as the implementation of public procurement rules is developed at a lower level of government, it enjoys a

assessing the practical enforcement of the existing public procurement legislation – i.e., in the competitive restrictions that, either in the market or in the tender itself, may vitiate the drafting of a specific procuring process. To a large extent, the referred restrictions will take place as a result of the decisions taken by public contracting authorities within the discretionary limits set up by public procurement regulations[247].

Under some circumstances, the contracting authority will be duly entitled to resort to procedures alternative to a public procurement process, which would not trigger the application of the usually more stringent public procurement regulations, but, in any case, would allow the contracting authority to source the required good, work or service[248]. The contracting authority may make use of its self-organizational prerogatives (section 1). Other times, the contracting authority may well opt for qualifying its services as being of 'general interest' in order to duly exempt them from

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more reduced legitimacy (compared to the degree of legitimacy legislation or general regulations are imbued with). Consequently, as it entails a non-regulatory intervention in the market that it is subject to a more intense competition scrutiny. When such non-regulatory intervention is of economic nature – procurement of a good, work or service to fulfil the operational needs of the contracting authority–, that is, when the contracting authority acts as a buyer, EU competition law provisions will be directly applicable, specially article 102 TFEU; instead, when is of non-economic nature –direct provision to the market of the object of the procurement process to comply with a public interest task–, that is, when the contracting authority acts as an offeror, competition scrutiny will be performed from a competition policy perspective, which is prone to take into account interests other than pure economic efficiency. As said, competition distortive public procurement practices are likely to fall under the scope of article 102 TFEU, which, unlike article 101 TFEU, does not foresees an exemption –article 101(3) TFEU– based on a four-step proportionality and necessity balance between the restriction of competition and the objective pursued. *Vide* Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty, *Official Journal of the European Union*, C 101/97, 27 April 2004; ANGULO GARZARO, N. "Competition within EU Public Procurement Regulation and Practice: When EU Competition Law Remains Silent, EU Competition Policy Speaks", in *Romanian Journal of European Affairs*, vol. 16, no. 1, March 2016, [pp. 44-56] pp. 48-55; SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules*, *op. cit.,* pp. 181-184.

[247] As Prof. SÁNCHEZ GRAELLS points out, the open-ended nature of most public procurement rules leads to the need of specifying and tailoring them to each and every tender procedure, since, even if public procurement procedures are highly regulated and detailed, they cannot be automatically set in motion. *Supra*, pp. 184, 245-246.

[248] COMISIÓN NACIONAL DE LA COMPETENCIA. *Guía sobre Contratación Pública y Competencia*. Madrid, 27 de abril de 2010, p. 7.

competition scrutiny (section 2). Throughout the following sections we will deal with the different competitively compliant alternatives in the hands of contracting authorities to provide goods, works and services without necessarily entering into a public procurement process, either because it resorts to its self-organizational prerogatives or because the work, good or service is provided, under certain conditions, in the general interest[249].

1. The competitively compliant use of alternatives to a public procurement process: public-public cooperation, or when to resort to public-public agreements or self-supply

The ECJ, when defining contracting authorities, and, particularly, 'bodies governed by public law', abandoned the formality test and, instead, it adopted the *functionality* and *dependency tests* to determine the relationship of an entity *vis-à-vis* the state[250]. It aimed at piercing the veil of the nature of the entities that are vested with the

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[249] With regards to the provision of Services of General Interest, as we will see, its exemption from competition scrutiny has been largely nuanced by the EU judicature –until its final codification– over the decades.

[250] Judgment of the Court (Fourth Chamber) of 20 September 1988, case 31/87, *Gebroeders Beentjes BV v State of the Netherlands* [ECLI:EU:C:1988:422], § 11; Judgment of the Court (Sixth Chamber) of 17 September 1998, case C-323/96, *Commission of the European Communities v Kingdom of Belgium* [ECLI:EU:C:1998:411], §§ 25-29; Judgment of the Court of 10 November 1998, case C-360/96, *Gemeente Arnhem and Gemeente Rheden v BFI Holding BV* [ECLI:EU:C:1998:525]**,** § 62; Judgment of the Court (Fifth Chamber) of 17 December 1998, case C-353/96, *Commission of the European Communities v Ireland* [ECLI:EU:C:1998:611], § 36; Judgment of the Court (Fifth Chamber) of 1 February 2001, case C-237/99, *Commission of the European Communities v French Republic* [ECLI:EU:C:2001:70], § 43; Judgment of the Court (Fifth Chamber) of 27 February 2003, case C-373/00, *Adolf Truley GmbH v Bestattung Wien GmbH* [ECLI:EU:C:2003:110], § 66; Judgment of the Court (Fifth Chamber) of 22 May 2003, case C-18/01, *Arkkitehtuuritoimisto Riitta Korhonen Oy, Arkkitehtitoimisto Pentti Toivanen Oy and Rakennuttajatoimisto Vilho Tervomaa v Varkauden Taitotalo Oy* [ECLI:EU:C:2003:300], §§ 48 and 59; Judgment of the Court (Sixth Chamber) of 16 October 2003, case C-283/00, *Commission of the European Communities v Kingdom of Spain* [ECLI:EU:C:2003:544], § 81; Judgment of the Court (Fourth Chamber) of 13 December 2007, case C-337/06, *Bayerischer Rundfunk and Others v GEWA - Gesellschaft für Gebäudereinigung und Wartung mbH* [ECLI:EU:C:2007:786], §§ 37 and 47; Judgment of the Court (Fourth Chamber) of 10 April 2008, case C-393/06, *Ing. Aigner, Wasser-Wärme-Umwelt, GmbH v Fernwärme Wien GmbH* [ECLI:EU:C:2008:213], § 37; Judgment of

performance of tasks in the public interest. It endeavors to combat the escape from the constraints imposed by the system of guarantees that any entity that carries out a public function must comply with[251].

According to the Directive 2014/24/EU, the notion of 'contracting authorities' refers to (a) State, regional or local authorities, (b) bodies governed by public law or (c) associations formed by one or more such authorities or more such bodies governed by public law[252]. Most concerns arising from that definition may be raised in relation to the identification of 'bodies governed by public law'[253].

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the Court (Fourth Chamber) of 11 June 2009, case C-300/07, *Hans & Christophorus Oymanns GbR, Orthopädie Schuhtechnik v AOK Rheinland/Hamburg* [ECLI:EU:C:2009:358], § 51; Judgment of the Court (Fifth Chamber) of 12 September 2013, case C-526/11, *IVD GmbH & Co. KG v Ärztekammer Westfalen-Lippe* [ECLI:EU:C:2013:543], §§ 23 and 25.

[251] The Member States have experienced an evolution in their internal legal systems. The evolution has been particularly far-reaching in the case of the French model (adopted almost in its entirety in Spain, Portugal, Italy, Belgium and Greece). In the XIX century the key concern was the instrument in which the bilateral relationship was embodied: if the administrative body concluded a contract, insofar as it was a 'contract', the archetype of the juridical act governed by private law, the relationship was likewise governed by private law. However, with time it evolved, it abandoned the stance in favor of the submission to private law (which is, still today, the principled position of a wide range of Member States) and it became the first model that submitted the contracts concluded by an administrative body to public law. The concern was rather placed on the nature of the object of the bilateral relationship: if the contract has, as its object, the performance of a task in the public interest, it was subject to public (administrative) law. FROMONT, M. *Droit administratif des États européens*. Paris, Themis, 2006, pp. 297-299; GONZÁLEZ-VARAS IBÁÑEZ, S. *Tratado de Derecho Administrativo. Tomo IV – Contratación pública*. Madrid, Civitas – Thomson Reuters, 2012, 2nd edition, p. 81.

[252] Article 2(1)(1) of the Directive 2014/24/EU. When it comes to the definitions on which the ECJ has based its case law when dealing with the notion of 'contracting authorities', it is appropriate to underline that, in that regard, this article has remained essentially unaltered. *Vide* Recital 10 of the Directive 2014/24/EU, with reference to the definitions contained in Article 2(1)(1), in relation to the definition of 'contracting authority', and in Article 2(1)(4), in relation to the definition of 'bodies governed by public law', previously contained in Article 1(9) of the Directive 2004/18/EC.

[253] In the Directives, the definition of 'contracting authority' contains a specific reference to the sub-notion of 'body governed by public law'. In the current Directive, such definition is contained in the article 2(1)(4)(c). For the previous Directives, *vide* Directive 2004/18/EC, article 1(9). Additionally, to the previous ones, some Annexes were added, containing non-exhaustive lists of the bodies and categories of bodies governed by public law which fulfill the criteria to be qualified as 'contracting

The aim of the Directive, as well as it was of the previous Directives, is dual: to open up competition and to ensure transparency; therefore, the concept of 'contracting authority' must be given a functional interpretation and, in the same vein, the term 'body governed by public law' must be interpreted broadly[254]. In that sense, and following the aforementioned *functional test*, the Directive will apply as long as the body, vested with legal personality, has been created with the aim of meeting a general interest need, which is of no industrial or commercial character – i.e., whenever the formal qualification of an entity as 'contracting authority' is not straightforward, the functionality test will enter into play[255]. Attention will be drawn to whether the entity fulfills a public function, to whether it is bound to meet a general interest of no industrial or commercial character[256]. This does not necessarily imply that all the activities carried out by the entity have to be intended to meet needs in the general interest, not having an industrial or commercial character – that is, a contracting authority may pursue other activities in addition to its specific task of meeting needs in

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authorities'; accordingly, pursuant to article 1(9), Member States had to periodically notify the Commission any changes to their lists of bodies and categories of bodies.

[254] Judgment of the Court of 1 February 2001, case C-237/99, *Commission v France, cit.* [ECLI:EU:C:2001:70], §§ 41-43; Judgment of the Court (Sixth Chamber) of 12 December 2002, case C-470/99, *Universale-Bau AG, Bietergemeinschaft: 1) Hinteregger & Söhne Bauges.m.b.H. Salzburg, 2) ÖSTÜ-STETTIN Hoch- und Tiefbau GmbH v Entsorgungsbetriebe Simmering GmbH* [ECLI:EU:C:2002:746], §§ 51-53; Judgment of the Court of 27 February 2003, case C-373/00, *Adolf Truley, cit.*, § 43; Judgment of the Court (Sixth Chamber) of 15 May 2003, case C-214/00, *Commission of the European Communities v Kingdom of Spain* [ECLI:EU:C:2003:276], § 53; Judgment of the Court of 16 October 2003, case C283/00, *Commission v Spain, cit.,* § 73.

[255] GONZÁLEZ-VARAS IBÁÑEZ, S. *Tratado de Derecho Administrativo. Tomo IV – Contratación pública*. Madrid, Civitas – Thomson Reuters, 2012, 2nd edition, pp. 75-76.

[256] In fact, this general interest need of no commercial character is what characterizes and distinguishes the concept of 'body governed by public law' from that of 'public undertaking': «bodies governed by public law are created specifically to meet needs in the general interest having no industrial or commercial character, whereas public undertakings act to satisfy needs of an industrial or commercial character», *vide* Judgment of the Court of 16 October 2003, case C283/00, *Commission v Spain, cit.*, § 54. Also, *vide* BOVIS, C.H. "Financing Services of General Interest in the EU: How do Public Procurement and State Aids Interact to Demarcate between Market Forces and Protection?", in *European Law Journal*, vol. 11, no. 1, 2005, [pp. 79-109] pp. 83-84.

the general interest[257]. In conclusion, as expressed by the ECJ, 'needs in the general interest' is an autonomous concept of EU law[258]. Furthermore, the absence of an industrial or commercial character is a criterion intended to clarify the meaning of the term 'needs in the general interest', since the legislature acknowledges that there actually exist needs in the general interest that may well have an industrial or commercial character[259]. Thus, as indicated by the EU judiciary, the legal and factual situation of the body must be determined to assess whether it meets a need in the general interest not having an industrial or commercial character[260]. In doing so, the following aspects are, *inter alia*, to be taken into account: the lack of competition on the market, the fact that its primary aim is not the making of profits, the fact that it does not bear the risks associated with the activity and any public financing of the activity in question; in the end, if the body operates in normal market conditions, aims at making profit and bears the losses associated with the exercise of its activity, it is unlikely that the needs it aims at are not of industrial or commercial nature[261].

This functional definition of the notion of 'contracting authority' prevents the emergence of anticompetitive strategic procurement through the resort to entities that would otherwise fall outside the scope of a formal definition: from a subjective standpoint, as long as the public buyer turns to the market to procure services, works or

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[257] Judgment of the Court of 15 January 1998, case C-44/96, *Mannesmann Anlagenbau Austria AG and Others v Strohal Rotationsdruck GesmbH* [ECLI:EU:C:1998:4], §§ 26 and 31; Judgment of the Court of 1 February 2001, case C-237/99, *Commission v France*, *cit*., § 50.

[258] Judgment of the Court of 27 February 2003, case C-373/00, *Adolf Truley, cit.*, § 45; Judgment of the Court of 16 October 2003, case C283/00, *Commission v Spain, cit.*, §§ 79-80.

[259] Judgment of the Court of 15 January 1998, case C-44/96, *Mannesmann, cit.*, §§ 22-24; Judgment of the Court of 10 November 1998, case C-360/96, *BFI Holding BV*, *cit.*, §§ 32, 35-36.

[260] The inclusion of Annexes with non-exhaustive lists of the bodies governed by public law in the previous Directives implied the resort to the assessment of the legal and factual situation only when the body of reference was not included in the Annexes. *Vide* Judgment of the Court of 27 February 2003, case C-373/00, *Adolf Truley, cit.*, § 44.

[261] Judgment of the Court of 27 February 2003, case C-373/00, *Adolf Truley, cit.*, § 66; Judgment of the Court of 22 May 2003, case C-18/01, *Korhonen, cit.,* §§ 48-49, 51; Judgment of the Court of 16 October 2003, case C283/00, *Commission v Spain, cit.*, §§ 81-82.

goods, EU public procurement rules may be applicable[262]. In the end, it implies that the private law status of the body does not constitute a criterion for precluding it from being classified as a contracting authority[263].

As for the *dependency test*, for the body to be governed by public law, it has to be affiliated or associated to a public power; that is, the body has to be dependent on the public power. What matters is the ability of the public authority to influence the decisions of the body[264]. Therefore, the body has either to be financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law; or to 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[265].

When discerning whether the financing of the body complies with the requirements contained therein, some specifications must be made. First, the financing, albeit being a revealing sign of dependency, is not an absolute criterion: a payment by a public authority will be considered 'public financing' as long as it creates or reinforces a specific relationship of subordination or dependency without any specific consideration therefor[266]. Secondly, 'for the most part' implies that the body may also

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[262] As long as the basic requirements to consider the procuring entity an instrument of the State are complied with, no additional attention will be paid to that particular entity. *Vide* SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules, op. cit.,* p. 265.

[263] Judgment of the Court of 15 May 2003, case C-214/00, *Commission v Spain, cit.*, §§ 55-56.

[264] Judgment of the Court of 1 February 2001, case C-237/99, *Commission v France*, *cit*., § 49.

[265] Article 2(1)(4)(c) of the Directive 2014/24/EU.

[266] Judgment of the Court (Fifth Chamber) of 3 October 2000, case C-380/98, *The Queen v H.M. Treasury, ex parte The University of Cambridge* [ECLI:EU:C:2000:529], § 21. In this seminal Judgment, the ECJ provides with an example-based approach to the determination of the existence of a consideration and, consequently, of public financing: (a) payments in the form of awards or grants for the support of research work may be regarded as financing by a contracting authority –in the context of its research work–; (b) payments for the benefit of certain students to meet tuition fees may also be regarded as financing by a contracting authority –in the context of its educational activities–; but (c) payments made as consideration for contractual services provided by the body (execution of a particular research work or organization of seminars and conferences) prove the economic interest in providing the service and render impossible to regard them as public financing. *Vide* §§ 22 to 25.

be financed in part in some other way without losing its character of contracting authority, but more than a half of its income has to be public, taking into account all its income, including that which results from a commercial activity[267].

All in all, while the dependency test is limited to prove that the body is part of the public sector, the functionality test is aimed at assessing whether that body is actually a contracting authority[268].

Contracting authorities may source goods, works or services either to satisfy their operational needs or to comply with a public obligation of general interest they have been assigned with. When doing so, a contracting authority may (a) opt for outsourcing the provision of the good, work or service, or it may choose to provide the good, work or service either (b) itself –self-supply– or (c) in cooperation with another public entity –public-public agreement–[269]. In short, they are free to develop any economic activity they wish to pursue under public ownership, but, as expressed by the CJEU, public and private ownership must be treated equally –principle of neutrality of ownership–; therefore, both options –public and private ownership– are fully subject to the fundamental rules of the TFEU, what includes, for the purposes of our study, the subjection to the rules on competition[270].

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[267] Judgment of the Court (Fifth Chamber) of 3 October 2000, case C-380/98, *The Queen v H.M. Treasury, ex parte The University of Cambridge* [ECLI:EU:C:2000:529], §§ 35-36.

[268] ALMONACID LAMELAS, V. "Delimitación del concepto "poder adjudicador" a los efectos de la LCSP. Especial referencia a las sociedades mercantiles. Régimen jurídico de su actividad contractual", in *Noticias Jurídicas*, February 2009, available at: http://noticias.juridicas.com/conocimiento/articulos-doctrinales/4436--delimitacion-del-concepto-amp;8220;poder-adjudicadoramp;8221;-a-los-efectos-de-la-lcsp-especial-referencia-a-las-sociedades-mercantiles-regimen-juridico-de-su-actividad-contractual (last accessed: 22.12.2015).

[269] SANTIAGO IGLESIAS, D. "Las relaciones de colaboración entre poderes adjudicadores excluídas de la normativa de Contratación del sector público: una propuesta de transposición de la regulación contenida en las Directivas de contratación al ordenamiento español", in *Revista General de Derecho Administrativo*, vol. 38, 2015, p. 2.

[270] Article 345 TFEU (ex article 295 TEC, and, prior, article 222 TEC). On its interpretation by the EU judiciary, *vide* Judgment of the Court of 6 November 1984, case 182/83, *Robert Fearon & Company Limited v Irish Land Commission* [ECLI:EU:C:1984:335], § 7; Judgment of the Court of 1 June 1999, case C-302/97, *Klaus Konle v Republik Österreich* [ECLI:EU:C:1999:271], § 38; Judgment of the Court of 4 June 2002, case C-367/98, *Commission of the European Communities v Portuguese Republic*

From a Competition law standpoint, while options (b) and (c) –both are forms of public-public cooperation– are a very effective measure to limit the risk of tacit collusion, as they force suppliers to behave competitively inasmuch as contracting authorities are provided with an alternative to purchasing from external suppliers, they may also impact on competition[271]. By refusing to externalize, the contracting authorities limit the size of the market and reduce the number of suppliers that the market can sustain[272]. Such options may be inefficient to the extent that their cost is either above the current market price or below the current market price but above market price that would result if the public sector was to purchase externally and use its buyer power to promote competition; however, the straightforwardness of such a market-testing analysis might be hampered by the inexistence of a market price for the good, work or service under consideration, be it because no current market exists, or because the presence of a large public sector demand –significant public buyer power– substantially affects the terms and conditions on which the goods, services and works can be purchased[273].

[ECLI:EU:C:2002:326], § 48; Judgment of the Court of 4 June 2002, case C-503/99, *Commission of the European Communities v Kingdom of Belgium* [ECLI:EU:C:2002:328], § 44; Judgment of the Court of 23 September 2003, case C-452/01, *Margarethe Ospelt and Schlössle Weissenberg Familienstiftung* [ECLI:EU:C:2003:493], § 24; Judgment of the Court (First Chamber) of 8 July 2010, case C-171/08, *European Commission v Portuguese Republic* [ECLI:EU:C:2010:412], § 64; Judgment of the Court (Third Chamber) of 21 December 2011, case C-271/09, *European Commission v Republic of Poland* [ECLI:EU:C:2011:855], § 44; Judgment of the Court (Fourth Chamber) of 8 November 2012, case C-244/11, *European Commission v Hellenic Republic* [ECLI:EU:C:2012:694], § 16; Judgment of the Court (Grand Chamber) of 22 October 2013, joined cases C-105/12 to C-107/12, *Staat der Nederlanden v Essent NV (C-105/12), Essent Nederland BV (C-105/12), Eneco Holding NV (C-106/12) and Delta NV (C-107/12)* [ECLI:EU:C:2013:677], §§ 29, 31 and 36-37.

[271] SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules, op. cit.,* p. 33.

[272] As a result of a more limited market, other (private) buyers may have access to a smaller range of suppliers and, thus, face less competition. All in all, it must be recall that a large part of public procurement takes place in ‘regular’ markets – i.e., the public buyer sources services, goods and works that are also acquired by private buyers. OFFICE OF FAIR TRADING. *Assessing the impact of public sector procurement on competition*. Volume 1: main report, September 2004, pp. 20-21 and 129-130.

[273] *Supra*, p. 21 and 131.

Bearing these considerations in mind, we are going to analyze below the alternatives to the outsourcing of the provision of a good, work or service in the hands of contracting authorities. Focus will be placed thus on whether the use of such alternatives unduly forecloses supplying firms' access to the publicly-dominated market[274]. Indeed, competition law remedies may serve adequately the purpose of protecting competition in markets where the public buyer represents a large proportion of the demand, but where it is not the only source of demand[275].

Contracting authorities are free to decide how they organize the performance of activities for which they are publicly responsible[276]. Furthermore, Article 4(2) of the Treaty on the European Union (TEU) recognizes the right to regional and local self-

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[274] The mere existence and functioning of antitrust is not sufficient to ensure the achievement of a single public procurement market; instead, public procurement regulation requires the primary safeguard of market access. In this line, Prof. BOVIS coins the expression 'public competition law' to refer to this newly emerged *sui generis* market place. BOVIS, C.H. *EU Public Procurement Law*. Cheltenham, Edward Elgar Publishing, 2012, 2nd edition, p. 8.

In any case, such market place must not be just understood under the paradigm of a single public buyer – i.e., where the only source of demand is the public buyer, since, in practice, most public procurement processes are not brought in *pure* public procurement markets (with the exception, i.e., of defense procurement, medical equipment or education services in some countries). In such *pure* public procurement markets, as Prof. SÁNCHEZ GRAELLS points out, public authorities' decisions may not be guided by rational economic decision-making criteria, but by the pursuit of the public interest instead. Furthermore, the exclusivity of *pure* public procurement markets often is exogenous to the nature of the object of the procurement process; therefore, but for that regulatory restriction, a broader market could be defined. In conclusion, the specific economic problems present in these markets are better addressed through regulatory solutions rather than through competition law remedies. SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules, op. cit.,* pp. 33, 35-36 and 40-41.

[275] As explained above, monopolistic or monopsonist markets are better addressed through regulation than through competition since the exclusivity of the public buyer tends to be due to regulatory limitations that constrain the behavior of firms in a way equivalent to sectorial regulation; therefore, these markets present specific economic problems that are better dealt with through regulatory solutions. The classical monopsony model is a model of a single dominant buyer with fringe competition. SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules, op. cit.,* pp. 34, 39-41.

[276] Opinion of the AG Geelhoed delivered on 28 September 2006, case C-295/05, *Asociación Nacional de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa) and Administración del Estado* [ECLI:EU:C:2006:619], § 49. Also, SANTIAGO IGLESIAS, D. "Las relaciones de colaboración entre poderes adjudicadores excluídas de la normativa de Contratación del sector público… *op. cit.*, p. 2.

government; thus, a public administration can always carry out public interest activities on its own[277]. In this line, the CJEU has invoked the right to self-government and made clear that the obligation of public authorities to perform the public-interest tasks conferred on them may be exercised either (a) through the recourse to their own administrative, technical or other resources –self-supply– or (b) through cooperation with other public authorities –public-public agreements–[278]. Therefore, a public authority which is a contracting authority cannot be obliged to call on outside entities not forming part of its own departments; as a consequence, provided that certain criteria are met, genuine public-public cooperation falls outside the scope of the public procurement rules[279].

Notwithstanding, contracting authorities are, even outside the scope of public procurement, subject to respect the basic principles of the TFEU and, particularly,

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[277] Judgment of the Court of 11 January 2005, case C-26/03, *Stadt Halle, cit.*, § 48; Judgment of the Court (Third Chamber) of 13 November 2008, case C-324/07, *Coditel Brabant SA v Commune d'Uccle and Région de Bruxelles-Capitale* [ECLI:EU:C:2008:621], § 48; Judgment of the Court (Grand Chamber) of 9 June 2009, case C-480/06, *Commission of the European Communities v Federal Republic of Germany* [ECLI:EU:C:2009:357], § 45; Judgment of the Court (Third Chamber) of 22 December 2010, C-215/09, *Mehiläinen Oy and Terveystalo Healthcare Oy v Oulun kaupunki* [ECLI:EU:C:2010:807], § 31.

[278] Judgment of the Court (Second Chamber) of 19 April 2007, case C-295/05, *Asociación Nacional de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa) and Administración del Estado* [ECLI:EU:C:2007:227], § 65; Judgment of the Court of 13 November 2008, case C-324/07, *Coditel Brabant, cit.*, §§ 48 and 49; Judgment of the Court (Third Chamber) of 29 November 2012, joined cases C-182/11 and C-183/11, *Econord SpA v Comune di Cagno and Comune di Varese (C-182/11) and Comune di Solbiate and Comune di Varese (C-183/11)* [ECLI:EU:C:2012:758], § 25; Judgment of the Court (Fifth Chamber) of 19 June 2014, case C-574/12, *Centro Hospitalar de Setúbal EPE and Serviço de Utilização Comum dos Hospitais (SUCH) v Eurest (Portugal) - Sociedade Europeia de Restaurantes Lda.* [ECLI:EU:C:2014:2004], §§ 35, 36 and 44. Also, EUROPEAN PARLIAMENT. *Resolution of 18 May 2010 on developments in public procurement*, 2009/2175(INI), 18 May 2010, § 9. In the case of self-supply, all necessary resources for the performance of the task are available to the contracting authority within its own organization; whereas, in the case of public-public agreements, several contracting authorities mutually assist each other, without any remuneration or exchange of reciprocal rights and obligations whatsoever, as explained in EUROPEAN COMMISSION. *Commission Staff Working Paper concerning the application of EU public procurement law to relations between contracting authorities ('public-public cooperation')*, SEC(2011) 1169 final, Brussels, 4 October 2011, p. 5.

[279] For all, Judgment of the Court of 11 January 2005, case C-26/03, *Stadt Halle, cit.*, § 48.

competition rules and principles contained therein: Member States and the EU are required to conduct their activities in accordance with the principle of an open market economy with free competition, refraining from any measure that could jeopardize the attainment of EU goals, with the objective of building up a system ensuring that competition in the market is not distorted[280]. The EU Courts have clearly expressed that freedom of competition stands as a general principle of EU law and, besides, competition rules are fundamental provisions essential for the accomplishment of the tasks entrusted to the Union and, in particular, for the functioning of the internal market[281].

In any case, as public entities cannot be obliged to use any particular form to develop their public service tasks, the very fact that a public authority carries out a given economic activity with its own means or in cooperation with another public authority –instead of calling upon firms– does not, *per se*, constitute a restriction of competition contrary to EU law[282]. We will focus on whether the decision to resort to public-public cooperation – i.e., not to resort to the market for the provision of the good, work or service, unduly forecloses the market, either preventing new entrants from trying to penetrate the market or impeding private firms that are already active in the

[280] On the objective of building up a system ensuring an undistorted competition in the market, *vide* Articles 3(3) TEU, 3(1)(b) TFEU, Protocol 27 (ex article 3(1)(g) TEC); on the general requirement of observing the principle of an open market economy, article 119 TFEU (ex article 4 TEC); on the principle of sincere cooperation of the Member States for the achievement of EU's tasks, article 4(3) TEU (ex article 10(2) TEC). Judgment of the Court of 13 February 1969, case 14/68, *Walt Wilhelm and others v Bundeskartellamt* [ECLI:EU:C:1969:4], § 4; Judgment of the Court of 10 January 1985, case 229/83, *Association des Centres distributeurs Édouard Leclerc and others v SARL "Au blé vert" and others* [ECLI:EU:C:1985:1], § 14. SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules, op. cit.,* p. 251. Also, *vide* Opinion of the AG Kokott delivered on 1 March 2005, case C-458/03, *Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG* [ECLI:EU:C:2005:123], § 35.

[281] Judgment of the Court of 7 February 1985, case 240/83, *Procureur de la République v Association de défense des brûleurs d'huiles usagées (ADBHU)* [ECLI:EU:C:1985:59], § 9; Judgment of the Court of 1 June 1999, case C-126/97, *Eco Swiss China Time Ltd v Benetton International NV* [ECLI:EU:C:1999:269], § 36.

[282] Judgment of the Court of 9 June 2009, case C-480/06, *Hamburg, cit.*, § 47. Also, SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules, op. cit.,* p. 251.

market to sustain and compete profitably, especially in markets where the public buyer holds a large buying power *vis-à-vis* private purchasers[283].

Public-public cooperation allows public bodies to collaborate so they can efficiently improve the quality of their services or even carry out actions that they would not be able to perform individually[284]. According to the EU judicature, public bodies may cooperate either horizontally or vertically.

In a *horizontal* cooperation, public entities collaborate with the aim of ensuring that a public task they all have to perform is carried out[285]. In doing so, no new entity is created, nor an existing entity is mandated the performance of the public task; in short, no control is exercised by a public body over another company or entity[286]. Ultimately, public entities cooperate on equal terms[287]. This type of cooperation is also referred to as non-institutionalized cooperation or inter-municipal cooperation[288].

[283] It is precisely in those markets where the public buying power is likely to impact competition dynamics the most – that is, where the publicly-generated competitive distortions are more pernicious. On the contrary, if the percentage of public purchases is negligible, it may not be likely to affect the entry of potential operators to the market or the performance of already active operators. Likewise, market failures where the public buyer is the only purchaser –monopoly or pure monopsony models–, where the public entity is the only source of demand or it just faces fringe private competition– are better addressed through regulatory solutions, rather than through an assessment on the competitive dynamics, since such an exclusivity in the demand is often external to the nature of the object of the procurement process and, consequently, due to a regulatory restriction, in the absence of which a broader market could be defined. *Vide* SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules, op. cit.,* pp. 39-41.

[284] SANTIAGO IGLESIAS, D. "Las relaciones de colaboración entre poderes adjudicadores excluídas de la normativa de Contratación del sector público… *op. cit.*, p. 2.

[285] Judgment of the Court of 9 June 2009, case C-480/06, *Hamburg, cit.*, § 37.

[286] HAUSMANN, F.L. and QUEISNER, G. "In-house contracts and inter-municipal cooperation - Exceptions from the European Union Procurement Law should be applied with caution", in *European Procurement & Public Private Partnership Law Review*, vol. 8, issue 3, 2013, [pp. 231-237] p. 231. Also, stating the fact that EU Law does not require the creation of a separate legal entity, Judgment of the Court of 9 June 2009, case C-480/06, *Hamburg, cit.*, §§ 46-47.

[287] MADRIGAL ESTEBAN, M.J. "La positivación de la doctrina 'in house' y, con ella, la de la 'colaboración horizontal' entre poderes públicos para la realización en común de tareas de servicio público", in *Actualidad Jurídica Uría Menéndez*, vol. 36, 2014, [pp. 128-136] p. 132.

[288] EUROPEAN COMMISSION. SEC(2011) 1169 final, *cit.*, p. 12.

By contrast, in a *vertical* or institutionalized cooperation the contracting authority controls and uses an (instrumental) entity, which is a legally distinct person and with which it concludes contracts for the performance of tasks in the public interest, provided that the contracting authority exercises over the entity concerned a control which is similar to that which it exercises over its own departments and, at the same time, that entity carries out the essential part of its activities with the controlling local authority or authorities[289]. It is thus the presence of the in-house control (which may be joint in the case of several contracting authorities) what leads to the exemption from the scope of the public procurement regime of an otherwise covered public procurement contract for the performance of a task against remuneration[290].

However, the limits between both types of cooperation are not always easily determined; even more after the appearance of intermediate subcategories, such as horizontal in-house transactions or jointly controlled vertical cooperation[291].

In the following sub-sections, we will proceed to analyze the jurisprudentially developed and regulatory compiled requirements for the application of the horizontal cooperation exception (sub-section A) and of the vertical cooperation exception (sub-section B). If any of the criteria is not met, the need to protect an undistorted competition, which grounds and justifies the EU rules on the award of public contracts, leads irrefutably to the full submission of the award of the contract to the same constraints of any other service, good or work provider[292].

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[289] Judgment of the Court (Fifth Chamber) of 18 November 1999, case C-107/98, *Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia* [ECLI:EU:C:1999:562], § 50.

[290] EUROPEAN COMMISSION. SEC(2011) 1169 final, *cit.*, p. 15.

[291] As we will study below, both subcategories are to be considered variants of a vertical cooperation. Consequently, if contracting authorities are to evade their submission to EU public procurement regulatory constraints, they must meet the requirements established to qualify a cooperation as vertical.

[292] Opinion of the AG Léger, case C-94/99, *ARGE, cit.*, § 79; Opinion of the AG Geelhoed, case C-295/05, *Tragsa II*, *cit.*, § 105.

A. Horizontal cooperation exception: an insight, nuanced by competition concerns, to nowadays configuration of the inter-administrative cooperation exception

The Directive 2014/24 recognizes, in its Recital 33, the possibility for contracting authorities to provide jointly the public-interest tasks they have been assigned to or they have assumed – i.e., local or regional authorities may cooperate to comply with (a) their mandatory or voluntary tasks or (b) services conferred by public law upon specific bodies[293]. Therefore, the aim of the cooperation is, necessarily, of no commercial nature; instead, it involves and addresses the performance of mutual –that is, either identical or merely complementary– rights and obligations[294].

Such an immunity from public procurement provisions is grounded on the appreciation that an inter-municipal cooperation may be governed strictly by considerations relating to the public interest; all in all, cooperation requires a relationship of exchange and coordination of the respective contracting authorities' interests, going beyond the mere provision of services for consideration[295]. It is not a market transaction justified by economic reasons; instead, contracting authorities cooperate in order to discharge their obligations as emanations from the State[296].

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[293] Directive 2014/24/EU, Recital 33. Letter (b) makes reference to autonomous bodies or public corporations. *Vide* MADRIGAL ESTEBAN, M.J. "La positivación de la doctrina 'in house'… *op. cit.,* p. 135.

[294] EUROPEAN COMMISSION. SEC(2011) 1169 final, *cit.*, p. 15; MADRIGAL ESTEBAN, M.J. "La positivación de la doctrina 'in house'… *op. cit.,* p. 135. Also, Directive 2014/24/EU, Recital 33. On a case where there was indeed a public task to be performed (guaranteeing safety in hospitals), but horizontal cooperation exception was not applied due to the fact that the Court casted doubts as to whether both contracting authorities had to perform that task, *vide* Judgment of the Court (Grand Chamber) of 19 December 2012, case C-159/11, *Azienda Sanitaria Locale di Lecce and Università del Salento v Ordine degli Ingegneri della Provincia di Lecce and Others* [ECLI:EU:C:2012:817], §§ 35 and 36-37; Opinion of the AG Trstenjak delivered on 23 May 2012, case C-159/11, *Azienda Sanitaria Locale di Lecce and Università del Salento v Ordine degli Ingegneri della Provincia di Lecce and Others* [ECLI:EU:C:2012:303], §§ 71, 74 and 81.

[295] Opinion of the AG Trstenjak, case C-159/11, *Ordine degli Ingegneri della Provincia di Lecce, cit.,* §§ 75-76.

[296] SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules, op. cit.,* p. 253.

Further, contracting authorities intend to establish a genuine collaboration; they do not just aim at a mere transfer of the tasks conferred upon them[297]. Contracts concluded within the framework of pure delegations of powers or after entrusting the execution of a public task to another contracting authority, absent the objective of carrying out a real and effective cooperation, do fall under the scope of public procurement regulations[298]. However, the transfer itself, when the responsibility for a public task is transferred in its entirety, remains outside the scope of the EU public procurement directives[299].

Consequently, insofar as (1) contracts signed within the framework of a horizontal cooperation are concluded exclusively by contracting authorities, (2) the implementation of the cooperation –including financial transfers– is governed solely by considerations relating to the public interest and (3) no private service provider is placed in a position of advantage *vis-à-vis* competitors, EU public procurement rules will not be applicable and, shielded from such sectorial constraints, contracting authorities will be entitled to interact cooperatively for the pursuit of common objectives in the public interest[300]. The Commission, prior to the adoption of the Fourth Generation directives

[297] In *Piepenbrock* the object of the bilateral relationship was the cleaning of buildings used for the performance of public services, that is, an auxiliary task or a task indirectly relevant to the performance of public services. Therefore, more than a cooperative agreement, there was a pure delegation of powers from the district of Düren (an association of local authorities, including the city of Düren) to the city of Düren, over the responsibility for the cleaning of the district's office, administrative and school buildings located within the territory of the city. As the city was entitled to perform the cleaning tasks by availing itself of the services of third parties, if the agreement was to benefit from the public-public cooperation exception, such third parties would be placed ina position of advantage *vis-à-vis* other firms active in the same market. *Vide* Judgment of the Court (Fifth Chamber) of 13 June 2013, case C-386/11, *Piepenbrock Dienstleistungen GmbH & Co. KG v Kreis Düren* [ECLI:EU:C:2013:385], §§ 9 and 34-35. Also, *vide* HAUSMANN, F.L. and QUEISNER, G. "In-house contracts and inter-municipal cooperation… *op. cit.,* p. 235.

[298] MADRIGAL ESTEBAN, M.J. "La positivación de la doctrina 'in house'… *op. cit.,* pp. 134-135

[299] EUROPEAN COMMISSION. *Green Paper on the modernization of EU public procurement policy – Towards a more efficient European Procurement Market*, COM(2011) 15 final, Brussels, 27 January 2011, p. 21.

[300] Needless to say, the cooperation has to be real. Recital 33 of the Directive 2014/24/EU codifies what the EU case law had already stated: Judgment of the Court of 9 June 2009, case C-480/06, *Hamburg, cit.*, §§ 44 and 47; Judgment of the Court of 19 December 2012, case C-159/11, *Ordine degli Ingegneri della Provincia di Lecce, cit.*, § 35; Judgment of the Court (First Chamber) of 8 May 2013, joined cases C-

and after the seminal judgment of the CJEU in *Hamburg*, has varied the number of criteria identified on the basis of the EU Courts case law: from three to five[301]. Finally, the Directive 2014/24 discarded two of the conditions agreed upon in the consensus text:

> (d) the agreement does not involve financial transfers between the participating contracting authorities, other than those corresponding to the reimbursement of actual costs of the works, services or supplies;
>
> (e) there is no private participation in any of the contracting authorities involved.

Requisite (d) was undoubtedly stated in *Hamburg*, where the CJEU concluded that, in order to benefit from the horizontal cooperation exception, there may exist no financial transfers between the contracting authorities other than those corresponding to the reimbursement of the part of the charges effectively borne by each one[302]. However, it was finally extracted from the version of the Directive passed by the Parliament and the Council.

Likewise, requirement (e) is absent in article 12(4) of the Directive 2014/24. Private participation is intrinsically incompatible with the performance of a horizontal cooperation: it hinders public-public cooperation from remaining purely public and it may place private service providers in a position of advantage, since a contracting authority may sign a cooperation agreement, exempted from public procurement regulatory constraints, with a mixed economy entity that, being dependent of another

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197/11 and C-203/11, *Eric Libert and Others v Gouvernement flamand (C-197/11) and All Projects & Developments NV and Others v Vlaamse Regering (C-203/11)* [ECLI:EU:C:2013:288], § 118; Judgment of the Court of 13 June 2013, case C-386/11, *Piepenbrock, cit.*, § 37.

[301] The Commission identified three conditions to qualify a cooperation among contracting authorities without creating a specific structure as ‘using its own resources’. *Vide* EUROPEAN COMMISSION. SEC(2011) 1169 final, *cit.*, pp. 16-17. However, in its proposal for a Directive it included five cumulative conditions to exempt an agreement concluded between two or more contracting authorities from being considered a ‘public contract’. *Vide* EUROPEAN COMMISSION. *Proposal for a Directive of the European Parliament and of the Council on public procurement*, COM(2011) 896 final, 2011/0438 (COD), Brussels, 20 December 2011, article 11(4) (*consensus text*).

[302] Judgment of the Court of 9 June 2009, case C-480/06, *Hamburg, cit.*, § 43.

public administration, is in its turn a contracting authority[303]. The exclusion of such no-private participation requirement from the criteria to qualify for the horizontal cooperation exception raises important concerns with regard to the competitive distortions that an exempted agreement may generate. The immunity from public procurement rules brings along the submission to feebler competition constraints, as the contracting authorities may award directly to their contractor the performance of the object of the bilateral agreement – without subjecting it to a public procurement process[304]. It is precisely the respect to the fair and open competition principle what hampers an automatic exclusion from the scope of the public procurement directives of all agreements concluded between public authorities[305]. Thus, any exclusion from EU public procurement rules must be construed narrowly, as it implies a limitation of the free competition principle. An exclusion may be justified when the objective of the bilateral agreement is, at the end of the day, the exclusive pursuit of the public interest – i.e., when the public-public cooperation remains purely public. On the contrary, competition could be unduly endangered when private interests enter into play – no matter how little private participation is, since one may cast some doubts as to what extent a pure and sole public interest is truly being searched for. From a competition law standpoint, it is submitted that the wording of the article dealing with the horizontal cooperation exception contained in the consensus text yielded, at first sight, more guarantees. Therefore, in this more lenient regulatory framework, wider competitively compliant options are offered to contracting authorities, as, unlike in the consensus text, there is no express reproach to private participation. Competition authorities are required thus to pay thorough attention when assessing public-public cooperation agreements, in order to deter contracting authorities from distorting competition

[303] Judgment of the Court of 9 June 2009, case C-480/06, *Hamburg, cit.*, §§ 44 and 47. Also, *vide* EUROPEAN COMMISSION. SEC(2011) 1169 final, *cit.*, p. 15; EUROPEAN COMMISSION. COM(2011) 15 final, *cit.*, p. 22; MADRIGAL ESTEBAN, M.J. "La positivación de la doctrina 'in house'… *op. cit.,* p. 136; SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules, op. cit.,* pp. 252-253; SANTIAGO IGLESIAS, D. "Las relaciones de colaboración entre poderes adjudicadores excluídas de la normativa de Contratación del sector público… *op. cit.*, pp. 17-18.

[304] Directive 2014/24, recitals 31-33.

[305] EUROPEAN COMMISSION. SEC(2011) 1169 final, *cit.*, p. 15; EUROPEAN COMMISSION. COM(2011) 15 final, *cit.*, pp. 21-22. Also, Directive 2014/24, recital 31.

dynamics through the design of artificial schemes that imply the actual performance of market activities, rather than a mere self-organization.

As for the other three requirements, in order to apply the horizontal cooperation exception each and every criteria set forth in article 12(4) of the Directive 2014/24 have to be met, as they are cumulative[306].

(1) The aim of the contract establishing or implementing the horizontal cooperation must be ensuring that the public services that the contracting authorities have to perform are provided with a view to achieving common objectives[307]. Such public services may have been conferred to the contracting authorities or they can have assumed them[308]. Cooperating entities are not required to resort to any particular form to conduct their cooperation: as long as the interaction is based on a cooperative concept –i.e., in the contribution towards the cooperative performance of the public task–, it will not be required that all participating authorities assume the performance of the main contractual obligations[309].

(2) The implementation of the cooperation must be governed solely by considerations relating to the public interest[310]. This entails that there cannot exist interests, no matter how limited they may be, that are not directly and unequivocally related to the public interest that justifies the cooperation[311]. As addressed before, in cases where private participation exists, competition authorities will place their focus on whether such participation amounts to distancing the ultimate performance of the cooperative agreement from the public interest that justified its adoption.

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[306] Judgment of the Court of 13 June 2013, case C-386/11, *Piepenbrock*, *cit.,* § 38. Also, Judgment of the Court of 19 December 2012, case C-159/11, *Ordine degli Ingegneri della Provincia di Lecce, cit.*, § 36.

[307] Directive 2014/24, article 12(4)(a).

[308] MADRIGAL ESTEBAN, M.J. "La positivación de la doctrina 'in house'… *op. cit.,* p. 135.

[309] Judgment of the Court of 9 June 2009, case C-480/06, *Hamburg, cit.*, § 47. Also, *vide* MADRIGAL ESTEBAN, M.J. "La positivación de la doctrina 'in house'… *op. cit.,* p. 135.

[310] Directive 2014/24, article 12(4)(b).

[311] MADRIGAL ESTEBAN, M.J. "La positivación de la doctrina 'in house'… *op. cit.,* p. 135.

And (3) the participating contracting authorities must perform on the open market less than 20 % of the activities concerned by the cooperation[312]. To determine such percentage, it will be taken into account the average total turnover for the three years preceding the contract award, or any other alternative activity-based measure – i.e., costs incurred by the relevant legal person or contracting authority with respect to services, works and goods[313]. In cases where the average total turnover or the costs are not available or are no longer relevant, business projections will be sufficient to show that the measurement of the activity is credible[314]. This requirement serves a double purpose: on one hand, it reduces the likeliness for the contracting authorities to succumb to interests other than the public one; on the other hand, it places public-public agreements as a last resort measure, available only to the extent that the contracting authorities do not resort consistently to it. Such a marginal outsourcing of the activities under cooperation implies that, as the contracting authorities do not regularly resort to the market to carry out such activities, they are less likely to be captive by interests other than the pure public one. All in all, if they are active on the market, they are in direct competition with private operators: they pursue the same (or similar) commercial objectives and use the same instruments[315]. Horizontal cooperative agreements, in so far as they constitute an exception to the general rule of subjecting independent contracting authorities to the duty to procure, have to be interpreted restrictively[316]. Therefore, if contracting authorities regularly carry out their tasks under market conditions, that is,

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[312] Directive 2014/24, article 12(4)(c).

[313] Directive 2014/24, article 12(5), first paragraph.

[314] Directive 2014/24, article 12(5), second paragraph.

[315] EUROPEAN COMMISSION. COM(2011) 15 final, *cit.*, p. 22.

[316] WEISBEEK, E.L. "Teckal revisited - An examination of the intended codification of the exceptions of quasi in-house procurement and inter-municipal cooperation", in *Department of European and International Public Law*, Tilburg Law School, April 2013, p. 33. Also, *vide* Judgment of the Court (Second Chamber) of 13 January 2005, case C-84/03, *Commission of the European Communities v Kingdom of Spain* [ECLI:EU:C:2005:14], §§ 37-40. Against, considering that rather than an exception, public-public agreements are transactions that, due to their non-contractual nature, fall outside the scope of EU public procurement rules, *vide* PERNAS GARCÍA, J.J. *Las operaciones* in house *y el Derecho comunitario de los contratos públicos. Análisis de la jurisprudencia del TJCE*. Madrid, Iustel, 2008, p. 38. They do not benefit from an exception, since, to be exempted, they would have to fall first under the scope of EU public procurement rules.

resorting, in more than a 20 % of the cases, to the market through public procurement procedures, there appears to be no reason to seek for and justify a public-public cooperation exception.

As stated, the contracting authorities are not obliged to resort to any particular form to conduct their cooperation; however, there is a clear preference towards the drafting of public-public agreements. Inter-administrative agreements can be placed inside the wider concept of 'contract', which encompasses the agreement of intent of two or more entities aiming at establishing a legal bond[317]. However, traditionally 'contract' is used by the literature to refer to a more specific type of legal transaction whose essential features differ from those of an agreement: (a) in an agreement, both parties are placed at the same level, while in a contract the debtor or supplier is subordinated to the creditor or buyer; and, the decisive feature, (b) in an agreement the cause for the establishment of the bilateral relationship is the performance of a common public interest objective (*facio ut facias*), whereas in a contract the cause is remunerative (*facio ut des*)[318]. In any case, albeit the *nomen iuris* given to the bilateral relationship, the determination of the nature of a conventional legal transaction may not be dependent of its object; instead, attention should be paid to the cause of the legal relationship[319]. Further, to sign an agreement there must be an identity of objectives between the participating entities[320]. Consequently, although contracting authorities theoretically enjoy a wide freedom regarding the specific instrument to perform their

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[317] In favor of this point of view, *vide* GARCÍA DE ENTERRÍA, E. and FERNÁNDEZ, T.R. "Los contratos de la Administración y, en especial, los contratos administrativos" in ID. *Curso de Derecho Administrativo I*. Madrid, Civitas, 2006, 13th edition, [pp. 675-728] p. 680. On the hesitance of the scholarship to consider public-public agreement a type of contract, *vide* SANTIAGO IGLESIAS, D. "Las relaciones de colaboración entre poderes adjudicadores excluídas de la normativa de Contratación del sector público… *op. cit.*, p. 27.

[318] COMISIÓN NACIONAL DE LA COMPETENCIA. *Guía sobre Contratación Pública y Competencia*, *op. cit.*, p. 8; SANTIAGO IGLESIAS, D. "Las relaciones de colaboración entre poderes adjudicadores excluídas de la normativa de Contratación del sector público… *op. cit.*, pp. 28-31.

[319] SANTIAGO IGLESIAS, D. "Las relaciones de colaboración entre poderes adjudicadores excluídas de la normativa de Contratación del sector público… *op. cit.*, p. 12.

[320] COMISIÓN NACIONAL DE LA COMPETENCIA. *Guía sobre Contratación Pública y Competencia*, *op. cit.*, p. 8; MADRIGAL ESTEBAN, M.J. "La positivación de la doctrina 'in house'… *op. cit.,* pp. 134-135.

cooperation, it is submitted that an agreement is the instrument that ensures best the compliance with the requirements to qualify a legal transaction as a public-public cooperation.

Finally, the conclusion of public-public cooperation agreements may lead to a coordination of the contracting authorities' buying power, which, from a competition perspective, although is supposed to bring about some benefits, might endanger the competitive dynamics of the market through the creation of an overwhelming public buying power to the detriment of both operators and fringe competitors – i.e., both in the provision side and in the buying side[321]. However, whereas the decision to create a central purchasing body (CPB) to materialize the public-public cooperation is not subject to EU public procurement regulations (horizontal cooperation exception), the purchasing activities performed through such CPB do are subject to public procurement constraints[322].

B. Vertical cooperation exception: a competition-grounded analysis on the regulatory evolution and actual configuration of the jurisprudentially developed *Teckal* criteria

Vertical cooperation, also referred to as in-house operations, is the instrument used by contracting authorities to procure goods, works or services by themselves, be it through their own services –in house operations strictly speaking–, be it through a dependent body –in house operations in a broader sense or quasi in house operations–[323]. In either case, the contracting authority entrusts its instrumental entity with the provision of a good, work or service and, due to the internal nature of the entrusted entity *vis-à-vis* the entrusting contracting authority, the administrative relationship

[321] EUROPEAN COMMISSION. SEC(2011) 1169 final, *cit.*, p. 15; EUROPEAN COMMISSION. COM(2011) 15 final, *cit.*, p. 22.

[322] Directive 2014/24, article 37.

[323] PERNAS GARCÍA, J.J. *Las operaciones* in house *y el Derecho comunitario de los contratos públicos… op. cit.*, p. 176. In the Spanish literature, some authors have referred to 'collaboration' rather than cooperation, since one of the participants in the relationship has no competences over the object of the legal transaction. For all, *vide* ÁVILA ORIVE, J.L. *Los convenios de colaboración excluidos de la Ley de Contratos de las Administraciones Públicas.* Madrid, Civitas, 2002, pp. 92-93.

remains outside the scope of the EU public procurement rules[324]. All in all, the entrusted entity is a mere extension of the power of the entrusting authority: they are a unique and identical person, they share a single will and a single public interest[325]. Therefore, the entrusted entity is obliged to accept the assignment: it cannot neither refuse to perform it, nor reject it[326]. In conclusion, when the contracting authority entrusts its own services with the performance of a work, good or service in the public interest, there is formally a single person, so EU public procurement rules are not applicable; further, when the contracting authority entrusts a dependent body, although formally there are two persons, materially they are the same, so EU public procurement rules are neither applicable[327]. All in all, the creation of or the resort to a formally separate legal person does not entail a disassociation of the business organization of the entrusting authority; instead, it is just another means of administrative self-organization[328].

The case law has resorted to different formulations to refer to vertical cooperation: in-house providing, in-house contracts, domestic procurement, *contrats maison*… While 'in-house' is perceived as an ideal expression to capture the character of these relationships, performed within an internal structure, through an entity that 'belongs to the house', it has been submitted that they may not be referred to as 'contracts' –at least in a narrow sense–, since it is absent the freedom of choice of the entrusted body, who is simply obliged to accept the assignment of the entrusting authority[329]. Thus, more than a contractual relationship, where the will and consent of

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[324] COMISIÓN NACIONAL DE LA COMPETENCIA. *Los medios propios y las encomiendas de gestión: implicaciones de su uso desde la óptica de la promoción de la competencia*. Madrid, 2013, p. 5.

[325] PERNAS GARCÍA, J.J. *Las operaciones* in house *y el Derecho comunitario de los contratos públicos... op. cit.*, pp. 176-177.

[326] BERNAL BLAY, M.A. "Las encomiendas de gestión excluidas del ámbito de aplicación de la Ley de Contratos de las Administraciones Públicas. Una propuesta de interpretación del artículo 3.1. letra l) TRLCAP", in *Revista española de Derecho Administrativo*, vol. 129, January-March 2006, [pp. 77-90] p. 83.

[327] *Supra*, p. 63.

[328] PERNAS GARCÍA, J.J. *Las operaciones* in house *y el Derecho comunitario de los contratos públicos... op. cit.*, pp. 59-60 and 70-71.

[329] BALLINA DÍAZ, D. *Las sociedades mercantiles de capital íntegramente municipal. Instrumentos públicos entre el Derecho Público y el Derecho Privado*. Madrid, Instituto Nacional de la Administración

the intervening parties is mandatory, it is merely an organizational formula in the hands of the administration[330].

The EU legislature, on its turn, has opted for the following formulation: "public contracts between entities within the public sector"[331]. Consequently, to qualify for a vertical cooperation exception, both sides of the legal relationship must be 'entities within the public sector'; whereas the entrusting authority must be a contracting authority –meeting the aforementioned criteria–, the entrusted entity must comply with the requirements to be considered a public sector body, no matter its private or public law status[332].

Pública, septiembre 2015, § 6.1; Opinion of the AG Bot delivered on 20 September 2007, case C-220/06, *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v Administración General del Estado* [ECLI:EU:C:2007:540], § 75. The expression 'in-house' was coined by the Commission. *Vide* COMMISSION OF THE EUROPEAN COMMUNITIES. *Communication from the Commission – Public procurement in the European Union*, COM(1998) 143 final, Brussels, 11 March 1998, fn 10. Also, *vide* BERNAL BLAY, M.A. "Las encomiendas de gestión excluidas del ámbito de aplicación de la Ley de Contratos de las Administraciones Públicas… *op. cit.,* p. 81.

[330] PERNAS GARCÍA, J.J. *Las operaciones* in house *y el Derecho comunitario de los contratos públicos… op. cit.*, p. 39.

[331] Directive 2014/24, article 12. Also, *vide* BERNAL BLAY, M.A. "Las encomiendas de gestión excluidas del ámbito de aplicación de la Ley de Contratos de las Administraciones Públicas… *op. cit.*, p. 81; GORDILLO PÉREZ, L.I. and MÚGICA ALCORTA, R. "La evolución del requisito del 'control análogo' en la adjudicación directa de contratos 'in-house'", in CANEDO ARRILLAGA, M.P. and GORDILLO PÉREZ, L.I. (Dirs.). *La autonomía local en tiempos de crisis: reformas, fiscalidad y contratación pública*, Cizur Menor, Thomson Reuters - Aranzadi, 2015, [pp. 265-306] p. 297.

[332] Directive 2014/24, article 12(1). The criteria set forth in article 12(1) of the Directive, which aims at qualifying an entity as a public sector body, must not be confused with those that qualify an entity as a body governed by public law (article 1(4) of the Directive). While if the entity meets the former it will be considered an instrumental body; if it meets the latter, it will be considered a contracting authority. Given their resemblance, it may be the case that an entity meets both sets of criteria. In such a case, the entity will qualify for being a contracting authority instrumental of another contracting authority. However, whereas, in theory, to be an instrumental entity the body may be governed either by private or public law, to be a contracting authority the body must necessarily be governed by public law. In practice, entities that meet the more stringent criteria established in article 12(1) will likewise meet those of article 1(4) and, albeit the reference to legal persons governed by private law contained in article 12(1), will fall under the definition of bodies governed by public law. On the recognition that an entity's private law status does not constitute a criterion to preclude it from being classified as a contracting authority, *vide*

In practice, whereas the exception from EU public procurement rules of the provision of a service, work or good through its own services –e.g., a department that organically is part of the contracting authority– is straightforward, as there is no doubt that they are public sector entities, the qualification of contracting authorities' instrumental entities poses certain questions[333]. First and foremost, a body specifically created to satisfy public interest tasks of no commercial nature may still be considered an in-house instrument even in the case that it carries out commercial activities, as long as such body continues to attend to the needs which it is required to meet[334]. Whereas the intention of the EU legislature was to draw a distinction between (a) needs in the general interest not having an industrial or commercial character and (b) needs in the general interest having an industrial or commercial character, 'specifically' does not mean 'exclusively': the instrumental entity may well carry out both[335]. Therefore, a body created specifically to meet industrial or commercial needs will not qualify for being considered an instrumental entity of the contracting authority for the purposes of applying the vertical cooperation exception. That is, a body that satisfies needs by carrying on economic activities in the industrial or commercial field that involve supplying goods, works or services on markets which are open to other public or private operators under fully competitive conditions is, actually, aiming at the market, at making profit and assuming the losses related to the performance of the activity[336]. On

Judgment of the Court of 15 May 2003, case C-214/00, *Commission v Spain, cit.*, §§ 54,55 and 60; Judgment of the Court of 13 January 2005, case C-84/03, *Commission v Spain*, *cit.,* § 28.

[333] Such instrumental entities may have been granted with a wide margin of autonomy, but insofar as the required cumulative criteria that we will explain below are met, such autonomy does not hamper the application of the vertical cooperation exception. Order of the Court (Seventh Chamber) of 10 April 2008, case C-323/07, *Termoraggi SpA v Comune di Monza* [ECLI:EU:C:2008:219], §§ 7 and 18.

[334] Judgment of the Court of 15 January 1998, case C-44/96, *Mannesmann, cit.*, § 25; Judgment of the Court of 10 November 1998, case C-360/96, *BFI Holding BV*, *cit.*, § 55.

[335] Judgment of the Court of 10 November 1998, case C-360/96, *BFI Holding BV*, *cit.*, § 36. Also, *vide* BOVIS, C.H. "Financing Services of General Interest in the EU… *op. cit.*, p. 84.

[336] In such a case, the referred body carries on a business equivalent to that of a private operator and, insofar as it actually competes in the market, it must be thus fully subject to EU public procurement regulatory constraints. EUROPEAN COMMISSION. *Public procurement in the European Union – Guide to the Community rules on public supply contracts, other than in the water, energy, transport and telecommunications sectors, Directive 93/36/EEC,* p. 8.

the contrary, a body specifically set to meet needs of a different nature, that is, of no commercial of industrial nature –e.g., social needs in the public interest– may be entitled to carry on a profitable commercial activity in order to ensure that its books balance and, even so, it may still qualify for a vertical cooperation exception[337]. In any case, according to the EU judicature, in order to discern its commercial or industrial nature attention must be paid to the relevant legal and factual circumstances surrounding both the creation of the entity and its day-to-day performance of the activity – i.e., if the entity operates in normal market conditions, aims at making profit and bears the losses associated with the exercise of its activity, it most probably seeks to meet needs of industrial or commercial nature[338].

At this stage of the analysis it must be underlined that public sector entities may cooperate vertically with a view of improving the management of public general interest tasks; the in-house instrument must have at its disposal the adequate tools to satisfactorily perform the entrusted activity –judgment of suitability–[339]. To put it in other words, a contracting body entrusts the performance of an activity to its dependent body because in terms of efficiency and effectiveness of the investment of public funds it deems it to be the best option[340]. As a result, on one hand, contracts concluded by the entrusted entities to carry on their assignment are fully subject to EU public procurement rules, as, in principle, the subcontracted undertakings do not meet the requirements to enjoy a vertical cooperation exception in relation with the entrusting authority; on the other hand, entrusted entities cannot re-entrust the essential core of the activity they have been entrusted with[341].

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[337] EUROPEAN COMMISSION. *Public procurement in the European Union – Guide to the Community rules on public supply contracts… op. cit.*, pp. 8-9.

[338] Judgment of the Court of 27 February 2003, case C-373/00, *Adolf Truley, cit.*, §§ 65-66; Judgment of the Court of 22 May 2003, case C-18/01, *Korhonen, cit.,* § 51; Judgment of the Court of 16 October 2003, case C283/00, *Commission v Spain, cit.,* §§ 81-92.

[339] TEJEDOR BIELSA, J. "Idoneidad de medios propios, gestión directa por sociedad mercantil y contratación con terceros", in *Observatorio de la Contratación Pública*, 3 February 2014, p. 3.

[340] BALLINA DÍAZ, D. *Las sociedades mercantiles de capital íntegramente municipal… op. cit.*, § 6.1.

[341] As stated, the basis for assigning the performance of an activity to an in-house entity is that such body does own the adequate tools to efficiently carry on the activity by itself. If the in-house entity ultimately resorts to the market to look for undertakings that may perform the activity, the assignment from the

Furthermore, the rationale behind the exception is the absence of a market interaction – that is, as the entrusting authority resorts to its own house to look for a provider of the work, good or service, it is not considered to intervene in the market; consequently, no harm is likely to be caused to the objective of ensuring free and undistorted competition, pursued by the EU legislature when it endeavors the coordination of procedures for the award of public contracts regarding the provision of goods, works or services[342]. Not surprisingly, the Directive 2014/24, in line with its preceding legal texts, establishes several cumulative criteria, which, with the clear objective of preventing distortions of competition arising from an incorrect assessment of the nature of an intended vertical cooperation, might be all complied with[343]. The conditions to apply the vertical cooperation exception are the following: (1) the contracting authority must exercise over the entrusted legal person concerned a control which is similar to that which it exercises over its own departments; (2) more than 80% of the activities of the controlled (entrusted) 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; and, (3) there is no direct private capital participation in the controlled (entrusted) legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national

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entrusted authority to the in-house entity cannot benefit from a vertical cooperation exception; otherwise, the assignment constitutes a mere artifice to submit the provision of the work, good or service to a more lenient regulatory framework, which involves the evasion from EU public procurement constraints. BALLINA DÍAZ, D. *Las sociedades mercantiles de capital íntegramente municipal... op. cit.*, § 6.1. Also, *vide* TEJEDOR BIELSA, J. "Idoneidad de medios propios, gestión directa por sociedad mercantil y contratación con terceros", *op. cit.,* p. 3.

[342] Opinion of the AG Cosmas delivered on 1 July 1999, case C-107/98, *Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia* [ECLI:EU:C:1999:344], § 65. Also, *vide* SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules*, *op. cit.*, p. 271.

[343] Judgment of the Court (First Chamber) of 11 May 2006, case C-340/04, *Carbotermo SpA and Consorzio Alisei v Comune di Busto Arsizio and AGESP SpA* [ECLI:EU:C:2006:308], §§ 58-59. Also, *vide* Opinion of the AG Stix-Hackl delivered on 23 September 2004, case C-26/03, *Stadt Halle and RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna* [ECLI:EU:C:2004:553], §§ 50-52; Opinion of the AG Kokott, case C-458/03, *Parking Brixen*, *cit.*, §§ 44-48; Opinion of the AG Geelhoed delivered on 21 April 2005, case C-29/04, *Commission of the European Communities v Republic of Austria* [ECLI:EU:C:2005:247], § 42.

legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person[344].

In the seminal *Teckal* case, the EU Court established the two requirements that may nowadays be found consigned in the first two paragraphs of article 12(1) of the Directive 2014/24: in order to consider that a legal person is an in-house instrument of a contracting authority, (a) such contracting authority must exercise over the legal person a *control which is similar* to that which it exercises over its own departments and, at the same time, (b) the legal person must carry out the *essential part* of its activities with the controlling authority or authorities[345]. Those requirements were intended to capture situations where the contracting authorities, for purposes of internal reorganization, within the framework of their organizational sovereignty, resort to undertakings other than their own departments or dedicated entities that form part of the administrative hierarchy and have no real independence[346]. All in all, restricting the application of the vertical cooperation exception and obliging thus contracting authorities to comply with the procurement rules before concluding contracts with their subsidiaries runs counter to what is necessary for the purpose of the market-opening of EU public procurement rules[347]. If such subsidiaries meet the criteria, they will be considered in-house instruments *vis-à-vis* the contracting authority, and, therefore, the latter may be entitled to directly award to the former the provision of a contract aimed at performance of public interest tasks[348].

While in the Directive 2014/24 a requirement has been added –regarding the private capital participation–, others, set by the EU judicature throughout its case law and profoundly related to the similar control requirement, have been suppressed. First, it has been obviated the obligation that the controlled entity must only be reimbursed the costs actually incurred[349]. Such a condition served the purpose of making more evident

[344] Article 12(1) of the Directive 2014/24.

[345] Judgment of the Court of 18 November 1999, case C-107/98, *Teckal, cit.*, § 50.

[346] Opinion of the AG Kokott, case C-458/03, *Parking Brixen, cit.*, §§ 70-71.

[347] Opinion of the AG Kokott, case C-458/03, *Parking Brixen, cit.*, § 80.

[348] Judgment of the Court of 11 January 2005, case C-26/03, *Stadt Halle, cit.*, § 48.

[349] For a clear explanation on what she refers to as 'pecuniary interest of the service', *vide* Opinion of the AG Trstenjak, case C-159/11, *Ordine degli Ingegneri della Provincia di Lecce, cit.,* §§ 30-34. Judgment

the similar control requirement[350]. Second, nothing is said about the obligation of setting beforehand the fees that must be paid for the entrusted activities[351]. This was intended to guarantee an effective structural and functional control of the controlling authority over the entrusted entity[352]. In conclusion, a door is thus left open both to the transfer of funds with an objective different from paying back costs and, also, to the retribution at a market price[353].

Before going any further, we must devote some lines to conduct an in-depth analysis on the *similar control* and the *essential part* requirements.

According to the case law, a contracting authority exercises a control similar to that which it exercises over its own departments when it is able to influence the decisions of the entrusted company – i.e., the controlling authority must own a power of decisive influence over both strategic objectives and significant decisions of that company in a way that the tasks assigned to it will be treated no differently than if they had been simply delegated internally[354]. A similar control does not entail a control

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of the Court of 9 June 2009, case C-480/06, *Hamburg, cit.*, § 43. Also, EUROPEAN COMMISSION. SEC(2011) 1169 final, *cit.*, p. 13.

[350] MADRIGAL ESTEBAN, M.J. "La positivación de la doctrina 'in house'… *op. cit.,* pp. 130. Further, it was also intended to prevent the resort to other forms of remuneration that may not be readily recognizable as profit-making – i.e., swaps or the waiver of reciprocal claims between the contracting parties, *vide* Opinion of the AG Trstenjak, case C-159/11, *Ordine degli Ingegneri della Provincia di Lecce, cit.,* § 32.

[351] Judgment of the Court of 19 April 2007, case C-295/05, *Tragsa II*, *cit.*, § 54.

[352] Judgment of the Court of 13 November 2008, case C-324/07, *Coditel Brabant, cit.*, § 46; Judgment of the Court (Second Chamber) of 17 July 2008, case C-371/05, *Commission of the European Communities v Italian Republic* [ECLI:EU:C:2008:410], § 26; Judgment of the Court of 29 November 2012, joined cases C-182/11 and C-183/11, *Econord*, *cit.*, § 27

[353] MADRIGAL ESTEBAN, M.J. "La positivación de la doctrina 'in house'… *op. cit.,* pp. 131.

[354] Judgment of the Court (First Chamber) of 13 October 2005, case C-458/03, *Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG* [ECLI:EU:C:2005:605], § 65; Judgment of the Court of 11 May 2006, case C-340/04, *Carbotermo, cit.,* § 36; Judgment of the Court of 17 July 2008, case C-371/05, *Commission v Italy, cit.*, § 24; Judgment of the Court of 13 November 2008, case C-324/07, *Coditel Brabant, cit.*, §§ 28 and 46; Judgment of the Court (Third Chamber) of 10 September 2009, case C-573/07, *Sea Srl v Comune di Ponte Nossa* [ECLI:EU:C:2009:532], § 65; Judgment of the Court of 29 November 2012, joined cases C-182/11 and C-183/11, *Econord, cit.*, § 27. Also, Opinion of the AG

identical to that which the controlling authority exercises over its own departments: while the departments of a contracting authority are part of a hierarchical structure, instrumental entities obey the exigencies of a relationship of dependence; that is to say, there will be no expression of hierarchy, but, still, controlling authorities will be duly entitled to intervene both in the strategic market decisions and in the individual management decisions[355]. Otherwise, in the absence of a similar control, two autonomous wills may cohabit, which essentially represent the pursuit separate legitimate interests and trigger the application of EU public procurement rules[356].

In a legal relationship subject to a vertical cooperation exception, there is a single decision-making entity – that is, the controlling authority; therefore, rather than a dominant influence, it is a decisive influence –characterized by rights to give instructions and supervisory powers– what the controlling entity must exert over the in-house instrument[357]. The entrusted instrumental body may enjoy a certain margin of effective autonomy in the day-to-day management of its activities, but the key is placed on whether the controlling authority is likely to influence the entity with a view of

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Léger delivered on 15 June 2000, case C-94/99, *ARGE Gewässerschutz v Bundesministerium für Land- und Forstwirtschaft* [ECLI:EU:C:2000:677], § 59; Opinion of the AG Mengozzi delivered on 23 January 2014, case C-15/13, *Technische Universität Hamburg-Harburg and Hochschul-Informations-System GmbH v Datenlotsen Informationssysteme GmbH* [ECLI:EU:C:2014:23], § 34; Opinion of the AG Mengozzi delivered on 27 February 2014, case C-574/12, *Centro Hospitalar de Setúbal EPE and Serviço de Utilização Comum dos Hospitais (SUCH) v Eurest (Portugal) - Sociedade Europeia de Restaurantes Lda.* [ECLI:EU:C:2014:120], § 23. Acknowledging that a control merely over procurement decisions in general or even over specific procurement decisions is not enough, *vide* Opinion of the AG Stix-Hackl, case C-26/03, *Stadt Halle, cit.*, §§ 77-78.

[355] PERNAS GARCÍA, J.J. *Las operaciones* in house *y el Derecho comunitario de los contratos públicos… op. cit.*, p, 72; SOSA WAGNER, F. "¿Pueden los contratos quedar en casa? (La polémica europea sobre la contratación *in house*)", in *Diario La Ley* n. 6715, XXVIII, 17 May 2007. In the language of the case, Italian, the Court required only control which is analogous ('analogo'), that is comparable but not identical, *vide* Opinion of the AG Stix-Hackl, case C-26/03, *Stadt Halle, cit.*, §§ 64 and 78.

[356] Opinion of the AG Cosmas, case C-107/98, *Teckal, cit.*, § 64.

[357] Opinion of the AG Stix-Hackl, case C-26/03, *Stadt Halle, cit.*, § 72; Opinion of the AG Kokott, case C-458/03, *Parking Brixen*, *cit.*, § 67. Also, *vide* PERNAS GARCÍA, J.J. *Las operaciones* in house *y el Derecho comunitario de los contratos públicos… op. cit.*, pp. 70 and 78.

attaining, through such instrumental entity, its public interest objectives[358]. The determination of the degree of decision-making dependency involves the appreciation of several indicative signs, as well as some unequivocal circumstances, that suggest –or reveal– the existence of a dependency relationship.

With regard to the signs that may indicate a relationship of dependency, a high degree of participation of the contracting authority in the entrusted entity suggests the existence of a subordination relationship; however, to assess the control, one may not just focus on a set percentage – attention should be paid, instead, to the specific circumstances of the case[359]. The fact that the instrumental entity is owned, alone or together with other public authorities, by the contracting authority tends to indicate that the contracting authority exercises over that company a control similar to that which it exercises over its own departments, but it is not decisive[360]. In some cases, albeit the participation being minority, thanks to the concurrence of other sings or unequivocal circumstances, the EU Court has considered that the similar control requirement is indeed complied with[361]. Among those circumstances it is the obligation for the

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[358] PERNAS GARCÍA, J.J. *Las operaciones* in house *y el Derecho comunitario de los contratos públicos… op. cit.*, pp. 179-180. Also, Opinion of the AG Stix-Hackl, case C-26/03, *Stadt Halle, cit.*, § 76.

[359] Opinion of the AG Stix-Hackl, case C-26/03, *Stadt Halle, cit.*, § 69.

[360] Judgment of the Court of 11 May 2006, case C-340/04, *Carbotermo, cit.,* § 37; Judgment of the Court of 19 April 2007, case C-295/05, *Tragsa II*, *cit.*, § 57. Also, *vide* BERNAL BLAY, M.A. "Las encomiendas de gestión excluidas del ámbito de aplicación de la Ley de Contratos de las Administraciones Públicas… *op. cit.,* p. 83.

[361] Considering that a 0,97% holding is so small as to preclude any similar control, Judgment of the Court (Grand Chamber) of 21 July 2005, case C-231/03, *Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti* [ECLI:EU:C:2005:487], § 24. However, in this Judgment it was not analyzed whether the control could be exercised jointly, as pointed out in *Coditel Brabant*, *vide* Judgment of the Court of 13 November 2008, case C-324/07, *Coditel Brabant, cit.*, § 52. Conversely, in *Tragsa II* the CJEU considered that four Autonomous Communities that hold a 1% of the capital of an entity may entrust such entity and benefit from the vertical cooperation exception, Judgment of the Court of 19 April 2007, case C-295/05, *Tragsa II*, *cit.*, §§ 58 and 60-61. Contra, Opinion of the AG Geelhoed, case C-295/05, *Tragsa II*, *cit.*, §§ 97-101. In any case, in *Tragsa II* the key lies in the fact that it was normatively required that the instrumental entity carried out the orders given by the public authorities, including the Autonomous Communities. Also, Judgment of the Court of 29 November 2012, joined cases C-182/11 and C-183/11, *Econord*, *cit.*, §§ 30-31. The Italian State Council considered that, given the circumstances of the case,

entrusted entity to accept the demands made by the controlling authority or the impossibility for the former to fix the tariff for its actions[362]. Even though the wording of the Directive, as explained before, does not expressly include the obligation of setting beforehand the fees payable to the entrusted entity, if the similar control requirement is to be met, the instrumental entity must not enjoy any freedom regarding the setting of the tariff for its services[363]. All in all, to the extent that the entrusted entity has no word in relation with the course that it may give to the assignment, its will does not intervene in the acceptance, configuration, evolution and termination of the legal relationship and, consequently, the existence of a single decision-making triggers the application of the vertical cooperation exception[364].

Furthermore, it is the entrusting authority who must hold, alone or with other public authorities, the participation; otherwise, the instrumental entity may be entirely participated –and, thus, controlled– by a public contracting authority; but, absent any participation of the entrusting authority, the entity may not be regarded as an in-house instrument of such entrusting authority and the contractual relationship will be fully subjected to EU public procurement rules[365].

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with a 0,000576% of the capital, the city councils of Cagno and Solbiate exerted over the entrusted entity a control similar to that over their own departments. *Vide* Judgment of the Italian State Council (First Section), no. 4080/2013, of 1 October 2013. On the possibility for a public authority which has become minority shareholder to be still considered a controlling authority, as long as the control is exercised by the authorities, member of the instrumental company, jointly, *vide* Judgment of the Court of 10 September 2009, case C-573/07, *Sea, cit.*, § 63. Also, *vide* PERNAS GARCÍA, J.J. *Las operaciones* in house *y el Derecho comunitario de los contratos públicos… op. cit.*, pp. 107-108 and 180.

[362] Judgment of the Court of 19 April 2007, case C-295/05, *Tragsa II*, *cit.*, §§ 54-60.

[363] Judgment of the Court of 19 April 2007, case C-295/05, *Tragsa II*, *cit.*, § 54.

[364] In *Correos*, the so-believed instrumental entity was enabled to negotiate the content of the legal relationship and the applicable tariffs; further, it was also entitled to put an end to the legal bond with the contracting authority. Judgment of the Court (First Chamber) of 18 December 2007, case 220/06, *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v Administración General del Estado* [ECLI:EU:C:2007:815], §§ 54-55. Also, *vide* PERNAS GARCÍA, J.J. *Las operaciones* in house *y el Derecho comunitario de los contratos públicos… op. cit.*, p. 116.

[365] Opinion of the AG Léger, case C-94/99, *ARGE, cit.*, § 65. Also, *vide* PERNAS GARCÍA, J.J. *Las operaciones* in house *y el Derecho comunitario de los contratos públicos… op. cit.*, pp. 80-81.

As said, the participation may be hold by the entrusting authority alone or by several contracting authorities. When the 100% of the share capital of the entrusted entity is hold by a contracting authority, there is no need to conduct an in-depth analysis on the internal organization of such entrusting authority to conclude that the entity is part of it and that, with regard to the assignments made by the contracting authority, the similar control requirement is thus met[366]. Exceptionally, upon the concurrence of special circumstances, even in cases where the instrumental entity is entirely owned by a contracting authority, it could be stated that the similar control criterion is not met – e.g., when the contracting authority exercises a control that merely consists in the latitude conferred by company law on the majority of shareholders, limiting its power to influence the decisions of the instrumental entity[367].

In contrast, when the instrumental entities are jointly controlled by several contracting authorities, some specifications must be made.

According to the case law, at the beginning, the ECJ focused on the legal provisions to ascertain whether the entrusted entity could be considered instrumental to the controlling authority[368]. Several judgments after *Teckal*, the ECJ clarified that, in addition to the legislative provisions, relevant circumstances also were to be taken into account[369]. Therefore, in the case of jointly controlled entities, attention is paid to the legal and factual circumstances that indicate that all the controlling authorities exercise a joint decisive influence over the strategic objectives and significant decisions of the

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[366] Opinion of the AG Alber delivered on 18 March 1999, case C-108/98, *RI.SAN. Srl v Comune di Ischia, Italia Lavoro SpA and Ischia Ambiente SpA* [ECLI:EU:C:1999:161], § 53; Opinion of the AG Léger, case C-94/99, *ARGE, cit.*, § 61.

[367] Judgment of the Court of 11 May 2006, case C-340/04, *Carbotermo, cit.,* §§ 38-40. After *Carbotermo*, it seemed that holding the 100% of the capital of an instrumental entity, as it was not decisive, might not be sufficient to exempt the internal cooperation from the tendering requirement. However, in *Tragsa II* the Court of Justice clarified that 'generally' it is sufficient, though not automatically. Consequently, the exemption could only be displaced by the concurrence of special circumstances. Judgment of the Court of 19 April 2007, case C-295/05, *Tragsa II*, *cit.*, § 57. Also, *vide* Opinion of the AG Trstenjak, case C-324/07, *Coditel Brabant*, *cit*., §§ 62-67.

[368] Judgment of the Court (Sixth Chamber) of 8 May 2003, case C-349/97, *Kingdom of Spain v Commission of the European Communities* [ECLI:EU:C:2003:251], §§ 205-206.

[369] Judgment of the Court of 13 October 2005, case C-458/03, *Parking Brixen*, *cit.*, § 65.

controlled entity[370]. This does not imply that the control must be exercised individually; instead, it suffices if the control is effective, as long as, with a view of not rendering the very concept of joint control meaningless, the control exercised over the entity is not based solely on the controlling power of the public authority with a majority holding in the capital of the controlled entity[371]. Otherwise, if individual control was required, in the majority of cases where a public authority seeks to join a grouping composed by other public authorities, such a requirement would not be met and a call for competition would end up being compulsory[372]. In such a case, construing so narrowly the similar control criterion would suppose an incommensurate interference with the public administrations' right to self-government and Member States' organizational sovereignty by attaching a disproportionate weight to competition law objectives[373]. All in all, it is for the public administrations to decide whether they carry out their general interest tasks with their own administrative and technical means or with their instrumental entities, or whether they resort to the market[374]. In conclusion, as long as, given the legal and factual circumstances of each case, all contracting authorities are

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[370] Judgment of the Court of 13 November 2008, case C-324/07, *Coditel Brabant, cit.*, §§ 49-50; Judgment of the Court of 10 September 2009, case C-573/07, *Sea, cit.*, § 59.

[371] Judgment of the Court of 13 November 2008, case C-324/07, *Coditel Brabant, cit.*, § 46; Judgment of the Court of 10 September 2009, case C-573/07, *Sea, cit.*, § 63; Judgment of the Court of 29 November 2012, joined cases C-182/11 and C-183/11, *Econord*, *cit.*, § 30. Also, *vide* Opinion of the AG Cruz Villalón delivered on 19 July 2012, case C-182/11, *Econord SpA v Comune di Cagno and Comune di Varese (C-182/11) and Comune di Solbiate and Comune di Varese (C-183/11)* [ECLI:EU:C:2012:494], § 26.

[372] Judgment of the Court of 13 November 2008, case C-324/07, *Coditel Brabant, cit.*, § 47. On the consequences of resort to a tendering in relation with the performance of public interest tasks, *vide* Opinion of the AG Kokott, case C-458/03, *Parking Brixen*, *cit.*, § 68; Opinion of the AG Trstenjak delivered on 4 June 2008, case C-324/07, *Coditel Brabant SA v Commune d'Uccle and Région de Bruxelles-Capitale* [ECLI:EU:C:2008:317], § 83. Also, *vide* MADRIGAL ESTEBAN, M.J. "La positivación de la doctrina 'in house'… *op. cit.,* p. 130.

[373] Opinion of the AG Kokott, case C-458/03, *Parking Brixen*, *cit.*, § 71; Opinion of the AG Trstenjak, case C-324/07, *Coditel Brabant*, *cit*., § 84.

[374] Judgment of the Court of 11 January 2005, case C-26/03, *Stadt Halle, cit.*, § 48; Judgment of the Court of 13 November 2008, case C-324/07, *Coditel Brabant, cit.*,, § 48; Judgment of the Court of 9 June 2009, case C-480/06, *Hamburg*, *cit.*, § 45; Judgment of the Court of 22 December 2010, C-215/09, *Mehiläinen Oy, cit.*, § 31; Opinion of the AG Trstenjak, case C-324/07, *Coditel Brabant*, *cit*., § 86.

provided with an actual possibility –not merely formal– of taking part in the effective control of the entity, the latter may be deemed instrumental to the formers[375].

In the light of those considerations introduced by the EU judicature, the Directive 2014/24 has consolidated the requirements for the existence of joint control[376]. The second paragraph of article 12(3) reads as follows:

> […] contracting authorities exercise joint control over a legal person 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. Individual representatives may represent several or all of the participating contracting authorities;
>
> (ii) those contracting authorities are able to jointly exert decisive influence over the strategic 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.

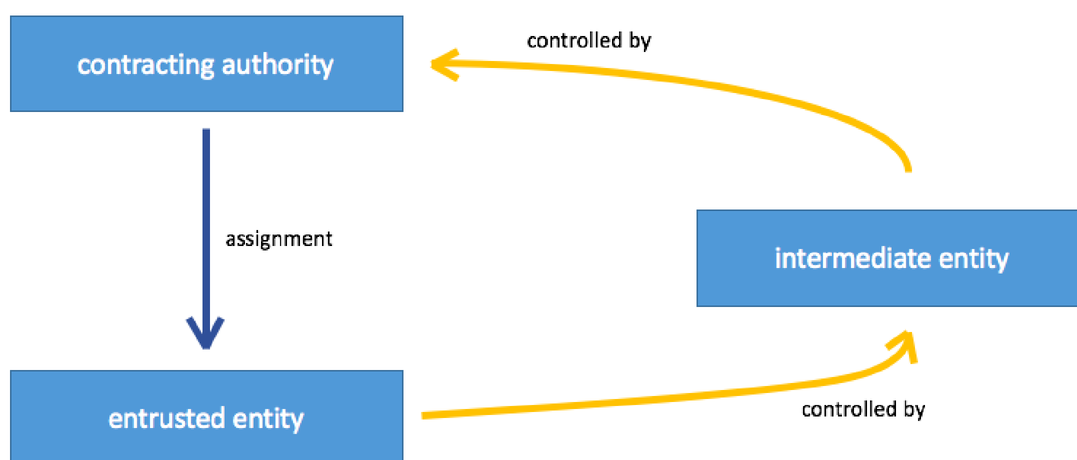
[375] In *Econord*, the concerned contracting authorities, who owned a single participation each in the entrusted entity –Aspem–, signed a shareholders' agreement conferring on them the right to be consulted, to appoint a member of a supervisory council and to nominate a member of the management board. The national court –the Italian State Council– considered that such an agreement enabled the contracting authorities to contribute effectively to the control of Aspem. *Vide* Judgment of the Court of 29 November 2012, joined cases C-182/11 and C-183/11, *Econord*, *cit.,* § 32; Judgment of the Italian State Council (First Section), no. 4080/2013, of 1 October 2013. If the capacity of controlling the instrumental entity is merely formal, contracting authorities will never exert a control similar to that which it exercises over their own departments, *vide* BALLINA DÍAZ, D. *Las sociedades mercantiles de capital íntegramente municipal… op. cit.*, § 6.1. On the need to take into account both the legal provisions and the factual circumstances, Judgment of the Court of 11 May 2006, case C-340/04, *Carbotermo, cit.,* § 36.

[376] Prof. SÁNCHEZ GRAELLS, after stating that the new directives did not only codify the in-house exception, but they also developed it in a very significant way, underlines the rigidity of the wording of the Directive when compared with the functional approach followed by the ECJ, which simply required that he contracting authorities jointly exercised the control and that none of their participations was thus merely formal. *Vide* SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules*, *op. cit.,* pp. 270-271.

Such consolidation narrows down the scope for appreciation left by the EU case law, but it brings about certainty both to national courts and to contracting authorities. They will not be automatically obliged to resort to the jurisprudential interpretation when assessing whether public authorities' procuring activities comply with the requirements for the application of the vertical cooperation exception in order to exclude them from EU public procurement rules.

The case law recognized, and the Directive 2014/24 confirmed, the possibility of exerting an indirect similar control – i.e., the similar control may be exercised by a person which is not the contracting authority, but which is itself controlled in the same way by the contracting authority[377]. In this case, the contracting authority makes an assignment to an entity –grand-daughter entity–, which is controlled by another entity – daughter entity– that is, on its turn, controlled by the contracting authority (*vide* Figure 1).

Figure 1 – Indirect similar control



SOURCE: Elaborated by the author

As stated before, factual and legal circumstances are to be examined in order to ascertain whether the contracting authority is in a position as to exercise a decisive

[377] Directive 2014/24, article 12(1).

influence over both strategic objectives and significant decisions of the entrusted grand-daughter entity[378].

On the other side of the 'decisive influence' coin, there are some indications that, considered altogether, may lead to the assumption that an entity is actually market-oriented, mainly because its wide decision-making autonomy transcends what is usual in the case of departments part of the contracting authority[379]. In this line, the controlling authority (or authorities) must be granted wider powers than those conferred by company law on the majority of shareholders – i.e., it must be provided with special control mechanisms[380]. Even in cases where the entrusted entity is fully owned by a contracting authority, it may be deemed, once examined the legislative provisions and factual circumstances of the case, market-oriented[381]. Moreover, one may not limit to

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[378] Judgment of the Court of 13 October 2005, case C-458/03, *Parking Brixen*, *cit.*, § 65; Judgment of the Court of 11 May 2006, case C-340/04, *Carbotermo, cit.,* §§ 36 and 39. However, in *Carbotermo*, the Court considered that the contracting authority did not exercised a similar control over the entrusted grand-daughter entity: on one side, the daughter and the grand-daughter were provided with the broadest possible powers for the ordinary and extraordinary management of the company, without reserving for the contracting authority any control or specific voting powers different from the powers conferred by company law on the majority of shareholders; and, on the other side, as any influence that the contracting authority might have on the entrusted grand-daughter entity's decisions was through the daughter entity, the control that the contracting authority could possibly exercise over the grand-daughter was actually weakened, *vide* Judgment of the Court of 11 May 2006, case C-340/04, *Carbotermo, cit.,* §§ 38-39. Criticizing the Judgment, as it de facto prohibits the indirect similar control, *vide* SOSA WAGNER, F. "¿Pueden los contratos quedar en casa?... *op. cit.*

[379] Judgment of the Court of 13 October 2005, case C-458/03, *Parking Brixen*, *cit.*, §§ 66-68. Also, Opinion of the AG Bot, case C-220/06, *Correos*, *op. cit.*, § 79. *Vide* PERNAS GARCÍA, J.J. *Las operaciones* in house *y el Derecho comunitario de los contratos públicos… op. cit.*, p. 94.

[380] Judgment of the Court of 11 May 2006, case C-340/04, *Carbotermo, cit.,* §§ 36 and 38. Also, *vide* PERNAS GARCÍA, J.J. *Las operaciones* in house *y el Derecho comunitario de los contratos públicos… op. cit.*, p. 73.

[381] In *Parking Brixen*, the entrusted entity was fully owned by the contracting authority, but its objects were extended to significant new areas, its capital must obligatorily be opened in the short term to other capital, the geographical area of its activities was extended to the entire country and abroad, and its Administrative Board possessed very broad management powers which it could exercise independently. In such circumstances, the Court considered that the relationship of dependence between the contracting authority and the entrusted entity was considerably attenuated and, therefore, the control of the former

abstractly analyze the legal status of the entrusted entity[382]. However, it is undeniable that legal persons governed by public law may offer a higher degree of identification with the structure and interests of the contracting authority – a higher degree of dependency, in short. Contrariwise, in the case of bodies governed by private law, their wider degree of autonomy may hamper their consideration, together with the entrusting contracting authority, as a single administrative unit[383]. That is why attention is paid to the indications that may denote a market orientation of the entrusted entity. Among such indications we may find, for example, the extension to significant new areas of the social object of the entity, the expansion of its geographical area, the conferral of broad management powers to the administrative board or the obligatory opening of the entity to private capital in the short term[384].

With regard to that last indication – that is, the opening of the entity to private capital, the relevant date to be taken into account is, for reasons of legal certainty, that on which the public contract was awarded[385]. The question of whether it was necessary to carry out an award procedure must be determinable at the time when the contract was

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over the latter was limited, not similar to the control that it may exert over its own departments. *Vide* Judgment of the Court of 13 October 2005, case C-458/03, *Parking Brixen*, *cit.*, §§ 66-69 and 72.

[382] Opinion of the AG Stix-Hackl, case C-26/03, *Stadt Halle, cit.*, § 65. Also, Opinion of the AG Alber, case C-108/98, *RI.SAN., cit.,* § 52: « *le seul fait qu'il s'agisse* […] *d'une société par actions n'exclut pas* […] *que [la société instrumentale] fasse partie intégrante de l'administration publique.* […] *la question de savoir dans quelle catégorie il y a lieu de classer ladite société doit au contraire faire l'objet d'une appréciation fonctionnelle. La question décisive est par conséquent celle de savoir quelle est l'influence de l'administration publique sur la société en cause* ».

[383] PERNAS GARCÍA, J.J. *Las operaciones* in house *y el Derecho comunitario de los contratos públicos… op. cit.*, p. 73

[384] Judgment of the Court of 13 October 2005, case C-458/03, *Parking Brixen*, *cit.*, § 72.

[385] Judgment of the Court of 17 July 2008, case C-371/05, *Commission v Italy, cit.*, § 29: « […] *il y a lieu de relever que la possibilité pour des personnes privées de participer au capital de la société adjudicataire* […] *ne suffit pas, en l'absence d'une participation effective de leur part au moment de la conclusion d'une convention telle que celle en cause dans la présente affaire, pour conclure que la première condition, relative au contrôle de l'autorité publique, n'est pas remplie. En effet, pour des raisons de sécurité juridique, l'éventuelle obligation pour le pouvoir adjudicateur de procéder à un appel d'offres public doit être examinée, en principe, au vu des conditions prévalant à la date de l'attribution du marché public en cause* ».

actually concluded[386]. Nevertheless, in some cases, the public contract must be assessed taking into account events occurred after the award itself, with a view of piercing the veil of staged artificial constructions, conceived by contracting authorities to skip the stringent public procurement rules, like those on equal treatment and transparency[387]. Accordingly, the award of such a contract must be examined in the light of all the stages, as well as of their purpose, and not on the basis of their strictly chronological order[388]. The only limitation is that the subsequent events may only be taken into consideration to the extent that their occurrence was already foreseeable with certainty at the time of the award[389]. In cases where the opening to private capital is not imminent, it cannot be concluded that the contracting authority is forced, for the award of the contract, to balance the interests of any private investor, since no third party has yet emerged. Consequently, a future opening does not necessarily prevent, at the time of the award, the contracting authority from being able to exercise a similar control over the entrusted entity[390].

In conclusion, the existence of a legal obligation to open the capital of the instrumental entity to private investors does not imply, by itself, that the contracts awarded before the referred opening may not benefit from the vertical cooperation

[386] Opinion of the AG Kokott, case C-458/03, *Parking Brixen*, *cit.*, § 56.

[387] In *Commission v Austria*, a 49% of the shares in the entrusted entity were transferred to a private firm shortly after the entity was made responsible, exclusively and for an unlimited period of time, of the public interest task (the collection and treatment of the town of Mödling's waste), and, in addition, the entrusted entity did not become operational until the private firm took over some of its shares. *Vide* Judgment of the Court (First Chamber) of 10 November 2005, case C-29/04, *Commission of the European Communities v Republic of Austria* [ECLI:EU:C:2005:670], §§ 39-40. In contrast, in *Commission v Italy*, the Commission argued that the articles of incorporation of the entrusted entity specifically included the possibility of opening the capital to private firms; however, the Court answered that, given the circumstances of the case, no artificial construction was feared, the general rule was applicable and, thus, the relevant date was that of the award of the contract. *Vide* Judgment of the Court of 17 July 2008, case C-371/05, *Commission v Italy, cit.*, §§ 27 and 29. Also, *vide* PERNAS GARCÍA, J.J. *Las operaciones* in house *y el Derecho comunitario de los contratos públicos… op. cit.*, pp. 148-149.

[388] Judgment of the Court of 10 November 2005, case C-29/04, *Commission v Austria*, *cit.*, § 41.

[389] Opinion of the AG Kokott, case C-458/03, *Parking Brixen*, *cit.*, § 56. Also, *vide* PERNAS GARCÍA, J.J. *Las operaciones* in house *y el Derecho comunitario de los contratos públicos… op. cit.*, p. 183.

[390] Opinion of the AG Kokott, case C-458/03, *Parking Brixen*, *cit.*, §§ 59-60 and 62.

exception. Instead, it is just an indication that, together with other circumstances, may serve the purpose of assessing whether the contracting authority effectively exercises a similar control over the entrusted entity. On the contrary, an imminent opening of the instrumental entity's capital to private investors may be decisive when assessing the control exerted by the contracting authority over the instrumental entity at the time of the award, as it may be a sign of the existence of an artificial construction to evade the application of the public procurement rules.

If a subsequent private investor finally enters into the capital of the entrusted entity, precautions are to be taken when that third party is selected, rather than when the contracts prior to the entrance were awarded, in order to safeguard the fundamental freedoms, which require compliance with the prohibition against discrimination, the obligation of transparency and the assurance of an appropriate degree of publicity, with an ultimate view of ensuring the opening of the market to competition[391].

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[391] Only if the award of a contract is carried out transparently can it be established whether the principle of non-discrimination was observed or whether the decision to accept or reject a particular applicant was arbitrary. Therefore, the obligation of transparency means ensuring a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed. Otherwise, a direct transfer of the capital of an entrusted entity to a private undertaking, without prior tendering, would be tantamount to an illegal award of a concession or public contract. *Vide* Judgment of the Court (First Chamber) of 18 November 1999, case C-275/98, *Unitron Scandinavia A/S and 3-S A/S, Danske Svineproducenters Serviceselskab v Ministeriet for Fødevarer, Landbrug og Fiskeri* [ECLI:EU:C:1999:567], § 31; Judgment of the Court (Sixth Chamber) of 7 December 2000, case C-324/98, *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG, joined party: Herold Business Data AG* [ECLI:EU:C:2000:669], §§ 60-62; Judgment of the Court (Sixth Chamber) of 18 June 2002, case C-92/00, *Hospital Ingenieure Krankenhaustecnnik Planungs-Gesellschaft mbH (HI) v Stadt Wien* [ECLI:EU:C:2002:379], § 45. Also, *vide* Opinion of the AG Kokott, case C-458/03, *Parking Brixen*, *cit.*, §§ 36-37 and 61; COMMISSION OF THE EUROPEAN COMMUNITIES. *Green Paper on public-private partnerships and Community Law on public contracts and concessions*, COM(2004) 327 final, Brussels, 30 April 2004, § 63. Also, *vide* PERNAS GARCÍA, J.J. *Las operaciones* in house *y el Derecho comunitario de los contratos públicos… op. cit.*, p. 178.

In *Acoset*, the Court declared compatible with EU Law the direct award of a public services to «a semi-public company formed specifically for the purpose of providing that service and possessing a single corporate purpose, the private participant in the company being 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

Notwithstanding, until the new directives, the case law –and the literature– was categorical: the participation, even as a minority, of a private firm in the capital of a company excludes in any event the possibility of that contracting authority exercising over that company a control similar to that which it exercises over its own departments[392]. Therefore, at the beginning, the mere participation of private capital triggered the application of EU public procurement rules. The reasons were mainly two. Firstly, whereas the relationship of the contracting authority with its departments or in-house entities is governed by considerations proper to the pursuit of objectives in the public interest, any private capital investment serves private interests and objectives of a different kind, which may hamper the prevalence of the public interest[393]. All in all, the cornerstone is the alignment of interests of the instrumental entity with those of the contracting authority –the public interest–, without the interference of any other external

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competition, transparency and equal treatment laid down by the Treaty». Otherwise, requiring the use of a double competitive tendering procedure –one to find the private partner and the other to conclude the contract– would create an artificial roadblock for the creation of public-private partnerships. Judgment of the Court (Third Chamber) of 15 October 2009, case C-196/08, *Acoset SpA v Conferenza Sindaci e Presidenza Prov. Reg. ATO Idrico Ragusa and Others* [ECLI:EU:C:2009:628], § 63. Also, *vide* WEISBEEK, E.L. "Teckal revisited… *op. cit.*, fn 26.

[392] Judgment of the Court of 11 January 2005, case C-26/03, *Stadt Halle, cit.*, § 49; Judgment of the Court of 21 July 2005, case C-231/03, *Coname, cit.*, § 26; Judgment of the Court of 10 November 2005, case C-29/04, *Commission v Austria*, *cit.*, §§ 48-50; Judgment of the Court (First Chamber) of 18 January 2007, case C-220/05, *Jean Auroux and Others v Commune de Roanne* [ECLI:EU:C:2007:31], § 64; Judgment of the Court of 19 June 2014, case C-574/12, *Setúbal*, *cit.*, §§ 40 and 42-43. Also, *vide* BERNAL BLAY, M.A. "Las encomiendas de gestión excluidas del ámbito de aplicación de la Ley de Contratos de las Administraciones Públicas… *op. cit.,* p. 84; GORDILLO PÉREZ, L.I. and MÚGICA ALCORTA, R. "La evolución del requisito del 'control análogo' en la adjudicación directa de contratos 'in-house'", *op. cit.*, p. 290; PERNAS GARCÍA, J.J. *Las operaciones* in house *y el Derecho comunitario de los contratos públicos… op. cit.*, p. 124; TEJEDOR BIELSA, J. "Entidades sin ánimo de lucro, contratos 'in house' y reserva legal de contratos", in *Observatorio de la contratación pública*, 26 January 2015, p. 1. On private foundations, which may switch to public sector foundations in order to be able to qualify for being considered an instrumental entity, *vide* ARIAS RODRÍGUEZ, A. "No caben encomiendas a fundaciones privadas", in *Observatorio de la contratación pública*, 2 February 2015, p. 2.

[393] Judgment of the Court of 11 January 2005, case C-26/03, *Stadt Halle, cit.*, § 50

interest[394]. And, secondly, the private firm whose capital is present in the instrumental entity would be offered an advantage over its competitors[395].

Conversely, some Advocates General claimed for a more functional approach, intended to examine whether the privately participated instrumental entity was indeed market-oriented and whether the contracting authority (or authorities) exerted a decisive influence over both strategic objectives and significant decisions of that company[396]. They considered that the ECJ established in its case law a more stringent standard than what was customary in competition law and that it disregarded several legal and factual circumstances which, combined, supported the conclusion that there existed a similar control[397]. Consequently, they stated that entities in which there was a private minority shareholder might also pass the control test and, thus, the similar control exception was to be extended not only to wholly owned companies, but also to semi-public ones[398].

The Directive 2014/24 crystallized the opinions delivered by the Advocates General and, albeit proscribing direct capital participation in the controlled legal person, it accepted private partnership in specific and restricted cases:

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[394] PERNAS GARCÍA, J.J. *Las operaciones* in house *y el Derecho comunitario de los contratos públicos… op. cit.*, p. 125.

[395] Judgment of the Court of 11 January 2005, case C-26/03, *Stadt Halle, cit.*, § 51.

[396] Opinion of the AG Stix-Hackl, case C-26/03, *Stadt Halle, cit.*, §§ 63-69. Even before, in *ARGE*, the AG Léger pointed out the importance of assessing the degree of autonomy of the instrumental entity, albeit the fact that there were private minority shareholders in the capital of the entrusted entity. Opinion of the AG Léger, case C-94/99, *ARGE, cit.*, §§ 62-63.

[397] Among those legal and factual circumstances, AG Kokott underlined the following ones: «the fact that the contracting authority has a majority holding in the capital of its subsidiary, the fact that it exercises the majority of the voting rights and the fact that it appoints the majority of the members of the subsidiary's managerial bodies – together with any agreements between the members–». Opinion of the AG Kokott, case C-458/03, *Parking Brixen*, *cit.*, § 52. On definition, at the time, of control in the context of competition law, *vide* Commission Notice on the concept of concentration under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, *Official Journal of the European Communities*, C 66/5, 2 March 1998, § III Acquisition of control.

[398] The AG Stix-Hackl insisted: «There is therefore, in principle, no problem created by private business being involved». Opinion of the AG Stix-Hackl, case C-26/03, *Stadt Halle, cit.*, § 70.

> [in cases related to] 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[399].

The Directive itself clarifies, in its recitals, that an award of a public contract without a competitive procedure could provide the participant private economic operator with an undue advantage over its competitors[400]. That conclusion, as the ECJ explained, is irrespective of the commercial for-profit or non-profit character of the private partner[401]. However, the Directive continues, sometimes national legislative provisions, in conformity with the Treaties, make compulsory the participation of specific private economic operators in the capital of the controlled entity, such as in the case of organizations responsible for the management or exercise of certain public services[402]. Therefore, the mere participation of private capital does not automatically preclude the application of the vertical cooperation exception. Otherwise, the resort to instruments such as certain types of public-private partnerships would be hardened, as, absent a certainty over the outcome of the ultimate awards, private investors would be

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[399] Directive 2014/24, articles 12(1)(c), 12(2) and 12(3)(c).

[400] Directive 2014/24, recital 32. Also, *vide* the case law of the ECJ: Judgment of the Court of 19 June 2014, case C-574/12, *Setúbal*, *cit.*, § 40.

[401] The concepts of 'undertaking' or 'share capital' used by the ECJ in *Stadt Halle* does not mean that the Court intended to restrict its findings to those cases alone – that is, when commercial for-profit undertakings form part of the entrusted entity; conversely, non-profit entities –such as social solidarity institutions– are also covered by the considerations put forward by the ECJ. Judgment of the Court of 19 June 2014, case C-574/12, *Setúbal*, *cit.*, §§ 35-40. Further, for competition purposes, non-profit-making undertakings may be deemed 'economic operators': « […] *l'absence de but lucratif n'exclut pas que de telles associations exercent une activité économique et constituent des entreprises au sens des dispositions du traité relatives à la concurrence* ». Judgment of the Court (Third Chamber) of 29 November 2007, case C-119/06, *Commission of the European Communities v Italian Republic* [ECLI:EU:C:2007:729], §§ 37 and 41; Judgment of the Court (Fourth Chamber) of 23 December 2009, case C-305/08, *Consorzio Nazionale Interuniversitario per le Scienze del Mare (CoNISMa) v Regione Marche* [ECLI:EU:C:2009:807], § 45. Also, *vide* TEJEDOR BIELSA, J. "Entidades sin ánimo de lucro, contratos 'in house' y reserva legal de contratos", *op. cit.*, pp. 1-2.

[402] Directive 2014/24, recital 32.

reluctant to participate[403]. In any case, the private partner cannot benefit from its privileged position to obtain any advantage – i.e., if the *Teckal* criteria are not met, it should not reserve for itself tasks without a prior call for competition[404]. Further, no risk is transferred to the private partner, who would limit itself to provide financial resources and complete specific project units[405].

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[403] Institutionalized public-private partnerships may involve the creation *ex novo* of the jointly held instrumental entity or the acquisition by the private partner of a share in the capital of an already existing instrumental entity. A call for competition, which contains the conditions governing the creation of the instrumental entity, will be issued for the selection of the private partner. Legal relationships concluded after the creation of such an instrumental entity and strictly linked to what was envisaged when creating it will benefit from a vertical cooperation exception. Or, in the case of instrumental entities already incorporated, the entrance of private shareholding may refrain from involving the concession of any control whatsoever over the strategic decisions and objectives of the entity. The public-private partnerships, albeit the increased resort to them, are preferably intended to the utilities sector or to undertake infrastructure projects in sectors such as transport, public health, education and national security. They are forms of cooperation between public authorities and private entities which aim to ensure the funding, construction, renovation, management or maintenance of an infrastructure or the provision of a service. However, they are also used when administering the provision of public services. *Vide* Judgment of the Court of 15 October 2009, case C-196/08, *Acoset, cit.*, § 63; COMMISSION OF THE EUROPEAN COMMUNITIES. COM(2004) 327 final, *op. cit.*, pp. 3-4 and §§ 53-69; PERNAS GARCÍA, J.J. *Las operaciones* in house *y el Derecho comunitario de los contratos públicos… op. cit.*, p. 182.. On the institutionalized public-private partnerships, *vide* ÁVILA ORIVE, J.L.; ARENAS ALEGRÍA, C. and GALLASTEGI ARANZABAL, C. *Los contratos de gestión de servicios públicos en el ámbito municipal*. Munguía, Diputación Foral de Bizkaia – Universidad de Deusto, May 2006, pp. 71-81; DORREGO DE CARLOS, A. and MARTÍNEZ VÁZQUEZ, F. "La colaboración público-privada", in ID. (Dirs.) *La colaboración público-privada en la Ley de Contratos del Sector Público – Aspectos adminstrativos y financieros*. Madrid, La Ley, 2009, [pp. 31-89] pp. 81-85 and 375-448; TEISMAN, G.R. and KLIJN, E.H. "Public-private partnerships in the European Union: officially suspect, embraced in daily practice", in OSBORNE, S.P. (Ed.) *Public-Private Partnerships: Theory and Practice in the International Perspective.* London, Routledge, 2005, [pp. 165-186] pp. 179-180; WEISBEEK, E.L. "Teckal revisited… *op. cit.*, fn 26. On the benefits for competition of the resort to public-private partnerships, COMMISSION OF THE EUROPEAN COMMUNITIES. *Guidelines for successful public-private partnerships*. Brussels, March 2003, pp. 8-9 and 15-16.

[404] COMMISSION OF THE EUROPEAN COMMUNITIES. COM(2004) 327 final, *op. cit.*, §§ 63-64.

[405] TEJEDOR BIELSA, J. "Idoneidad de medios propios, gestión directa por sociedad mercantil y contratación con terceros", *op. cit.*, p. 2.

The ECJ has interpreted the similar control criterion restrictively. Consequently, as in a wide number of the cases it considered that the first requirement was not met, its case law commenting on the second and correlative criterion is not manifold[406]. Having said that and moving on to the second *Teckal* criterion, the Directive 2014/24 sets forth the following:

> A public contract awarded by a contracting authority to a legal person governed by private or public law shall fall outside the scope of this Directive where […] (b) 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[407].

In relation with this requirement, the legal text establishes a fixed arithmetic criterion for the purpose of quantifying the 'essential part' of the activity that the entrusted entity is mandated to carry out in the performance of tasks entrusted to it by the controlling contracting authority. However, some concerns were raised with regard to the set of a fixed percentage: the very rigidity of a fixed percentage may represent an obstacle to the appreciation of qualitative factors – that is, how and for whom the controlled entity carries out its activities[408]. While the 80% criterion was deemed to be adequate, as it was objective and appropriate, it was submitted that any other percentage would be equally objective and appropriate[409]. Indeed, in the Proposal from the

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[406] To a certain extent, that explains why in this part of the research we will essentially draw conclusions from the opinions of the Advocates General, as well as from the literature. MADRIGAL ESTEBAN, M.J. "La positivación de la doctrina 'in house'… *op. cit.,* p. 131; PERNAS GARCÍA, J.J. *Las operaciones* in house *y el Derecho comunitario de los contratos públicos… op. cit.*, p. 167.

[407] Directive 2014/24, articles 12(1)(b) and 12(3)(b).

[408] Opinion of the AG Stix-Hackl, case C-26/03, *Stadt Halle, cit.*, §§ 87-89 and 93; Opinion of the AG Stix-Hackl delivered on 12 January 2006, case C-340/04, *Carbotermo SpA and Consorzio Alisei v Comune di Busto Arsizio and AGESP SpA* [ECLI:EU:C:2006:24], §§ 97-98

[409] Moreover, the entrusted entity may require the possibility of providing services to private economic operators or public authorities, different from the controlling contracting authority, in order to guarantee its economic viability. *Vide* MADRIGAL ESTEBAN, M.J. "La positivación de la doctrina 'in house'… *op. cit.,* p. 131. Also, *vide* Opinion of the AG Stix-Hackl, case C-26/03, *Stadt Halle, cit.*, § 94. The Committee of the Regions proposed to delete the article 11 and, in relation with the fixed percentage, it stated that since the *Teckal* case referred to the essential part of the activities, not to 90%, a narrower

Commission, the fixed percentage was 90%[410]. In the compromise texts amending the Proposal, the Council of the EU and the European Parliament proposed to lower the percentage, first to the 85% and then to the 80%[411]. In any case, despite the fact that the quantification –through a fixed percentage– of the 'essential part' requirement may suggest that there is a narrow scope left for qualitative appreciation, both quantitative and qualitative factors are imperatively taken into account[412]. The qualitative assessment is intended to evaluate not only the relationship between the contracting authority and the entrusted entity, but also the economic position of the entrusted entity in the market – i.e., the relationship between the entrusted entity and its possible competitors[413].

For the appreciation of this second criterion, and in contrast with the first *Teckal* criterion, focus is exclusively placed on the factual circumstances –both quantitative and qualitative–, rather than on the factual and legal circumstances[414]. The essential part criterion is aimed at ensuring that the public procurement rules are applied in the event that an entrusted entity, controlled by a contracting authority (or several contracting

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interpretation of the ECJ case law should be avoided. Opinion of the Committee of the Regions on 'Public procurement package', *Official Journal of the European Union*, C 391/49, 18 December 2012, Amendment 3.

[410] EUROPEAN COMMISSION. *Proposal for a Directive of the European Parliament and of the Council on public procurement*, COM(2011) 896 final, Brussels, 20 December 2011, article 11(1)(b).

[411] COUNCIL OF THE EUROPEAN UNION. *Proposal for a Directive of the European Parliament and of the Council on public procurement – Presidency compromise text / Consolidated version*, 14418/12, Brussels, 2 October 2012, p. 68. Already lowered to 80%, COUNCIL OF THE EUROPEAN UNION. *Proposal for a Directive of the European Parliament and of the Council on public procurement – Presidency compromise text*, 16725/1/12, REV 1, Brussels, 30 November 2012, p. 81; EUROPEAN PARLIAMENT. *Report on the proposal for a directive of the European Parliament and of the Council on public procurement*, A7-0007/2013 (Ordinary legislative procedure: First reading), Amendment 72.

[412] Judgment of the Court of 11 May 2006, case C-340/04, *Carbotermo, cit.,* § 64. Also, *vide* Opinion of the AG Stix-Hackl, case C-26/03, *Stadt Halle, cit.*, § 89; Opinion of the AG Kokott, case C-458/03, *Parking Brixen*, *cit.*, § 83.

[413] Opinion of the AG Stix-Hackl, case C-26/03, *Stadt Halle, cit.*, § 89; Opinion of the AG Stix-Hackl, case C-340/04, *Carbotermo*, *cit.*, § 99.

[414] PERNAS GARCÍA, J.J. *Las operaciones* in house *y el Derecho comunitario de los contratos públicos… op. cit.*, p. 166.

authorities), is active in the market and, therefore, likely to be in competition with other undertakings[415]. Otherwise, if such an entity was allowed to be considered an instrumental body and, at the same time, it competed in the market, it would be placed in a considerably more advantaged position *vis-à-vis* its competitors[416].

Attention is thus paid to the activities actually performed, not to those permitted by law or under the entrusted entity's statutes[417]. All in all, the mere fact that the field of activity in the statutes of the entrusted entity is extensive in material and geographical terms –allowing activities to be pursued beyond the boundaries of the administrative authority– does not mean that it does not in fact carry out the essential part of its activity for the controlling contracting authority[418]. Taking into account any activity that the entity could ever pursue would hinder the assessment of the essential part requirement, as it would be almost impossible to supply reliable updated information on potential –indefinite, future– activities as to evaluate whether the entrusted entity performs the essential part of its activities for the controlling contracting authority[419]. In conclusion, the examination should concentrate on determining the value in quantitative and qualitative terms, in relation to the activities performed for the controlling contracting authority, of the activity carried out for an undertaking other than its public shareholder[420]. Therefore, the activities of the entrusted entity must be devoted principally to the controlling contracting authority while any other activity would be only of marginal significance[421]. In cases of jointly controlled entities, the essential part

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[415] Judgment of the Court of 11 May 2006, case C-340/04, *Carbotermo, cit.,* § 60; Judgment of the Court of 18 December 2007, case 220/06, *Correos, cit.*, § 62.

[416] PERNAS GARCÍA, J.J. *Las operaciones* in house *y el Derecho comunitario de los contratos públicos… op. cit.*, p. 156.

[417] Opinion of the AG Stix-Hackl, case C-26/03, *Stadt Halle, cit.*, § 83; Opinion of the AG Kokott, case C-458/03, *Parking Brixen*, *cit.*, § 81. Also, *vide* PERNAS GARCÍA, J.J. *Las operaciones* in house *y el Derecho comunitario de los contratos públicos… op. cit.*, pp. 160-161.

[418] Opinion of the AG Kokott, case C-458/03, *Parking Brixen*, *cit.*, §§ 85-86.

[419] Opinion of the AG Stix-Hackl, case C-340/04, *Carbotermo*, *cit.*, § 100.

[420] Opinion of the AG Kokott, case C-458/03, *Parking Brixen*, *cit.*, § 84

[421] Judgment of the Court of 11 May 2006, case C-340/04, *Carbotermo, cit.,* § 63; Judgment of the Court of 17 July 2008, case C-371/05, *Commission v Italy, cit.*, § 31.

condition may be met if the entity carries out the essential part of its activities with all of the controlling authorities together, not necessarily with any one of them[422].

In the context of the assessment of this second criterion, the activities which must be taken into account are all those activities which the entrusted entity carries out as a part of a contract awarded by the controlling contracting authority, regardless of who the beneficiary is –the contracting authority itself or the user of the services–, who pays the entrusted entity –the contracting authority itself or third-party users– and in which territory those services are provided[423]. However, it would not be absurd to contend that the entrusted entity must only be able to carry out the activities that it is specifically assigned by the legal order or by its own statutes; otherwise, it is submitted, contracting authorities may be tempted to succumb to the abuse of administrative deconcentration[424].

To determine the specific percentage of activities that the entrusted entity performs for the controlling contracting authority –or authorities–, the specifications made in the previous section (A.) when referring to the less than 20 % requirement are recalled: it will be taken into account the average total turnover for the three years preceding the contract award, or any other alternative activity-based measure – i.e., costs incurred by the relevant legal person or contracting authority with respect to services, works and goods[425]. In cases where the average total turnover or the costs are

[422] Judgment of the Court of 11 May 2006, case C-340/04, *Carbotermo, cit.,* § 70; Judgment of the Court of 19 April 2007, case C-295/05, *Tragsa II*, *cit.*, § 62.

[423] Judgment of the Court of 11 May 2006, case C-340/04, *Carbotermo, cit.,* §§ 66-67 and 72. In contrast, in *Correos* the ECJ held that the essential part requirement was not met since Correos, as provider of the universal postal service in Spain, did not carry out the essential part of its activities with the Ministerio de Educación, Cultura y Deporte, but it provided postal services to an unspecified number of customers of that postal service. *Vide* Judgment of the Court of 18 December 2007, case 220/06, *Correos, cit.*, § 59; PERNAS GARCÍA, J.J. *Las operaciones* in house *y el Derecho comunitario de los contratos públicos… op. cit.*, pp. 117-119.

[424] PERNAS GARCÍA, J.J. *Las operaciones* in house *y el Derecho comunitario de los contratos públicos… op. cit.*, p. 185.

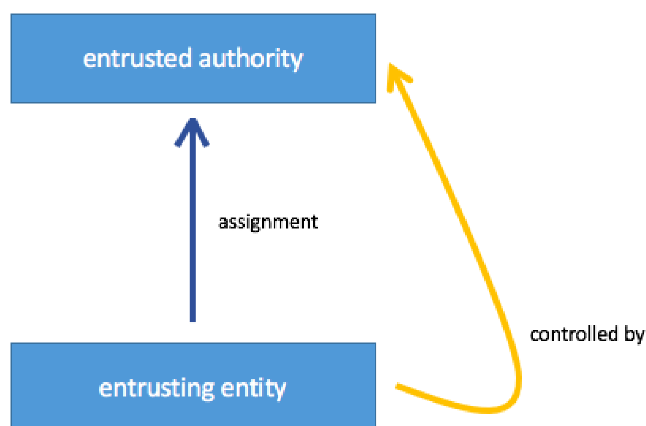
[425] Although the ECJ did not clarify at what point in time the essential part condition had to be satisfied or what period of time was relevant for making the assessment, the legislature, in line with the opinions of the Advocates General, has prescribed a period of three years (preceding the contract award), which aims

not available or are no longer relevant, business projections will be sufficient to show that the measurement of the activity is credible[426].

Finally, the Directive 2014/24 has also extended the in-house exception to 'inverted' –bottom-up in-house transactions– or 'lateral' situations –horizontal in-house transactions–[427].

In the first situation –bottom-up–, a contracting authority awards a contract to its controlling contracting authority (*vide* Figure 2).

Figure 2 – Bottom-up in-house transaction



SOURCE: Elaborated by the author

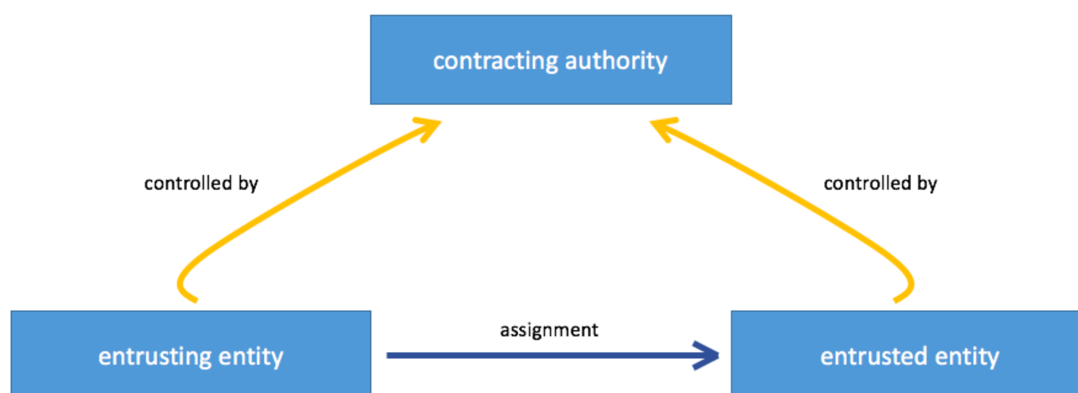
at not capturing just a snapshot of the situation. Directive 2014/24, article 12(5), first paragraph. Also, *vide* Opinion of the AG Stix-Hackl, case C-340/04, *Carbotermo*, *cit.*, §§ 107-108.

[426] Directive 2014/24, article 12(5), second paragraph.

[427] Directive 2014/24, article 12(2): «Paragraph 1 also applies where a controlled legal person which is a contracting authority awards a contract to its controlling contracting authority, or to another legal person controlled by the same contracting authority, provided that there is no direct private capital participation in the legal person being awarded the public contract with the exception of 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 in the controlled legal person».

In the second one –horizontal–, the contracting authority awards a contract to a person equally controlled by its controlling contracting authority – that is, to a sister entity (*vide* Figure 3). In such situations, there must exist a contracting authority which exercises similar control over two distinct economic operators, one of which awards a contract to the other[428].

Figure 3 – Horizontal in-house transaction



SOURCE: Elaborated by the author

To conclude, it must be recalled that, although being a possibility in the hands of the contracting authorities, from a competition law standpoint, an extensive use of these self-organizational instruments may unduly foreclose the market –harming actual and potential competitors that serve both the public and the private demand-side–, as well as, in the absence of any competitive tension, it may hamper the attainment of the efficiency linked to the existence of vigorous competition in a market[429].

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[428] Judgment of the Court of 8 May 2014, case C-15/13, *Datenlotsen Informationssysteme*, *op. cit.*, § 33.

[429] COMISIÓN NACIONAL DE LA COMPETENCIA. *Los medios propios y las encomiendas de gestión… op. cit.*, p. 7; PERNAS GARCÍA, J.J. *Las operaciones* in house *y el Derecho comunitario de los contratos públicos… op. cit.*, p. 177.

2. The services exempted from competition scrutiny: from the jurisprudentially developed overriding reasons of general interest to the specifically codified in the Treaties Services of General Economic Interest

In this section, we are going to deal with the various techniques developed by Member States' contracting authorities in order to escape from competition scrutiny, hiding behind what they called the 'general interest'. The general interest is an evolving concept whose protection was initially extended –or contracted– to the discretion of Member States. However, the increasing concern of the EU for the attainment of a single market triggered its intervention when it came to defining the boundaries of what constituted the general interest, since, the wider the general interest, the narrower the scope left to competitive concerns –and the development of an EU-wide level-playing field–. As a consequence, to the extent that the consensus among Member States to codify the specific services that are to be performed in the general interest throughout all territories has proven to be insufficient, the EU judicature has found itself obliged to interpret EU Law in order to make EU's and Member States' (often conflicting) interests reconcile.

A. Overriding reasons of general interest: a jurisprudentially developed exception to competition concerns

National measures that hinder the effective exercise of fundamental freedoms guaranteed in the Treaty may nevertheless be allowed if they pursue a legitimate objective which may be classified as an overriding reason of general interest –'pressing' in the first English versions of the case law–, as long as they are justified by imperative requirements in the general interest, they are applied in a non-discriminatory manner, they are appropriate to ensure the attainment of the objective pursued and they do not go beyond what is necessary for that purpose[430]. Therefore, if the same result can be achieved through the recourse to less restrictive measures, those are preferred[431].

[430] Judgment of the Court of 28 April 1977, case 71/76, *Jean Thieffry v Conseil de l'ordre des avocats de la Cour de Paris* [ECLI:EU:C:1977:65], §§ 12 and 15; Judgment of the Court of 18 January 1979, joined cases 110/78 and 111/78, *Ministère public and "Chambre syndicale des agents artistiques et impresario de Belgique" v Willy van Wesemael and others* [ECLI:EU:C:1979:8], § 28; Judgment of the Court of 9

February 1982, case 270/80, *Polydor Limited and RSO Records Inc. v Harlequin Records Shops Limited and Simons Records Limited* [ECLI:EU:C:1982:43], §§ 19-22; Judgment of the Court of 4 December 1986, case 205/84, *Commission of the European Communities v Federal Republic of Germany* [ECLI:EU:C:1986:463], § 27; Judgment of the Court of 26 February 1991, case C-180/89, *Commission of the European Communities v Italian Republic* [ECLI:EU:C:1991:78], § 17; Judgment of the Court (Sixth Chamber) of 20 May 1992, case C-106/91, *Claus Ramrath v Ministre de la Justice, and l'Institut de réviseurs d'entreprises* [ECLI:EU:C:1992:230], §§ 29-30; Judgment of the Court of 31 March 1993, case C-19/92, *Dieter Kraus v Land Baden-Württemberg* [ECLI:EU:C:1993:125], § 32; Judgment of the Court of 30 November 1995, case C-55/94, *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [ECLI:EU:C:1995:411], § 37; Judgment of the Court of 15 December 1995, case C-415/93, *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* [ECLI:EU:C:1995:463], § 104; Judgment of the Court of 15 May 1997, case C-250/95, *Futura Participations SA and Singer v Administration des contributions* [ECLI:EU:C:1997:239], § 26; Judgment of the Court (Fifth Chamber) of 1 February 2001, case C-108/96, *Criminal proceedings agains Denis Mac Queen, Derek Pouton, Carla Godts, Youssef Antoun and Grandvision Belgium SA, being civilly liable, intervenir: Union professionnelle belge des médicins spécialistes en ophtalmologie et chirurgie oculaire* [ECLI:EU:C:2001:67], § 26; Judgment of the Court of 20 February 2001, case C-205/99, *Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir) and Others v Administración General del Estado* [ECLI:EU:C:2001:107], § 25; Judgment of the Court (Fifth Chamber) of 21 November 2002, case C-436/00, *X and Y v Riksskatteverket* [ECLI:EU:C:2002:704], § 49; Judgment of the Court (Fifth Chamber) of 11 March 2004, case C-9/02, *Hughes de Lasteyrie du Saillant v Ministère de l'Économie, des Finances et de l'Industrie* [ECLI:EU:C:2004:138], § 49; Judgment of the Court (Second Chamber) of 7 September 2006, case C-470/04, *N v Inspecteur van de Belastingdienst Oost/kantoor Almelo* [ECLI:EU:C:2006:525], § 40; Judgment of the Court (Second Chamber) of 26 October 2006, case C-345/05, *Commission of the European Communities v Portuguese Republic* [ECLI:EU:C:2006:685], § 24; Judgment of the Court (Eighth Chamber) of 18 January 2007, case C-104/06, *Commission of the European Communities v Kingdom of Sweden* [ECLI:EU:C:2007:40], § 25; Judgment of the Court (Second Chamber) of 17 January 2008, case C-152/05, *Commission of the European Communities v Federal Republic of Germany* [ECLI:EU:C:2008:17], § 26; Judgment of the Court (Grand Chamber) of 16 March 2010, case C-325/08, *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC* [ECLI:EU:C:2010:143], § 38; Judgment of the Court (First Chamber) of 20 January 2011, case C-155/09, *European Commission v Hellenic Republic* [ECLI:EU:C:2011:22], § 51; Judgment of the Court (First Chamber) of 1 December 2011, case C-253/09, *European Commission v Republic of Hungary* [ECLI:EU:C:2011:795], § 69.

[431] Judgment of the Court (First Chamber) of 28 March 1996, case C-272/94, *Criminal proceedings against Michel Guiot and Climatec SA, as employer liable at civil law* [ECLI:EU:C:1996:147], §§ 11 and 13; Judgment of the Court (Second Chamber) of 21 April 2005, case C-140/03, *Commission of the European Communities v Hellenic Republic* [ECLI:EU:C:2005:242], § 35.

The overriding reason must be related to public policy, public security or public health concerns[432]. In any case, the contracting authority must ensure that four conditions are met: non-discrimination, justification, appropriateness and proportionality[433]. Further, the state may duly request that the provider meets the condition of being non-profit-making[434].

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[432] Opinion of the AG Alber delivered on 29 May 2001, case C-439/99, *Commission of the European Communities v Italian Republic* [ECLI:EU:C:2001:295], § 60.

[433] The Court has considered a wide range of issues to be overriding reasons of general interest: in relation with the freedom of establishment, the reliability of a dental practitioner's communication with his patient and with administrative authorities and professional bodies; in relation with the freedom of movement of workers, the social protection of employees and the facilitation of related administrative controls; and, in relation with the freedom to provide services, the desire to avoid disturbances on the labor market. *Vide* Judgment of the Court of 4 July 2000, case C-424/97, *Salomone Haim v Kassenzahnärztliche Vereinigung Nordhein* [ECLI:EU:C:2000:357], § 59. Also, *vide* Judgment of the Court of 3 February 1982, joined cases 62/81 and 63/81, *Société anonyme de droit français Desquenne & Giral v Etablissement d'assurance contre la vieillesse et l'invalidité* [ECLI:EU:C:1982:34], § 14; Judgment of the Court (Sixth Chamber) of 27 March 1990, case C-113/89, *Rush Portuguesa Ld[a] v Office national d'immigration* [ECLI:EU:C:1990:142], §§ 13 and 18; Judgment of the Court of 28 March 1996, case C-272/94, *Guiot, cit.*, § 16; Judgment of the Court of 23 November 1999, joined cases C-369/96 and C-376/96, *Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL (C-369/96) and Bernard Leloup, Serge Leloup and Sofrage SARL (C-376/96)* [ECLI:EU:C:1999:575], § 51; Judgment of the Court (First Chamber) of 18 July 2007, case C-490/04, *Commission of the European Communities v Federal Republic of Germany* [ECLI:EU:C:2007:430], § 70; Judgment of the Court (Grand Chamber) of 16 April 2013, case C-202/11, *Anton Las v PSA Antwerp NV* [ECLI:EU:C:2013:239], § 28. Also, *vide* Judgment of the Court (First Chamber) of 21 October 2004, case C-445/03, *Commission of the European Communities v Grand Duchy of Luxembourg* [ECLI:EU:C:2004:655], § 38

[434] In *Spezzino*, the ECJ went further and stated that a State, in the exercise of the powers to organize its national social security system, may take the view that «recourse to voluntary associations is consistent with the social purpose of the emergency ambulance services and may help to control the costs relating to those services», Judgment of the Court (Fifth Chamber) of 11 December 2014, case C-113/13, *Azienda sanitaria locale n. 5 «Spezzino» and Others v San Lorenzo Soc. coop. sociale and Croce Verde Cogema cooperativa sociale Onlus* [ECLI:EU:C:2014:2440], §§ 9 and 58-59. In that sense, an Italian law established that emergency ambulance services must be awarded on a preferential basis and by direct award (without any advertising) to certain voluntary bodies, *vide* SÁNCHEZ GRAELLS, A. "Competition and the public buyer. Towards a more competition-oriented procurement - the principle of competition embedded in EC Public Procurement Directives", in *Nottingham Procurement PhD Student Conference*, 15 May 2009, p. 3. Also, *vide* Judgment of the Court of 17 June 1997, case C-70/95,

Specifically, in the realm of public procurement, according to the recent case law of the EU judicature, EU law does not preclude the Member States from entrusting the provision of certain social services on a preferential basis and without a procurement process, as long as the social purpose and the pursuit of the objectives is designed for the good of the community and the budgetary efficiency of the Member State[435]. The CJEU backs up its conclusion in Member States' discretion to decide the level of protection of public health and to organize their social security systems and, therefore, in its view, the recourse to voluntary associations is consistent, first, with the social purpose of emergency ambulance services and, second, with the cost control purpose[436].

This leaves the door open to a preferential treatment in favor of voluntary entities, which are thus deemed to be equally costly in comparison with (if not cheaper than) an alternative for-profit provider since –it is assumed– voluntary entities are in a position to resort to an unknown proportion of unpaid volunteers and to allow the State to save financial resources; however, there is no effective economic assessment on their actual contribution to budgetary efficiency[437]. Furthermore, the particular non-profit-entity provider is not chosen following a public procurement procedure so as to ensure that the provider is able to provide those services at the least cost to the community; instead, a direct award scheme is followed, to the detriment of public finances, as competition (even among non-profit entities) is completely suppressed[438]. Finally, the

Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl v Regione Lombardia [ECLI:EU:C:1997:301], §§ 32-35.

[435] SÁNCHEZ GRAELLS, A. "Competition and the public buyer… *op. cit.,* p. 7; SZYSZCZAK, E. "Services of General Economic Interest and State Measures Affecting Competition", in *Journal of European Competition Law & Practice*, 2015, September 7, [pp. 1-8] p. 1. On the power of Member States to organize their public health and social security systems, *vide* Judgment of the Court of 7 February 1984, case 238/82, *Duphar BV and others v The Netherlands State* [ECLI:EU:C:1984:45], § 16; Judgment of the Court of 17 February 1993, joined cases C-159/91 and C-160/91, *Christian Poucet v Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon* [ECLI:EU:C:1993:63], § 6; Judgment of the Court of 17 June 1997, case C-70/95, *Sodemare*, *cit.*, § 27; Judgment of the Court of 11 December 2014, case C-113/13, *Spezzino, cit.*, § 55.

[436] Judgment of the Court of 11 December 2014, case C-113/13, *Spezzino, cit.*, § 59.

[437] SÁNCHEZ GRAELLS, A. "Competition and the public buyer… *op. cit.,* p. 9.

[438] In the line of defending a certain degree of competition, and setting consequently aside direct awards, the AG Wahl considered that «The fact that the respondents in the main proceedings are non-profit-

approach followed by the CJEU is at odds with its own case law: the non-profit nature of the body being awarded a public contract does not alter the rules applicable to such an award due to the fact that, despite their status as social solidarity institutions carrying out non-profit activities, those entities may well engage in economic activity in competition with other economic operators[439].

Notwithstanding, it must be acknowledged that the Treaty provisions on the fundamental freedoms just prohibit Member States from introducing or maintaining unjustified restrictions on the exercise of those freedoms; or, to put it otherwise, and coming back to the previously announced overriding reasons of general interest, Member States may organize their public services in a way that hampers the fundamental freedoms provided that such restrictions are non-discriminatory, justified, appropriate and proportionate[440]. Furthermore, insofar as EU law on public procurement

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making organisations which would have been interested in providing the services concerned shows that there is clearly scope for opening the award of such services to a higher degree of competition, even among non-profit-making entities», in Opinion of the AG Wahl delivered on 30 April 2014, case C-113/13, *Azienda sanitaria locale n. 5 «Spezzino» and Others v San Lorenzo Soc. coop. sociale and Croce Verde Cogema cooperativa sociale Onlus* [ECLI:EU:C:2014:291], § 59.

What is more, the CJEU had already stated that the fact that an award does not generate substantial net revenue «does not, in itself, support the inference that the concession is of no economic interest for undertakings located in Member States other than that of the contracting authority. In the context of 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 expansión», in Judgment of the Court (Fourth Chamber) of 14 November 2013, case C-388/12, *Comune di Ancona v Regione Marche* [ECLI:EU:C:2013:734], § 51.

[439] For all, Judgment of the Court of 19 June 2014, case C-574/12, *Setúbal*, *cit.*, § 40. Also, Judgment of the Court (Second Chamber) of 10 January 2006, case C-222/04, *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SpA, Fondazione Cassa di Risparmio di San Miniato and Cassa di Risparmio di San Miniato SpA* [ECLI:EU:C:2006:8], §§ 104-106. *Vide*, EUROPEAN COMMISSION. *State aid SA.39426 (2014/N) – Italy – Rescue aid to PICFIC in A.S., health care services operator in the Region of Lazio*, C(2014) 9255 final, C(2014) 9255 final, Brussels, 10 December 201, § 24; SÁNCHEZ GRAELLS, A. "Competition and the public buyer… *op. cit.,* p. 2; SZYSZCZAK, E. "Services of General Economic Interest and State Measures Affecting Competition", *op. cit.*, pp. 7-8.

[440] Judgment of the Court (Grand Chamber) of 16 May 2006, case C-372/04, *The Queen, on the application of Yvonne Watts v Bedford Primary Care Trust and Secretary of State for Health*

concerns the provision of public services, it is intended to ensure the free movement of services and the opening-up to competition in the Member States which is undistorted and as wide as possible; however, objective circumstances may justify an indirect discrimination –i.e., on the basis of nationality– towards undertakings located in Member States different from the one where the contracting authority is situated[441]. Among those objective circumstances, aiming at providing the public service in an economically balanced manner for budgetary purposes, we may find the followings:

[ECLI:EU:C:2006:325], § 92; Judgment of the Court (Grand Chamber) of 10 March 2009, case C-169/07, *Hartlauer Handelsgesellschaft mbH v Wiener Landesregierung and Oberösterreichische Landesregierung* [ECLI:EU:C:2009:141], § 29; Judgment of the Court (Grand Chamber) of 19 May 2009, case C-531/06, *Commission of the European Communities v Italian Republic* [ECLI:EU:C:2009:315], § 35; Judgment of the Court (Grand Chamber) of 19 May 2009, joined cases C-171/07 and C-172/07, *Apothekerkammer des Saarlandes and Others (C-171/07) and Helga Neumann-Seiwert (C-172/07) v Saarland and Ministerium für Justiz, Gesundheit und Soziales* [ECLI:EU:C:2009:316], § 18; Judgment of the Court (Grand Chamber) of 1 June 2010, joined cases C-570/07 and C-571/07, *José Manuel Blanco Pérez and María del Pilar Chao Gómez v Consejería de Salud y Servicios Sanitarios (C-570/07) and Principado de Asturias (C-571/07)* [ECLI:EU:C:2010:300], § 43.

[441] On the opening-up to competition, *vide* Judgment of the Court of 11 January 2005, case C-26/03, *Stadt Halle, cit.*, § 44; Judgment of the Court of 13 December 2007, case C-337/06, *Bayerischer Rundfunk*, *cit.,* § 39; Judgment of the Court of 11 December 2014, case C-113/13, *Spezzino, cit.*, § 51.

While Member States must refrain from introducing practices that may amount to a direct discrimination –i.e., only national undertakings will be selected–, they may introduce criteria that are, apparently, neutral but actually lead to a discrimination –i.e., only undertakings able to provide the service within a delay of ten minutes will be selected; thus, if the territory to provide the service is located more than a ten-minute trip from the borders with another Member State, only national undertakings would be able to comply with that requirement–. However, as explained, in this second case the discrimination may be fully justified. Acknowledging the existence of objective circumstances that may justify an indirect discrimination, *vide* Judgment of the Court of 10 March 1993, case C-111/91, *Commission of the European Communities v Grand Duchy of Luxembourg* [ECLI:EU:C:1993:92], § 17; Judgment of the Court (Fifth Chamber) of 8 June 1999, case C-337/97, *C.P.M. Meeusen v Hoofddirectie van de Informatie Beheer Groep* [ECLI:EU:C:1999:284], § 27; Judgment of the Court of 21 July 2005, case C-231/03, *Coname, cit.*, § 19; Judgment of the Court (Grand Chamber) of 13 November 2007, case C-507/03, *Commission of the European Communities v Ireland* [ECLI:EU:C:2007:676], § 31; Judgment of the Court of 29 November 2007, case C-119/06, *Commission v Italy, cit.,* § 64; Judgment of the Court (Second Chamber) of 21 February 2008, case C-412/04, *Commission of the European Communities v Italian Republic* [ECLI:EU:C:2008:102], § 66; Judgment of the Court of 11 December 2014, case C-113/13, *Spezzino, cit.*, § 52.

principle of universality, the good of the community, economic efficiency and suitability[442]. Indeed, it is in the interest of the community that health and life of humans are ranked foremost among the assets or interests protected by the Treaty[443]. Consequently, the provision of related public services is subject to a high degree of discretion on the side of Member States, who, arguing the existence of an overriding reason of general interest, in the absence of harmonization at EU-level, may well opt for assuring a different degree of protection and, provided that (1) no direct discrimination is present, (2) that the measure adopted is appropriate to secure the attainment of the objective which they pursue and (3) that it does not go beyond what is necessary in

[442] Judgment of the Court of 11 December 2014, case C-113/13, *Spezzino, cit.*, § 52.

[443] Judgment of the Court of 20 May 1976, case 104/75, *Adriaan de Peijper, Managing Director of Centrafarm BV* [ECLI:EU:C:1976:67]**,** § 15; Judgment of the Court of 17 December 1981, case 272/80, *Criminal proceedings against Frans-Nederlandse Maatschappij voor Biologische Producten BV* [ECLI:EU:C:1981:312], § 12; Judgment of the Court (Fifth Chamber) of 14 July 1983, case 174/82, *Criminal proceedings against Sandoz BV* [ECLI:EU:C:1983:213], § 16; Judgment of the Court (Third Chamber) of 7 March 1989, case 215/87, *Heinz Schumacher v Hauptzollamt Frankfurt am Main-Ost* [ECLI:EU:C:1989:111], § 17; Judgment of the Court (Third Chamber) of 16 April 1991, case C-347/98, *Freistaat Bayern v Eurim-Pharm GmbH* [ECLI:EU:C:1991:148], § 26; Judgment of the Court (Fifth Chamber) of 10 November 1994, case C-320/93, *Lucien Ortscheit GmbH v Eurim-Pharm Arzneimittel GmbH* [ECLI:EU:C:1994:379], § 16; Judgment of the Court of 11 December 2003, case C-322/01, *Deutscher Apothekerverband eV v 0800 DocMorris NV and Jacques Waterval* [ECLI:EU:C:2003:664], § 103; Judgment of the Court (Grand Chamber) of 13 July 2004, case C-262/02, *Commission of the European Communities v French Republic* [ECLI:EU:C:2004:431], § 24; Judgment of the Court (Third Chamber) of 2 December 2004, case C-41/02, *Commission of the European Communities v Kingdom of the Netherlands* [ECLI:EU:C:2004:762], § 42; Judgment of the Court (First Chamber) of 14 September 2006, joined cases C-158/04 and C-159/04, *Alfa Vita Vassilopoulos AE (C-158/04) and Carrefour Marinopoulos AE (C-159/04) v Elliniko Dimosio and Nomarchiaki Aftodioikisi Ioanninon* [ECLI:EU:C:2006:562], § 21; Judgment of the Court (Grand Chamber) of 5 June 2007, case C-170/04, *Klas Rosengren and Others v Riksåklagaren* [ECLI:EU:C:2007:313], § 39; Judgment of the Court (Second Chamber) of 8 November 2007, case C-143/06, *Ludwigs - Apotheke München Internationale Apotheke v Juers Pharma Import-Export GmbH* [ECLI:EU:C:2007:656], § 27; Judgment of the Court (Fourth Chamber) of 11 September 2008, case C-141/07, *Commission of the European Communities v Federal Republic of Germany* [ECLI:EU:C:2008:492], § 46; Judgment of the Court of 11 December 2014, case C-113/13, *Spezzino, cit.*, § 56.

order to attain it, organize a preferential scheme susceptible of being objectively justified[444].

In conclusion, despite the latest case law of the CJEU, one is forced to conclude that, even when the good of the community and the budgetary efficiency are to be complied with, EU public procurement rules do apply. Otherwise, Member States will feel compelled to restrict their public service markets to national non-profit providers, closing such markets to all other potential providers (both for-profit providers and foreign providers)[445]. The only exception –which must be thus interpreted narrowly– to the freedom to provide services and the principle of open competition would be the existence of an overriding reason of general interest that could justify a differentiated treatment, provided that principles of non-discrimination, justification, appropriateness and proportionality are fully respected – i.e., provided that the rules justified in the general interest are applied to all undertakings operating in the territory of the State where the service is provided, that they are appropriate for securing the attainment of the objective pursued and that they do not go beyond what is necessary for that purpose[446].

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[444] Case law cited in fn 187. Also *vide* Judgment of the Court of 25 July 1991, joined cases C-1/90 and C-176/90, *Aragonesa de Publicidad Exterior SA and Publivía SAE v Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña* [ECLI:EU:C:1991:327], § 16; Judgment of the Court (Sixth Chamber) of 25 July 1991, case C-76/90, *Manfred Säger v Dennemeyer & Co. Ltd.* [ECLI:EU:C:1991:331], § 15; Judgment of the Court of 28 March 1996, case C-272/94, *Guiot, cit.*, §§ 11 and 13; Judgment of the Court of 23 November 1999, joined cases C-369/96 and C-376/96, *Arblade, cit.*, § 35; Judgment of the Court of 3 October 2000, case C-58/98, *Josef Corsten* [ECLI:EU:C:2000:527], § 39; Judgment of the Court of 22 January 2002, case C-390/99, *Canal Satélite Digital SL v Adminstración General del Estado, and Distribuidora de Televisión Digital SA (DTS)* [ECLI:EU:C:2002:34], § 33; Judgment of the Court of 13 July 2004, case C-262/02, *Commission v France, cit.,* § 24; Judgment of the Court of 11 September 2008, case C-141/07, *Commission v Germany, cit.*, § 51; Judgment of the Court (Fourth Chamber) of 23 December 2009, *Serrantoni Srl and Consorzio stabile edili Scrl v Comune di Milano* [ECLI:EU:C:2009:808], § 44; Judgment of the Court of 11 December 2014, case C-113/13, *Spezzino, cit.*, § 52.

[445] SÁNCHEZ GRAELLS, A. "Competition and the public buyer… *op. cit.,* p. 9.

[446] Judgment of the Court of 4 December 1986, case 205/84, *Commission v Germany, cit.*, § 27; Judgment of the Court of 26 February 1991, case C-180/89, *Commission v Italy, cit.*, § 17; Judgment of the Court of 26 February 1991, case C-198/89, *Commission of the European Communities v Hellenic Republic* [ECLI:EU:C:1991:79], § 18; Judgment of the Court of 9 August 1994, case C-43/93, *Raymond Vander*

In any case, from a competition law standpoint, if the good of the community is to be guaranteed, most efficient public service provider needs to be selected; contrariwise, the community risks to bear the costs of opting for a provider whose incentives to provide the best service at the lowest cost are none.

B. Services of General Interest: a specifically codified, and jurisprudentially expanded, exception to competition scrutiny

The Services of General Interest (hereinafter, SGI) provided in a given society have a bearing upon its cohesion and stability, as their provision is one of the elements giving shape to a society and an indicator of its general state[447]. In times of crisis, they are viewed as an instrument of economic, social and territorial cohesion[448]. Consequently, SGI constitute a key element, an essential building block, in the European model society[449].

Elst v Office des Migrations Internationales [ECLI:EU:C:1994:310], § 16; Judgment of the Court of 28 March 1996, case C-272/94, *Guiot, cit.*, § 11. Also, Opinion of the AG Wahl, case C-113/13, *Spezzino, cit.*, § 51.

[447] The provision of SGI can be used to complement more traditional instruments of social policy, as they are aimed at assuring the financial viability of the welfare state – i.e., their provision may involve redistribution through the equalization of tariffs or cross-subsidies; *vide*, for all, BAQUERO CRUZ, J. "Beyond Competition: Services of General Interest and European Community Law", in BURCA, G. *EU Law and the Welfare State: In Search of Solidarity*, Oxford, Oxford University Press, 2005, [pp. 169-212] p. 169; SÁNCHEZ GRAELLS, A. "Competition and the public buyer… *op. cit.,* p. 10.

[448] EUROPEAN PARLIAMENT. *Resolution of 5 July 2011 on the future of social services of general interest*, 2009/2222(INI), Strasbourg, 5 July 2011, § 17. In the same vein,

[449] Commission Communication – Services of general interest in Europe, *Official Journal of the European Communities*, C 281/3, 26 September 1996, § I; Communication from the Commission – Services of general interest in Europe, *Official Journal of the European Communities,* C 17/4, 19 January 2001, § 7; COMMISSION OF THE EUROPEAN COMMUNITIES. *Report to the Laeken European Council – Services of General Interest*, COM(2001) 598 final, Brussels, 17 October 2001, § 1; COMMISSION OF THE EUROPEAN COMMUNITIES. *Green Paper on Services of General Interest*, COM(2003) 270 final, Brussels, 21 May 2003, § 2; COMMISSION OF THE EUROPEAN COMMUNITIES. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – White Paper on services of general interest*, COM(2004) 374 final, Brussels, 12 May 2004, § 2.1.

Notwithstanding, the process of European integration has been characterized by a decoupling of economic integration concerns and social-protection issues – the European agenda was devised by economic interests, which ensured their privileged access to European policy processes; therefore, economic policy and social-protection policy do not have the same constitutional status and the latter –welfare-state policies at the national level– is to be designed in the shadow of the former –constitutionalized European law–[450]. In this line, from the Member States standpoint, due to the limited competences enshrined in the Treaties, the European social model is only partial – i.e., Member States can thus expand and/or modify it; indeed, Member States whose social model is backed up with a legal tradition that relies heavily in the recognition of SGI are usually reluctant to uncontrolledly open such services to competition[451].

'SGI' covers market and non-market services which the public authorities class as being of general interest and subject to specific public service obligations[452]. Those services, whose (ideally) main objective is not that of making profits, are deemed essential for the functioning of the society in so far as if they collapse, many other activities would also collapse[453]. Protocol 26, annexed to the text of the Treaties, makes

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[450] Interestingly enough, as Prof. SCHARPF explains, in the 1956 negotiations leading to the Treaties of Rome and the creation of the European Economic Community, the French (Socialist) Prime Minister tried to make the harmonization of social regulations and fiscal burdens a precondition for the integration of industrial markets. However, as he mainly concentrated in the opening of European markets for French agriculture and the support for former French colonies, all he got in the final package deal was a mere political commitment towards the increase of social protection nationally. *Vide* SCHARPF, F.W. "The European Social Model: Coping with the challenges of diversity", in *MPIfG*, Working paper No. 02/8, 2002, available at: http://hdl.handle.net/10419/44265 (last accessed: 19.07.2016), pp. 2-3.

[451] There are wide divergences among Member States: in France, SGI are very entrenched –legally, institutionally and culturally–; in Germany, Spain and Italy, equivalent categories exist, but they are not so entrenched; in the UK there is no legal notion of SGI and barely any limit affecting the processus of liberalization and privatization. As Prof. BAQUERO puts forward, such divergences are accommodated in a way that a fragile compromise is reached, whereas never resolved, between the defendants of SGI and the proponents of competition. *Vide* BAQUERO CRUZ, J. "Beyond Competition… *op. cit*., pp. 170-171.

[452] Commission Communication – Services of general interest in Europe, *cit.*, p. 1; COMMISSION OF THE EUROPEAN COMMUNITIES. *Green Paper on Services of General Interest*, COM(2003) 270 final, *cit.*, Annex.

[453] BAQUERO CRUZ, J. "Beyond Competition… *op. cit*., p. 170.

a clear distinction between non-market and market SGI[454]. Since the differentiated treatment resulting from such distinction does affect the degree to which such services are subjected to competitive concerns, we must then analyze, on one hand, non-economic SGI and, on the other hand, services of general economic interest (hereinafter, SGEI)[455].

a. The gradual EU-wide expansion of non-economic SGI: from the undisputed exercise of public powers to the debatable direct provision of social services

In respect of non-economic SGI article 2 of Protocol 26 establishes the following:

> The provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organize non-economic services of general interest.

And recital 114 of the Directive 2014/24 reads as follows:

> Certain categories of services continue by their very nature to have a limited cross-border dimension, namely such services that are known as services to the person, such as certain social, health and educational services. Those services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. A specific regime should therefore be established for public contracts for those services, with a higher threshold than that which applies to other services [EUR 750.000, instead of EUR 134.000, as for public supply and service contracts awarded by central government authorities or EUR 207.000, as

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[454] As explained in the previous Section, according to article 51 TEU, Protocols and Annexes to the Treaties do form an integral part thereof.

[455] As expressed by Prof. MAÍLLO, in non-economic activities, competition is not the guiding principle, whereas in essentially economic activities free competition is the rule, but for exemptions in the general interest allowed, as it will be dealth with in the following point on SGEIs, by 106(2) TFEU. *Vide*, MAÍLLO GONZÁLEZ-ORÚS, J. *Servicios de interés general y artículo 86 del Tratado CE: una visión evolutiva.* Madrid, Universidad San Pablo - CEU, Instituto de Estudios Europeos, 2005, p. 10.

> for public supply and service contracts awarded by sub-central contracting authorities].
>
> Services to the person with values below that threshold will typically not be of interest to providers from other Member States, unless there are concrete indications to the contrary, such as Union financing for cross-border projects.
>
> Contracts for services to the person above that threshold should be subject to Union-wide transparency. Given the importance of the cultural context and the sensitivity of these services, Member States should be given wide discretion to organize the choice of the service providers in the way they consider most appropriate. The rules of this Directive take account of that imperative, imposing only the observance of basic principles of transparency and equal treatment and making sure that contracting authorities are able to apply specific quality criteria for the choice of service providers […].

The states finance activities which are not of an economic nature: security, justice, social security, health care, education, among others[456]. By doing so, Member States are enabled to define and enforce public service obligations in a way that takes into account specific national, regional or local circumstances[457]. Some of those

[456] SZYSZCZAK, E. "Services of General Economic Interest and State Measures Affecting Competition", *op. cit.*, p. 8. The Annex XIV of the Directive 2014/24 lists out the following social services: health, social and related services; administrative social, educational, healthcare and cultural services; compulsory social security services; benefit services; other community, social and personal services, including services furnished by trade unions, political organisations, youth associations and other membership organisation services; religious services; hotel and restaurant services; legal services –to the extent not excluded pursuant to point (d) of Article 10; other administrative services and government services; provision of services to the community; prison related services, public security and rescue services to the extent not excluded pursuant to point (h) of Article 10; investigation and security services; international services –services provided by extra-territorial organisations and bodies and services specific to international organisations and bodies–; postal services, and miscellaneous services –tyre-remoulding services and blacksmith services–. Some of those social services, depending on the way they are organized in a given Member State, are to be deemed social services of general interest since, as specifically remarked in the first footnote of Annex XIV, «Member States are free to organize the provision of compulsory social services or of other services as services of general interest or as non-economic services of general interest».

[457] COMMISSION OF THE EUROPEAN COMMUNITIES. COM(2003) 270 final, *cit.*, § 83.

activities are performed in the exercise of public powers, while others are developed in the public interest –in the latter case, it may well be the operation of a social security scheme or the direct provision of a social service (health care, education)–.

Due to their contribution to several essential values and objectives of the EU, they form an integral part of the European model society and the European economy –among those values we may find the followings: achieving a high level of employment and social protection (irrespective of wealth and income), a high level of human health protection, equality, non-discrimination, and economic, social and territorial cohesion[458]. That explains why, albeit the fact that non-economic (social) SGI belong to the competences of the Member States, EU law plays and important role regarding their delivery and financing, and why the Commission, in the absence of competences to legislate in the area of non-economic SGI, has thus resorted to soft law measures to move their modernization towards a Europeanization process, away from Member States' autonomous policy making[459]. In any case, the Commission has refrained from defining exhaustively social services to prevent any intervention with Member States' view on what services deem to have social character and it has confined itself to list a couple of social services, such as (a) statutory and complementary social security schemes –covering the main risks like those linked to health, ageing, occupational accidents, unemployment, retirement and disability– and (b) other services provided

[458] COMMISSION OF THE EUROPEAN COMMUNITIES. *Comission staff working document – Annexes to the Communication from the Commission on Social services of general interest in the European Union – Socio-economic and legal overview,* SEC(2006) 516, Brussels, 26 April 2006, pp. 4 and 5; COMMISSION OF THE EUROPEAN COMMUNITIES. *Communication form the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, accompanying the Communication on "A single market for 21st century Europe" – Services of general interest, including social services of general interest: a new European commitment*, COM(2007) 725 final, Brussels, 20 November 2007, p. 7; VAN DE GRONDEN, J.W. and RUSU, C.S. "The *Altmark* Update and Social Services: Toward a European Approach", in SZYSZCZAK, E. and VAN DE GRONDEN, J.W. (Ed.), *Financing Services of General Economic Interest: Reform and Modernization*, The Hague, Asser Press, 2013, [pp. 185-216] p. 188.

[459] According to an analysis carried out by Prof. VAN DE GRONDEN, the concept of 'social services of general interest' (SSGI) appears only in policy documents of the Commission, neither in EU primary law nor specifically acknowledged in the ECJ's case law, *vide* VAN DE GRONDEN, J.W. and RUSU, C.S. "The *Altmark* Update and Social Services… *op. cit.*, pp. 188-189.

directly to the person –social assistance services, employment and training services, social housing and long-term care–[460].

Providers of non-economic SGI would not be considered undertakings, in so far as they do not perform an economic activity; as a consequence, they would not be subjected to the core competition rules of the Treaty[461]. All in all, from a competition law perspective, Member States may withdraw some activities from the field of competition – i.e., if they organize them in a way that the principle of solidarity –which bears no relation to the market– is effectively implemented, giving effect to redistribution policies, competition law does not apply[462]. Still, despite not being subject to core competition rules, a level playing field must be ensured to all providers capable of providing the non-economic SGI with the characteristics and conditions fixed by the public authority in question, who, in the absence of any harmonization, is to define the characteristics of the service to be provided in the light of its public policy objectives[463].

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[460] COMMISSION OF THE EUROPEAN COMMUNITIES. COM(2007) 725 final, *cit.*, pp. 5 and 6; EUROPEAN COMMISSION. "Social services of general interest", in *Employment, social affairs & inclusion*, European Commission webpage, available at: http://ec.europa.eu/social/main.jsp?catId=794 (last accessed: 24.08.2016).

[461] COMMISSION OF THE EUROPEAN COMMUNITIES. COM(2004) 374, *cit.*, § 4.3. In this same line, *vide* Judgment of the Court of 19 January 1994, case C-364/92, *SAT Fluggesellschaft mbH v Eurocontrol* [ECLI:EU:C:1994:7], § 30; Judgment of the Court (Grand Chamber) of 1 July 2008, case C-49/07, *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* [ECLI:EU:C:2008:376], § 24; Judgment of the Court (Third Chamber) of 12 July 2012, case C-138/11, *Compass-Datenbank GmbH v Republik Österreich* [ECLI:EU:C:2012:449], § 36; Judgment of the Court (Fourth Chamber) of 12 December 2013, case C-327/12, *Ministero dello Sviluppo economico and Autorità per la vigilanza sui contratti pubblici di lavori, servizi e forniture v SOA Nazionale Costruttori - Organismo di Attestazione SpA* [ECLI:EU:C:2013:827], § 27.

[462] Opinion of the AG Poiares Maduro delivered on 10 November 2005, case C-205/03 P, *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v Commission of the European Communities* [ECLI:EU:C:2005:666], §§ 27, 28 and 51.

[463] COMMISSION OF THE EUROPEAN COMMUNITIES. COM(2003) 270 final, *cit.*, § 81. On the need to comply with EU law, *vide* Judgment of the Court of 28 April 1998, case C-120/95, *Nicolas Decker v Caisse de maladie des employés privés* [ECLI:EU:C:1998:167], §§ 22 and 23; Judgment of the Court of 26 January 1999, case C-18/95, *F.C. Terhoeve v Inspecteur van de Belastingdienst Particulieren/Ondernemingen buitenland* [ECLI:EU:C:1999:22], §§ 34 and 35; Judgment of the Court of 28 April 1998, case C-158/96, *Raymond Kohll v Union des caisses de maladie* [ECLI:EU:C:1998:171],

Before deepening this level-playing-field idea, one must analyze the concept of 'economic activity', since, first, it will draw the line between SGEI and non-economic (or social) SGI and, second, it will condition the application of core competition rules to state activity[464].

Traditionally, it has been accepted that the State may act either by exercising public powers or by carrying on economic activities of an industrial or commercial nature by offering goods and services on the market[465]. While the contours of the exercise of public powers – or, to put it in other words, the activities of entities that, emanating from the State, act in their capacity as public authorities, are more clearly

§§ 18 and 19; Judgment of the Court (Fifth Chamber) of 23 November 2000, case C-135/99, *Ursula Elsen v Bundesversicherungsanstalt für Angestellte* [ECLI:EU:C:2000:647], § 33; Judgment of the Court of 12 July 2001, case C-157/99, *B.S.M. Geraets-Smits v Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v Stichting CZ Groep Zorgverzekeringen* [ECLI:EU:C:2001:404], §§ 45 and 46; Judgment of the Court (Third Chamber) of 7 July 2005, case C-227/03, *A. J. van Pommeren-Bourgondiën v Raad van bestuur van de Sociale verzekeringsbank* [ECLI:EU:C:2005:431], § 39; Judment of the Court (Third Chamber) of 3 April 2008, case C-103/06, *Philippe Derouin v Union pour le recouvrement des cotisations de sécurité sociale et d'allocations familiales de Paris - Région parisienne (Urssaf de Paris - Région parisienne)* [ECLI:EU:C:2008:185], § 25; Judgment of the Court (Third Chamber) of 5 March 2009, case C-350/07, *Kattner Stahlbau GmbH v Maschinenbau- und Metall-Berufsgenossenschaft* [ECLI:EU:C:2009:127], §§ 74 to 76. Also, Opinion of the AG Fennelly delivered on 6 February 1997, case C-70/95, *Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl v Regione Lombardia* [ECLI:EU:C:1997:55], §§ 23 to 30, specially, §§ 28 and 30; Opinion of the AG Tesauro delivered on 16 September 1997, case C-120/95, *Nicolas Decker v Caisse de maladie des employés privés* [ECLI:EU:C:1997:399], §§ 17 to 25.

[464] Acknowledging the character of key jurisdictional tool to the concept of 'undertaking', as it delineates the scope of competition rules, *vide* VAN DE GRONDEN, J.W. "Financing Health Care in EU Law: Do the European State Aid Rules Write Out an Effective Prescription for Integrating Competition Law with Health Care?", in *Competition Law Review*, vol. 6, issue 1, 2009, [pp. 5-29] p. 8. Also, *vide* SZYSZCZAK, E. "Services of General Economic Interest and State Measures Affecting Competition", *op. cit.*, p. 1. Furthermore, *vide* Judgment of the Court (Third Chamber) of 18 July 2006, case C-519/04 P, *David Meca-Medina and Igor Majcen v Commission of the European Communities* [ECLI:EU:C:2006:492], § 30; Judgment of the Court of 5 March 2009, case C-350/07, *Kattner Stahlbau, cit.*, § 66.

[465] Judgment of the Court of 16 June 1987, case 118/85, *Commission of the European Communities v Italian Republic* [ECLI:EU:C:1987:283], § 7.

outlined, the concept of ‘economic activity’ is in constant expansion[466]. Furthermore, that dichotomy –public powers *versus* economic activity– must be transcended so as to include a third type of acts: the non-economic activities. When an entity acts, on behalf of the State, in the exercise of non-economic activities in the public interest, it does not enjoy the same protection that it enjoys when it acts in the exercise of (pure) public powers. This is so because, while, given their nature, the sovereign exercise of public powers does not account for the establishment of an –economic-efficiency-concern-driven– market, the provision of a service, good or work in the public interest, be it economic or non-economic, does enable the (potential) introduction of market mechanisms.

It is undisputed that authorities that, in the exercise of public powers –sovereign powers; *prérogative de puissance publique*–, act in their capacity as public authorities, perform activities that are not of an economic nature justifying the application of competition rules – such activities are deemed to form part of the essential functions of the State or are connected with those essential functions by their nature, their aim or the rules to which they are subject[467]. No market –whose preservation is the utmost

[466] MAÍLLO GONZÁLEZ-ORÚS, J. *Servicios de interés general y artículo 86 del Tratado CE… op. cit.*, p. 8.

[467] The exercise of sovereign powers, in so far as it implies an exercise of legitimate administrative discretion, is subject to political review rather than being subject to the economic scrutiny of competition rules. *Vide*, on the State Action Doctrine, ANGULO GARZARO, N. “Competition within EU Public Procurement Regulation and Practice… *op. cit.*, pp. 53 and 54. Also, *vide* the following case law of the EU judicature, Judgment of the Court of 11 July 1985, case 107/84, *Commission of the European Communities v Federal Republic of Germany* [ECLI:EU:C:1985:332], §§ 14 and 15; Judgment of the Court (Sixth Chamber) of 4 May 1988, case 30/87, *Corinne Bodson v SA Pompes funèbres des régions libérées* [ECLI:EU:C:1988:225], § 18; Judgment of the Court of 19 January 1994, case C-364/92, *Eurocontrol, cit.*, §§ 30 and 31; Judgment of the Court of 19 February 2002, case C-309/99, *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, intervener: Raad van de Balies van de Europese Gemeenschap* [ECLI:EU:C:2002:98], § 57; Judgment of the Court of 1 July 2008, case C-49/07, *MOTOE, cit.*, § 24; Judgment of the Court of 12 July 2012, case C-138/11, *Compass-Datenbank, cit.,* § 36; Judgment of the Court (Second Chamber) of 28 February 2013, case C-1/12, *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência* [ECLI:EU:C:2013:127], § 40; Judgment of the General Court (Fifth Chamber) of 12 September 2013, case T-347/09, *Federal Republic of Germany v European Commission* [ECLI:EU:T:2013:418], § 27. Also, *vide* EUROPEAN COMMISSION. *State aid SA.34646 (2014/NN)(ex 2012/CP) – The Netherlands – E-procurement platform TenderNed*, C(2014) 9548 final, Brussels, 18

objective of competition rules– can thus be established for the provision of those activities[468]. Even if the product or service supplied is provided in return for remuneration, that alone is not sufficient for the activity to be classified as an economic activity, as long as the remunerations are set down by law and not determined (directly or indirectly) by the entity[469]. Among those activities that intrinsically form part of the prerogatives of official authority and are brought in the exercise of public powers we may find the following: army; police; air navigation safety and control; maritime traffic control and safety; anti-pollution surveillance; organization, financing and enforcement

December 2014, § 51; MAÍLLO GONZÁLEZ-ORÚS, J. *Servicios de interés general y artículo 86 del Tratado CE… op. cit.*, p. 9; SZYSZCZAK, E. "Services of General Economic Interest and State Measures Affecting Competition", *op. cit.*, p. 3.

[468] Some authors leave the door open to the existence of a market for the provision of goods, works or services in the exercise of public authority powers. In any case, they consider that, should a market exist, the fact that the State is exercising its official authority will result in the activity being automatically categorised as a non-economic activity. *Vide* SZYSZCZAK, E. "Services of General Economic Interest and State Measures Affecting Competition", *op. cit.*, p. 4.

In any case, those activities are traditionally performed by employers 'in the public service' – that is, civil servants: their posts involve direct or indirect participation in the exercise of powers conferred by public law and in the discharge of functions whose purpose is to safeguard the general interests of the State or of other public authorities and therefore require a special relationship of allegiance to the State on the part of the persons occupying them and reciprocity of rights and duties. Those posts are confined to those which, having regard to the tasks and responsibilities involved, are apt to display the characteristics of the specific activities of the public service in the aforementioned spheres. *Vide* Judgment of the Court of 17 December 1980, case 149/79, *Commission of the European Communities v Kingdom of Belgium* [ECLI:EU:C:1980:297], § 10; Judgment of the Court of 26 May 1982, case 149/79, *Commission of the European Communities v Kingdom of Belgium* [ECLI:EU:C:1982:195], §§ 7 to 9; Judgment of the Court of 3 July 1986, case 66/85, *Deborah Lawrie-Blum v Land Baden-Württemberg* [ECLI:EU:C:1986:284], § 27; Judgment of the Court (Fifth Chamber) of 30 May 1989, *Pilar Allué and Carmel Mary Coonan v Università degli studi di Venezia* [ECLI:EU:C:1989:222], § 7. Considering that areas of research, education, health, transport by land, sea and air, posts and telecommunications, television broadcasting, water, gas, electricity and music involve no direct or indirect participation in the exercise of powers conferred by public law, *vide* Judgment of the Court of 2 July 1996, case C-290/94, *Commission of the European Communities v Hellenic Republic* [ECLI:EU:C:1996:265], §§ 33 and 34.

[469] Judgment of the Court of 19 January 1994, case C-364/92, *Eurocontrol, cit.*, § 28; Judgment of the Court of 18 March 1997, case C-343/95, *Diego Calì & Figli Srl v Servizi ecologici porto di Genova SpA (SEPG)* [ECLI:EU:C:1997:160], §§ 22 to 25; Judgment of the Court of 12 July 2012, case C-138/11, *Compass-Datenbank, cit.*, § 39.

of prison sentences; and data collection on the basis of a statutory obligation to disclose the data and powers of enforcement related thereto[470]. Finally, the pursuit of a given public policy in the interest of the society is to be distinguished from the exercise of public powers. The general interest is insufficient in itself to qualify an activity as an act in the exercise of the prerogatives of public power; the criteria used, instead, is its nature, its objective and the rules to which the activity is subject[471].

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[470] On air navigation safety and control, *vide* Judgment of the Court of 19 January 1994, case C-364/92, *Eurocontrol, cit.*, § 27; on control and supervision of air space, *vide* Judgment of the Court (Second Chamber) of 26 March 2009, case C-113/07 P, *SELEX Sistemi Integrati SpA v Commission of the European Communities and Organisation européenne pour la sécurité de la navigation aérienne (Eurocontrol)* [ECLI:EU:C:2009:191], § 71; on the maritime traffic control and safety, *vide* Authorisation for State aid pursuant to Articles 87 and 88 of the EC Treaty – Cases where the Commission raises no objections, *Official Journal of the European Communities*, C 284/2, 21 November 2002, Objective, with reference to COMMISSION OF THE EUROPEAN COMMUNITIES. *Aide d'État nº N 438/2002 – Belgique – Subventions aux régies portuaires pour l'exécution de missions relevant de la puissance publique*, Brussels, 16 October 2002, C(2002) 3763 fin, §§ 12 to 16; on the anti-pollution surveillance, *vide* Judgment of the Court of 18 March 1997, case C-343/95, *Calì, cit.*, § 22; on the organization, financing and enforcement of prision sentences, *vide* Authorisation for the State aid pursuant to Articles 87 and 88 of the EC Treaty – Cases where the Commission raises no objections, *Official Journal of the European Union*, C 244/12, 11 October 2006, with reference to COMMISSION OF THE EUROPEAN COMMUNITIES. *Case N 140/2006 – Lithuania – Allotment of Subsidies to the State Enterprises at the Correction Houses*, C(2006) 3212, Brussels, 19 July 2006, § 2.5; and on the data collection, *vide* Judgment of the Court of 12 July 2012, case C-138/11, *Compass-Datenbank, cit.*, § 40.

For all, *vide* Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, *Official Journal of the European Union*, C 8/4, 11 January 2012, § 16; EUROPEAN COMMISSION. *Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest*, C(2011) 9404 final, Brussels, 20 December 2011, § 16.

[471] For all, Judgment of the General Court (Fifth Chamber) of 16 July 2014, case T-309/12, *Zweckverband Tierkörperbeseitigung in Rheinland-Pfalz, im Saarland, im Rheingau-Taunus-Kreis und im Landkreis Limburg-Weilburg v European Commission* [ECLI:EU:T:2014:676], § 88. In that case, the General Court stated that « *il convient de rejeter l'argument de la requérante selon lequel le mantien d'une réserve de capacités en cas d'épizootie se rattache à l'exercice des prérogatives de puissance publique parce qu'il ferait de la gestión de crises et serait donc assuré dans l'intérêt de la société dans son ensemble. En effet, s'il est vrai [...] que cette réserve est maintenue par mesure de précaution, il n'en demeure pas moins [...]que la finalité tant de l'activité d'élimination que de celle du maintien d'une*

Notwithstanding, if the State fails to offer a good or service that, by its nature, its objective or the rules to which is subject, is essential to comply with the exercise of its public powers, the activity can be exploited, in such a situation, commercially[472]. But the essential character of the provision of such good, work or service –ancillary activity– *vis-á-vis* the activity in exercise of public powers –principal activity– does alter the nature of the ancillary activity, as, if the State resorts to the market to look for a provider of the ancillary activity that allows it to still perform the principal activity itself, the provision of the ancillary service is considered non-economic and, thus, it is not subjected to competition law concerns[473].

Any activity consisting in offering goods and services on a given market is an economic activity[474]. However, the notion of economic activity may be applied differently depending on the situation and on the various Treaty provisions; therefore, where engagement in an activity is to be assessed in the light of the Treaty provisions on competition, the first step in the assessment will consist on clarifying whether the rules that govern the activity emanate from an undertaking[475].

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réserve est d'assurer la protection de la santé publique et de la santé animale. Les deux activités en cause sont donc assurées dans l'intérêt de la société dans son ensemble. [C]ette finalité des activités en cause ne perment cependant pas de conclure que ces activités sont rattachées à l'exercice des prérogatives de puissance publique, étant donné que les critères pertinents pour qualifier une activité sont san ature, son objet et les règles auxquelles elle est soumise ».

[472] That could be the case of the provision of electronic services to comply with State's procurement activities and e-Procurement availability requirements, as in EUROPEAN COMMISSION. C(2014) 9548 final, *cit.*, § 68.

[473] EUROPEAN COMMISSION. *State aid SA.25745 (2013/NN) (ex CP 11/2008) – Germany – National website for auctions in insolvency proceedings (ZVG Portal)*, C(2013) 2361 final, Brussels, 2 May 2013, §§ 29, 30 and 32.

[474] Judgment of the Court of 16 June 1987, case 118/85, *Commission v Italy, cit.*, § 7; Judgment of the Court (Fifth Chamber) of 18 June 1998, case C-35/96, *Commission of the European Communities v Italian Republic* [ECLI:EU:C:1998:303], § 36; Judgment of the Court of 12 September 2000, joined cases C-180/98 to C-184/98, *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* [ECLI:EU:C:2000:428], § 75; Judgment of the Court (Fifth Chamber) of 25 October 2001, case C-475/99, *Firma Ambulanz Glöckner v Landkreis Südwestpfalz* [ECLI:EU:C:2001:577], § 19.

[475] Stating that the scope of freedom of competition and that of the freedom to provide services, albeit searching a common objective –that of the completion of the internal market–, are not identical, *vide* § 51.

As for competition purposes, any entity engaged in an economic activity is an 'undertaking', regardless of its legal status and the way in which it is financed; it follows, then, that the nature of an activity does not depend on the private or public status of the entity engaged in it or on the profitability of that activity; conversely, the classification of a particular entity as an 'undertaking' does depend on the nature of its activities[476]. An association or sports club under national law may well be regarded as

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The AG Maduro holds that «there is nothing to prevent a transaction involving an exchange being classified as the provision of services, even where the parties to the exchange are not undertakings for the purposes of competition law» – i.e., since, as we will explain, Member States are enabled to organize certain activities in a way that they are not considered economic. *Vide*, Opinion of the AG Poiares Maduro delivered on 10 November 2005, case C-205/03 P, *FENIN, cit.,* § 51. Considering an activity non-economic for competition purposes and, therefore, exempting it from the scope of core competition rules, but, at the same time, acknowledging the application of the EU Treaties' rules, in particular those relating to freedom to provide services, as they have a broader scope than competition rules, Judgment of the Court of 5 March 2009, case C-350/07, *Kattner Stahlbau, cit.*, §§ 66 and 72 to 75. Considering that medical activities fall within the scope of the fundamental principle of freedom of movement while they may not fall under the scope of competition rules, *vide* Judgment of the Court of 12 July 2001, case C-368/98, *Abdon Vanbraekel and Others v Alliance nationale des mutualités chrétiennes (ANMC)* [ECLI:EU:C:2001:400], §§ 41 to 45. Also, *vide* Judgment of the Court (Third Chamber) of 18 July 2006, case C-519/04 P, *Meca-Medina and Majcen, cit.,* §§ 29 to 33; Judgment of the Court (Grand Chamber) of 11 December 2007, case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [ECLI:EU:C:2007:772], § 53. BAQUERO CRUZ, J. "Beyond Competition… *op. cit*., p. 183.

[476] Judgment of the Court (Sixth Chamber) of 23 April 1991, case C-41/90, *Klaus Höfner and Fritz Elser v Macrotron GmbH* [ECLI:EU:C:1991:161], § 21; Judgment of the Court of 17 February 1993, joined cases C-159/91 and C-160/91, *Poucet and Pistre, cit.*, § 17; Judgment of the Court of 16 November 1995, case C-244/94, *Fédération Française des Sociétés d'Assurance, Société Paternelle-Vie, Union des Assurances de Paris-Vie and Caisse d'Assurance et de Prévoyance Mutuelle des Agriculteurs v Ministère de l'Agriculture et de la Pêche* [ECLI:EU:C:1995:392], § 14; Judgment of the Court (Sixth Chamber) of 11 December 1997, case C-55/96, *Job Centre coop. arl.* [ECLI:EU:C:1997:603], § 21; Judgment of the Court of 18 June 1998, case C-35/96, *Commission v Italy, cit.,* § 36; Judgment of the Court of 12 September 2000, joined cases C-180/98 to C-184/98, *Pavlov, cit.*, § 75; Judgment of the Court of 22 January 2002, case C-218/00, *Cisal di Battistello Venanzio & C. Sas v Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL)* [ECLI:EU:C:2002:36], §§ 22 and 23; Judgment of the Court of 19 February 2002, case C-309/99, *Wouters, cit.*, § 47; Judgment of the Court (Sixth Chamber) of 24 October 2002, case C-82/01 P, *Aéroports de Paris v Commission of the European Communities* [ECLI:EU:C:2002:617], § 79; Judgment of the Court of 10 January 2006, case C-222/04, *Cassa di Risparmio di Firence, cit.,* § 108; Judgment of the Court (Second Chamber) of 23 March 2006,

an undertaking, regardless of the status of such entity under national law, since the relevant criterion is whether it carries out an economic activity: non-profit entities can also perform an economic activity as, irrespective of not being set up to generate profits, they may offer goods and services in a market too[477]. However, provided that an entity carries out both economic and non-economic activities, it will be regarded as an undertaking only with regard to the former[478]. Furthermore, it is the activity consisting

case C-237/04, *Enirisorse SpA v Sotacarbo SpA* [ECLI:EU:C:2006:197], § 29; Judgment of the Court (Grand Chamber) of 11 July 2006, case C-205/03 P, *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v Commission of the European Communities* [ECLI:EU:C:2006:453], § 25; Judgment of the Court of 1 July 2008, case C-49/07, *MOTOE, cit.*, §§ 21 and 22; Judgment of the Court (First Chamber) of 3 March 2011, case C-437/09, *AG2R Prévoyance v Beaudout Père et Fils SARL* [ECLI:EU:C:2011:112], § 42; Judgment of the Court of 28 February 2013, case C-1/12, *Ordem dos Técnicos Oficiais de Contas, cit.*, § 36; Judgment of the Court of 12 December 2013, case C-327/12, *SOA Nazionale Costruttori, cit.,* § 27; Judgment of the Court (Second Chamber) of 22 October 2015, case C-185/14, *"EasyPay" AD and "Finance Engineering" AD v Ministerski savet na Republika Bulgaria and Natsionalen osiguritelen institut* [ECLI:EU:C:2015:716], § 37; Judgment of the Court (Grand Chamber) of 23 February 2016, case C-179/14, *European Commission v Hungary* [ECLI:EU:C:2016:108], § 149. Also, Opinion of the AG Saugmandsgaard Øe delivered on 6 July 2016, case C-216/15, *Betriebsrat der Ruhrlandklinik gGmbH v Ruhrlandklinik gGmbH* [ECLI:EU:C:2016:518], § 50.

[477] Judgment of the Court of 29 October 1980, joined case 209/78 to 215/78 and 218/78, *Heintz van Landewyck SARL and others v Commission of the European Communities* [ECLI:EU:C:1980:248], §§ 87 and 88; Judgment of the Court of 16 November 1995, case C-244/94, *FFSA, cit.,* § 21; Judgment of the Court of 10 January 2006, case C-222/04, *Cassa di Risparmio di Firence, cit.,* § 123; Judgment of the Court of 1 July 2008, case C-49/07, *MOTOE, cit.*, §§ 27 to 29; EUROPEAN COMMISSION. C(2011) 9404, *cit.*, p. 4.

[478] BAQUERO CRUZ, J. "Beyond Competition… *op. cit*., p. 181; EUROPEAN COMMISSION. C(2011) 9404 final, *cit.*, p. 4. Establishing a difference between economic activities and public authority activities, the ECJ stated that «Treaty provisions on competition are applicable to the activities of an entity which can be severed from those in which it engages as a public authority», Judgment of the Court of First Instance (Third Chamber) of 12 December 2000, case T-128/98, *Aéroports de Paris v Commission of the European Communities* [ECLI:EU:T:2000:290], § 108, confirmed by Judgment of the Court of 24 October 2002, case C-82/01 P, *Aéroports de Paris*, *cit.*, §§ 74 and 81. Also, *vide* Judgment of the Court of 11 July 1985, case 107/84, *Commission v Germany, cit.*, §§ 14 and 15; Judgment of the Court of 1 July 2008, case C-49/07, *MOTOE, cit.*, § 25; Judgment of the Court of 12 July 2012, case C-138/11, *Compass-Datenbank, cit.*, § 37. Contrariwise, in *Eurocontrol* the ECJ clarified that the activity of collecting route charges in the hands of Eurocontrol (an organization established by an international agreement, entrusted with the control of air navigation among its contracting states) cannot be separated from its other activities; thus, taking as a whole –by their nature, their aim and the rules to which they are subject– (1)

in offering goods and services on a given market that is the characteristic feature of an economic activity; thus, it would be incorrect to dissociate the activity of purchasing goods, providing services or performing works from the subsequent use to which they are put – i.e., the nature of the activity is to be determined according to whether the subsequent use of the purchased goods, the provided services or the performed works amounts to an economic activity[479]. Conversely, an activity that by its nature, its aim and the rules to which is subject is inseparably connected to another activity that fulfills an exclusively social function is to be qualified as 'non-economic' –functional analysis of the concept of undertaking–[480].

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such charges are merely the consideration, payable by users, for the obligatory and exclusive use of air navigation control facilities and services, (2) Eurocontrol had no influence whatsoever over the amount of the charges, which were fixed by applying a common formula set by the contracting states and, then, (3) Eurocontrol's activities were connected with the exercise of power relating to the control and supervision of air space, which are typically those of a public authority. *Vide* Judgment of the Court of 19 January 1994, case C-364/92, *Eurocontrol, cit.*, §§ 27 to 29.

[479] Judgment of the Court of 11 July 2006, case C-205/03 P, *FENIN, cit.,* §§ 26 and 27, which confirmed what was stated in Judgment of the Court of First Instance (First Chamber, extended composition) of 4 March 2003, case T-319/99, *Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental (FENIN) v Commission of the European Communities* [ECLI:EU:T:2003:50], §§ 36 and 40. Also, *vide* Judgment of the Court of 26 March 2009, case C-113/07 P, *SELEX, cit.*, § 102, which confirmed what was stated in Judgment of the Court of First Instance (Second Chamber) of 12 December 2006, case T-155/04, *SELEX Sistemi Integrati SpA v Commission of the European Communities* [ECLI:EU:T:2006:387], §§ 65 to 69.

[480] Judgment of the Court of 22 October 2015, case C-185/14, *EasyPay, cit.,* §§ 40 to 44, where the ECJ considers that the activity of money order operations for the payment of retirement pensions is separable from –purely instrumental to– the provision of pension funds itself. Thus, it was neither essential nor intrinsic to it: while the essence of the retirement pension system is its funding through contributions and the granting of pensions, the payment method is just the tool to make it effective.

By analogy, see also *Aéroports de Paris*, where the ECJ recalled, in relation with the exercise of public powers, that the activities of an entity may be «by their nature, their aim and the rules to which they are subject, […] connected with the exercise of public powers which are typically those of a public authority and that none of those activities were separable from the others», Judgment of the Court of 24 October 2002, case C-82/01 P, *Aéroports de Paris*, *cit.*, § 81. Also, in relation with the exercise of public powers, see *Compass-Datenbank,* were the maintenance of a database containing the data and making that data available to the public are considered activities that cannot be separated from the activity of collection of the data, Judgment of the Court of 12 July 2012, case C-138/11, *Compass-Datenbank, cit.,* § 41. Also,

It is undeniable that the term 'undertaking', once defined by the CJEU as a single organization of personal, tangible and intangible elements attached to an autonomous legal entity pursuing a given long term economic aim, has been considerably widened as to encompass a broad range of service providers, such as inventors that exploit commercially their inventions, opera singers, customs officers – despite their occasional exercise of official authority and other public functions– and lawyers[481]. The crucial element for a natural or legal person to be considered an undertaking is its pursuit of an independent economic activity bearing economic risk – i.e., should an imbalance between expenditure and receipts occur, undertakings bear the financial risks –deficits– attached to the performance of their activities[482].

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vide SÁNCHEZ GRAELLS, A. and HERRERA ANCHÚSTEGUI, I. "Revisiting the concept of undertaking from a public procurement law perspective - A discussion on *EasyPay and Finance Engineering"* in *SSRN*, http://ssrn.com/abstract=2695742 (last consulted: 23.08.2016), pp. 2 and 5 to 8.

[481] On the initial definition of 'undertaking', *vide* Judgment of the Court of 13 July 1962, case 19/61, *Mannesmann AG v High Authority of the European Coal and Steel Community* [ECLI:EU:C:1962:31], p. 371. On the consideration of inventors as undertakings, *vide* Commission Decision of 26 July 1976 relating to a proceeding under Article 85 of the EEC Treaty – IV/28.996 – Reuter/BASF, *Official Journal of the European Communities*, L 254/40, 17 September 1976, § 2.1: «Dr. Reuter is also to be regarded as an undertaking for the purpose of Article [101 TFEU], since he engages in economic activity through those firms of the Elastomer group which remain under his control, by exploiting the results of his own research and as commercial adviser to third parties». On the consideration of opera singers as undertakings, *vide* Commission Decision of 26 May 1978 relating to a proceeding under Article 85 of the EEC Treaty – IV/29.559 – RAI/UNITEL, *Official Journal of the European Communities*, L 157/39, 15 June 1978, § IV.1(a): «artistes are undertakings within the meaning of [Article 101(1)] when they exploit commercially their artistic performances». On the consideration of customs agents as undertakings, *vide* Judgment of the Court of 18 June 1998, case C-35/96, *Commission v Italy, cit.,* §§ 36 to 38; Judgment of the Court of First Instance (Fifth Chamber, extended composition) of 30 March 2000, case T-513/93, *Consiglio Nazionale degli Spedizionieri Doganali v Commission of the European Communities* [ECLI:EU:T:2000:91], §§ 37 and 38. On the consideration of lawyers as undertakings, Judgment of the Court of 19 February 2002, case C-309/99, *Wouters*, *cit.*, §§ 45 to 49.

[482] Judgment of the Court of 16 December 1975, joined cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73, *Coöperatieve Vereniging "Suiker Unie" UA and others v Commission of the European Communities* [ECLI:EU:C:1975:174], §§ 541 and 542; Judgment of the Court of 18 June 1998, case C-35/96, *Commission v Italy, cit.,* § 37; Judgment of the Court of 19 February 2002, case C-309/99, *Wouters*, *cit.*, § 48; Judgment of the Court of 12 December 2013, case C-327/12, *SOA Nazionale Costruttori, cit.,* § 29. Also, *vide* HATZOPOULOS, V. "Health Law and Policy: The Impact of the EU",

It is not possible to draw up an exhaustive list of activities that would never be economic because the distinction between economic and non-economic services depends on the political and economic specificities of the Member State – the question whether a market exists for certain services may depend on the way those services are organized in the Member State concerned[483]. The decision not to allow third parties to provide a certain service – i.e., to concede an exclusive right to a given entity, does not *per se* rule out the existence of an activity of economic nature[484].

From a competition law standpoint, the fact that a given activity is labelled 'social' is not in itself enough for it to avoid being regarded as an economic activity and escape competition concerns[485]. In practice, if an activity is to be found social rather than economic, attention is paid to whether the principle of solidarity is observed[486]. All in all, as long as the decision is transparent and complete, it is for the Member State to organize its services in a way that, in the pursuit of the general interest, a given activity is excluded from its operation in the market, that is to say, in a way that, proven –by its nature, its aim and the legal framework to which is subject– the non-economic character of the activity, competition is ruled out[487]. As stated in the previous point, the weaker

in BURCA, G. *EU Law and the Welfare State: In Search of Solidarity*, Oxford, Oxford University Press, 2005, [pp. 111-168] p. 149.

483 EUROPEAN COMMISSION. C(2011) 9404 final, *cit.*, pp. 4-5. In the public sector sphere, Prof. BUENDÍA accurately points out, the state provides certain services whose economic nature is undeniable – telecommunications, energy, transport, postal services–; on the contrary, other services' nature –health, social security and education– is not clearcut. *Vide* BUENDÍA, J.L. "Derechos especiales y exclusivos, servicios públicos y servicios de interés económico general", in BENEYTO PÉREZ, J.M. (Dir.). *Tratado de Derecho de la competencia*, Barcelona, Bosch, 2005, [pp. 1055-1154] p. 1060. Also, *vide* BAQUERO CRUZ, J. "Beyond Competition… *op. cit*., p. 182. Stating the necessity to conduct a case by case analysis, as «it is almost impossible to know in advance with any degree of certainty whether the competition rules will apply at all», *vide* HATZOPOULOS, V. "Health Law and Policy… *op. cit.,* p. 160.

484 EUROPEAN COMMISSION. C(2011) 9404 final, *cit.*, pp. 4-5.

485 VAN DE GRONDEN, J.W. and RUSU, C.S. "The *Altmark* Update and Social Services… *op. cit.*, pp. 189-190.

486 For all, *vide* Judgment of the Court of 23 February 2016, case C-179/14, *Commission v Hungary*, *cit.*, § 158.

487 BAQUERO CRUZ, J. "Beyond Competition… *op. cit*., pp. 182 and 184. In *Albany*, the ECJ made clear that, albeit being some manifestations of solidarity, they might not be enough to deprive an activity

attention paid to the social dimension in the EU integration process has allowed Member States to develop, almost unconstrainedly, national policies on public services that are protected from outside competition; notwithstanding, one must not obviate that the economic and fiscal crisis is increasingly pulling in favor of re-shaping public services, of guiding them by considerations of competition and efficiency, since, if the welfare state is to be preserved, public financial stability must be ensured[488].

When a Member State opts for organizing a service –such as the management of the public security system– in a way that it fulfills exclusively a social function and it is based on the principle of national solidarity –that is, equalization of costs and risks, in the sense of redistribution of wealth, as opposed to that of capitalization–, the provision of such service is not an economic activity; it implies that (1) the provision of such service is entirely non-profit-making, (2) the benefits paid are statutory benefits bearing no relation to the amount of contributions and (3) the scheme, supervised by the State, is based on a system of compulsory contributions –indispensable for the application of the principle of solidarity and the financial equilibrium of those schemes–,[489]. In such

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of its economic character – i.e., the aim, the nature and the rules to which the activity is subject need to be examined; in that case, the legislation provided exemptions from affiliation and the fund operated in accordance with the principle of capitalization, in so far as the benefits depended on the financial results of the investments made. *Vide* Judgment of the Court of 21 September 1999, case C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [ECLI:EU:C:1999:430], §§ 78 and 82 to 86.

[488] In this line, Prof. SÁNCHEZ GRAELLS and Prof. SZYSZCZAK underline that «Member States are under significant pressure to find new ways of meeting their social duties with increased 'efficiency' or, in other terms, under pressure to achieve significant savings that allow them to remain in compliance with fiscal stability obligations without completely dismantling the welfare state», *vide* SÁNCHEZ GRAELLS, A. and SZYSZCZAK, E. "Modernising Social Services in the Single Market: Putting the Market into the Social", in BENEYTO, J.M. and MAILLO, J. (Dirs.). *Fostering Growth in Europe: Reinforcing the Internal Market*. Madrid, CEU Ed., 2014, [pp. 69-96] pp. 70 to 72.

[489] Judgment of the Court of 17 February 1993, joined cases C-159/91 and C-160/91, *Poucet and Pistre, cit.*, §§ 13, 14 and 18; Judgment of the Court of 16 November 1995, case C-244/94, *FFSA, cit.,* § 19; Judgment of the Court of 22 January 2002, case C-218/00, *Cisal*, *cit.*, §§ 43 to 45; Judgment of the Court of 16 March 2004, joined cases C-264/01, C-306/01, C-354/01 and C-355/01, *AOK Bundesverband, Bundesverband der Betriebskrankenkassen (BKK), Bundesverband der Innungskrankenkassen, Bundesverband der landwirtschaftlichen Krankenkassen, Verband der Angestelltenkrankenkassen eV, Verband der Arbeiter-Ersatzkassen, Bundesknappschaft and See-Krankenkasse v Ichthyol-Gesellschaft*

circumstances, the activity is exclusively directed to serve a social function and, thus, it is not an economic activity for the purposes of competition law and the body performing such activity is not an undertaking for core competition law purposes – i.e., the activity is aimed at safeguarding the welfare state[490]. Contrariwise, a scheme based on the principle of capitalization –that is, the entitlements depend on the contributions paid and the financial results of the scheme–, is to be regarded as economic; such a scheme may be characterized by (1) its optional membership, (2) its profit-making nature and/or (3) the option of providing supplementary entitlements[491]. However, it may well be the case that a specific activity combines features of both categories –e.g., it pursues a social aim in the public interest, but it is framed in a scheme that applies the capitalization principle to calculate the amount of contributions, not subject to any supervision by the state whatsoever–[492]. In those cases, its classification requires an

Cordes, Hermani & Co. (C-264/01), Mundipharma GmbH (C-306/01), Gödecke GmbH (C-354/01) and Intersan, Institut für pharmazeutische und klinische Forschung GmbH (C-355/01) [ECLI:EU:C:2004:150], §§ 47-55.

[490] Judgment of the Court of 22 January 2002, case C-218/00, *Cisal*, *cit.*, § 45; Judgment of the Court of 5 March 2009, case C-350/07, *Kattner Stahlbau, cit.*, § 66. Also, *vide* MAÍLLO GONZÁLEZ-ORÚS, J. *Servicios de interés general y artículo 86 del Tratado CE… op. cit.*, p. 9.

[491] Judgment of the Court of 16 November 1995, case C-244/94, *FFSA, cit.,* §§ 15 to 17 and 20; Judgment of the Court of 21 September 1999, case C-67/96, *Albany, cit.*, §§ 80 to 85; Judgment of the Court of 21 September 1999, joined cases C-115/97 to C-117/97, *Brentjens' Handelsonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* [ECLI:EU:C:1999:434], §§ 81 to 85; Judgment of the Court of 21 September 1999, case C-219/97, *Maatschappij Drijvende Bokken BV v Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven* [ECLI:EU:C:1999:437], §§ 71 to 75; Judgment of the Court of 12 September 2000, joined cases C-180/98 to C-184/98, *Pavlov, cit.*, §§ 80 to 82, 114 and 115. Also, *vide* BUENDÍA, J.L. "Derechos especiales y exclusivos, servicios públicos y servicios de interés económico general", *op. cit.*, p. 1061.

[492] Acknowledging that, despite rendering the service less competitive, the pursuit of a social aim, the manifestations of solidarity and state restrictions or controls over the activity do not prevent automatically an activity from being regarded as economic, Judgment of the Court of 21 September 1999, case C-67/96, *Albany, cit.*, § 86; Judgment of the Court of 21 September 1999, joined cases C-115/97 to C-117/97, *Brentjens, cit.,* §§ 85 and 86; Judgment of the Court of 21 September 1999, case C-219/97, *Drijvende Bokken, cit.*, §§ 75 and 76; Judgment of the Court of 12 September 2000, joined cases C-180/98 to C-184/98, *Pavlov, cit.*, § 118; Judgment of the Court of 22 January 2002, case C-218/00, *Cisal*, *cit.*, § 37; Judgment of the Court of 5 March 2009, case C-350/07, *Kattner Stahlbau, cit.*, §§ 42 and 43.

analysis and evaluation of the different elements of the activity and their respective importance[493]. As a way of an example, a service that applies the solidarity principle but to which the affiliation is not compulsory –letting users concerned opt for the solution that guarantees best their investment– is to be deemed economic[494]. Further, an activity that, despite being based on a system of compulsory affiliation and applying a solidarity mechanism for determination of the amount of contributions and the level of benefits, allows the service provider itself to determine the amount of contributions and the level of benefits and, indeed, is operated in accordance with the principle of capitalization, is to be undoubtedly considered economic[495]. On the other hand, a system that allows a certain degree of competition may well be considered solidarity-based as long as it complies with the aforementioned criteria and it is entirely aimed at encouraging the operation of the system under principles of sound management – i.e., in the most effective and least costly manner possible, in the interests of the proper functioning of the system itself[496]. From a competition law perspective, such an initiative is to be applauded.

More generally, on the fact that a body entrusted with a public interest task or public service obligation does not prevent the activitiy at issue from being regarded as an economic activity, *vide* Judgment of the Court of 25 October 2001, case C-475/99, *Ambulanz Glöckner, cit.*, § 21; Judgment of the Court of 23 March 2006, case C-237/04, *Enirisorse*, *cit.*, § 34.

[493] For all, *vide* Judgment of the Court of 22 January 2002, case C-218/00, *Cisal*, *cit.*, §§ 38 to 45.

[494] Judgment of the Court of 16 March 2004, joined cases C-264/01, C-306/01, C-354/01 and C-355/01, *AOK Bundesverband, cit.,* § 50, with reference to Judgment of the Court of 16 November 1995, case C-244/94, *FFSA, cit.*

[495] Judgment of the Court of 16 March 2004, joined cases C-264/01, C-306/01, C-354/01 and C-355/01, *AOK Bundesverband, cit.,* § 50, with reference to Judgment of the Court of 21 September 1999, case C-67/96, *Albany, cit.*

[496] Judgment of the Court of 16 March 2004, joined cases C-264/01, C-306/01, C-354/01 and C-355/01, *AOK Bundesverband, cit.,* § 56. Also, *vide* Commission Decision (EU) 2015/248 of 15 October 2014 on the measures SA.23008 (2013/C) (ex 2013/NN) implemented by Slovak Republic for Spoločná zdravotná poisťovňa, a.s (SZP) and Všeobecná zdravotná poisťovňa, a.s (VZP), (notified under document C(2014) 7277), *Official Journal of the European Union*, L 41/25, 17 February 2015, § 92. In the latter, in relation with the non-economic nature of the activity of compulsory health insurance, the Commission clarifies that providers –health insurers– have no possibility to influence over the statutory benefits as the level of contributions of the insured are fixed by law. Price competition –which is the type of competition most interesting for consumers– is ruled out, while quality competition is rather limited, as national legislation

In this same vein, among non-economic (social) SGI, apart from social security schemes, we may also found social services provided directly to the person. Health care and education have been extensively addressed by the EU judicature, and conclusions extracted therefrom can be applied for the examination of other social services provided directly to the person[497].

With regard to health care, the degree to which health care providers compete with each other equally depends on national specificities: while in some Member States there are health care providers –such as public hospitals– that form an integral part of the national health service and are almost entirely based on the principle of solidarity, in other Member States health care providers offer their services for remuneration –either directly from patients or from their insurance–, at their own risk[498]. However, the mere fact that the health service is provided by a public hospital is not sufficient for the activity to be classified as non-economic; the principle of solidarity is, once again, the key[499]. Indeed, very few bodies involved in the organization of healthcare system remain excluded from their classification as undertakings[500]. In any case, all Member States share the value that their nationals are entitled to a minimum level of health care benefits and, consequently, a balanced medical and hospital service open to all must be

foresees a very wide range of statutory benefits that are equal for all insured persons. Thus, health insurers are not in competition with one another as regards the grant of the obligatory statutory benefits in respect of health care.

[497] On this two-prong definition of social SGI, VAN DE GRONDEN, J.W. and RUSU, C.S. "The *Altmark* Update and Social Services… *op. cit.*, p. 190.

[498] Judgment of the Court of 12 September 2000, joined cases C-180/98 to C-184/98, *Pavlov, cit.*, §§ 75 to 77. Also, *vide* Judgment of the Court of First Instance of 4 March 2003, case T-319/99, *FENIN, cit.,* § 39, confirmed by Judgment of the Court of 11 July 2006, case C-205/03 P, *FENIN, cit.,* § 27. In *FENIN* the ECJ put forward that public hospitals are not considered undertakings as long as they are integral part of the national health service and they are based on the principle of solidarity –that is, funded from social security contributions and other state resources and providing their services free of charge to affiliated persons on the basis of universal coverage, albeit, sometimes, being subject to small charges in order to cover a small fraction of the actual cost of the service–.

[499] EUROPEAN COMMISSION. C(2011) 9404 final, *cit.*, p. 8.

[500] HATZOPOULOS, V. "Health Law and Policy… *op. cit.,* pp. 148 and 149. With relation to emergency transport services and patient transport services, *vide* Judgment of the Court of 25 October 2001, case C-475/99, *Ambulanz Glöckner, cit.*, § 20.

ensured (universal coverage)[501]. If, when designing the health care scheme, the national legislature opts for introducing certain market mechanisms, it does fall within the scope of competition law[502]. On the contrary, if the health care system is only based on the principle of solidarity it does escape from the EU rules on competition, provided that the managing bodies do not offer additional commercial health care policies[503].

In relation with ancillary services in the realm of medical care –hospital services and emergency services–, it must be examined the relationship of those activities to the process of diagnosing and treating – that is, whether they are essentially linked to curing patients and are necessary in order to contribute to the activity of curing[504]. Contrariwise, relations of other persons, such as providers of goods, works or services,

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[501] Charter of Fundamental Rights of the European Union, *Official Journal of the European Communities*, C 364/1, 18 December 2000, Article 35. Judgment of the Court of 28 April 1998, case C-158/96, *Kohll, cit.*, §§ 50 and 51; Judgment of the Court of 12 July 2001, case C-157/99, *Smits and Peerbooms, cit.,* §§ 73 and 74; Judgment of the Court of 13 May 2003, case C-385/99, *V.G. Müller-Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA and E.E.M. van Riet v Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen* [ECLI:EU:C:2003:270], §§ 67 and 78 to 80; Judgment of the Court of 16 May 2006, case C-372/04, *Watts, cit.,* §§ 104 and 111. Also, *vide* COMMISSION OF THE EUROPEAN COMMUNITIES. *White Paper – Together for Health: A Strategic Approach for the EU 2008-2013*, COM(2007) 630 final, Brussels, 23 October 2007, pp. 1 to 4; EUROPEAN COMMISSION. *Communication from the Commission on effective, accessible and resilient health systems*, COM(2014) 215 final, Brussels, 4 April 2014, pp. 7 to 10; SZYSZCZAK, E. "Services of General Economic Interest and State Measures Affecting Competition", *op. cit.*, p. 1; VAN DE GRONDEN, J.W. "Financing Health Care in EU Law… *op. cit.*, pp. 6 and 7.

[502] Judgment of the Court of 16 November 1995, case C-244/94, *FFSA, cit.,* §§ 14 to 22; Judgment of the Court of 21 September 1999, case C-67/96, *Albany, cit.,* §§ 77 to 84; Judgment of the Court of 12 September 2000, joined cases C-180/98 to C-184/98, *Pavlov, cit.*, § 76; VAN DE GRONDEN, J.W. "Financing Health Care in EU Law… *op. cit* , p. 20; VAN DE GRONDEN, J.W. and RUSU, C.S. “The *Altmark* Update and Social Services… *op. cit.*, pp. 201 and 202.

[503] VAN DE GRONDEN, J.W. "Financing Health Care in EU Law… *op. cit* , p. 13.

[504] VAN DE GRONDEN, J.W. and RUSU, C.S. “The *Altmark* Update and Social Services… *op. cit.*, p. 193.

with such activity of care provision may well be economic in character in so far as they are not essential to the achievement of the social objective[505].

As for education, public education organized within the national educational system funded and supervised by the State is also to be considered non-economic; the State, in establishing and maintaining such a system, is indeed seeking to fulfil its duties towards its own population in the social, cultural and educational fields, rather than engaging in a gainful activity[506]. Moreover, the existence of tuition or enrolment fees, which are intended to contributing to the operating expenses of the system, do not run counter to the non-economic character of public education, since it remains predominantly funded by the public purse due to the fact that those financial contributions cannot be considered as remuneration for the service provided because they just cover a fraction of the true costs of the service[507]. Public educational services can be offered in the following areas: vocational training, primary schools, kindergartens and universities[508].

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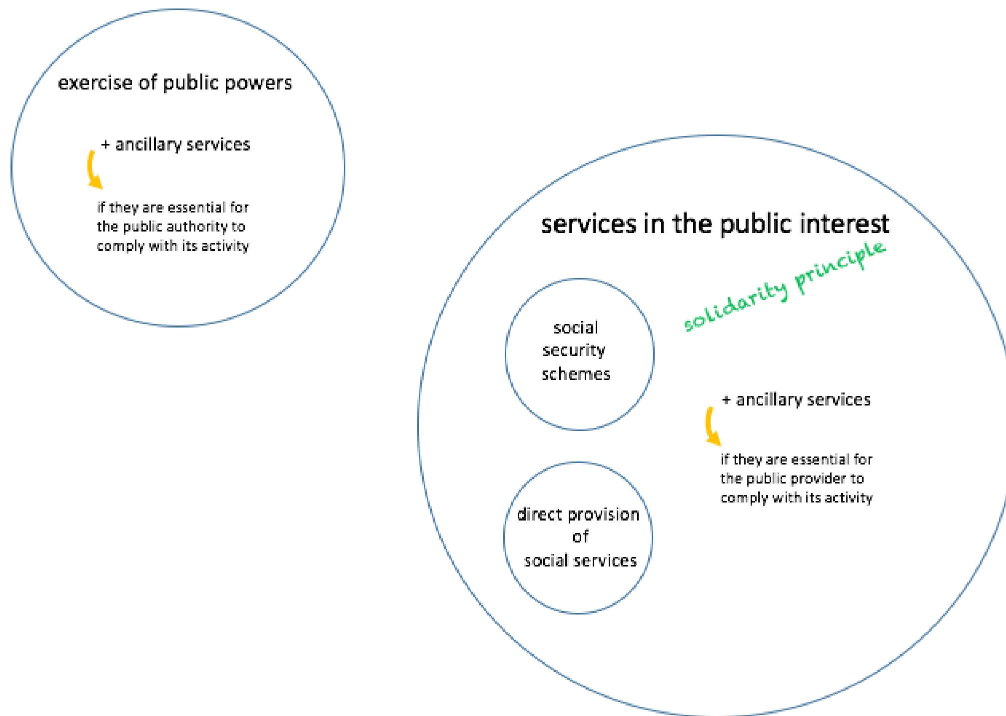
[505] Opinion of the AG Fennelly delivered on 6 February 1997, case C-70/95, *Sodemare, cit.,* § 30; by analogy with ancillary activities to the exercise of public powers, EUROPEAN COMMISSION. C(2013) 2361 final, *cit.*, § 32.

[506] EUROPEAN COMMISSION. C(2011) 9404, *cit.*, § 26. Also, *vide* Judgment of the Court of 27 September 1988, case 263/86, *Belgian State v René Humbel and Marie-Thérèse Edel* [ECLI:EU:C:1988:451], §§ 17 and 18; Judgment of the Court (Fifth Chamber) of 7 December 1993, case C-109/92, *Stephan Max Wirth v Landeshauptstadt Hannover* [ECLI:EU:C:1993:916], §§ 15 and 16; excluding such a system from the concept of services within the meaning of Article 57 TFEU (ex Article 50 TEC), Judgment of the Court (Grand Chamber) of 11 September 2007, case C-318/05, *Commission of the European Communities v Federal Republic of Germany* [ECLI:EU:C:2007:495], § 68. Considering the necessity of promoting sports an activity in the general interest, which can be assimilated to education in a broad sense, *vide* COMMISSION OF THE EUROPEAN COMMUNITIES. *Aide d'État nº N 118/00 – France – Subventions publiques aux clubs sportifs professionnels*, SG (2001) D / 288165, Brussels, 25 April 2001, §§ 12 and 16.

[507] EUROPEAN COMMISSION. C(2011) 9404, *cit.*, § 27. Also, *vide* Judgment of the EFTA Court of 21 February 2008, case E-5/07, *Private Barnehagers Landsforbund v EFTA Surveillance Authority* [2008] EFTA Ct. Rep. 62, §§ 83 and 84.

[508] On vocational training, *vide* Judgment of the Court of 27 September 1988, case 263/86, *Humbel and Edel, cit.,* § 20; on primary schools, *vide* Judgment of the Court of 11 September 2007, case C-318/05, *Commission v Germany, cit.,* §§ 71 and 72, and Judgment of the Court (Grand Chamber) of 11 September 2007, case C-76/05, *Herbert Schwarz and Marga Gootjes-Schwarz v Finanzamt Bergisch Gladbach*

Figure 4 – Non-economic activities within the public sector



SOURCE: Elaborated by the author

To sum up, both activities in the exercise of public powers and services in the public interest where the solidarity principle is predominant are shielded from competition scrutiny, in so far as they are not economic activities for the purposes of applying EU competition law. Such protection is extended to ancillary activities that are essentially linked with the provision of the activities in the exercise of public powers or in the public interest by the public authority. This conception is not tantamount to that initially developed by the EU judicature, where any activity objectively suitable to be carried out by private entities should be deemed economic[509]. As a consequence of that

[ECLI:EU:C:2007:492], §§ 39 to 41; on kindergartens, Judgment of the EFTA Court of 21 February 2008, case E-5/07, *Private Barnehagers Landsforbund v EFTA Surveillance Authority*, *cit.*, §§ 78 to 84; on universities, *vide* Judgment of the Court (Third Chamber) of 18 December 2007, case C-281/06, *Hans-Dieter Jundt and Hedwig Jundt v Finanzamt Offenburg* [ECLI:EU:C:2007:816], §§ 37 and 38.

[509] Judgment of the Court of 23 April 1991, case C-41/90, *Höfner, cit.*, §§ 19 to 22. The ECJ considered that the fact that employment procurement activities are normally entrusted to public agencies could not

legal standpoint, it was sufficient with demonstrating that the activity was or had been carried out by private entities in any geographic area[510]. However, the provision of an activity by private entities is a consequence of, not a condition for, finding it an economic activity: an activity is not rendered economic simply by virtue of the fact that it may be carried out by private actors; instead, it is economic because the rules to which it is subject do not completely shield it from competition on the part of private undertakings – on the contrary, if the rules are framed in such a way that no private undertaking could perform it, it would not be economic[511]. Otherwise, on the one hand, there would be an excessively strong presumption in favor of the applicability of the economic rules of the Treaty; and, on the other hand, activities traditionally carried out by or reserved to public entities –traditional state monopolies– would automatically be deemed non-economic, as, despite their purely economic nature, they had never been carried out by private entities[512].

A given activity carried out in the public interest may be considered, if the afore-mentioned requirements are met, non-economic while, under different circumstances, it would be considered economic; thus, the pursuit of a social objective, albeit legitimate, may render the service less competitive, in terms of economic efficiency, that comparable services provided by private entities. That being the case, rather than

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affect their economic nature, since employment procurement has not always been and is not necessarily carried out by public entities. Also, *vide* Opinion of the AG Jacobs delivered on 22 May 2003, joined cases C-264/01, C-306/01, C-354/01 and C-355/01, *AOK Bundesverband, Bundesverband der Betriebskrankenkassen (BKK), Bundesverband der Innungskrankenkassen, Bundesverband der landwirtschaftlichen Krankenkassen, Verband der Angestelltenkrankenkassen eV, Verband der Arbeiter-Ersatzkassen, Bundesknappschaft and See-Krankenkasse v Ichthyol-Gesellschaft Cordes, Hermani & Co. (C-264/01), Mundipharma GmbH (C-306/01), Gödecke GmbH (C-354/01) and Intersan, Institut für pharmazeutische und klinische Forschung GmbH (C-355/01)* [ECLI:EU:C:2003:304], §§ 27 and 28. On the *Höfner test, vide* BAQUERO CRUZ, J. "Beyond Competition… *op. cit*., p. 182; BUENDÍA, J.L. "Derechos especiales y exclusivos, servicios públicos y servicios de interés económico general", *op. cit.*, p. 1062.

[510]Judgment of the Court of 25 October 2001, case C-475/99, *Ambulanz Glöckner, cit.*, § 20; Judgment of the Court of First Instance of 12 December 2000, case T-128/98, *Aéroports de Paris*, *cit.*, § 124.

[511] BAQUERO CRUZ, J. "Beyond Competition… *op. cit*., p. 182.

[512] BAQUERO CRUZ, J. "Beyond Competition… *op. cit*., p. 180; BUENDÍA, J.L. "Derechos especiales y exclusivos, servicios públicos y servicios de interés económico general", *op. cit.*, pp. 1060 and 1061.

regarding the activity as economic, it might be justified the granting of an exclusive right to manage the social service[513].

Member States may grant an exclusive right to a –public or private– provider and it will require such provider the provision of the service on adequate terms and at affordable rates, and, in the expectation that the provision of the service may not be profitable, the provider is granted the exclusive right as a financial compensation[514].

In any case, the granting of exclusive rights is subject to article 106(1) TFEU (ex article 86(1) TEC):

> In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.

In principle, that article applies to 'undertakings'; therefore, entities that carry on activities that (a) are organized by the Member State as a non-economic SGI or (b) by their nature, their objective and the rules to which they are subject are essentially connected with a non-economic activity, are not to be considered undertakings since they do perform a non-economic activity. However, from our standpoint, the content of that provision can be equally applied, with all due caution, to entities carrying on activities of non-economic nature[515].

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[513] Judgment of the Court of 21 September 1999, case C-67/96, *Albany, cit.,* § 86; Judgment of the Court of 21 September 1999, joined cases C-115/97 to C-117/97, *Brentjens, cit.,* §§ 85 and 86; Judgment of the Court of 21 September 1999, case C-219/97, *Drijvende Bokken, cit.*, §§ 75 and 76; Judgment of the Court of 12 September 2000, joined cases C-180/98 to C-184/98, *Pavlov, cit.*, § 118; Judgment of the Court of 22 January 2002, case C-218/00, *Cisal*, *cit.*, § 37; Judgment of the Court of 5 March 2009, case C-350/07, *Kattner Stahlbau, cit.*, §§ 42 and 43; Judgment of the Court of 3 March 2011, case C-437/09, *AG2R Prévoyance*, *cit.*, § 79.

[514] MAÍLLO GONZÁLEZ-ORÚS, J. *Servicios de interés general y artículo 86 del Tratado CE… op. cit.*, p. 4.

[515] *Contra*, stating that «el 106.1 se aplica a la regulación pública de actividades económicas, no a las medidas reguladoras de actividades no económicas», BUENDÍA, J.L. "Derechos especiales y exclusivos, servicios públicos y servicios de interés económico general", *op. cit.*, p. 1060.

Article 106(1) TFEU is not a self-contained rule; rather, its regulatory substance depends on that of the rule to which it refers –rule of *renvoi*–: (1) rules to remove obstacles to the internal market imposed by the Member States –article 18 TFEU (ex article 12 TEC)– or (2) rules on competition –articles 101 to 109 TFEU (ex 81 to 89 TEC)–[516]. Given the subject-matter of this research, we will focus on the point (2) rules on competition. Yet, the logic of those provisions, whose typical addressee are undertakings, needs to be adapted in order to be applied to State measures[517].

A privileged entity is any (public or private) entity which has been discretionarily granted with a special or exclusive right – that is, if the granting is automatic, rather than discretionary, as a result of the compliance with a predefined set of legal conditions (e.g., IP rights), article 106(1) TFEU would not be applicable[518]. All in all, attention is paid to whether the protection conferred by the regulatory measure on a limited number of entities –privileged entities– may substantially affect the ability of other entities to exercise the activity in question in the same geographical area under

[516] BAQUERO CRUZ, J. "Beyond Competition… *op. cit*., p. 172; BUENDÍA, J.L. "Derechos especiales y exclusivos, servicios públicos y servicios de interés económico general", *op. cit.*, p. 1058 and 1070; MAÍLLO GONZÁLEZ-ORÚS, J. *Servicios de interés general y artículo 86 del Tratado CE… op. cit.*, p. 12. On the lack of independent effect of article 106(1) TFEU, *vide* Judgment of the Court of 19 April 2007, case C-295/05, *Tragsa II*, *cit.*, § 40; Order of the President of the Sixth Chamber of the Court of 11 November 2010, case C-20/10, *Vino Cosimo Damiano v Poste Italiane SpA* [ECLI:EU:C:2010:677], § 71; Order of the Court (Fifth Chamber) of 3 February 2015, case C-68/14, *Equitalia Nord SpA v CLR di Camelliti Serafino & C. Snc* [ECLI:EU:C:2015:57], § 21. On a state measure that harms article 106(1) TFEU in combination with article 34 TFEU (ex 28 TEC), *vide* Judgment of the Court of 10 December 1991, case C-179/90, *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA* [ECLI:EU:C:1991:464], §§ 21 and 24; Judgment of the Court (Fifth Chamber) of 13 December 1991, case C-18/88, *Régie des télégraphes et des téléphones v GB-Inno-BM SA* [ECLI:EU:C:1991:474], § 36. In combination with article 56 TFEU (ex article 49 TEC), *vide* Judgment of the Court of 18 June 1991, case C-260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* [ECLI:EU:C:1991:254], §§ 26 and 36 to 38.

[517] BUENDÍA, J.L. "Derechos especiales y exclusivos, servicios públicos y servicios de interés económico general", *op. cit.*, pp. 1071.

[518] Judgment of the Court of 16 November 1977, case 13/77, *SA G.B.-INNO-B.M. v Association des détaillants en tabac (ATAB)* [ECLI:EU:C:1977:185], § 41. Also, *vide* BUENDÍA, J.L. "Derechos especiales y exclusivos, servicios públicos y servicios de interés económico general", *op. cit.*, p. 1064.

substantially equivalent conditions[519]. The granting of an exclusive right implies that for each activity there exists just one beneficiary in each geographical area; indeed, several entities may be privileged as long as they commit themselves to act in different territories[520]. On the contrary, the granting of special rights implies that the activity may be reserved for more than one provider in the same geographical area[521]. Special rights may be conceded either to a limited number of two or more entities –artificial limitation of the number of operators– or to any entity that meets the criteria to qualify for their granting –in highly regulated liberalized markets, such as the telecommunications sector–[522].

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[519] Judgment of the Court of 25 October 2001, case C-475/99, *Ambulanz Glöckner, cit.*, § 24; Judgment of the Court of 12 December 2013, case C-327/12, *SOA Nazionale Costruttori, cit.,* § 41.

[520] Judgment of the Court of 4 May 1988, case 30/87, *Bodson*, *cit.*, §§ 27 and 28; Judgment of the Court of 19 May 1993, case C-320/91, *Criminal proceedings against Paul Corbeau* [ECLI:EU:C:1993:198], § 8; Judgment of the Court of 5 October 1994, case C-323/93, *Société Civile Agricole du Centre d'Insémination de la Crespelle v Coopérative d'Elevage et d'Insémination Artificielle du Département de la Mayenne* [ECLI:EU:C:1994:368], § 17; Judgment of the Court (Sixth Chamber) of 25 June 1998, case C-203/96, *Chemische Afvalstoffen Dusseldorp BV and Others v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* [ECLI:EU:C:1998:316], § 58; Judgment of the Court of 21 September 1999, case C-67/96, *Albany, cit.,* § 90; Judgment of the Court of 10 February 2000, joined cases C-147/97 and C-148/97, *Deutsche Post AG v Gesellschaft für Zahlungssysteme mbH GZS) (C-147/97) and Citicorp Kartenservice GmbH (C-148/97)* [ECLI:EU:C:2000:74], § 37; Judgment of the Court (Fifth Chamber) of 17 December 2015, joined cases C-25/14 and C-26/14, *Union des syndicats de l'immobilier (UNIS) v Ministre du Travail, de l'Emploi et de la Formation professionnelle et du Dialogue social et Syndicat national des résidences de tourisme (SNRT) and Others and Beaudout Père et Fils SARL v Ministre du Travail, de l'Emploi et de la Formation professionnelle et du Dialogue social and Others* [ECLI:EU:C:2015:821], § 34. Also, *vide* Judgment of the Court of First Instance (Second Chamber, extended composition) of 19 June 1997, case T-260/94, *Air Inter SA v Commission of the European Communities* [ECLI:EU:T:1994:265], §§ 120 and 121.

[521] Judgment of the Court of 19 March 1991, case C-202/88, *French Republic v Commission of the European Communities* [ECLI:EU:C:1991:120], §§ 45 to 47; Judgment of the Court of 17 November 1992, joined cases C-271/90, C-281/90 and C-289/90, *Kingdom of Spain, Kingdom of Belgium and Italian Republic v Commission of the European Communities* [ECLI:EU:C:1992:440], §§ 28 to 32; Judgment of the Court of 23 May 2000, case C-209/98, *Entreprenørforeningens Affalds/Miljøsektion (FFAD) v Københavns Kommune* [ECLI:EU:C:2000:279], §§ 53 and 54.

[522] The Commission gave a definition of special rights in Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment, *Official Journal of the*

In any case, as well as it is the case with regard to any public procurement process, the selection of a privileged entity or entities must observe the obligation of transparency, irrespective of the method ultimately used for selecting that operator or operators[523].

The use of article 106(1) TFEU together with 101 TFEU has been quite reduced. It implies the adoption of a state measure that imposes, reinforces or induces several entities (one of which, at least, is privileged) to conclude an anticompetitive agreement[524]. While article 101 TFEU is concerned solely with the conduct of undertakings –and not with regulatory acts emanating from the state– its scope is broadened when read in conjunction with article 4(3) TEU – i.e., Member States are required not to introduce or maintain in force measures, whether legislative or

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European Communities, L 131/73, 27 May 1988, as amended by Commission Directive 94/46/EC of 13 October 1994 amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard to satellite communications, *Official Journal of the European Communities*, L 268/15, 19 October 1994, article 2(a)(ii); and in Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings, *Official Journal of the European Communities*, L 195/35, 29 July 1980, as amended by Commission Directive 2000/52/EC of 26 July 2000 amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings, *Official Journal of the European Communities*, L 193/75, 29 July 2000, article 2(1)(g). Also, *vide* BUENDÍA, J.L. "Derechos especiales y exclusivos, servicios públicos y servicios de interés económico general", *op. cit.*, pp. 1066 and 1067.

[523] Judgment of the Court (Second Chamber) of 3 June 2010, case C-203/08, *Sporting Exchange Ltd v Minister van Justitie* [ECLI:EU:C:2010:307], § 47. Also, *vide* Opinion of the AG Bot delivered on 17 December 2009, case C-203/08, *Sporting Exchange Ltd v Minister van Justitie* [ECLI:EU:C:2009:791], §§ 154 and 155.

[524] Prof. BUENDÍA refers to them as 'compulsory cartels'. *Vide* BUENDÍA, J.L. "Derechos especiales y exclusivos, servicios públicos y servicios de interés económico general", *op. cit.*, p. 1083. Judgment of the Court of 11 April 1989, case 66/86, *Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH v Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.* [ECLI:EU:C:1989:140], §§ 50 to 52; Judgment of the Court of 25 October 2001, case C-475/99, *Ambulanz Glöckner, cit.*, § 24; Judgment of the Court of 12 December 2013, case C-327/12, *SOA Nazionale Costruttori, cit.,* § 27 to 29; Order of the Court of 3 February 2015, case C-68/14, *Equitalia Nord, cit.*, §§ 22 and 23. Also, *vide* Opinion of the AG Van Gerven delivered on 19 September 1991, case C-179/90, *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA* [ECLI:EU:C:1991:347], § 23.

regulatory, which may render ineffective the competition rules applicable to undertakings *–effet utile des règles de concurrence–*[525].

With regard to article 102 TFEU, article 106(1) TFEU has been more extensively applied together with article 102 TFEU. Nevertheless, the existence of a privileged entity is not tantamount to the existence of a dominant position by such entity and, in the absence of a dominant position, 102 TFEU is rendered inapplicable[526]. An

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[525] Article 4(3) reads as follows:

«Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.»

Vide Judgment of the Court of 16 November 1977, case 13/77, *INNO v ATAB*, *cit.*, § 31; Judgment of the Court of 9 November 1983, case 322/81, *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities* [ECLI:EU:C:1983:313], § 29; Judgement of the Court of 21 September 1988, case 267/86, *Pascal Van Eycke v ASPA NV* [ECLI:EU:C:1988:427], § 16; Judgment of the Court of 17 November 1993, case C-2/91, *Criminal proceedings against Wolf W. Meng* [ECLI:EU:C:1993:885], § 14; Judgment of the Court of 17 November 1993, case C-185/91, *Bundesanstalt für den Güterfernverkehr v Gebrüder Reiff GmbH & Co. KG* [ECLI:EU:C:1993:886], § 14; Judgment of the Court of 17 November 1993, case C-245/91, *Criminal proceedings against Ohra Schadeverzekeringen NV* [ECLI:EU:C:1993:887], § 10; Judgment of the Court (Sixth Chamber) of 9 June 1994, case C-153/93, *Bundesrepublik Deutschland v Delta Schiffahrts- und Speditionsgesellschaft mbH* [ECLI:EU:C:1994:240], § 14; Judgment of the Court (Sixth Chamber) of 5 October 1995, case C-96/94, *Centro Servizi Spediporto Srl v Spedizioni Marittima del Golfo Srl* [ECLI:EU:C:1995:308], § 21; Judgment of the Court of 18 June 1998, case C-35/96, *Commission v Italy, cit.,* §§ 53 and 54; Judgment of the Court (Fifth Chamber) of 18 June 1998, case C-266/96, *Corsica Ferries France SA v Gruppo Antichi Ormeggiatori del porto di Genova Coop. arl, Gruppo Ormeggiatori del Golfo di La Spezia Coop. arl and Ministero dei Trasporti e della Navigazione* [ECLI:EU:C:1998:306], §§ 35 and 49; Judgment of the Court of 21 September 1999, case C-67/96, *Albany, cit.,* § 65; Judgment of the Court of 21 September 1999, joined cases C-115/97 to C-117/97, *Brentjens, cit.,* § 65; Judgment of the Court of 21 September 1999, case C-219/97, *Drijvende Bokken, cit.*, § 55.

[526] In this line, Prof. BUENDÍA clarifies that the existence of an exclusive or special right depends on legal factors, whereas the existence of a dominant position depends on economic factors, *vide* BUENDÍA, J.L. "Derechos especiales y exclusivos, servicios públicos y servicios de interés económico general", *op. cit.*, pp. 1064 and 1065. Also, stating that the entity would hold a dominant position as long as the reserved

entity is placed in a dominant position when it enjoys a position of economic strength which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers and ultimately of consumers[527]. In any case, the condemned behavior is the abuse of such dominant position – thus, the state measure must, actually or potentially, force the dominant entity to abuse of its position in the market or it must bring about effects similar to those of an abusive practice –effects doctrine–[528].

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area and activity matches the relevant market, *vide* MAÍLLO GONZÁLEZ-ORÚS, J. *Servicios de interés general y artículo 86 del Tratado CE… op. cit.*, pp. 15 and 16.

While in the majority of the cases the granting of a priviledge that shields the grantee's activity from competition does imply that such entity is placed in a dominant position, the key is whether the scope of the exclusive or special right covers a substantial part of the market that, from an economic point of view, is relevant. *Vide* on the application of competition rules to abuses of dominance when the dominant position has been created or encouraged by provisions laid down by the State, Judgment of the Court of 13 November 1975, case 26/75, *General Motors Continental NV v Commission of the European Communities* [ECLI:EU:C:1975:150], §§ 7 to 10; Judgment of the Court of 16 November 1977, case 13/77, *INNO v ATAB*, *cit.*, §§ 33 to 38; Judgment of the Court (Fifth Chamber) of 3 October 1985, case 311/84, *Centre belge d'études de marché - Télémarketing (CBEM) v SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB)* [ECLI:EU:C:1985:394], § 16. On the need to assess whether a dominant position exist, albeit exclusive rights being granted, Judgment of the Court of 4 May 1988, case 30/87, *Bodson*, *cit.*, §§ 27 to 29; Judgment of the Court of First Instance of 12 December 2000, case T-128/98, *Aéroports de Paris*, *cit.*, §§ 147 to 151.

[527] For all, *vide* the initial judgments of the EU judicature on this matter: Judgment of the Court of 14 February 1978, case 27/76, *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* [ECLI:EU:C:1978:22], §§ 65 and 66; Judgment of the Court of 13 February 1979, case 85/76, *Hoffmann-La Roche & Co. AG v Commission of the European Communities* [ECLI:EU:C:1979:36], § 38; Judgment of the Court of 9 November 1983, case 322/81, *Michelin I, cit.,* § 30; Judgment of the Court of 3 October 1985, case 311/84, *CBEM v CLT and IPB, cit.*, § 16; Judgment of the Court of 4 May 1988, case 30/87, *Bodson*, *cit.*, § 26.

[528] On actual abuses, as the state measure force entities to behave in a way that, had it been autonomously decided by the entity to behave in such a way, it would have been deemed an abuse of its dominant position, *vide* Judgment of the Court of 4 May 1988, case 30/87, *Bodson*, *cit.*, § 33; Judgment of the Court of 17 May 1994, case C-18/93, *Corsica Ferries Italia Srl v Corpo dei Piloti del Porto di Genova* [ECLI:EU:C:1994:195], § 43; Judgment of the Court of 10 December 1991, case C-179/90, *Porto di Genova*, *cit*., § 19; Commission Decision 94/119/EC of 21 December 1993 concerning a refusal to grant access to the facilities of the port of Rødby [Denmark], *Official Journal of the European Communities*, L 55/52, 26 February 1994, § 13.

With a view of building a EU model for social services based on a balance between State involvement and social needs, on the one hand, and considerations of efficiency and competition, on the other hand, the Commission has stimulated the inclusion of efficiency mechanisms, so that Member States are prevented from compensating costs of inefficient service providers and are forced to oblige providers to

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On potential abuses, as (a) they affect the structure of the market and lead to a potential unavoidable abuse – also known as theory of 'extension of a dominant position' or 'effects doctrine', since the state measure deprives article 102 TFEU of its effectiveness by extending the position from a market to another with effects similar to those produced by the abuse of a dominant position, *vide* Judgment of the Court of 13 December 1991, case C-18/88, *RTT, cit.*, §§ 20 to 23; Judgment of the Court of 19 March 1991, case C-202/88, *France v Commission, cit.*, §§ 51 to 52; Judgment of the Court of 18 June 1991, case C-260/89, *ERT v DEP, cit.,* §§ 12 and 35 to 38; Judgment of the Court of 27 October 1993, joined cases C-46/90 and C-93/91, *Procureur du Roi v Jean-Marie Lagauche and others* [ECLI:EU:C:1993:852], § 44; Judgment of the Court of 27 October 1993, case C-69/91, *Criminal proceedings against Francine Gillon, née Decoster* [ECLI:EU:C:1993:853], § 22; Judgment of the Court (Fifth Chamber) of 12 February 1998, case C-163/96, *Criminal proceedings against Silvano Raso and Others* [ECLI:EU:C:1998:54], §§ 25 to 31; Judgment of the Court (Sixth Chamber) of 17 May 2001, case C-340/99, *TNT Traco SpA v Poste Italiane SpA and Others* [ECLI:EU:C:2001:281], § 48; Judgment of the Court of 25 October 2001, case C-475/99, *Ambulanz Glöckner, cit.*, § 39; Judgment of the Court (Fifth Chamber) of 22 May 2003, case C-462/99, *Connect Austria Gesellschaft für Telekommunikation GmbH v Telekom-Control-Kommission, and Mobilkom Austria AG* [ECLI:EU:C:2003:297], §§ 80 to 84; Judgment of the Court (Third Chamber) of 30 March 2006, case C-451/03, *Servizi Ausiliari Dottori Commercialisti Srl v Giuseppe Calafiori* [ECLI:EU:C:2006:208], § 23; Judgment of the Court of 1 July 2008, case C-49/07, *MOTOE, cit.*, § 50; Judgment of the Court (Fourth Chamber) of 31 January 2008, case C-380/05, *Centro Europa 7 Srl v Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni and Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni* [ECLI:EU:C:2008:59], § 60; Judgment of the Court (Third Chamber) of 17 July 2014, case C-553/12 P, *European Commission v Dimosia Epicheirisi Ilektrismou AE (DEI)* [ECLI:EU:C:2014:2083], §§ 42 and 56 to 59; or (b) the priviledged entity is not in a position to satisfy the demand, Judgment of the Court of 23 April 1991, case C-41/90, *Höfner, cit.*, § 31; Judgment of the Court of 21 September 1999, case C-67/96, *Albany, cit.,* § 95; Judgment of the Court of 12 September 2000, joined cases C-180/98 to C-184/98, *Pavlov, cit.*, § 127; Judgment of the Court of 3 March 2011, case C-437/09, *AG2R Prévoyance*, *cit.*, §§ 68 and 69.

Also, *vide* BUENDÍA, J.L. "Derechos especiales y exclusivos, servicios públicos y servicios de interés económico general", *op. cit.*, pp. 1072 and 1073; MAÍLLO GONZÁLEZ-ORÚS, J. *Servicios de interés general y artículo 86 del Tratado CE… op. cit.*, p. 17; SZYSZCZAK, E. "Services of General Economic Interest and State Measures Affecting Competition", *op. cit.*, p. 6.

live up to efficiency standards[529]. Further, the Commission, in its Decision of 20 December 2011 on the application of article 106(2) TFEU to undertakings entrusted with the SGEI, has considered that, despite their nature, social SGI are a sub-type of SGEI, and it has subjected them to the same requirements –*Altmark* doctrine– in order not to consider that public service compensation to entities other than the public authority for the provision of social SGI constitutes State aid within the meaning of 107 TFEU: (1) the recipient provider must actually have public service obligations to discharge, and they must be clearly defined; (2) the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner; (3) the compensation must not exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit; and (4) where the undertaking that is to discharge the public service obligation is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs that a typical entity, well-run and adequately provided with the relevant means, would have incurred[530]. Therefore, we anticipate that the same conclusions that we may extract from the analysis of the *Altmark* doctrine are likewise applicable in case of non-economic SGI.

Going back to the idea of ensuring a level-playing-field, even if core competition rules are not directly applicable –neither, in so far as social services are organized as non-economic services of general interest, the rules of Directive 24/2014 are– it is submitted that a certain influence of the competition principles, while nuanced by the superior notion of the public interest, is to be appreciated: as long as contracting

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529 VAN DE GRONDEN, J.W. and RUSU, C.S. "The *Altmark* Update and Social Services… *op. cit.*, pp. 214 and 215.

530 Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (notified under document C(2011) 9380), *Official Journal of the European Union*, L 7/3, 11 January 2012, article 2(1)(b) and (c) and recital 4; Judgment of the Court of 24 July 2003, case C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht* [ECLI:EU:C:2003:415], §§ 89 to 93; Judgment of the Court of 22 October 2015, case C-185/14, *EasyPay, cit.,* § 56.

authorities are compelled to conduct a public procurement process in order to select a provider that will carry out the non-economic activity in the public interest, they must respect, to the extent permitted by the nature of the service to be provided, the principles of transparency and equal treatment of economic operators, as well as they must ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, by choosing the service provider that presents the best price-quality ratio, taking into account quality and sustainability criteria[531]. Such 'best price-quality ratio' allows for the introduction of specific criteria in the determination of the Most Economically Advantageous Tender, like quality and sustainability, as the key factor is whole life cost, not lowest purchase price – i.e., a high minimum quality standard might be set and then accept the lowest cost bid that meets that standard[532].

The light touch regime is a specific set of rules for certain service contracts that tend to be of lower interest to cross-border competition, in so far as services that do not affect trade between Member States or that are of minor importance are excluded from

[531] Directive 2014/24, articles 76(1) and 76(2), read altogether with the first footnote of Annex XIV. Also, *vide* recital 114 of the Directive 2014/24: «Member States and public authorities remain free to provide [social] services themselves or to organize social services in a way that does not entail the conclusion of public contracts, for example through the mere financing of such services of by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority, without any limits or quotas, provided that such a system ensures sufficient advertising and complies with the principles of transparency and non-discrimination». Also, *vide* Judgment of the Court of 3 June 2010, case C-203/08, *Sporting Exchange, cit.,* § 47; Judgment of the Court of 17 December 2015, joined cases C-25/14 and C-26/14, *UNIS, cit.*, § 35.

On the constraints introduced by the Almunia package with regard to the financing of public services, *vide* SÁNCHEZ GRAELLS, A. and SZYSZCZAK, E. "Modernising Social Services in the Single Market… *op. cit.*, pp. 73 to 95.

[532] CROWN COMMERCIAL SERVICE. *The Public Contracts Regulations 2015 – Guidance on the new Light Touch Regime for Health, Social, Education and certain other service contracts*, October 2015, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/469057/LTR_guidance_v28_updated_October_2015_to_publish__1_.pdf (last consulted: 22.05.2016), p. 9; SÁNCHEZ GRAELLS, A. and SZYSZCZAK, E. "Modernising Social Services in the Single Market… *op. cit.*, pp. 90 and 91.

the scope of EU competition rules[533]. However, this regime, set out in articles 74 to 77 of the Directive 2014/24, does not apply to social services organized as non-economic SGI[534].

b. SGEI: the solution initially devised to adequately address all collective needs and ultimately subjected to a progressive liberalization

SGEIs, rooted in the shared values of the EU, play a central role in promoting social and territorial cohesion and contribute directly to the GDP[535]. Their rise is to be read in conjunction with the liberalization process accomplished in the second half of the 1980's and in the 90's, which led (or was supposed to lead) to the opening to competition of certain sectors traditionally linked to the provision of SGI – i.e., telecommunications, postal services, transport and energy sectors. In such a scenario, the Member States feared that EU action would impair their regulation powers and negatively impact the welfare state[536].

'SGEI' is used to describe a myriad of services embracing universal service obligations of an economic nature that public authorities identify as being of particular importance to citizens – that is, public service obligations[537]. Despite not containing a

[533] CROWN COMMERCIAL SERVICE. *The Public Contracts Regulations 2015… op. cit.*, p. 3.

[534] For a critical overview of the light touch regime, *vide* SÁNCHEZ GRAELLS, A. and SZYSZCZAK, E. "Modernising Social Services in the Single Market… *op. cit.*, pp. 89 to 91. On the definition of effect on trade and on services of minor importance, *vide* Commission Notice – Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, *Official Journal of the European Union*, C-101/81, 27 April 2004; 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 Notice), *Official Journal of the European Union*, C 291/1, 30 August 2014.

[535] EUROPEAN COMMISSION. *Reform of the EU rules applicable to State aid in the form of public service compensation – Commission Staff Working Paper – Impact Assessment*, SEC(2011) 1581 final, Brussels, 20 December 2011, § 2.1.2; EUROPEAN COMMISSION. C(2011) 9404, *cit.*, p. 2.

[536] MAÍLLO GONZÁLEZ-ORÚS, J. *Servicios de interés general y artículo 86 del Tratado CE… op. cit.*, p. 5.

[537] BUENDÍA, J.L. "Derechos especiales y exclusivos, servicios públicos y servicios de interés económico general", *op. cit.*, p. 1099; COMMISSION OF THE EUROPEAN COMMUNITIES.

definition of 'SGEI', article 14 TFEU (ex article 16 TEC) makes clear the prominent character of SGEI:

> Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.

Article 16 TEC (nowadays, article 14 TFEU) was introduced by the Treaty of Amsterdam[538]. As pointed out before, the market opening –in particular that of the network industries (telecoms, postal services, energy and transport)– that started in late 1980's and reached full speed in the 90s aimed at completing the internal market. In that context, some Member States feared that privatization would be favored, to the detriment of SGEI. As a consequence, article 16 TEC was introduced and a balance reached between principles of competition and the freedoms of the internal market on one hand and the traditional prerogatives of the Member States for defining and financing SGEI on the other hand[539]. In any case, to the extent that article 86(2) TEC –a

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COM(2003) 270 final, *cit.*, pp. 35 to 45; COMMISSION OF THE EUROPEAN COMMUNITIES. COM(2004) 374 final, *cit.*, p. 22; MAÍLLO GONZÁLEZ-ORÚS, J. *Servicios de interés general y artículo 86 del Tratado CE… op. cit.*, pp. 24 and 25; SZYSZCZAK, E. and VAN DE GRONDEN, J.W. (Ed.) *Financing Services of General Economic Interest: Reform and Modernization*. The Hague, Asser Press, 2013, p. 982.

[538] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, *Official Journal of the European Communities*, C 340/1, 10 November 1997.

[539] MAXIAN RUSCHE, T. "The Almunia Package: Legal Constraints, Policy Procedures and Political Choices", in SZYSZCZAK, E. and VAN DE GRONDEN, J.W. (Ed.), *Financing Services of General*

directly applicable provision, designed to implement the objectives defined in the Treaty– was not amended, the introduction of article 16 TEC did not affect in any form whatsoever the relationship between competition and SGEI under EU law, and it can only be seen as an element of interpretation of the, at the time, article 86(2) TEC (nowadays, article 106(2) TFEU)[540]. Further, by stressing that SGEI were the shared responsibility of the Member States and the EU, it provided a legal base for EU legislation on SGEI, which the Commission has so far declined to use, while focusing upon delivering soft law instruments –with a horizontal perspective– in the area[541]. This

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Economic Interest: Reform and Modernization, The Hague, Asser Press, 2013, [pp. 99-124] pp. 101 to 103.

540 BAQUERO CRUZ, J. "Beyond Competition… *op. cit.*, p. 177. On the fact that ECJ's interpretation of directly applicable provisions cannot be called into question as long as they have not been amended, *vide* Judgment of the Court (Sixth Chamber) of 3 October 2000, case C-9/99, *Echirolles Distribution SA v Association du Dauphiné and Others* [ECLI:EU:C:2000:532], § 24.

541 SZYSZCZAK, E. and VAN DE GRONDEN, J.W. (Ed.) *Financing Services of General Economic Interest… op. cit.*, p. 12.

The Almunia package, a set of measures to regulate the relationship between State aid rules and the financing of SGEI, is the latest example of the resort by the Commission to soft law. It specifies the conditions under which State aid for SGEI can be found to be compatible with Article 106(2) TFEU and it establishes a more prescriptive methodology for determining the compensation to the undertaking entrusted with offering the service on behalf of the public sector, taking into account the range of ways of organizing public services throughout the EU. *Vide* ALMUNIA, J. *Reforming EU State aid rules on public services: The way forward*. SPEECH/11/300, EPC policy Dialogue, Brussels, 2 May 2011, p. 2; BUENDÍA SIERRA, J.L. and PANERO RIVAS, J.M. "The Almunia Package: State Aid and Services of General Economic Interest", in SZYSZCZAK, E. and VAN DE GRONDEN, J.W. (Ed.), *Financing Services of General Economic Interest: Reform and Modernization*, The Hague, Asser Press, 2013, [pp. 125-148] pp. 126 and 147; KAVANAGH, J. "Financing Services of General Economic Interest: The European Commission's Economic Tests", in SZYSZCZAK, E. and VAN DE GRONDEN, J.W. (Ed.), *Financing Services of General Economic Interest: Reform and Modernization*, The Hague, Asser Press, 2013, [pp. 149-159] p. 150.

The Almunia package is composed by the following instruments: EUROPEAN COMMISSION. C(2011) 9404, *cit.*; Communication from the Commission on a European Union framework for State aid in the form of public service compensation (2011), *Official Journal of the European Union*, C 8/15, 11 January 2012; EUROPEAN COMMISSION. *Commission Decision on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest*, C(2011) 9380 final, Brussels, 20 December 2011; Commission Regulation (EU) No 1407/2013 of 18

reluctance may be due to the contested value attributed to article 16 TFEU: some Member States, when drafting the flawed Constitutional Treaty, claimed that article 16 TFEU had an essentially declaratory value and pleaded for the constitutional text to contain a legal basis allowing the EU to adopt framework legislation at European level[542].

Likewise, Article 1 of Protocol No. 26 includes some hints that help clarify and understand their nature:

> PROTOCOL (No 26)
>
> ON SERVICES OF GENERAL INTEREST
>
> THE HIGH CONTRACTING PARTIES,
>
> WISHING to emphasize the importance of services of general interest,
>
> HAVE AGREED UPON the following interpretative provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union:
>
> Article 1
>
> The shared values of the Union in respect of services of general economic interest within the meaning of Article 14 of the Treaty on the Functioning of the European Union include in particular:
>
> - the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organizing services of general economic interest as closely as possible to the needs of the users;

December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, *Official Journal of the European Union*, L 352/1, 24 December 2013; EUROPEAN COMMISSION. SEC(2011) 1581 final, *cit.*; EUROPEAN COMMISSION. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A Quality Framework for Services of General Interest in Europe*, COM(2011) 900 final, Brussels, 20 December 2011; Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, *Official Journal of the European Union*, C 262/1, 19 July 2016.

[542] EUROPEAN PARLIAMENT. *The European Convention – Final report of Working Group XI on Social Europe*. CONV 516/1/03, REV 1, WG XI 9, Brussels, 4 February 2003, § 32.

- the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations;

- a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.

Finally, article 36 of the Charter of Fundamental Rights of the European Union, emphasizing the fundamental character of the SGEI, reads as follows:

> Access to services of general economic interest.
>
> The Union recognizes and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union.

Such article is a programmatic provision and it does not create any new right; instead, it merely sets out the principle of respect by the EU for the access to SGEI as provided for by national provisions, when those provisions are compatible with EU law[543].

In the absence of specific EU rules, Member States are free to determine how SGEI should be organized and financed, as long as such services exhibit special characteristics as compared with the general economic interest of other economic activities; hence, the Commission is limited to checking whether the Member State has made a manifest error when defining the service as a SGEI[544]. SGEI is, thus, a dynamic

[543] PRAESIDIUM OF THE EUROPEAN PARLIAMENT. *Draft Charter of Fundamental Rights of the European Union*, Charte 4473/00, Convent 49, Brussels, 11 October 2000, p. 33. On the legal value of the Charter of Fundamental Rights of the European Union, stating that the rights, freedoms and principles contained therein have the same legal value as the Treaties, *vide* article 6(1) TEU.

[544] EUROPEAN COMMISSION. C(2011) 9404, *cit.*, p. 2. Also, *vide* Judgment of the Court of 10 December 1991, case C-179/90, *Porto di Genova*, *cit.*, § 27; Judgment of the Court (Sixth Chamber) of 17 July 1997, case C-242/95, *GT-Link A/S v De Danske Statsbaner (DSB)* [ECLI:EU:C:1997:376], § 53; Judgment of the Court of 18 June 1998, case C-266/96, *Corsica Ferries, cit.*, § 45; Judgment of the Court of First Instance (Second Chamber, extended composition) of 15 June 2005, case T-17/02, *Fred Olsen, SA v Commission of the European Communities* [ECLI:EU:T:2005:218], § 216; Judgment of the Court of First Instance (Third Chamber, extended composition) of 12 February 2008, case T-289/03, *British*

concept, subject to evolve, in the light of factors such as the European integration process, technological progress and changes in the perception of what needs must be covered by the State[545]. Among the services that, at some point, have been considered SGEI, we find the following: the operation of a river port that deals with the largest part of the traffic of goods by river in a Member State; the establishment and operation of a public broadband communication network which allows for generalized access to broadband infrastructure for all the population; the distribution of water, securing a regular supply and under conditions that fully guarantee the protection of public health; the operation of television broadcast services; the distribution of electric power; the operation of certain transport lines; the recruitment and placement of workers; the collection, carriage and distribution of mail of all users throughout the territory of the Member State; the performance of obligations flowing from the Universal Postal Convention; the provision of compulsory piloting services; the operation of a supplementary pension scheme; the management of building waste; the permanent provision of emergency ambulance services[546].

United Provident Association Ltd (BUPA), BUPA Insurance Ltd and BUPA Ireland Ltd v Commission of the European Communities [ECLI:EU:T:2008:29], §§ 166 to 169 and 172.

[545] BUENDÍA, J.L. "Derechos especiales y exclusivos, servicios públicos y servicios de interés económico general", *op. cit.*, p. 1102. To back up the dynamism of the concept, the EU judicature stated in *RTT* the following: «At the present stage of development of the Community, that monopoly, which is intended to make a public telephone network available to users, constitutes a service of general economic interest within the meaning of article [106(2)] of the Treaty», Judgment of the Court of 13 December 1991, case C-18/88, *RTT, cit.*, § 16. Also, *vide* EUROPEAN COMMISSION. C(2011) 9404, *cit.*, pp. 12 and 13.

[546] On the operation of a river port, *vide* Judgment of the Court of 14 July 1971, case 10/71, *Ministère public luxembourgeois v Madeleine Muller, Veuve J.P. Hein and others* [ECLI:EU:C:1971:85], §§ 10 and 11; on the operation of a telecommunications network, *vide* Judgment of the Court of 13 December 1991, case C-18/88, *RTT, cit.*, § 16; COMMISSION OF THE EUROPEAN COMMUNITIES. *Aide d'État nº N 381/2004 – France – Projet de réseau de telecommunication haut debit des Pyrénées-Atlantiques*, C(2004) 4343 fin, Brussels, 16 November 2004, §§ 45 to 68; on water-supply, *vide* Commission Decision 82/371/EEC of 17 December 1981 relating to a proceeding under Article 85 of the EEC Treaty – IV/29.995 – NAVEWA-ANSEAU, *Official Journal of the European Communities*, L 167/39, 15 June 1982, § 65; on television, *vide* Judgment of the Court of 30 April 1974, case 155/73, *Giuseppe Sacchi* [ECLI:EU:C:1974:40], §§ 14 and 15; Commission Decision 89/536/EEC of 15 September 1989 relating to a proceeding under Article 85 of the EEC Treaty – IV/31.734 – Film purchases by German television stations, *Official Journal of the European Communities*, L 284/36, 3 October 1989, §§ 39 and 40;

The provision of SGEI may require public intervention to guarantee that they are supplied to the extent and under the conditions (price, objective, quality characteristics, continuity and access to the service) requested by society[547]. Certain SGEIs can be provided by (public or private) undertakings without specific public financial support, whereas other SGEIs can only be provided if the authority concerned offers financial compensation to the provider (direct finance or other benefits such as special tax, social security rules, state guarantees, special or exclusive rights, tariff averaging, contributions by market participants or solidarity based financing), in order to offset the additional costs stemming from the public service obligation; from a competition law perspective, thus, State aid control is imperative in order to ensure that the

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Commission Decision 91/130/EEC of 19 February 1991 relating to a proceeding pursuant to Article 85 of the EEC Treaty – IV/32.524 – Screensport/EBU Members, *Official Journal of the European Communities*, L 63/32, 9 March 1991, §§ 68 and 69; on electricity, *vide* Commission Decision 91/50/EEC of 16 January 1991 relating to a proceeding under Article 85 of the EEC Treaty – IV/32.732 – Ijseelcentrale and others, *Official Journal of the European Communities*, L 28/32, 2 February 1991, §§ 40 and 41; Judgment of the Court of 27 April 1994, case C-393/92, *Municipality of Almelo and others v NV Energiebedrijf Ijsselmij* [ECLI:EU:C:1994:171], § 47; on transport lines, *vide* Judgment of the Court of 11 April 1989, case 66/86, *Saeed, cit.*, § 55; on the placement of workers, *vide* Judgment of the Court of 23 April 1991, case C-41/90, *Höfner, cit.*, §§ 24 and 25; on basic postal services, *vide* Judgment of the Court of 19 May 1993, case C-320/91, *Corbeau*, *cit*., § 15; Judgment of the Court of First Instance (Third Chamber, extended composition) of 27 February 1997, case T-106/95, *Fédération française des sociétés d'assurances (FFSA), Union des sociétés étrangères d'assurance (USEA), Groupe des assurances mutuelles agricoles (Groupama), Fédération nationale des syndicats d'agents généraux d'assurances (FNSAGA), Fédération française des courtiers d'assurances et de reassurances (FCA) and Bureau international des producteurs d'assurances et de réassurances (BIPAR) v Commission of the European Communities* [ECLI:EU:T:1997:23], §§ 108 and 192; on obligations flowing from the Universal Postal Convention, *vide* Judgment of the Court of 10 February 2000, joined cases C-147/97 and C-148/97, *Deutsche Post*, *cit*., § 44; on compulsory piloting services, *vide* Judgment of the Court of 17 May 1994, case C-18/93, *Corsica Ferries, cit*., § 45; on supplementary pension schemes, *vide* Judgment of the Court of 21 September 1999, case C-67/96, *Albany, cit.,* §§ 102 to 107; on building waste, *vide* Judgment of the Court of 23 May 2000, case C-209/98, *Sydhavnens Sten & Grus, cit.*, §§ 73 to 75; on emergency ambulance services, *vide* Judgment of the Court of 25 October 2001, case C-475/99, *Ambulanz Glöckner, cit.*, § 55.

[547] KAVANAGH, J. "Financing Services of General Economic Interest… *op. cit.*, p. 151; PESARESI, N.; SINNAEVE, A., GUIGUE-KOEPPEN, V.; WIEMANN, J. and RADULESCU, M. "The New State Aid Rules for Services of General Economic Interest (SGEI)", in *Competition policy newsletter*, 2012, 1, [pp. 1-7] p. 4.

compensation is both necessary and proportionate to the objective pursued, so as to avoid distortions of competition[548]. Furthermore, given that a service is already satisfactorily provided by market forces under conditions consistent with the public interest, a public service obligation cannot be imposed for such activity[549].

Today, SGEI and competition are to be regarded as complementary. While competition is a tool to achieve the objectives of the EU, Member States' interests are to be protected and reconciled with EU interest in ensuring compliance with rules on competition and in preserving the unity of the common market[550]. Article 106(2) TFEU, as interpreted by the EU judicature, is the instrument that enables the accommodation of those apparently colliding interests.

Free competition and the four freedoms are general principles, not absolute values; as such, they are to be regarded as tools to achieve the objectives of the EU, and not as ends in themselves – i.e., exceptions are admitted in so far as they are based on the general interest[551].

Article 106(2) TFEU may be seen as a switch-rule –i.e., a particular system–, rather than a derogation or justification, that establishes the conditions for the application or not of the Treaty rules with regards to situations involving undertakings entrusted with the operation of SGEI, in an attempt to reach a compromise between

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[548] PESARESI, N.; SINNAEVE, A., GUIGUE-KOEPPEN, V.; WIEMANN, J. and RADULESCU, M. "The New State Aid Rules for Services of General Economic Interest (SGEI)", *op. cit.*, p. 1; SZYSZCZAK, E. and VAN DE GRONDEN, J.W. (Ed.) *Financing Services of General Economic Interest… op. cit.*, p. 983.

[549] Communication from the Commission – European Union framework for State aid in the form of public service compensation (2011), *Official Journal of the European Union*, C 8/15, 11 January 2012, § 13. Also, *vide* KAVANAGH, J. "Financing Services of General Economic Interest… *op. cit.*, p. 152.

[550] Judgment of the Court of 19 March 1991, case C-202/88, *France v Commission, cit.*, § 12; Judgment of the Court of 23 October 1997, case C-157/94, *Commission of the European Communities v Kingdom of the Netherlands* [ECLI:EU:C:1997:499], § 39; Judgment of the Court of 21 September 1999, case C-67/96, *Albany, cit.,* § 103.

[551] On the nature of free competition provisions, *vide* previous section, and Protocol no. 27 and Article 3(3) TEU. Also, *vide* MAÍLLO GONZÁLEZ-ORÚS, J. *Servicios de interés general y artículo 86 del Tratado CE… op. cit.*, p. 22.

traditional state duties towards citizens and the demands of EU-wide competitive markets[552]:

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

First, it must be clarified that paragraph 2 of Article 106 TFEU is an autonomous provision whose substance surpasses the scope of paragraph 1 (previously explained when dealing with the granting of exclusive and special rights)[553]. Second, the mere existence of Article 106(2) TFEU entails that the qualification of an activity as 'economic' is not tantamount to its compulsory opening to competition; neither does it imply that the activity could not be of general interest, otherwise, the very existence of Article 106(2) TFEU would be meaningless[554]. Some argue that the maintenance of a free and competitive economic system constitutes an important SGI, placing it at the same range as the provision of SGEI; however, from our standpoint, given their purposes, the adequate provision of SGEI is of greater importance than the

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[552] On the character of 'particular system' attributed to article 106(2) TFEU, *vide* Judgment of the Court of 18 June 1975, case 94/74, *Industria Gomma Articoli Vari IGAV v Ente nazionale per la cellulosa e per la carta ENCC* [ECLI:EU:C:1975:81], § 33. Contrariwise, on its character of 'exception', which requires a strict interpretation, *vide* Judgment of the Court of 27 March 1974, case 127/73, *Belgische Radio en Televisie and société belge des auteurs, compositeurs et éditeurs v SV SABAM and NV Fonior* [ECLI:EU:C:1974:25], § 19; Judgment of the Court of 23 October 1997, case C-157/94, *Commission v Netherlands, cit.*, § 37; Judgment of the Court of First Instance of 27 February 1997, case T-106/95, *FFSA, cit.*, § 173; Judgment of the Court of First Instance of 19 June 1997, case T-260/94, *Air Inter*, *cit.*, § 135; Judgment of the Court of First Instance of 12 December 2000, case T-128/98, *Aéroports de Paris*, *cit.*, § 227. Also, *vide* BAQUERO CRUZ, J. "Beyond Competition… *op. cit*., p. 186; BUENDÍA, J.L. "Derechos especiales y exclusivos, servicios públicos y servicios de interés económico general", *op. cit.*, p. 1097; SZYSZCZAK, E. and VAN DE GRONDEN, J.W. (Ed.) *Financing Services of General Economic Interest… op. cit.*, p. 982.

[553] BAQUERO CRUZ, J. "Beyond Competition… *op. cit*., p. 186.

[554] BUENDÍA, J.L. "Derechos especiales y exclusivos, servicios públicos y servicios de interés económico general", *op. cit.*, pp. 1061 and 1062.

accomplishment of competition law's goal – that is, the accomplishment of state duties towards citizens in the public interest is to be view of further significance than the achievement of economic efficiency[555].

In the realm of public procurement, both competition rules –together with State aid control– and the provision of SGEI are, as stated before, complementary – that is, whereas rules contained in Articles 101 to 109 TFEU seek to avoid the conclusion that the functioning of the common market and free competition are fettered from action by private undertakings, their joint application with Article 106(2) TFEU aims at preventing Member states from intervening directly in favor of specific undertakings or sectors of the industry, at deterring indirect State aids through the arbitrary award of public contracts –or, to put it in other words, market foreclosure without a competitive selection procedure–, the concession of excessively long public service assignments, the improper bundling of tasks, the unlawful financing of a non-replicable infrastructure to which competitors do not have fair and non-discriminatory access or the provision of immaterial advantages through the undue granting of special or exclusive rights[556].

Article 106(2) TFEU plays a twofold role: (a) vertical, as it defines the relationship of the Member states *vis-à-vis* the EU – i.e., the room for manoeuvre of the former and the limits to latter's action against potential anticompetitive Member states' behaviors; and (b) horizontal, as it seeks to set a balance among the different EU interests[557]. Members states' anticompetitive measures, if they are to be allowed, must comply with the same criteria afore-mentioned when examining the overriding reasons of general interest: the measure must be justified by imperative requirements in the general interest, it must be applied in a non-discriminatory manner, it must be appropriate to ensure the attainment of the objective pursued and it may not go beyond

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[555] For a reflection on the way the understanding of competition law may influence the perception of what the priority is, competition or SGEI, *vide* BAQUERO CRUZ, J. "Beyond Competition… *op. cit.*, pp. 174 to 175.

[556] HATZOPOULOS, V. "Health Law and Policy… *op. cit.,* p. 147; PESARESI, N.; SINNAEVE, A., GUIGUE-KOEPPEN, V.; WIEMANN, J. and RADULESCU, M. "The New State Aid Rules for Services of General Economic Interest (SGEI)", *op. cit.*, p. 7.

[557] MAÍLLO GONZÁLEZ-ORÚS, J. *Servicios de interés general y artículo 86 del Tratado CE… op. cit.*, p. 23.

what is necessary for that purpose[558]. Article 106(2) TFEU could be, thus, understood as a codification of a specific set of overriding reasons of general interest –the provision of SGEI– and as an explicit acknowledgement of their preemptive position with regard to competitive concerns. In any case, the last sentence of Article 106(2) TFEU –«The development of trade must not be affected to such an extent as would be contrary to the interests of the Union»– must be viewed as an exception to the exception contained in Article 106(2) TFEU – that is, as a sort of clause of non-detriment to the EU interests, which are superior, and hence it enables the Commission to intervene if it deems that the application of the 106(2) TFEU exception could harm the EU interests.

The most alleged requirement is that of the need to guarantee a universal service[559]. The granting of a universal service comprises a minimum set of services of a given quality to which all users and consumers have access, at uniform tariff rates and on similar quality conditions[560]. Therefore, the exception contained in Article 106(2) TFEU may justify (a) the granting of exclusive or special rights –internal financing–, (b) the set of a sectorial fund –sectorial funding– or (c) the direct subsiding by the State –external financing– in order to comply with the universal service obligation.

Whenever an exclusive or special right is granted, Article 106(1) TFEU applies. Consequently, conclusions reached in the previous section (2.I.B.a) are applicable. The existence of a universal service obligation does not automatically render exclusive rights compatible with the Treaty; the SGEI provider must operate efficiently[561]. Further, the granting of the exclusive right is anchored in the assumption of the universal service obligation by the SGEI provider – i.e., the economic equilibrium of

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[558] *Vide* Section 2, Chapter I, point 2, letter A.

[559] BUENDÍA, J.L. "Derechos especiales y exclusivos, servicios públicos y servicios de interés económico general", *op. cit.*, p. 1110; MAÍLLO GONZÁLEZ-ORÚS, J. *Servicios de interés general y artículo 86 del Tratado CE… op. cit.*, pp. 26 and 27.

[560] Judgment of the Court of 19 May 1993, case C-320/91, *Corbeau*, *cit.*, § 15; Judgment of the Court of 27 April 1994, case C-393/92, *Almelo, cit.*, § 48. Also, *vide* COMMISSION OF THE EUROPEAN COMMUNITIES. *Communication from the Commission – Services of General Interest in Europe*, COM(2000) 580 final, Brussels, 20 September 2000, pp. 30 and 31.

[561] BUENDÍA, J.L. "Derechos especiales y exclusivos, servicios públicos y servicios de interés económico general", *op. cit.*, p. 1116. Also, *vide* Judgment of the Court of 25 October 2001, case C-475/99, *Ambulanz Glöckner, cit.*, § 62.

the undertaking cries for the payback of the non-profitable supply services to the SGEI provider through the granting of an exclusive right, otherwise it would be harder or impossible for it to maintain its supply to non-profitable areas[562]. However, on one hand, such a conclusion is not extensible to specific services dissociable from the SGEI, which, not being subject to compromise the economic equilibrium of the SGEI provider, cannot escape from been submitted to competition[563]. On the other hand, before granting an exclusive right, an analysis of the proportionality of such a measure should be carried out in order to determine whether it is economically viable any less restrictive way that both allows competition and guarantees the adequate provision of the universal service[564]. Whereas opponents of the granting of exclusive rights would argue that those rights are not indispensable to ensure the supply of the universal service, the burden of proving that the suppression of the exclusive right would lead to serious financial difficulties which could jeopardize the provision of the SGEI is on the side who claims it – that is, the Member state or the privileged undertaking; however, claimants may not be obliged to positively demonstrate that there is no other (hypothetic) conceivable measure that, being less restrictive, can comply with the

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[562] Prof. BUENDÍA, by way of example, puts forward the supply to densely populated areas and compares it to the supply to rural areas: consumers located in densely populated areas, given the cost of their supply, they may overpay it, while consumers located in rural areas may not cover the costs incurred by the undertaking in charge of guaranteeing their supply. *Vide* BUENDÍA, J.L. "Derechos especiales y exclusivos, servicios públicos y servicios de interés económico general", *op. cit.*, pp. 1110 and 1111. It is also known as 'cherry picking' or 'écremage', as in the absence of the exclusive right, competitors may take the 'cream', the 'cherries', the profitable services, and leave the SGEI provider with the 'skimmed milk', with the 'tree', with the non-profitable services. *Vide* Judgment of the Court of 19 May 1993, case C-320/91, *Corbeau*, *cit.*, §§ 17 and 18; Judgment of the Court of 27 April 1994, case C-393/92, *Almelo, cit.*, §§ 46 and 49; Judgment of the Court of 25 October 2001, case C-475/99, *Ambulanz Glöckner, cit.*, § 55; Judgment of the Court of First Instance of 19 June 1997, case T-260/94, *Air Inter*, *cit.*, §§ 129 and 130.

[563] Judgment of the Court of 19 May 1993, case C-320/91, *Corbeau*, *cit.*, § 19.

[564] Judgment of the Court of 25 June 1998, case C-203/96, *Chemische Afvalstoffen Dusseldorp, cit.*, § 65 to 67. BUENDÍA, J.L. "Derechos especiales y exclusivos, servicios públicos y servicios de interés económico general", *op. cit.*, pp. 1114 and 1119; MAÍLLO GONZÁLEZ-ORÚS, J. *Servicios de interés general y artículo 86 del Tratado CE… op. cit.*, pp. 27 and 28.

universal service obligation[565]. Still, potential competitors may prove, through a detailed analysis of actual alternative methods, that there would be less restrictive choices[566].

A more stringent approach is to be preferred in relation with the granting of new exclusive rights or the extension of existing exclusive rights to (traditionally) non-reserved areas – all in all, the extension of a reserved sector is to be deemed unjustified, as before the universal service was financed with a narrower reserved sector[567]. In such cases, direct financing or sectorial financing, if possible, are prioritize. Indirect financing –that is, the granting of exclusive rights– would be justified in so far as, absent the exclusive rights, the provision of the universal service obligation assigned to the undertaking would be hampered. The performance of the universal service obligation must be *de facto* impossible or extremely difficult[568]. Furthermore, the income arising from the exclusive rights granted cannot exceed the costs (plus a reasonable profit) of providing the universal service, provided that the privileged provider is sufficiently efficient[569]. One must fear that the granting of an exclusive right might enclose protectionist purposes, rather than being essential for the compliance with a universal service obligation.

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[565] In the following cases, the ECJ considered that Member states offered enough explanations on the problems that would follow the suppression of exclusive rights, while the Commission just provides with legal arguments, without entering into answering the economic arguments put forward by the Member states: Judgment of the Court of 23 October 1997, case C-157/94, *Commission v Netherlands, cit.*, §§ 48 to 64; Judgment of the Court of 23 October 1997, case C-158/94, *Commission of the European Communities v Italian Republic* [ECLI:EU:C:1997:500], §§ 46 to 60; Judgment of the Court of 23 October 1997, case C-159/94, *Commission of the European Communities v French Republic* [ECLI:EU:C:1997:501], §§ 90 to 107. Also, *vide* BUENDÍA, J.L. "Derechos especiales y exclusivos, servicios públicos y servicios de interés económico general", *op. cit.*, p. 1115.

[566] MAÍLLO GONZÁLEZ-ORÚS, J. *Servicios de interés general y artículo 86 del Tratado CE… op. cit.*, p. 32.

[567] BUENDÍA, J.L. "Derechos especiales y exclusivos, servicios públicos y servicios de interés económico general", *op. cit.*, pp. 1120.

[568] MAÍLLO GONZÁLEZ-ORÚS, J. *Servicios de interés general y artículo 86 del Tratado CE… op. cit.*, p. 31.

[569] Judgment of the Court of 25 October 2001, case C-475/99, *Ambulanz Glöckner, cit.*, § 62; Judgment of the Court of First Instance of 27 February 1997, case T-106/95, *FFSA, cit.*, §§ 108 and 192.

As for pre-existing exclusive rights, despite the fact that the EU judicature has shown a more lenient approach, nowadays, even if EU specific harmonizing regulation has not been passed so far, an analysis on whether the maintenance of existing exclusive rights is the less restrictive option needs (ideally) to be conducted[570].

At the beginning, payments by a public authority to a specific undertaking for the costs incurred by the latter when providing a service in the public interest were not deemed State aid, as long as such payments were equal or less than the net cost of the service; consequently, Member states were not obliged to notify and obtain Commission's prior permission for the payments[571]. After, the ECJ considered that, in such cases, there existed an obligation of prior notification that implied the suspension of the implementation of the so-claimed aid, until clearance by the Commission[572].

In *Ferring*, the ECJ came back to the previous approach: it considered that the tax exemption granted to SGEI providers corresponded to the additional costs actually incurred by them in discharging their public service obligations and, consequently, it was to be regarded as compensation for the services they provide and hence not as State aid[573].

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[570] Initially, the ECJ did not conduct an analysis on the existence of less restrictive options and it just focused on the necessity of granting exclusive rights to the universal service provider, *vide* Judgment of the Court of 27 April 1994, case C-393/92, *Almelo*, *cit.*, §§ 48 to 50. That may be due to the need of establishing a transition period for undertakings granted with pre-existing traditional exclusive rights in order to adapt to the, at the time, newly set requirements. *Vide* MAÍLLO GONZÁLEZ-ORÚS, J. *Servicios de interés general y artículo 86 del Tratado CE… op. cit.*, p. 32. On the contrary, if a harmonization process has been undertaken (a Directive or an Article-106(3)-TFEU decision), the same stringent approach applied to the granting of new exclusive rights is fully applicable. *Vide* Judgment of the Court (Sixth Chamber) of 18 May 2000, case C-206/98, *Commission of the European Communities v Kingdom of Belgium* [ECLI:EU:C:2000:256], § 45.

[571] BUENDÍA, J.L. "Derechos especiales y exclusivos, servicios públicos y servicios de interés económico general", *op. cit.*, pp. 1125.

[572] Judgment of the Court (Fifth Chamber) of 22 June 2000, case C-332/98, *French Republic v Commission of the European Communities* [ECLI:EU:C:2000:338], §§ 27 to 32.

[573] Judgment of the Court (Sixth Chamber) of 22 November 2001, case C-53/00, *Ferring SA v Agence centrale des organisms de sécurité sociale (ACOSS)* [ECLI:EU:C:2001:627], §§ 27 to 33.

Several Advocates General suggested setting aside or limiting the reach of the *Ferring* doctrine, but it was not until *Altmark* that the ECJ settle, once and for all, the matter[574]. Four cumulative conditions must be met in order not to consider that a public service compensation is State aid: (1) the recipient provider must actually have public service obligations to discharge, and they must be clearly defined; (2) the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner; (3) the compensation must not exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit; and (4) where the undertaking that is to discharge the public service obligation is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs that a typical entity, well-run and adequately provided with the relevant means, would have incurred[575].

In so far as they distort competition on the internal market and influence intracommunity trade, Member States are not allowed to grant State aid to undertakings[576]. The Commission, however, has the power to approve national State aid

[574] Opinion of the AG Léger delivered on 19 March 2002, case C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht* [ECLI:EU:C:2002:188], § 73; Opinion of the AG Jacobs delivered on 30 April 2002, case C-126/01, *Ministère de l'Économie, des Finances et de l'Industrie v GEMO SA* [ECLI:EU:C:2002:273], §§ 105 and 128 to 130; Opinion of the AG Stix-Hackl delivered on 7 November 2002, joined cases C-34/01 to C-38/01, *Enirisorse SpA v Ministero delle Finanze* [ECLI:EU:C:2002:643], §§ 148 to 152.

[575] Judgment of the Court of 24 July 2003, case C-280/00, *Altmark*, *cit*., §§ 89 to 94; Judgment of the Court of 22 October 2015, case C-185/14, *EasyPay, cit.,* §§ 47 to 56.

[576] Article 107(1) TFEU. The EU judicature has clarified that, as long as the following four conditions laid down in Article 107(1) TFEU are met, the measure must be classified as State aid: (1) there must be intervention by the State or through State resources; (2) intervention must be liable to affect trade between Member States; (3) it must confer an advantage on the recipient; and (4) it must distort or threaten to distort competition. *Vide* Judgment of the Court of 21 March 1990, case C-142/87, *Kingdom of Belgium v Commission of the European Communities* [ECLI:EU:C:1990:125], § 25; Judgment of the Court of 24 July 2003, case C-280/00, *Altmark*, *cit*., §§ 74 and 75; Judgment of the Court of 23 March 2006, case C-237/04, *Enirisorse, cit.*, §§ 38 and 39; 451/03, Judgment of the Court of 30 March 2006,

measures, provided that it considers them to be compatible with the internal market[577]. Alternatively to Commission's approval, Article 106(2) TFEU provides for an exception with regard to the prohibition of granting distortive State aid, and it is particularly the interpretation and application of such provision what *Altmark* doctrine aims at clarifying – or, in other words, when a compensation for the services provided by the recipient undertaking in order to discharge a public service obligation escapes

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case C-451/03, *Servizi Ausiliari Dottori Commercialisti, cit.*, §§ 55 and 56; Judgment of the Court (Grand Chamber) of 1 July 2008, joined cases C-341/06 P and C-342/06 P, *Chronopost SA and La Poste v Union française de l'express (UFEX) and Others* [ECLI:EU:C:2008:375], §§ 121 and 122; Judgment of the Court (Third Chamber) of 17 July 2008, case C-206/06, *Essent Netwerk Noord BV supported by Nederlands Elektriciteit Administratiekantoor BV v Aluminium Delfzijl BV, and in the indemnification proceedings Aluminium Delfzijl BV v Staat der Nederlanden and in the indemnification proceedings Essent Netwerk Noord BV v Nederlands Elektriciteit Administratiekantoor BV and Saranne BV* [ECLI:EU:C:2008:413], §§ 63 and 64; Judgment of the Court (Second Chamber) of 5 March 2009, case C-222/07, *Unión de Televisiones Comerciales Asociadas (UTECA) v Administración General del Estado* [ECLI:EU:C:2009:124], § 42; Judgment of the Court (Fourth Chamber) of 10 June 2010, case C-140/09, *Fallimento Traghetti del Mediterraneo SpA v Presidenza del Consiglio dei Ministri* [ECLI:EU:C:2010:335], § 31; Judgment of the Court (Fourth Chamber) of 29 March 2012, case C-417/10, *Ministero dell'Economia e delle Finanze and Agenzia delle Entrate v 3M Italia SpA* [ECLI:EU:C:2012:184], § 37; Judgment of the Court of 8 May 2013, joined cases C-197/11 and C-203/11, *Libert and Others, cit.,* § 74; Judgment of the Court of 22 October 2015, case C-185/14, *EasyPay, cit.,* § 35.

[577] Article 107(3) TFEU. State aid measures will only benefit from the exemption if they are notified to the Commission; in the absence of notification, the Commission has the authority to order repayment of the aid concerned. Further, national courts must apply the standstill provision of Article 108(3) TFEU – that is, the Member State concerned may not put its proposed measures into effect until the procedure of notifying the Commission has resulted in a final decision.

classification as State aid[578]. If any of the four *Altmark* conditions is not met, the measure is classified as State aid – a separate issue would be whether it could be declared a compatible State aid[579].

The notion of State aid has been extensively interpreted: it refers to publicly-funded measures that mitigate the charges normally included in the budget of a (category of) undertaking(s), conferring it (or them) an unjustified economic advantage (as it does not bear the costs that it would have had to meet out under normal market conditions) that a private investor, had it been in the public investor's position, would not have conceded –i.e., attention is paid to their effects, rather than to their causes or aims[580]. The range of measures comprises any transfer of state resources – namely,

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[578] If such measures comply with the Altmark criteria, they will not be considered State aid – i.e., they escape Commission's scrutiny and will not be caught by the prohibition of article 107(1) TFEU; hence, notification to the Commission is not needed, nor is the stanstill provision applicable. Otherwise, in the worst case scenario, many firms entrusted with special tasks in the general interest might face actions of repayment and undergo deficits on their budgets. Consequently, the ECJ has developed a special approach towards State aid with regards to compensatory measures for the execution of public service obligations. *Vide* MAXIAN RUSCHE, T. "The Almunia Package… *op. cit.*, p. 100; VAN DE GRONDEN, J.W. "Financing Health Care in EU Law… *op. cit* , pp. 11 and 12; SZYSZCZAK, E. and VAN DE GRONDEN, J.W. (Ed.) *Financing Services of General Economic Interest: Reform and Modernization*, The Hague, Asser Press, 2013, p. 991.

[579] BUENDÍA SIERRA, J.L. and PANERO RIVAS, J.M. "The Almunia Package… *op. cit.*, p. 129; KLASSE, M. "The Impact of *Altmark*: The European Commission Case Law Responses", in SZYSZCZAK, E. and VAN DE GRONDEN, J.W. (Ed.), *Financing Services of General Economic Interest… op. cit.*, p. 37.

[580] HATZOPOULOS, V. "Health Law and Policy… *op. cit.,* p. 161. Judgment of the Court of 2 July 1974, case 173/73, *Italian Republic v Commission of the European Communities* [ECLI:EU:C:1974:71], § 13; Judgment of the Court of 14 February 1990, case C-301/87, *French Republic v Commission of the European Communities* [ECLI:EU:C:1990:67], § 41; Judgment of the Court of 21 March 1991, case C-305/89, *Italian Republic v Commission of the European Communities* [ECLI:EU:C:1991:142], §§ 18 to 20; Judgment of the Court of 14 September 1994, case C-42/93, *Kingdom of Spain v Commission of the European Communities* [ECLI:EU:C:1994:326], §§ 12 to 18; Judgment of the Court of 11 July 1996, case C-39/94, *Syndicat français de l'Express international (SFEI) and others v La Poste and others* [ECLI:EU:C:1996:285], § 60; Judgment of the Court of 26 September 1996, case C-241/94, *French Republic v Commission of the European Communities* [ECLI:EU:C:1996:353], §§ 20 and 24; Judgment of the Court (Sixth Chamber) of 29 April 1999, case C-342/96, *Kingdom of Spain v Commission of the European Communities* [ECLI:EU:C:1999:210], §§ 40 to 49; Judgment of the Court (Sixth Chamber) of

direct grants, tax credits, benefits in kind, provided that they are granted either directly or indirectly through State resources and they are imputable to the State[581]. When it comes to SGEI, as long as its operation is financed by resources imputable to the State, even when charges or contributions compulsorily paid to finance those SGEI are administered by institutions distinct from the public authorities, such financing is capable of constituting State aid; hence, attention will be paid to whether an unduly economic advantage for the beneficiaries has been created[582]. In conclusion, whereas

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17 June 1999, case C-75/97, *Kingdom of Belgium v Commission of the European Communities* [ECLI:EU:C:1999:311], §§ 25 to 39. On the private investor test, *vide* Opinion of the AG Wathelet delivered on 1 July 2015, case C-357/14 P, *Electrabel SA, Dunamenti Erõmū Zrt. v European Commission* [ECLI:EU:C:2015:435], § 71; Judgment of the Court of 24 July 2003, case C-280/00, *Altmark*, *cit*., § 87; Judgment of the Court (First Chamber) of 8 May 2013, joined cases C-197/11 and C-203/11, *Libert and Others, cit*., § 84; Judgment of the Court of 22 October 2015, case C-185/14, *EasyPay, cit.,* §§ 36 and 45.

[581] Judgment of the Court of 24 January 1978, case 82/77, *Openbaar Ministerie (Public Prosecutor) of the Kingdom of the v Jacobus Philippus van Tiggele* [ECLI:EU:C:1978:10], §§ 23 to 25; Judgment of the Court of 2 February 1988, joined cases 67/85, 68/85 and 70/85, *Kwekerij Gebroeders van der Kooy BV and others v Commission of the European Communities* [ECLI:EU:C:1988:38], § 35; Judgment of the Court of 21 March 1991, case C-303/88, *Italian Republic v Commission of the European Communities* [ECLI:EU:C:1991:136], § 11; Judgment of the Court of 21 March 1991, case C-305/89, *Italy v Commission*, *cit.*, § 13; Judgment of the Court of 17 March 1993, joined cases C-72/91 and C-73/91, *Firma Sloman Neptun Schiffahrts AG v Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts AG* [ECLI:EU:C:1993:97], § 19; Judgment of the Court of 30 November 1993, case C-189/91, *Petra Kirsammer-Hack v Nurhan Sidal* [ECLI:EU:C:1993:907], § 16; Judgment of the Court (Fourth Chamber) of 7 May 1998, joined cases C-52/97, C-53/97 and C-54/97, *Epifanio Viscido (C-52/97), Mauro Scandella and Others (C-53/97) and Massimiliano Terragnolo and Others (C-54/97) v Ente Poste Italiane* [ECLI:EU:C:1998:209], § 13; Judgment of the Court (Fifth Chamber) of 1 December 1998, case C-200/97, *Ecotrade Srl v Altiforni e Ferriere di Servola SpA (AFS)* [ECLI:EU:C:1998:579], § 35; Judgment of the Court (Fifth Chamber) of 17 June 1999, case C-295/97, *Industrie Aeronautiche e Meccaniche Rinaldo Piaggio SpA v International Factors Italia SpA (Ifitalia), Dornier Luftfahrt GmbH and Ministero della Difesa* [ECLI:EU:C:1999:313], § 35; Judgment of the Court of 13 March 2001, case C-379/98, *PreussenElektra AG v Schhleswag AG, in the presence of Windpark Reußenköge III GmbH and Land Schleswig-Holstein* [ECLI:EU:C:2001:160], § 58; Judgment of the Court of 16 May 2002, case C-482/99, *French Republic v Commission of the European Communities* [ECLI:EU:C:2002:294], § 24.

[582] EUROPEAN COMMISSION. C(2011) 9404, *cit.*, p. 9. Also *vide* Judgment of the Court of 2 July 1974, case 173/73, *Italy v Commission, cit.*, § 16; Judgment of the Court (Third Chamber) of 17 July 2008, case C-206/06, *Essent Netwerk Noord, cit.*, § 96; Judgment of the Court of First Instance (Fourth

Member States retain their discretion as to how define, organize and finance SGEI, they are subject to State aid control when compensation is granted to the SGEI provider; all in all, the decision to provide the SGEI by methods other than through a public procurement procedure –which ensures the least cost to the community– may lead to competitive distortions – such as preventing entry by competitors or making easier the expansion of the beneficiary in other markets[583]. Furthermore, there is no threshold below which trade between Member States can be regarded as not been affected since the relatively small amount of aid or the size of the recipient undertaking does not a priori mean that trade between Member States may not be affected[584].

Chamber) of 4 July 2007, case T-475/04, *Bouygues SA and Bouygues Télécom SA v Commission of the European Communities* [ECLI:EU:T:2007:196], §§ 101 to 111.

[583] EUROPEAN COMMISSION. C(2011) 9404, *cit.*, p. 10.

[584] Likewise, aid measures may also have effect on trade where the recipient undertaking does not itself participate in cross-border activities, provided that the opportunities for undertakings established in other Member States to offer their services in that Member State are reduced. *Vide* Judgment of the Court of 24 July 2003, case C-280/00, *Altmark*, *cit.*, § 81. Also, *vide* EUROPEAN COMMISSION. C(2011) 9404, *cit.*, p. 11. In any case, the following activities are to be deemed of a purely local character: on swimming pools used predominantly by the local population, *vide* COMMISSION OF THE EUROPEAN COMMUNITIES. *Staatliche Beihilfe nº N 258/00 – Deutschland – Freizeitbad Dorsten*, SG (2001) D / 285046, Brussels, 12 January 2001, § 3; on local hospitals aimed exclusively at the local population, *vide* COMMISSION OF THE EUROPEAN COMMUNITIES. *State aid nº 543/2001 – Ireland – Capital Allowances for Hospitals*, C (2002) 608 fin, Brussels, 27 February 2002, §§ 18 to 20; on local museums unlikely to attract cross-border visitors, *vide* COMMISSION OF THE EUROPEAN COMMUNITIES. *Aiuto di Stato nº N 630/2003 – Italia – Musei di interesse locale – Regione autonoma della Sardegna*, C (2004) 317 fin, Brussels, 18 February 2004, p. 3; on local cultural events, whose potential audience is restricted locally, *vide* COMMISSION OF THE EUROPEAN COMMUNITIES. *Ayuda estatal nº N 257/2007 – España – Programa de ayudas destinadas a la promoción de la producción teatral en el País Vasco*, C (2007) 3035 final, Brussels, 27 June 2007, §§ 19 to 28. Further, aid amounting to less than EUR 200 000 per undertaking over any period of 3 years –*de minimis* aid– is not caught by article 107 TFEU. *Vide* Article 2(2) of the Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid, *Official Journal of the European Union*, L 379/5, 28 December 2006. The Commission envisaged adopting a Regulation with a specific *de minimis* threshold for local SGEI; in the Proposal aid under EUR 500 000 was considered *de minimis*. *Vide* EUROPEAN COMMISSION. C(2011) 9404, *cit.*, p. 12; PESARESI, N.; SINNAEVE, A., GUIGUE-KOEPPEN, V.; WIEMANN, J. and RADULESCU, M. "The New State Aid Rules for Services of General Economic Interest (SGEI)", *op. cit.*, p. 5.

It is required that the public service obligation is individually discharged or assigned by a public authority, in the exercise of its public functions, to one or more specific undertakings[585]. It is key, thus, that the entrustment is assigned in the exercise of its functions of public authority, which may regularly be embodied in a regulatory act or in a public law instrument (regulation, public law contract, concession…), but may also be expressed through a private law instrument, as public administrations could resort, for the exercise of their functions, to private instrumental entities[586]. In any case, the SGEI task cannot be entrusted through a private law contract in the exercise of the economic activities of the public authority[587]. Likewise, the assignment of particular tasks cannot just be a permission to carry on certain activities or the mere knowledge that those activities are being carried out does not suffice to comply with the first *Altmark* criteria[588]. Even when the entrustment is issued at the request of the service provider, it does not mean that the task does not derive from an act of public

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[585] Judgment of the Court of 27 March 1974, case 127/73, *BRT v SABAM, cit.*, § 20; Judgment of the Court of 14 July 1981, case 172/80, *Gerhard Züchner v Bayerische Vereinsbank AG* [ECLI:EU:C:1981:178], § 7; Judgment of the Court of 2 March 1983, case 7/82, *Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) v Commission of the European Communities* [ECLI:EU:C:1983:52], §§ 31 and 32; Judgment of the Court of 23 October 1997, case C-159/94, *Commission v France, cit.*, §§ 69 to 71; Judgment of the Court of 18 June 1998, case C-266/96, *Corsica Ferries, cit.*, § 47; Judgment of the Court of First Instance (Fifth Chamber, extended composition) of 13 June 2000, case jointes T-204/97 and T-270/97, *EPAC - Empresa para a Agroalimentação e Cereais, SA v Commission of the European Communities* [ECLI:EU:T:2000:148], §§ 125 and 126.

[586] On the entrustment 'by law', *vide* Judgment of the Court of 14 July 1971, case 10/71, *Muller, cit.*, § 11. On the entrustment through a public law instrument, such as the granting of a concession, *vide* Judgment of the Court of 27 April 1994, case C-393/92, *Almelo, cit.*, § 49; Judgment of the Court of 23 October 1997, case C-159/94, *Commission v United Kingdom, cit.*, § 66; Commission Decision 91/50/EEC of 16 January 1991 – IV/32.732 – Ijseelcentrale, *cit.*, §§ 7 and 41. On the (extraordinary) possibility for the public authority to use a private law instrument, *vide* BUENDÍA, J.L. "Derechos especiales y exclusivos, servicios públicos y servicios de interés económico general", *op. cit.*, p. 1104.

[587] Judgment of the Court of 27 April 1994, case C-393/92, *Almelo, cit.*, § 31.

[588] Commission Decision 81/1030/EEC of 29 October 1981 relating to a proceeding under Article 86 of the EEC Treaty – IV/29.839 – GVL, *Official Journal of the European Communities*, L 370/49, 28 December 1981, § 66; Commission Decision 85/77/EEC of 10 December 1984 relating to a proceeding under Article 85 of the EEC Treaty – IV/30.717 – Uniform Eurocheques, *Official Journal of the European Comunities*, L 35/43, 7 February 1985, § 29.

authority[589]. Finally, the entrustment act must specify, at least, the following: (1) the content and duration of the public service obligation; (2) the undertaking and territory concerned (when applicable); (3) the nature of any exclusive or special right assigned; (4) the parameters for calculating, controlling and reviewing the compensation; and (5) the arrangements for avoiding and recovering any over-compensation[590].

The need for a compensation lies in the fact that the entrustment of the SGEI task implies the supply of services that, considering the commercial interest of the entrusted undertaking, it would not have assumed them, or not to the same extent, or not under the same conditions. The parameters of compensation must be established in advance in an objective and transparent manner in order to ensure that the recipient undertaking is not conferred an economic advantage or is put in a more favorable competitive position *vis-à-vis* competitors[591]. It must be clear from the outset how the compensation is to be determined and calculated: (a) only costs directly associated with the provision of the SGEI can be taken into account; (b) all revenue accruing to the undertaking from the provision of the SGEI must be deducted; (c) when a reasonable

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[589] Although it may seem to be at odds with the public nature of the entrustment, in some Member States it is not uncommon for authorities to finance services developed and proposed by the provider itself; in any case, the public authority has to decide whether it approves the provider's proposal before it grants it any compensation. *Vide* Judgment of the Court of First Instance of 15 June 2005, case T-17/02, *Olsen*, *cit.*, § 188. Also, *vide* EUROPEAN COMMISSION. C(2011) 9404, *cit.*, p. 15.

[590] EUROPEAN COMMISSION. C(2011) 9404, *cit.*, pp. 14 and 15. The compensation method must ensure that the amount of compensation does not exceed what is necessary to cover the net cost of discharging the public service obligation, plus a reasonable profit. Net cost calculation should assess the benefits, including intangible benefits as far as posible, to the SGEI provider. The net cost necessary to discharge the public service obligation should be calculated using the net avoided cost methodology: the net cost necessary is calculated as the difference between the net cost for the same provider of operating with the public service obligation and the net costo r profit for the same provider of operating without that obligation. *Vide* Communication from the Commission – European Union framework for State aid in the form of public service compensation (2011), *cit.*, §§ 21 and 25. Such calculations are aimed at comparing the costs and revenues of a business operating in a purely competitive market without SGEI obligations with those of an undertaking entrusted with a SGEI. *VIde* KAVANAGH, J. "Financing Services of General Economic Interest… *op. cit.*, p. 153.

[591] VEDDER, H. and HOLWERDA, M. "The European Courts' Jurisprudence after *Altmark*: Evolution or Devolution?", in SZYSZCZAK, E. and VAN DE GRONDEN, J.W. (Ed.), *Financing Services of General Economic Interest: Reform and Modernization*, The Hague, Asser Press, 2013, [pp. 53-67] p. 57.

profit is offered as part of SGEI provider's compensation, the entrustment act must establish the criteria for calculating that profit; and (d) when a review of the amount of compensation during the entrustment period is provided for, the entrustment act must specify the arrangements of review and any impact it may have on the total amount of compensation[592]. In any case, the compensation must not exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligation, taking into account the relevant receipts and a reasonable profit[593]. Moreover, from a competition perspective, it is desirable that, when determining what constitutes a reasonable profit – that is, a benchmark rate of return, Member States introduce incentive criteria, seeking to encourage gains in productive efficiency, unless they can duly justify that it is not feasible or appropriate to do so[594]. Precisely, also aiming at encouraging an efficient expense of public funds, the Commission is prone to favorize a fixed compensation method, instead of an ex post compensation in full –which does not create efficiency incentives– or a method of productive efficiency targets –which, as the end of the entrustment approaches and rewards diminish, does not stimulate efficiency–; a fixed compensation would provide incentives for the SGEI provider to find more efficient ways of delivering the required level of service over the course of the entrustment[595].

Provided that an undertaking is active both in a reserved sector and in a liberalized one, the lack of efficiency of the entrustee in the reserved sector may be translated into higher incremental costs because of the higher common costs – given

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[592] EUROPEAN COMMISSION. C(2011) 9404, *cit.*, p. 15.

[593] The reasonable profit must be determined in accordance to the rate of return on capital (internal rate of return of the undertaking on its invested capital over the lifetime of the project, over the cash flows of the contract) required by a typical company considering whether it provides the SGEI for the whole duration of the period of entrustment, taking into account the level of risk. The level of risk depends on the sector concerned, the type of services and the characteristics of the compensation mechanism. Further, the rate is to be determined by reference to the rate of return on capital achieved on similar types of public service contracts under competitive condidtions or comparable undertakings situated in other Member States or in other sectors. *Vide* EUROPEAN COMMISSION. C(2011) 9404, *cit.*, p. 16.

[594] In any case, gains in efficiency cannot come at the expense of quality of the service, particularly in the realm of the provision of SGEI. *Vide* Communication from the Commission – European Union framework for State aid in the form of public service compensation (2011), *cit.*, §§ 39 and 43.

[595] KAVANAGH, J. "Financing Services of General Economic Interest… *op. cit.*, p. 159.

that services in the non-reserved sector are provided with the infrastructure and staff used in the reserved sector to meet the public service obligation, common costs are related both to the reserved sector and the commercial activity, hence an increase in a portion of common costs means higher incremental costs; therefore, an undertaking discharging SGEI while also providing commercial services is well-advised to be as efficient as possible since only the exclusion of an "as efficient competitor" would be deemed abusive – and thus proscribed by article 102 TFEU[596].

To sum up, controls on compensation require considerable economic analysis. The aim of controlling the compensation is two-fold: (a) avoid SGEI cross-subsidizing commercial activities, which could distort competition in adjacent non-SGEI markets (non-reserved markets); and (b) avoid over-compensation of the SGEI activity, which leads to an inefficient investment of public funds, contrary to the outcome expected if the SGEI was systematically provided under competitive conditions – i.e., if the SGEI provider was always selected following a public procurement procedure, allowing for selection of the tenderer capable of providing the service at the least cost to the

[596] The only exception would be if the exclusionary effects are counterbalanced or outweighed by advantages in terms of efficiency which benefits consumers. *Vide* VEDDER, H. and HOLWERDA, M. "The European Courts' Jurisprudence after *Altmark*... *op. cit.*, pp. 65 to 66. Dominance in itself is not a ground of criticism on the basis of article 102 TFEU, but does put upon the dominant undertaking a special responsibility not to allow its behavior to impair genuine, undistorted competition on the internal market. *Vide* Judgment of the Court of 9 November 1983, case 322/81, *Michelin I*, *cit.*, § 57; Judgment of the Court (Fifth Chamber) of 16 March 2000, joined cases C-395/96 P and C-396/96 P, *Compagnie maritime belge transports SA (C-395/96 P), Compagnie maritime belge SA (C-395/96 P) and Dafra-Lines A/S (C-396/96 P) v Commission of the European Communities* [ECLI:EU:C:2000:132], § 37; Judgment of the Court (First Chamber) of 2 April 2009, case C-202/07 P, *France Télécom SA v Commission of the European Communities* [ECLI:EU:C:2009:214], § 105; Judgment of the Court (Grand Chamber) of 27 March 2012, case C-209/10, *Post Danmark A/S v Konkurrencerådet* [ECLI:EU:C:2012:172], §§ 21 to 23. On the justification of an exclusionary conduct, Judgment of the Court of 3 October 1985, case 311/84, *CBEM v CLT and IPB*, *cit.*, § 27; Judgment of the Court (Third Chamber) of 15 March 2007, case C-95/04 P, *British Airways plc v Commission of the European Communities* [ECLI:EU:C:2007:166], § 86; Judgment of the Court (First Chamber) of 17 February 2011, case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB* [ECLI:EU:C:2011:83], § 76; Judgment of the Court of 27 March 2012, case C-209/10, *Post Danmark, cit.*, §§ 41 and 42.

community[597]. Maintaining competitive neutrality is paramount; otherwise, absent a truly effective and undistorted competition, an efficient provision of services in the public interest is impeded and the welfare state's financial viability risks to be menaced by the artificially increased costs of providing such services, which the society perceives as essential.

Finally, the procedure followed to select the SGEI provider is subject to mask anticompetitive practices. In accordance with the fourth *Altmark* criterion, the SGEI provider could not be chosen pursuant to a public procurement procedure (and, instead, opt for the approach of the costs a typical well-run entity and adequately provided with the relevant means). From our standpoint, an open, transparent and non-discriminatory public procurement procedure should be the preferred method to select the SGEI provider, as long as the criterion of 'least cost to the Community' aligns with that of 'best value for money for the Community' – that is, the 'Most Economically Advantageous Tender' that meets the quality standards set by the contracting authority must be awarded the provision of the SGEI[598]. We contend that 'least cost' –pure economic efficiency– may not always be tantamount to 'best value for money' –addition of quality standards, and environmental and social considerations–; hence, the importance of SGEI requires that, in certain cases, the assessment of tenders is nuanced by the evaluation of wider quality standards, as well as environmental and social

[597] KAVANAGH, J. "Financing Services of General Economic Interest… *op. cit.*, p. 152; SÁNCHEZ GRAELLS, A. and SZYSZCZAK, E. "Modernising Social Services in the Single Market… *op. cit.*, pp. 94 and 95.

[598] Prof. SÁNCHEZ GRAELLS clarifies that rather than the selection of the 'least cost to the Community', the resort to public procurement procedures aims at excluding the existence of over-compensation and, hence, at identifying the 'most efficient actual option', instead of the 'lowest available competitive cost to the Community'; therefore, an undertaking would be in a position of receiving a State aid that exceeds the costs of an ideal efficient undertaking without invoking the State aid rules. It concludes that value for money is an aspiration of public procurement rules and not a *condition sine qua non*; consequently, contracting authorities look for efficient market conditions set through effective competition, rather than for obtaining absolute best contract conditions. *Vide* SÁNCHEZ GRAELLS, A. "The Commission's Modernisation Agenda for Procurement and SGEI", in SZYSZCZAK, E. and VAN DE GRONDEN, J.W. (Ed.), *Financing Services of General Economic Interest: Reform and Modernization*, The Hague, Asser Press, 2013, [pp. 161-181] p. 165.

considerations[599]. Furthermore, the elusion of an open –or even restricted– public procurement process must be limited to cases where the conduct of such a process does not give rise to a sufficiently open and genuine competition for the selection of the SGEI provider – namely, due to the particularities of the service in question, existing IP rights, the necessary infrastructure or that only one bid is submitted[600].

[599] CLARKE, I. "The Role of Procurement and SGEI After *Altmark*", in SZYSZCZAK, E. and VAN DE GRONDEN, J.W. (Ed.), *Financing Services of General Economic Interest: Reform and Modernization*, The Hague, Asser Press, 2013, [pp. 69-84] p. 75.

[600] Competitive dialogue and negotiated procedure with prior publication can only be deemed to be sufficient to satify the fourth *Altmark* criterion in exceptional cases, whereas negotiated procedure without publication of a contract notice cannot ensure that the procedure leads to the selection of the tenderer capable of providing the SGEI at the least cost to the Community. *Vide* EUROPEAN COMMISSION. C(2011) 9404, *cit.*, pp. 17 and 18.

CHAPTER IV - ONCE THE DECISION TO SUBMIT THE PROVISION OF THE WORK, SERVICE OR GOOD TO A PROCUREMENT PROCESS IS TAKEN: KEY FOR A COMPETITIVELY COMPLIANT DRAFTING OF THE PUBLIC PROCUREMENT DOCUMENTS

Public purchases in the EU before the approval of the first generation of public procurement directives were vitiated by two practices common to most of the Member States: on one side, preferential purchasing – i.e., non-economic discrimination among bidders; and, on the other side, protectionism – i.e., 'buying national' policies[601]. Nowadays, contracting authorities do still risk to undermine the effectiveness of public procurement regulations by unwillingly generating competitive distortions when drafting their public procurement documents.

In this chapter we will analyze the different stages of a public procurement process in order to determine, in the light of the needs that the contracting authority is aimed at meeting, the most competitively-compliant drafting of the procurement process. First, we will assess whether a contracting authority should opt for drafting a contract or giving a concession. Then, we will deepen into the drafting of the procurement documents and we will reflect, first, about the more convenient type of procedure in the light of the needs that the contracting authority intends to meet; second, about the more adequate identification of the object of the contract in order to increase competition; third, about the qualitative selection criteria that a potential awardee must comply with –together with the exclusion grounds to prevent a given tenderer from taking part in an award process–; and, fourth, about the award criteria that, chosen by the contracting authority, will condition the ultimate selection of the awardee of the contract to source the good, work or service.

[601] HEIJBOER, G. and TELGEN, J. "Choosing the open or the restricted procedure: A big deal or a big deal?", in *Journal of Public Procurement*, vol. 2, issue 2, 2002, [pp. 187-215] p. 189.

1. The most pro-competitive choice in the light of the factual circumstances: contract *versus* concession

Contracting authorities, when drafting their public procurement procedures, must carefully identify the object to be procured, as it will condition the possibility for the contracting authorities to resort to mechanisms other than pure public contracts. Complex, long, high-value projects often require wider flexibility rather than the stringent application of public procurement rules for contracts. For the provision of such works or services it is essential to reap private investment, which will undertake the operational risk of performing the project and, in turn, will be offered a return proportional to such risk. However, even in cases where contracting authorities are duly entitled to resort to concession contracts, utmost cautions must be observed when designing the procurement process in order to avoid unlawful restrictions to competition; all in all, concessions have the potential to foreclose a market.

In this section we will first analyze the legal status of concessions from the EU Law perspective. We will conclude that, in so far as they have to be consented by the concessionaire, they are a sub-type of contract. Then, we will identify the characteristics that qualify a contract as a concession and we will claim that, to prevent the potential restrictions to competition that may arise from its incorrect qualification and may further vitiate its award process, whenever doubts are casted over the nature of the risk transferred, the contracting authority may best qualify it as a contract and, consequently, follow the more stringent procurement rules. Finally, we will deal with the aspects of a concession process that, if poorly drafted, may lead to unjustified restrictions of competition or may facilitate anticompetitive behaviors.

A. Legal status of concessions: the autonomous concept of 'concession contract'

The Directive 2014/23 –so-called 'concessions directive'– defines concessions as «contracts for pecuniary interest by means of which one or more contracting authorities or entities entrust the execution of works, or the provision and management

of services to one or more economic operators»[602]. And, it follows, «the object of such contract is the procurement of works or services by means of a concession, the consideration of which consists in the right to exploit the works or services or in that right together with payment»[603]. Given such a definition, one may conclude that, as configured by the EU legislator, concessions are arrangements of a contractual nature, where the emphasis is placed in the concurrence of wills: that of the contracting authority, on one side; and that of the concessionaire, on the other.

Back in 2000, the Commission, in its Interpretative Communication, stated that a concession is any act «attributable to the State whereby a public authority entrusts to a third party –by means of a contractual act or a unilateral act with the prior consent of the third party– the total or partial management of services for which the third party assumes the risk»[604]. Thus, although the Commission itself acknowledged the existence of contractual acts *vis-à-vis* unilateral acts, which are, supposedly, not of contractual nature, unilateral legal acts, in so far as they are required to be consented by the potential concessionaire, do fall under the community concept of 'concession contract'[605].

In this very same line, article 5(1) of the Directive 2014/23 defines public works concession as follows:

> (a) 'works concession' means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the execution of works to one or more economic operators the

[602] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, Official Journal of the European Union, L 94/1, 28 March 2014, recital 11. Throughout this section, once again, albeit the definition provided in the Directive –but in line with it– we will make generic reference to 'contracting authorities', meaning both contracting authorities and contracting entities.

[603] Directive 2014/23, recital 11.

[604] Commission Interpretative Communication on concessions under Community Law, *Official Journal of the European Communities*, C 121/2, 29 April 2000, § 2.4.

[605] VAN GARSSE, S. "Concessions and public procurement", in BOVIS, C. (Ed.), *Research Handbook on EU Public Procurement Law*, Cheltenham, Edward Elgar, 2016, [pp. 593-626] p. 604.

consideration for which consists either solely in the right to exploit the works that are the subject of the contract or in that right together with payment.

And, also, it defines public service concessions as follows:

(b) 'services concession' means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the provision and the management of services other than the execution of works referred to in point (a) to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment.

Interestingly enough, until the Directive 2014/23, public service concessions were excluded from the scope of application of EU public procurement directives (even expressly, as in the case of the Directive 2004/18, by virtue of article 17)[606]. Both the different treatment to services concessions by the national legal orders and the need for flexibility in the hands of contracting authorities when concluding such concession contracts grounded such exclusion[607]. Up to the Directive 2014/23, no matter their tacit or express exclusion, as long as they could have a cross-border interest, those concessions remained subject to general Treaty principles: equal treatment, non-discrimination, transparence, mutual recognition and proportionality[608]. Such

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[606] Contrariwise, 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, *Official Journal of the European Union*, L 134/114, 30 April 2004, did include, in its Title III, the rules on public works concessions.

[607] Judgment of the Court of 7 December 2000, case C-324/98, *Telaustria, cit.,* §§ 48 to 50. Also, *vide* HERNÁNDEZ GONZÁLEZ, F.L. "La nueva Directiva de concesiones. Un largo viaje con final esperado", in GIMENO FELIÚ, J.M.; GALLEGO CÓRCOLES, I.; HERNÁNDEZ GONZÁLEZ, F. and MORENO MOLINA, J.A. (Eds.), *Las nuevas Directivas de Contratación Pública*. Cizur Menor, Thomson Reuters – Aranzadi, 2015, número monográfico especial, X Congreso Asociación Española de Profesores de Derecho Administrativo, [pp. 169-240] p. 171.

[608] Judgment of the Court of 21 July 2005, case C-231/03, *Coname, cit.,* §§ 19 to 21; Judgment of the Court of 13 October 2005, case C-458/03, *Parking Brixen, cit.*, §§ 46 to 50; Judgment of the Court of 13 November 2008, case C-324/07, *Coditel Brabant, cit.,* §§ 25 and 26; Judgment of the Court (Grand Chamber) of 13 April 2010, case C-91/08, *Wall AG v La ville de Francfort-sur-le-Main and Frankfurter Entsorgungs- und Service (FES) GmbH* [ECLI:EU:C:2010:182], §§ 33 to 36; Judgment of the Court

submission to the Treaty principles was interpreted as implying certain procedural obligations – i.e., ensuring, for the benefit of the potential tenderer, a degree of advertising sufficient to enable the services market to be opened to competition and the impartiality of the procurement procedures[609]. Notwithstanding, in practice, contracting authorities were obliged to face a significant level of uncertainty[610].

The search for legal certainty regarding the minimum standards that service concessions must observe has led to their inclusion in the normative corpus of the Directive 2014/23 itself[611]. All in all, the inherent exclusivity and quasi-monopolistic features of concessions, which are typically high value, complex and long term contracts, may hinder competition within the internal market, impacting negatively on the ability of potential tenderers to compete with the concessionaire in the same geographical area under substantially equivalent conditions during the lifespan of the concession contract[612]. What is more, viewed the role of concessions in the long-term

(Third Chamber) of 10 March 2011, case C-274/09, *Privater Rettungsdienst und Krankentransport Stadler v Zweckverband für Rettungsdienst und Feuerwehralarmierung Passau* [ECLI:EU:C:2011:130], § 49.

[609] Judgment of the Court of 7 December 2000, case C-324/98, *Telaustria, cit.,* § 62.

[610] FARLEY, M. and POURBAIX, N. "The EU Concessions Directive: Building (Toll) Bridges between Competition Law and Public Procurement?", in *Journal of European Competition Law & Practice*, 2014, [pp. 1-11] p. 3.

[611] The Directive 2014/23 emphasizes that «There is a risk of legal uncertainty related to divergent interpretations of the principles of the Treaty by national legislators and of wide disparities among the legislations of various Member States. Such risk has been confirmed by the extensive case law of the Court of Justice of the European Union which has, nevertheless, only partially addressed certain aspects o the award of concession contracts». *Vide* Directive 2014/23, recital 4.

[612] Those words are taken from an in-depth research conducted by Prof. SÁNCHEZ GRAELLS, where he compares concessions to the granting of special or exclusive rights. *Vide* SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules, op. cit.,* p. 128. On the difficulties to systematically and precisely measure the economic and social importance of concessions, due to their different labelling in the Member States and the lack of transparency in their awards, *vide* FARLEY, M. and POURBAIX, N. "The EU Concessions Directive… *op. cit.*, p. 3. In that line, it is worth mentioning the Commission Impact Assessment of an initiative on concessions, where it stated that 37% of the respondents and 44% of all respondents who were undertakings said that they were aware of the direct award of concession contracts without any kind of publicity or transparency. *Vide* EUROPEAN COMMISSION. *Commission Staff Working Document – Impact Assessment of an initiative on concessions, accompanying the*

structural development of infrastructure and strategic services, a healthy resort to concessions is crucial, as it would also make possible to benefit from private sector expertise and help to achieve efficiency and innovation[613].

Their higher technical complexity, higher cost and longer duration involves a greater level of uncertainty[614]. Those circumstances justify a greater flexibility in the hands of the contracting authority when concluding concession contracts, both in relation with the awarding process and with its implementation arrangements[615]. Consequently, the Directive 2014/23 does not prescribe any specific formal procedure once the concession contract has been advertised, as long as the principles of equal treatment, non-discrimination, transparency and proportionality are fully observed, the contracting authority has the flexibility to design an individual awarding procedure[616]. In that very same line, Article 41 of the Directive 2014/23, on the award criteria, does no prescribe a specific procedure that contracting authorities need to follow in order to select candidates and award concessions. The referred provision just sets out that:

> Concessions shall be awarded on the basis of objective criteria which comply with the principles set out in Article 3 and which ensure that tenders are assessed in conditions of effective competition so as to identify an overall economic advantage for the contracting authority or the contracting entity.

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document "Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts", SEC(2011) 1588 final, Brussels, 20 December 2011, p. 16.

[613] Directive 2014/23, recital 3.

[614] Due to those features, the Committee on the Internal Market and Consumer Protection of the European Parliament has referred to concessions as 'incomplete contracts'. COMMITTEE ON THE INTERNAL MARKET AND CONSUMER PROTECTION. *Draft Report on the proposal for a directive of the European Parliament and of the Council on the award of concession contracts*, 2011/0437(COD), 5 July 2012, pp. 186-187.

[615] As stated in the recitals of Directive 2014/23, «For concessions equal to or above a certain value, it is appropriate to provide for a minimum coordination of national procedures for the award of such contracts based on the principles of the TFEU so as to guarantee the opening-up of concessions to competition and adequate legal certainty. Those coordinating provisons should not go beyond what is necessary in order to achieve the aforementioned objectives and to ensure a certain degree of flexibility. Member States should be allowed to complete and develop further those provisions if they find it appropiate, in particular to better ensure compliance with the principles set out above». *Vide* Directive 2014/23, recital 8.

[616] Directive 2014/23, article 3.

Article 3 of the Directive 2014/23 states as follows:

> 1. Contracting authorities and contracting entities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.
>
> The design of the concession award procedure, including the estimate of the value, 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.
>
> 2. Contracting authorities and contracting entities shall aim at ensuring the transparency of the award procedure and of the performance of the contract, while complying with Article 28.

Equivalent provisions in Directives 2014/24 and 2014/25 –articles 18(1) and 36(1), respectively– do include the principle of competition. Indeed, they include it in the following terms:

> 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 is made with the intention of unduly favoring or disadvantaging certain economic operators.

Although the term 'competition' has been suspiciously removed from the text of that provision of the Directive 2014/23, the inclusion in its article 3 of the expression «unduly favouring or disadvantaging certain economic operators or certain works, supplies or services» is to be understood as a clear reference to the artificial narrowing down of competition, since, in the words of Directives 2014/24 and 2014/25, competition is to «be considered to be artificially narrowed where the design of the procurement is made with the intention of *unduly favoring or disadvantaging certain economic operators*»[617]. We hence contend that, albeit indirectly, the need to observe

[617] Prof. SÁNCHEZ GRAELLS understands such absence of mention to the principle of competition when consolidating the general principles applicable to the award of concessions as a significant departure from the equivalent provisions of Directives 2014/24 and 2014/25, but he stands that competition remains a

the principle of competition can be inferred from the wording of the Directive 2014/23 itself. Further, article 35 of the Directive 2014/23, when identifying the general principles and procedural guarantees with regard to the award of concessions, makes specific reference to competition (emphasis added):

> Member States shall require contracting authorities and contracting entities to take appropriate measures to combat fraud, fauvoritism and corruption and to effectively prevent, identify and remedy conflicts of interest arising in the conduct of concession award procesures, *so as to avoid any distortion of competition* and to ensure the transparency of the award procedure and the equal treatment of all candidates and tenderers.

Likewise, the afore-mentioned Article 41 of the Directive 2014/23 sets out the following (emphasis added):

> Concessions shall be awarded on the basis of objective criteria which comply with the principles set out in Article 3 and *which ensure that tenders are assessed in conditions of effective competition* so as to identify an overall economic advantage for the contracting authority or the contracting entity.

Finally, the classification of the contract must be exclusively made in the light of the EU Law; as the definitions provided by the Directive make no express reference to the law of the Member States for the purposes of determining its meaning and scope –i.e., are autonomous–, the legal classification of the contracts in domestic laws is irrelevant for the purpose of classifying the contract[618]. If a contracting authority mistakenly categorises as a concession a contract that should be subject to the full

general principle under the applicable interpretative case law of the ECJ. *Vide* SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules, op. cit.,* p. 131.

[618] Judgment of the Court (Third Chamber) of 20 October 2005, case C-264/03, *Commission of the European Communities v French Republic* [ECLI:EU:C:2005:620], § 36; Judgment of the Court of 18 January 2007, case C-220/05, *Auroux, cit.*, § 40; Judgment of the Court (Second Chamber) of 18 July 2007, case C-382/05, *Commission of the European Communities v Italian Republic* [ECLI:EU:C:2007:445], § 30; Judgment of the Court of 18 December 2007, case 220/06, *Correos, cit.*, § 50; Judgment of the Court (Fourth Chamber) of 29 October 2009, case C-536/07, *Commission of the European Communities v Federal Republic of Germany* [ECLI:EU:C:2009:664], § 54.

regulatory regime of the public procurement directives –and, hence, does not follow the stringent procurement procedures–, it would be exposed to challenges from unsuccessful bidders and/or winning bidder's competitors, and it risks the costs in time and expense of having to re-run the tender process[619]. The legality of the awarding process largely depends on the legal classification of the contract[620].

B. The competitively compliant delimitation of the requirement regarding the transfer of an operating risk

Article 5(1) of the Directive 2014/23 sets out the following (emphasis added):

> The award of a works or services concession shall involve the *transfer to the concessionaire of an operating risk* in exploiting those works or services encompassing demand or supply risk or both.

And, it continues (emphasis added):

> The concessionaire shall be deemed to assume operating risk where, under normal operating conditions, *it is not guaranteed to recoup the investments made or the costs incurred* in operating the works or the services which are the subject-matter of the concession. The part of risk transferred to the concessionaire shall involve *real exposure to the vagaries of the market*, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible.

Therefore, any contract that does not imply the transfer of an operating risk to the concessionaire in the terms set out by Article 5(1) of the Directive 2014/23 cannot be classified as 'concession' –which, as said before, is an autonomous concept of EU Law–. In the end, the right to exploit a concession implies the transfer to the concessionaire of an operating risk of economic nature involving the possibility that the concessionaire will not recoup the investments made and the costs incurred in operating the works or services[621]. While the contracting authority may retain part of the risk, it

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[619] FARLEY, M. and POURBAIX, N. "The EU Concessions Directive… *op. cit.*, pp. 3-4.

[620] HERNÁNDEZ GONZÁLEZ, F.L. "La nueva Directiva de concesiones… *op. cit.*, p. 179.

[621] Directive 2014/23, recital 18.

cannot relieve the economic operator of any potential loss by guaranteeing a minimal revenue, equal or higher to the investments made and the costs incurred in relation with the performance of the contract[622]. There must be a risk of loss borne by the economic operator[623].

Directive 2014/23 does not clarify the extent of the operating risk that must be transferred to the concessionaire. The EU judicature refers to a 'substantial part' or 'significant share' of the operating risk[624]. In a concession contract, the contracting authority may hence retain part of the risk, as it would not be reasonable to require the contracting authority to transfer higher economic risks than those that, in accordance with the applicable law, exist in the sector and over which the contracting authority has no decision power[625]. The introduction of clauses that partially limit the risk faced by the concessionaire does not run counter to the legal status of concessions, in so far as the core of the assumption of the risk does not disappear[626]. Likewise, the risk may be,

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[622] Directive 2014/23, recital 18. Also, *vide* HERNÁNDEZ GONZÁLEZ, F.L. "La nueva Directiva de concesiones… *op. cit.*, pp. 183-184.

[623] FARLEY, M. and POURBAIX, N. "The EU Concessions Directive… *op. cit.*, p. 4.

[624] Judgment of the Court (Third Chamber) of 10 September 2009, case C-206/08, *Wasser- und Abwasserzweckverband Gotha und Landkreisgemeinden (WAZV Gotha) v Eurawasser Aufbereitungs- und Entsorgungsgesellschaft mbH* [ECLI:EU:C:2009:540], §§ 77 and 78; Judgment of the Court of 10 March 2011, case C-274/09, *Privater Rettungsdienst, cit.*, § 29; Judgment of the Court (Second Chamber) of 10 November 2011, case C-348/10, *Norma-A SIA and Dekom SIA v Latgales plānošanas regions* [ECLI:EU:C:2011:721], § 45.

[625] Judgment of the Court of 10 September 2009, case C-206/08, *Eurawasser, cit.*, § 75.

[626] In that respect, it is worth mentioning the Report by the Spanish Advisory Board on Public Procurement, an administrative body specialized in public procurement. In its Report on the introduction of clauses that lower the risk assumed by the concessionaire it states the following: «el establecimiento de cláusulas que supongan una reducción parcial del riesgo asumido por el concesionario no es contrario a la naturaleza propia de las concesiones siempre que no desaparezca el núcleo de tal asunción. Es decir siempre que, considerado el término de vida de la concesión, el concesionario haya asumido el riesgo derivado de la explotación de la obra o del servicio en su conjunto, aún cuando éste haya podido estar limitado o incluso excluido durante un cierto periodo o en relación a determinadas circunstancias». JUNTA CONSULTIVA DE CONTRATACIÓN ADMINISTRATIVA. *Posibilidad de la aplicación o no de una cláusula de reequilibrio económico de la concesión administrativa de explotación de un aparcamiento: Afectación al principio de riesgo y ventura expresamente establecido para la concesión en otra cláusula del pliego*, Informe 69/09, 23 July 2010, available at:

from the outset, limited on account of the detailed rules of public law governing the service; still, the contract will remain to be categorized as a 'concession' where the concessionare is uncertain, given the vagaries of the market, over whether he will recoup all the costs and/or investments made[627].

An operating risk must be due to factors outside the control of the parties, to the exposure to vagaries of the market – i.e., risks inherent in every contract, such as bad management, contractual defaults by the economic operator or instances of force majeure, would not be decisive for the purpose of classification as a concession[628]. Therefore, operating risk may consist in the risk of competition from other operators, the risk that supply of the services will not match demand, the risk that those liable will be unable to pay for the services proviced, the risk that the costs of operating the services will not fully be met by revenue or the risk of liability for harm or damage resulting from an inadequacy of the service[629]. Moreover, an operating risk may also exist when the concessionaire is fully remunerated by persons other than the contracting authority that awarded the contract, the amount of the usage fees depends on the result of annual negotiations with third parties and it is not assured full coverage of the costs incurred in managing its activities[630].

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http://www.minhafp.gob.es/Documentacion/Publico/D.G.%20PATRIMONIO/Junta%20Consultiva/informes/Informes2009/Informe%2069-09.pdf (last consulted: 29.11.2016), § 3.

[627] Judgment of the Court of 10 September 2009, case C-206/08, *Eurawasser, cit.*, § 80. As a way of examples, Directive 2014/23, in its recital 19, provides the followings: «The fact that the risk is limited from the outset should not preclude the qualification of the contract as a concession. This can be the case for instance in sectors with regulated tariffs or where the operating risk is limited by means of contractual arrangements providing for partial compensation including compensation in the event of early termination of the concession for reasons attributable to the contracting authority or contracting entity or for reasons of force majeure».

[628] Directive 2014/23, recital 20.

[629] Judgment of the Court (Third Chamber) of 27 October 2005, case C-234/03, *Contse SA, Vivisol Srl and Oxigen Salud SA v Instituto Nacional de Gestión Sanitaria (Ingesa), formerly Instituto Nacional de la Salud (Insalud)* [ECLI:EU:C:2005:644], § 22; Judgment of the Court of 11 June 2009, case C-300/07, *Hans & Christophorus Oymanns, cit.*, § 74; Judgment of the Court of 10 March 2011, case C-274/09, *Privater Rettungsdienst, cit.*, § 37.

[630] Judgment of the Court of 10 March 2011, case C-274/09, *Privater Rettungsdienst, cit.*, § 48. On the contrary, if the concessionaire is compensated for the losses associated with the performance of the

According to Article 5(1) of the Directive 2014/23, the transfer of an operating risk encompasses demand risk, supply risk or both a demand and supply risk. Demand risk is to be undertood as the risk on actual demand for the works or services which are the object of the contract. Supply risk is to be understood as the risk on the provision of the works or services which are the object of the contract, in particular the risk that the provision of the services will not match demand[631]. The terms finally included in the Directive 2014/23 differ from those used in the Proposal for a Directive on the award of concession contracts, which refers to the risk of demand and the risk of availability. Specifically, in the Proposal for a Directive, the Commission included in Article 2(2), concerning the definitions, that the economic risk may consist in either of the following: «(a) the risk related to the use of the works or the demand for the provision of the service; or (b) the risk related to the availability of the infrastructure provided to the concessionaire or used for the provision of services to users»[632]. While the risk of demand is linked to the use given to the service or work, the risk of availability is linked to the quality of the service or work. Therefore, it is uncertain to what extent the supply risk should be interpreted as being tantamount to the availability risk; or, to put it in other words, whether a concession only exists as long as the remuneration of the concessionaire depends really and substantially of the demand or, on the contrary, it may also exist when the compensation to the concessionaire is determined by the degree of availability of the work or the quality of the service[633]. In any case, from our

contract and it is also guaranteed a specific amount of profit, even when the service is paid by users, according to compulsory tariffs set down by the contracting authority, that does not constitute a concession. *Vide* Judgment of the Court of 10 November 2011, case C-348/10, *Norma-A and Dekom*, *cit.,* §§ 48 to 55.

[631] Directive 2014/23, recital 20.

[632] EUROPEAN COMMISSION. *Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts*, COM(2011) 897 final, Brussels, 20 December 2011, Article 2(2).

[633] This second approach would ease the financing of concessions, as the concessionaire's remuneration would be reduced if the quality of the service or the availability of the work is deficient, but not if the exploitation of the work or service is less than expected. Indeed, this approach would be in line with the idea of flexibility that inspires the Directive 2014/23 itself. However, one stands that such an approach to the concept of operating risk should be used only for 'cold concessions', that is, those whose remuneration is not determined by their level of use –hospitals, schools, prisions…–, *vide* HERNÁNDEZ

standpoint, whereas the resort to concession contracts is desirable to attract private investors' collaboration in (usually) complex and expensive public projects, in case of doubt with regard to the risk transferred when concluding a particular contract, the submission of the legal relationship to the stringent public procurement rules does not actually harm the ultimate provision of the service or completion of the work; rather, although the awarding process may take longer, it ensures that benefits (in terms of quality and price) from the existence of an open and undistorted competition are reaped and that the provider awarded the contract is indeed the one that will more efficiently provide the work or service.

In any case, the operating risk is assumed by the concessionaire «under normal operating conditions»[634]. Therefore, unforeseeable risks, which could not have been predicted despite reasonably diligent preparation of the initial award by the contracting authority, are excluded and the concession contract may be modified so as to compensate risks arising from unforseeable events[635]. However, this should not be interpreted in the sense that a minimal revenue –equal or superior to the investments and costs made for the operation of the work or service awarded– is guaranteed to the

GONZÁLEZ, F.L. "La nueva Directiva de concesiones… *op. cit.*, pp. 187-188. In any case, the Interpretative Communication from the Commission of 2000 favored the first approach. It considered that a concession implies that «the risks inherent in exploitation are transferred to the concessionaire» and, it continues, «if recovery of expenditure were guaranteed by the awarding authority without the risk involved in the management of the construction, there would be no element of risk and the contract should be regarded as a works contract rather than a concession contract», or, to put it in other words, «the economic risk exists where income depends on the amount of use», *vide* Commission Interpretative Communication on concessions under Community Law, 29 April 2000, *cit.,* § 2.1.2, notes 9 and 13.

[634] Directive 2014/23, article 5.

[635] Directive 2014/23, recital 76: «Contracting authorities and contracting entities can be faced with external circumstances that they could not foresee when they awarded the concession, in particular when the performance of the concession covers a long period. In those cases, a certain degree of flexibility is needed to adapt the concession to the circumstances without a new award procedure». The notion of unforeseeable circumstances takes into account «the available means, the nature and characteristics of the specific project, good practices in the field in question and the need to ensure the appropriate relationship between the resources spent in preparing the award and its foreseeable value».

concessionaire and that any loss that he may incur would be compensated[636]. The transfer of the risk is compatible with the maintenance of the financial and economic balance of the operation; that is, the concession contract must potentially enable the private partner to obtain a return proportional to the risks he undertakes[637].

Finally, the concessionaire recovers its investment in the works or services being procured by being given the right to exploit for payment the works or services once they are complete[638]. The concession contract may, but not necessarily, involve the transfer of ownership to the contracting authority[639]. At the same time, it should be made clear that certain arrangements which are exclusively remunerated by a contracting authority should qualify as concessions where the recoupment of the investments and costs incurred by the operator for executing the work or providing the service depends on the actual demand for or the supply of the service or asset[640]. Such a method of remuneration means that the concessionaire assumes the risk connected with operating the works and services in question[641]. Once again, the nature of the awarded contract is

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[636] HERNÁNDEZ GONZÁLEZ, F.L. "La nueva Directiva de concesiones… *op. cit.*, p. 190. Also, *vide* Judgment of the Court of 10 November 2011, case C-348/10, *Norma-A and Dekom*, *cit.,* §§ 51 to 55.

[637] COMMISSION OF THE EUROPEAN COMMUNITIES. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on mobilising private and public investment for recovery and long term structural change: developing Public Private Partnerships*, COM(2009) 615 final, Brussels, 19 November 2009, p. 11.

[638] Directive 2014/23, articles 5(1)(a) and 5(1)(b). Also, *vide* FARLEY, M. and POURBAIX, N. "The EU Concessions Directive… *op. cit.*, p. 1. Also, *vide* Judgment of the Court of 13 October 2005, case C-458/03, *Parking Brixen, cit.*, § 41; Judgment of the Court of 11 June 2009, case C-300/07, *Hans & Christophorus Oymanns, cit.*, §§ 68 and 71 to 72.

[639] Directive 2014/23, recital 11.

[640] Directive 2014/23, recital 18.

[641] Judgment of the Court of 7 December 2000, case C-324/98, *Telaustria, cit.,* § 58; Order of the Court (Second Chamber) of 30 May 2002, case C-358/00, *Buchhändler-Vereinigung GmbH v Saur Verlag GmbH & Co. KG and Die Deutsche Bibliothek* [ECLI:EU:C:2002:317], § 27; Judgment of the Court of 13 October 2005, case C-458/03, *Parking Brixen, cit.*, § 40; Judgment of the Court of 18 July 2007, case C-382/05, *Commission v Italy, cit.,* § 34; Judgment of the Court of 13 November 2008, case C-324/07, *Coditel Brabant, cit.,* § 24; Judgment of the Court of 10 September 2009, case C-206/08, *Eurawasser, cit.*, § 80.

conditioned by the design of a recoupment mechanism that does not run counter to the actual transfer of an operating risk.

C. The drafting of concession contracts: conditions to avoid the foreclosure of an allegedly competitive market

Several aspects of a concession contract have the potential to affect competition in the market of reference. It is paramount, given its potential to foreclose a market, that the process to select the concessionaire awarded the work or service is carefully drafted in order to guarantee the effective and non-discriminatory access of all economic operators to the EU concessional market; indeed, EU Public Procurement Law aims at opening contracts to the most effective competition possible[642]. Consequently, as in the case of any other contract, any person or entity that, given the conditions laid down in the contract notice, believes that can carry out a contract –either directly or by using subcontractors– should be eligible to submit a tender, regardless of whether it is governed by public or private law, whether it is currently active in the market or only on an occasional basis and whether is subsidized by public funds[643]. Conditions for participation must thus be related and proportionate to the need to ensure the ability of the concessionaire to perform the concession, taking into account the subject-matter of the concession and the purpose of ensuring genuine competition[644].

In order to meet the conditions for participation, candidates may rely on the capacities of other entities –regardless of the legal nature of the links with them–, as long as they can prove to the contracting authority that they will have at their disposal, throughout the period of the concession, the necessary resources[645]. Likewise, a group

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[642] HERNÁNDEZ GONZÁLEZ, F.L. "La nueva Directiva de concesiones… *op. cit.*, pp. 194-195.

[643] Judgment of the Court of 23 December 2009, case C-305/08, *CoNISMa, cit.,* § 42; Judgment of the Court of 19 December 2012, case C-159/11, *Ordine degli Ingegneri della Provincia di Lecce, cit.*, § 26; Judgment of the Court of 13 June 2013, case C-386/11, *Piepenbrock*, *cit.*, § 29; Judgment of the Court of 19 June 2014, case C-574/12, *Setúbal*, *cit.*, § 33; Judgment of the Court (Fifth Chamber) of 18 December 2014, case C-568/13, *Azienda Ospedaliero-Universitaria di Careggi-Firenze v Data Medical Service srl.* [ECLI:EU:C:2014:2466], §§ 34 to 38;

[644] Directive 2014/23, article 38(1).

[645] Directive 2014/23, article 38(2).

of economic operators may participate and be awarded the performance of a concession contract[646]. In fact, given that concession contracts are often large, high-value, complicated projects, it is not uncommon that economic operators join and submit joint bids, as the submission of a joint bid enables a pooling of resources to meet the needs of the contracting authority in a situation where none of the economic operators could perform the work or service individually[647]. Focus should be placed then on whether the economic operators would have been able to submit an individual bid. If so, the submission of a joint bid would not be deemed necessary –as contracting authority's requirements could be met individually– and, rather, it would have the effect of reducing competition. Further, even if their entering into a joint bidding arrangement is justified, partners to the consortium need to take care to ensure that their discussions are not used for illicitly exchanging commercially sensitive information[648].

As for the duration of concession contracts, we contend that, from a competition law perspective, it is the key element: the concession must last long enough to guarantee the concessionaire an adequate remuneration, in line with the risks undertaken, but it may not restrict free competition more than what is necessary. While the Directive 2014/23 itself orders that the duration of concessions must be limited, it also envisages that:

> For concessions lasting more than five years, the maximum duration of the concession shall not exceed the *time that a concessionaire could reasonably be expected to take recoup the investments made in operating the works or services together with a return on invested capital* taking into account the investments required to achieve the specific contractual objectives.

[646] Directive 2014/23, article 26 and article 38(3).

[647] FARLEY, M. and POURBAIX, N. "The EU Concessions Directive… *op. cit.*, p. 5.

[648] Such information includes that «relating to projects falling outside of the joint bidding arrangement, aspects of their respective businesses not related to the tender in question and any discussions relating to divisions of responsibility unrelated to who will be responsible for preparing specific parts of the submission or which party will carry out certain parts of the work in the event that the bid is successful», *vide* FARLEY, M. and POURBAIX, N. "The EU Concessions Directive… *op. cit.*, p. 5.

> The investments taken into account for the purposes of the calculation shall include both initial investments and investments during the life of the concession[649].

The duration of the concession contract is therefore objectively necessary to enable the concessionaire to recoup its investment, but it should be limited in order to avoid market foreclosure and restriction of competition since concessions of unjustified very long duration are likely to foreclose the market and hinder the free movement of services and the freedom of establishment[650]. It is for the contracting authority to find the balance between competition and recovery of investments, making both match and embodying them in the duration of the concession contract when drafting the procurement process.

2. Drafting of the tender: the tempered discretionality of contracting authorities when designing the procurement process

Contracting authorities are vested with a quite (apparently) wide degree of discretionality when they design their public procurement procedures; indeed, public procurement rules need to be specified and tailored to every tender procedure[651]. The design of the precise features of the procurement process may influence the efficiency of the outcome[652]. However, there are several principles that must be observed by contracting authorities in their procuring endeavours and, consequently, limit their so-perceived vast discretionality[653]. Above all, and for the purposes of this study,

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[649] Directive 2014/23, article 18(2).

[650] Directive 2014/23, recital 52. Also, *vide* FARLEY, M. and POURBAIX, N. "The EU Concessions Directive… *op. cit.*, p. 8.

[651] SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules, op. cit.,* p. 245.

[652] ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT. "Fighting Cartels in Public Procurement", in *Policy Brief*, October 2008, p. 4.

[653] In particular, the EU judicature has stated that discretionary conduct on the part of the national authorities cannot be rendered legitimate if it is liable to negate the effectiveness of provisions of Community law relating to a fundamental freedom. *Vide*, Judgment of the Court of 23 February 1995, joined cases C-358/93 and C-416/93, *Criminal proceedings against Aldo Bordessa, Vicente Marí Mellado and Concepción Barbero Maestre* [ECLI:EU:C:1995:54], § 25; Judgment of the Court of 14

contracting authorities have the obligation to guarantee equality of opportunity of tenderers at each and every stage of the tendering procedure[654]. Such an obligation is essentially nurtured by the principle of equal treatment and by the principle of competition, which require a degree of advertising sufficient to enable, on one hand, to open the market concerned to EU-wide competition and, on the other hand, to review the impartiality of procurement procedures[655]. All in all, the principle of equal

December 1995, joined cases C-163/94, C-165/94 and C-250/94, *Criminal proceedings against Lucas Emilio Sanz de Lera, Raimundo Díaz Jiménez and Figen Kapanoglu* [ECLI:EU:C:1995:451], § 25; Judgment of the Court of 20 February 2001, case C-205/99, *Analir*, *cit.*, § 37; Judgment of the Court of 12 July 2001, case C-157/99, *Smits and Peerbooms*, *cit.*, § 90; Judgment of the Court of 22 January 2002, case C-390/99, *Canal Satélite Digital*, *cit.*, § 35; Judgment of the Court (Third Chamber) of 13 December 2007, case C-250/06, *United Pan-Europe Communications Belgium SA and Others v Belgian State* [ECLI:EU:C:2007:783], § 45.

[654] Judgment of the Court (Sixth Chamber) of 27 November 2001, joined cases C-285/99 and C-286/99, *Impresa Lombardini SpA - Impresa Generale di Costruzioni v ANAS - Ente nazionale per le strade and Società Italiana per Condotte d'Acqua SpA (C-285/99) and Impresa Ing. Mantovani SpA v ANAS - Ente nazionale per le strade and Ditta Paolo Bregoli (C-286/99)* [ECLI:EU:C:2001:640], § 37; Judgment of the Court (Sixth Chamber) of 19 June 2003, case C-315/01, *Gesellschaft für Abfallentsorgungs-Technik GmbH (GAT) v Österreichische Autobahnen und Schnellstraßen AG (ÖSAG)* [ECLI:EU:C:2003:360], § 73; Judgment of the Court (Sixth Chamber) of 29 April 2004, case C-496/99 P, *Commission of the European Communities v CAS Succhi di Frutta SpA* [ECLI:EU:C:2004:236], § 108; Judgment of the Court of First Instance (Fourth Chamber) of 17 December 1998, case T-203/96 *Embassy Limousines & Services v European Parliament* [ECLI:EU:T:1998:302], § 85; Judgment of the Court of First Instance (Third Chamber) of 24 February 2000, case T-145/98, *ADT Projekt Gesellschaft der Arbeitsgemeinschaft Deutscher Tierzüchter mbH v Commission of the European Communities* [ECLI:EU:T:2000:54], § 164; Judgment of the Court of First Instance (Fifth Chamber) of 17 March 2005, case T-160/03, *AFCon Management Consultants, Patrick Mc Mullin and Seamus O'Grady v Commission of the European Communities* [ECLI:EU:T:2005:107], § 75; Judgment of the Court of First Instance (Second Chamber) of 14 February 2006, joined cases T-376/05 and T-383/05, *TEA-CEGOS, SA, Services techniques globaux (STG) SA (T-376/05) and GHK Consulting Ltd (T-383/05) v Commission of the European Communities* [ECLI:EU:T:2006:47], § 76; Judgment of the Court of First Instance (Fourth Chamber) of 12 July 2007, case T-250/05, *Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v Commission of the European Communities* [ECLI:EU:T:2007:225], § 45; Judgment of the Court of First Instance (First Chamber) of 12 November 2008, case T-406/06, *Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v Commission of the European Communities* [ECLI:EU:T:2008:484], § 83.

[655] Judgment of the Court of 7 December 2000, case C-324/98, *Telaustria*, *cit.*, §§ 60 to 62; Judgment of the Court of 12 December 2002, case C-470/99, *Universale-Bau*, *cit.*, § 92; Judgment of the Court of 21

treatment, which underlies the directives on procedures for the award of public contracts, aims at promoting a healthy and effective competition between undertakings willing to participate in a public procurement procedure. In doing so, it implies, in particular, an obligation of transparency, in order to enable verification that it has been complied with, while ensuring that any risk of favoritism or arbitrariness on the part of the contracting authority has been eliminated[656]. As for the interested operator, such obligation of transparency entails that all the conditions and rules governing the award procedure are drawn up in a clear, precise and unequivocal manner so that all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way; whereas, as for the contracting authority, it implies that the authority conducting the public procurement procedure is

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July 2005, case C-231/03, *Coname, cit.,* §§ 16 to 21; Judgment of the Court of 13 October 2005, case C-458/03, *Parking Brixen, cit.*, § 46; Judgment of the Court of 13 November 2007, case C-507/03, *Commission v Ireland*, *cit*., §§ 30 and 31; Judgment of the Court (Second Chamber) of 17 July 2008, case C-347/06, *ASM Brescia SpA v Comune di Rodengo Saiano* [ECLI:EU:C:2008:416], §§ 59 and 60; Judgment of the Court of 13 November 2008, case C-324/07, *Coditel Brabant, cit.,* § 25; Judgment of the Court of 10 September 2009, case C-206/08, *Eurawasser, cit.*, § 44; Judgment of the Court of 13 April 2010, case C-91/08, *Wall*, *cit*., § 33; Judgment of the Court of 3 June 2010, case C-203/08, *Sporting Exchange*, *cit*., § 39; Judgment of the Court (Tenth Chamber) of 14 November 2013, case C-221/12, *Belgacom NV v Interkommunale voor Teledistributie van het Gewest Antwerpen (INTEGAN) and Others* [ECLI:EU:C:2013:736], § 37; Judgment of the Court of 17 December 2015, joined cases C-25/14 and C-26/14, *UNIS*, *cit.*, § 38; Judgment of the Court (First Chamber) of 4 February 2016, case C-336/14, *Criminal proceedings against Sebat Ince* [ECLI:EU:C:2016:72], § 86. Also, *vide* Opinion of the AG Ruiz-Jarabo Colomer delivered on 8 November 2006, case C-412/04, *Commission of the European Communities v Italian Republic* [ECLI:EU:C:2006:699], § 46; Opinion of the AG Jääskinen delivered on 19 March 2015, joined cases C-25/14 and C-26/14, *Union des syndicats de l'immobilier (UNIS) v Ministre du Travail, de l'Emploi et de la Formation professionnelle et du Dialogue social et Syndicat national des résidences de tourisme (SNRT) and Others and Beaudout Père et Fils SARL v Ministre du Travail, de l'Emploi et de la Formation professionnelle et du Dialogue social and Others* [ECLI:EU:C:2015:191], § 68; Opinion of the AG Szpunar delivered on 22 October 2015, case C-336/14, *Criminal proceedings against Sebat Ince* [ECLI:EU:C:2015:724], § 73.

[656] Judgment of the Court of 18 November 1999, case C-275/98, *Unitron Scandinavia*, *cit.*, § 31; Judgment of the Court of 7 December 2000, case C-324/98, *Telaustria*, *cit.*, §§ 60-61; Judgment of the Court of 18 June 2002, case C-92/00, *HI*, *cit.*, § 45; Judgment of the Court of 12 December 2002, case C-470/99, *Universale-Bau*, *cit.*, § 91; Judgment of the Court of 4 February 2016, case C-336/14, *Ince*, *cit.*, § 87.

able to ascertain whether the bids submitted satisfy the criteria applying to the contract in question[657].

Contracting authorities are bound by the principle of good administration, which involves their duty to examine carefully and impartially all the relevant aspects of the individual case[658]. Furthermore, when evaluating the bids submitted, they are under a particular duty to avoid conflicts of interest[659]. All in all, a situation of conflict of interests constitutes a breach of the equal treatment of candidates and of the equal opportunity for tenderers, as a tenderer who –even he has no intention of doing so– is capable of influencing the conditions of a call for tenders in a manner favorable to himself may distort competition in that procurement process and harm equal treatment of all economic operators[660]. Likewise, contracting authorities are also under a duty to

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[657] Judgment of the Court of 29 April 2004, case C-496/99 P, *Succhi di Frutta*, *cit.*, § 111; Judgment of the Court of 13 December 2007, case C-250/06, *United Pan-Europe Communications*, *cit.*, § 46; Judgment of the Court (Fourth Chamber) of 16 February 2012, joined cases C-72/10 and C-77/10, *Criminal proceedings against Marcello Costa and Ugo Cifone* [ECLI:EU:C:2012:80], § 73; Judgment of the Court (Tenth Chamber) of 6 November 2014, case C-42/13, *Cartiera dell'Adda SpA v CEM Ambiente SpA* [ECLI:EU:C:2014:2345], § 44; Judgment of the Court of 4 February 2016, case C-336/14, *Ince*, *cit.*, § 87; Judgment of the Court (First Chamber) of 7 April 2016, case C-324/14, *Partner Apelski Dariusz v Zarząd Oczyszczania Miasta* [ECLI:EU:C:2016:214], § 61.

[658] Judgment of the Court of 21 November 1991, case C-269/90, *Tecnische Universität München v Hauptzollamt München-Mitte* [ECLI:EU:C:1991:438], § 14; Judgment of the Court of First Instance (First Chamber) of 24 January 1992, case T-44/90, *La Cinq SA v Commission of the European Communities* [ECLI:EU:T:1992:5], § 86; Judgment of the Court of First Instance (Third Chamber) of 11 September 2002, case T-70/99, *Alpharma Inc. v Council of the European Union* [ECLI:EU:T:2002:210], § 182; Judgment of the Court of First Instance of 14 February 2006, joined cases T-376/05 and T-383/05, *TEA-CEGOS*, *cit.*, § 76; Judgment of the General Court (Seventh Chamber) of 15 March 2012, case T-236/09, *Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v European Commission* [ECLI:EU:T:2012:127], § 45.

[659] Directive 2014/24, recital 16 and article 24. The latter defines conflicts of interest as follows: «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».

[660] Judgment of the Court (Second Chamber) of 3 March 2005, joined cases C-21/03 and C-34/03, *Fabricom SA v Belgian State* [ECLI:EU:C:2005:127], § 30. Also, *vide* Judgment of the Court of First

exercise the power to ask for additional information in circumstances where (1) the clarification of a tender is clearly both practically possible and necessary, and (2) as long as the exercise of that duty to seek clarification is in accordance with the principle of equal treatment; otherwise, a decision to reject a tender whose ambiguity, in the light of surrounding circumstances, has probably a simple explanation and can be easily resolved, is liable to be vitiated by a manifest error of assessment on the part of the contracting authority[661]. In any case, the contracting authority must ensure that the request for clarification is sent in an equivalent manner to all undertakings which are in the same situation, as, in the event that the clarifying tenderer is finally successful, the contracting authority must be prevented from appearing to have negotiated with the tenderer on a confidential basis[662].

Instance (Third Chamber) of 15 June 1999, case T-277/97, *Ismeri Europa Srl v Court of Auditors of the European Communities* [ECLI:EU:T:1999:124], § 112; Judgment of the Court of First Instance (Fifth Chamber) of 17 March 2005, case T-160/03, *AFCon Management Consultants, Patrick Mc Mullin and Seamus O'Grady v Commission of the European Communities* [ECLI:EU:T:2005:107], § 74; Judgment of the General Court (First Chamber) of 20 March 2013, case T-415/10, *Nexans France v European Joint Undertaking for ITER and the Development of Fusion Energy* [ECLI:EU:T:2013:141], § 114; Judgment of the General Court (Third Chamber) of 11 June 2014, case T-4/13, *Communicaid Group Ltd v European Commission* [ECLI:EU:T:2014:437], § 53.

[661] Judgment of the Court of First Instance (Fifth Chamber) of 6 July 1999, joined cases T-112/96 and T-115/96, *Jean-Claude Séché v Commission of the European Communities* [ECLI:EU:T:1999:134], § 127; Judgment of the Court of First Instance of 27 September 2002, case T-211/02, *Tideland Signal, cit.*, §§ 37 and 38; Judgment of the Court of First Instance (Fifth Chamber) of 21 May 2008, case T-495/04, *Belfass SPRL v Council of the European Union* [ECLI:EU:T:2008:160], §§ 65 to 71. On the other hand, the presence of non-obvious errors and their subsequent amendment or correction might result in breach of the principle of equal treatment, *vide* Judgment of the Court of First Instance of 8 May 1996, case T-19/95, *Adia Interim SA, cit.*, §§ 43 to 47; Judgment of the Court of First Instance (Fifth Chamber) of 26 February 2002, case T-169/00, *Esedra SPRL v Commission of the European Communities* [ECLI:EU:T:2002:40], § 49; Judgment of the Court of First Instance (Fourth Chamber) of 18 April 2007, case T-195/05, *Deloitte Business Advisory NV v Commission of the European Communities* [ECLI:EU:T:2007:107], § 102.

[662] Judgment of the Court (Fourth Chamber) of 29 March 2012, case C-599/10, *SAG ELV Slovensko a.s. and Others v Úrad pre verejné obstarávanie* [ECLI:EU:C:2012:191], §§ 37 to 44; Judgment of the Court (Tenth Chamber) of 10 October 2013, case C-336/12, *Ministeriet for Forskning, Innovation og Videregående Uddannelser v Manova A/S* [ECLI:EU:C:2013:647], §§ 31 to 37; Judgment of the Court of 7 April 2016, case C-324/14, *Partner Apelski Dariusz, cit.*, §§ 61 to 65.

In the following sections we are going to deepen into the decisions that, in the light of the referred duty of good administration, together with the principles of equal treatment and competition, should be taken by contracting authorities when narrowing down their ample discretionality and designing their public procurement processes to source goods, works or services, while preserving sound EU-wide competition in the market where tenderers compete[663].

A. The choice of the type of procedure: conditions to opt for a concrete procurement procedure while observing competitive constraints[664]

Contracting authorities, when selecting a given type of public procurement procedure, must be aware of the fact that such a choice may impact the competition for that contract in the market where potential tenderers compete, since each type of public procurement procedure entails a different degree of publicity[665]. In doing so, contracting

[663] In this line, Prof. SÁNCHEZ GRAELLS accurately warns that «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», *vide* SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules, op. cit.,* p. 246.

[664] Our proposition for this research is the issuance of a public procurement procedure by a single contracting authority; but it is worth mentioning, even incidentally, the increasing recourse to cooperate-to-buy decisions which, instrumented either through centralized procurement –central purchasing bodies– or through occasional joint procurement, allow contracting authorities to jointly obtain better conditions. Equally, although it goes further than our subject-matter of study, reference must be made to instruments for aggregated procurement, which may be of great value as they intend to simplify and reduce the administrave burden; for example, they may be used to govern contracts to be awarded during a given period of time –framework agreements, Article 33 of the Directive 2014/24– or to award standardized –off-the-shelf– goods, works or services which are generally available on the market –dynamic purchasing agreements, Article 34 of the Directive 2014/24–.

[665] In the following sub-sections we will deal with those procurement procedures most frequently used, setting aside other procedures, such as innovation partnerships, whose special nature and scope –the conditions to resort to it are detailed in article 31 of the Directive 2014/24– makes their use, up to date, rather marginal.

authorities must bear in mind that the more intense the competition, the higher the chances to get lower prices and to increase investment in innovation[666].

Viewed the concurring circumstances of each case, contracting authorities must enhance competition in the market of the procured good, work or service and, hence, seek to obtain the most efficient outcome –best value for money– by orienting their choice of the procurement procedure to selecting the procedure that ensures best that their needs will be efficiently met. In a public procurement procedure, the contracting authority ultimately aims at both optimizing the quality and minimizing the cost of acquiring a product with that quality[667].

a. Non-negotiated procedures: open procedures, as the paradigm of transparency, and restricted procedures, as an equally competitively compliant procedure, but subject to a milder requirement of transparency

In pure theory, contracting authorities should be prone to resort to the open procedure, which guarantees the maximum degree of publicity and, hence, of competition[668]. In an open procedure, any interested economic operator may submit a tender in response to a call for competition[669]. It is a single-stage process where a contracting authority advertises the contract opportunity and then issues full tender documents[670].

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[666] In the same line, *vide* HEIJBOER, G. and TELGEN, J. "Choosing the open or the restricted procedure… *op. cit.*, p. 189.

[667] LUNDBERG, S. and BERGMAN, M. "Tender Evaluation and Award Methodologies in Public Procurement", in *SSRN*, 4 May 2011, available at: https://ssrn.com/abstract=1831143 (last consulted: 15.03.2017), p. 5.

[668] Regulated in Article 27 of the Directive 2014/24. Also, *vide* COMISIÓN NACIONAL DE LA COMPETENCIA. *Guía sobre Contratación Pública y Competencia, op. cit.*, p. 10; SUPPORT FOR IMPROVEMENT IN GOVERNANCE AND MANAGEMENT. *What are the Public Procurement Procedures and When Can They Be Used?*, Public Procurement, Brief 10, January 2011, p. 5.

[669] Directive 2014/24, Article 27(1).

[670] SUPPORT FOR IMPROVEMENT IN GOVERNANCE AND MANAGEMENT. *What are the Public Procurement Procedures... op. cit.*, p. 2.

The contracting authority may otherwise opt, within its discretionary powers, for a restricted procedure[671]. In this case, only those economic operators invited to do so by the contracting authority may submit a tender[672]. It is a two-stage process where a contracting authority advertises the contract opportunity and economic operators submit requests to participate and the provide selection stage (pre-qualification) information, which is used by the contracting authority to establish whether the economic operators are qualified to perform the contract and to select the economic operators that are to be invited to tender[673].

Practice shows that, sometimes, open procedures, albeit transparent, are more susceptible to collusive exchanges of information by tenderers, while in restricted procedures, if they are to collude, bidders may communicate in advance, as they are required to submit simultaneously their offer[674].

It is for the contracting authority, in view of its needs and its prior knowledge of the market, to decide whether it applies an open or restricted procedure[675]. Prior to opting for the type of procurement procedure, contracting authorities must inform themselves about market conditions: where there are enough firms in the market of the procured good, work or service, they may achieve efficient outcomes through an open procedure; but, when there are not enough firms to sustain competition, more sophisticated arrangements may be necessary to achieve an efficient outcome[676]. It is

[671] Directive 2014/24, Article 26(2).

[672] Directive 2014/24, Article 28(2).

[673] SUPPORT FOR IMPROVEMENT IN GOVERNANCE AND MANAGEMENT. *What are the Public Procurement Procedures… op. cit.*, pp. 2 and 3.

[674] ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT. "Fighting Cartels in Public Procurement", *op. cit.*, p. 3; COMPETITION COMMITTEE OF THE ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT. *Competition and Procurement. Key Findings*, 2011, p. 41.

[675] HEIJBOER, G. and TELGEN, J. "Choosing the open or the restricted procedure… *op. cit.*, pp. 187 and 193; SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules, op. cit.,* p. 259.

[676] COMPETITION COMMITTEE OF THE ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT. *Competition and Procurement… op. cit.*, p. 16; HEIJBOER, G. and TELGEN, J. "Choosing the open or the restricted procedure… *op. cit.*, p. 209.

undeniable that the evaluation costs linked to an open procedure are higher, as the number of tenders received –which have to be evaluated equally– increases[677]. Moreover, in an open procedure tenderers may either compete less fiercely, as they perceive lower chances to be awarded the contract –due to the high level of competition–, or compromise the quality as they may mainly focus on price-driven competition[678]. Notwithstanding, the choice of conducting a restricted procedure may also entail some drawbacks: while restricting the number of economic operators participating at the tender stage may result in the selection of the most interested ones, which submit better quality tenders –thereby facilitating more effective competition–, the contracting authority is granted a wider discretion, it must not be obviated that there is more potential for corruption and a higher likeliness for collusion among tenderers[679].

Should the contracting authority ultimately choose to conduct a restricted procedure, it may limit the number of operators invited to tender, since it is not obliged to invite all the operators that qualify, and only those economic operators invited to do so by the contracting authority –following its assessment of the information provided– may submit their tender[680]. The contracting authority must be aware of the fact that there is a trade off between increasing tendering costs and the best-expected bid: inviting more tenderers will increase the costs of the whole evaluation process –as more

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[677] As suggested by SIGMA, those costs can be significantly reduced if the documents are available electronically, *vide* SUPPORT FOR IMPROVEMENT IN GOVERNANCE AND MANAGEMENT. *What are the Public Procurement Procedures… op. cit.*, p. 6.

[678] In this very same vein, Prof. HEIJBOER and Prof. TELGEN developed a model that, albeit the fact that it only includes price and costs, proves that the contracting authority should base «the actual decision on the characteristics of each case separately and not having a general rule of, for instance, always using the restricted procedure with a fixed number of candidates», *vide* HEIJBOER, G. and TELGEN, J. "Choosing the open or the restricted procedure… *op. cit.*, pp. 200 and 206 to 210. Also, *vide* SUPPORT FOR IMPROVEMENT IN GOVERNANCE AND MANAGEMENT. *What are the Public Procurement Procedures… op. cit.*, p. 6.

[679] SUPPORT FOR IMPROVEMENT IN GOVERNANCE AND MANAGEMENT. *What are the Public Procurement Procedures… op. cit.*, p. 6.

[680] Directive 2014/24, Articles 28(2) and 65(1). Also, *vide* SUPPORT FOR IMPROVEMENT IN GOVERNANCE AND MANAGEMENT. *What are the Public Procurement Procedures… op. cit.*, p. 3. Once selected, all those candidates must be invited simultaneously and in writing by contracting authorities to submit their tenders, as provided in Article 54(1) of Directive 2014/24.

time needs to be spent to evaluate all tenders submitted–, but inviting more tenderers increases competition, what hence increases the chances to get a better bid[681]. In any case, the minimum number of qualified candidates to be invited to participate in a restricted procedure is five and, as the Directive expressly clarifies, «in any event the number of candidates invited shall be sufficient to ensure genuine competition»[682]. Therefore, to ensure genuine competition it is submitted that the criteria for invitation and short-listing must be related and proportionate to the subject-matter of the contract, while ensuring that suitable potential candidates are not discouraged from participating; the objective of those criteria must be simply to pre-establish the rules that will rule the issuance of invitations provided that the number of applicants exceeds the maximum of the range set[683]. Accordingly, the contracting authority must indicate in the contract notice, together with the objective and non-discriminatory criteria or rules that it intends to apply, the minimum number of candidates it intends to invite and, where appropriate, the maximum number[684].

Still, under certain circumstances procedures without negotiations –either open or restricted ones– may not lead to satisfactory procurement outcomes[685]. Tat is, (a) whenever readily available solutions require their adaptation in order to meet contracting authority's needs; (b) whenever the complexity of the contract or risk attach to it makes contracting authority consider that the resort to open or restricted procedures will not ensure the award of the contract; (c) whenever the procured work, good or services includes innovative solutions; (d) whenever technical specifications cannot be established with sufficient precision in advance, or (e) whenever only irregular or unacceptable tenders are submitted in response to an open or restricted procedure,

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[681] HEIJBOER, G. and TELGEN, J. "Choosing the open or the restricted procedure… *op. cit.*, p. 201.

[682] Directive 2014/24, Article 65(2).

[683] Prof. SÁNCHEZ GRAELLS, aiming at ensuring the maintenance of genuine competition, addresses the following situation: when there is a large number of potential candidates and most of them fail to meet one and the same invitation criterion; in such a case, he suggests –and we could not agree more– the contracting authority should review the decision to include that particular requirement in the contract notice, *vide* SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules, op. cit.,* pp. 313 to 316.

[684] Directive 2014/24, Article 65(2).

[685] Directive 2014/24, recital 42.

contracting authorities may have no other option but opting for negotiated procedures[686].

b. Negotiated procedures: the balance between the necessity resort to negotiations to adapt readily available solutions to contracting authority's specific needs and the obligation not to harm competition

Article 26(4) of the Directive 2014/24 includes a *numerus clausus* of grounds that justify the recourse to negotiated procedures – either the competitive dialogue or the competitive procedure with negotiation. However, their drafting, due to the lack of precision of some of them, provides contracting authorities with an ample discretion when interpreting them; indeed, it may prove hard to argue that contracting authorities are constrained not to resort to them[687]. It is undisputed that negotiated procedures should not be used in respect of off-the-shelf services or supplies that can be provided by many different operators on the market; contrariwise, when it comes to services or

[686] Directive 2014/24, Article 26(4), which stands as follows: «Member States shall provide that contracting authorities may apply a competitive procedure with negotiation or a competitive dialogue in the following situations: (a) with regard to works, supplies or services fulfilling one or more of the following criteria: (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; (iv) the technical specifications cannot be established with sufficient precision by the contracting authority with reference to a standard, European Technical Assessment, common technical specification or technical reference within the meaning of points 2 to 5 of Annex VII; (b) with regard to works, supplies or services where, in response to an open or a restricted procedure, only irregular or unacceptable tenders are submitted. In such situations contracting authorities shall not be required to publish a contract notice where they include in the procedure all of, and only, the tenderers which satisfy the criteria set out in Articles 57 to 64 and which, during the prior open or restricted procedure, submitted tenders in accordance with the formal requirements of the procurement procedure. In particular, tenders which 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, shall be considered as being irregular. In particular, tenders 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 shall be considered as unacceptable».

[687] SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules, op. cit.,* p. 272.

supplies that require adaptation or design efforts –particularly in the case of complex purchases such as sophisticated products, intellectual services–, as well as when it comes to works that are not standard buildings or that include design or innovative solutions, negotiated procedures are likely to be of value[688].

The main aim of both procedures is to ensure that contracting authorities are provided with works, supplies and services perfectly adapted to their specific needs, while preserving the observance of the principles of equal treatment and transparency[689]. Whereas rules on public procurement do not require contracting authorities to use one of these procedures in preference to the other, competitive dialogue has proved to be of great importance where contracting authorities are unable to define the means of satisfying their needs or of assessing what the market can offer in terms of technical, financial or legal solutions[690]. A competitive dialogue is aimed at building a close cooperation between economic operators and the contracting authority in order to define a particularly complex contract[691]. When conducting a competitive dialogue, any economic operator can submit a request to participate in response to a contract notice by providing the information for qualitive selection required by the contracting authority[692]. But only those invited by the contracting authority following

[688] Directive 2014/24, recital 43. Among those complex purchases we may find, for example, some consultancy services, architectural services or engineering services, or major information and communications technology projects.

[689] Directive 2014/24, recitals 43 and 45.

[690] That is the case of innovative projects, the implementation of major integrated trnasport infrastructure projects, large computer networks or projects involving complex and structured financing, *vide* Directive 2014/24, recitals 42. Also, *vide* SUPPORT FOR IMPROVEMENT IN GOVERNANCE AND MANAGEMENT. *What are the Public Procurement Procedures… op. cit.*, pp. 6 and 7.

[691] According to Prof. SÁNCHEZ GRAELLS, the hurdle lies in justifying that the complexity test has been passed in order to turn to the competitive dialogue – in other words, that the thresholds of technical, legal or economic complexity have been met, *vide* SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules, op. cit.,* p. 275. Also, *vide* SUPPORT FOR IMPROVEMENT IN GOVERNANCE AND MANAGEMENT. *What are the Public Procurement Procedures… op. cit.*, p. 6.

[692] Directive 2014/24, Article 30(1).

the assessment of the information provided may participate in the dialogue – which, at least, must be three participants[693].

Once the participants are selected, the dialogue is opened and, by discussing all aspects of the procurement with the chosen participants, it aims at identifying and defining the means best suited to satisfying contracting authority's needs[694]. The contracting authority must continue the dialogue –project definition– stage until it identifies the solution or solutions that are capable of meeting its needs and, when identified, it must declare the dialogue concluded and ask each of the participants to submit their final tender on the basis of the solution or solutions presented and specified during the dialogue[695]. Therefore, on grounds of equal treatment, economic operators that take part in the dialogue stage are granted with the possibility of participating in the subsequent tender for its implementation or construction – that is, undertakings that had been instructed to carry out research, experiments, studies or development in connection with public works, supplies or services are not automatically excluded from the subsequent tender procedure for those works, supplies or services, as long as the experience acquired by those undertakings is not capable of distorting competition[696].

As for the competitive procedure with negotiation –former negotiated procedure with prior publication of a notice–, it is, like the competitive dialogue, a two-stage process, where the contracting authority advertises the contract opportunity and any

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[693] Directive 2014/24, Articles 30(1) and 65(3). All the conclusions come up with in the previous sub-section with regard to the selection of participants, apply here, as, equally, the number of candidates invited to participate in the competitive dialogue is required to be sufficient to ensure genuine competition.

[694] Directive 2014/24, Article 30(3). According to Article 30(8) of the Directive 2014/24, all those participants in the dialogue may be granted prizes or payments, if contracting authorities deem appropriate to do so.

[695] Directive 2014/24, Articles 30(5) and 30(6).

[696] Judgment of the Court of 3 March 2005, joined cases C-21/03 and C-34/03, *Fabricom*, *cit.*, § 36. Article 41 of the Directive 2014/24 expressly sets that «Where a candidate or tenderer or an undertaking related to a candidate or tenderer has advised the contracting authority, whether in the context of Article 40 or not [on preliminary market consultations], 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 the participation of that candidate or tenderer».

economic operator is entitled to submit pre-qualification and selection stage information, which is used by the contracting authority to decide whether the economic operator is qualified to perform the contract and to select the economic operators that are to be invited to tender – which, at least, must be three tenderers[697].

From a competitive perspective, in order to guarantee equal treatment of all economic operators, it is paramount that minimum requirements are indicated beforehand – i.e., contracting authorities must indicate prior to the commencement of the negotiations the minimum requirements –the conditions and characteristics (particularly physical, functional and legal) that any tender should meet– that characterize the nature of the procurement and which cannot be changed throughout the negotiations: award criteria and their weighting should remain stable, whereas all characteristics of the purchased works, supplies and services –including quality, quantities, commercial clauses, and social environmental and innovative aspects– are subject to negotiations, in so far as they do not constitute minimum requirements[698]. Failing to observe the obligation of not negotiating those minimum requirements by, for example, accepting a tender that does not comply with the mandatory requirements to be admissible with a view to negotiations, the contracting authority would breach the principle of transparency, risking falling into favouritism or arbitrariness[699].

Under the specific circumstances referred to in Article 32 of the Directive 2014/24, contracting authorities may exceptionally apply a negotiated procedure without a prior publication of a call for competition[700]. Article 32 of the Directive 2014/24 states as follows (emphasis added):

[…]

[697] Directive 2014/24, Articles 29(1) and 65(3). Also, *vide* SUPPORT FOR IMPROVEMENT IN GOVERNANCE AND MANAGEMENT. *What are the Public Procurement Procedures… op. cit.*, p. 3.

[698] Directive 2014/24, recital 45 and Article 29(1).

[699] Judgment of the Court (Fourth Chamber) of 5 December 2013, case C-561/12, *Nordecon AS and Ramboll Eesti AS v Rahandusministeerium* [ECLI:EU:C:2013:793], §§ 37 and 39.

[700] Directive 2014/24, Article 26(6), which clearly specifies the exceptional character of this procedure, by stating that «Member States shall not allow the application of that procedure in other cases than those referred to in Article 32».

2. The negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts in any of the following cases:

(a) where *no tenders or no suitable tenders or no requests to participate or no suitable requests to participate* have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of the contract are not substantially altered and that a report is sent to the Commission where it so requests.

[…]

(b) where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons:

(i) the aim of the procurement is the creation or acquisition of a *unique work of art or artistic performance*;

(ii) competition is absent for *technical reasons*;

(iii) the protection of *exclusive rights*, including intellectual property rights;

The exceptions set out in points (ii) and (iii) 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;

(c) in so far as is strictly necessary where, for *reasons of extreme urgency* brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with. The circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting authority.

3. The negotiated procedure without prior publication may be used for public supply contracts:

(a) where the products involved are manufactured purely for the purpose of *research, experimentation, study or development*; however, contracts awarded pursuant to this point shall not include quantity production to

establish commercial viability or to recover research and development costs;

(b) for *additional deliveries by the original supplier* which are intended either as a partial replacement of supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the contracting authority to acquire supplies having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance; the duration of such contracts as well as that of recurrent contracts shall not, as a general rule, exceed three years;

(c) for supplies quoted and purchased on a *commodity market*;

(d) for the *purchase of supplies or services on particularly advantageous terms*, from either a supplier which is definitively winding up its business activities, or the liquidator in an insolvency procedure, an arrangement with creditors, or a similar procedure under national laws or regulations.

4. The negotiated procedure without prior publication may be used for public service contracts, where the contract concerned follows a *design contest* organised in accordance with this Directive and is to be awarded, under the rules provided for in the design contest, to the winner or one of the winners of the design contest; in the latter case, all winners must be invited to participate in the negotiations.

5. The negotiated procedure without prior publication may be used for new works or services consisting in the *repetition of similar works or services* entrusted to the economic operator to which 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* pursuant to a procedure in accordance with Article 26(1). The basic project shall indicate the extent of possible additional works or services and the conditions under which they will be awarded.

[…]

This procedure, which does not require any transparency requirement whatsoever, is to be regarded as exceptional; consequently, it can only be used in the

circumstances precisely and exhaustively delimited in the Directive[701]. In so far as some of them are subject to interpretation, it is for the contracting authority to justify the concurrence of any of those circumstances, whereas any further judicial evaluation would be limited to a strict assessment on whether the contracting authority acted diligently and, hence, whether it could legitimately hold that the conditions for recourse to a negotiated procedure without a prior publication of a call for competition were in fact satisfied[702]. We contend that, given the negative impact of such a procedure in the competitive dynamics of the market where the good, work or service is procured, contracting authorities, when in doubt about whether the specific circumstances are indeed met, should refrain from using it, and should opt for conducting a more transparent procurement procedure.

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[701] Judgment of the Court of 13 January 2005, case C-84/03, *Commission v Spain, cit.*, § 47; Judgment of the Court (First Chamber) of 23 April 2009, case C-292/07, *Commission of the European Communities v Kingdom of Belgium* [ECLI:EU:C:2009:246], § 106; Judgment of the Court (Fifth Chamber) of 11 September 2014, case C-19/13, *Ministero dell'Interno v Fastweb SpA* [ECLI:EU:C:2014:2194], § 49.

[702] Judgment of the Court of 17 September 1998, case C-323/96, *Commission v Belgium, cit.*, §§ 31 to 38; Judgment of the Court of 11 September 2014, case C-19/13, *Fastweb, cit.*, § 50. On the principle that the burden of proof lies on the party seeking to rely on derogations from the general rule –which, given their exceptional character, must be interpreted strictly–, *vide* Judgment of the Court of 10 March 1987, case 199/85, *Commission of the European Communities v Italian Republic* [ECLI:EU:C:1987:115], § 14; Judgment of the Court of 18 May 1995, case C-57/94, *Commission of the European Communities v Italian Republic* [ECLI:EU:C:1995:150], § 23; Judgment of the Court (Fifth Chamber) of 28 March 1996, case C-318/94, *Commission of the European Communities v Federal Republic of Germany* [ECLI:EU:C:1996:149], § 13; Judgment of the Court (Second Chamber) of 14 September 2004, case C-385/02, *Commission of the European Communities v Italian Republic* [ECLI:EU:C:2004:522], § 19; Judgment of the Court of 13 January 2005, case C-84/03, *Commission v Spain, cit.*, § 48; Judgment of the Court (First Chamber) of 2 June 2005, case C-394/02, *Commission of the European Communities v Hellenic Republic* [ECLI:EU:C:2005:336], § 33; Judgment of the Court (Grand Chamber) of 8 April 2008, case C-337/05, *Commission of the European Communities v Italian Republic* [ECLI:EU:C:2008:203], § 57; Judgment of the Court (First Chamber) of 4 June 2009, case C-250/07, *Commission of the European Communities v Hellenic Republic* [ECLI:EU:C:2009:338], § 17.

B. The object of the procedure: the division of the contract into lots –or the 'divide-or-explain' requirement– as a means of increasing competition

Contracting authorities are entitled to split or divide the contracts into as many lots as they deem fit or objectively justified as long as, provided that the aggregate value of the lots is equal or exceeds the Directive's thresholds, the Directive applies to the awarding of each lot[703]. If the objects of several contracts conform a single economic and technical unit –that is, are unitary in nature–, they are to be viewed as lots of the same contract[704]. Furthermore, it is sufficient for the objects of the contracts that they fulfil the same economic function or the same technical function – i.e., a finding of economic identicalness and technical identicalness is alternative and not cumulative[705]. In short, contracting authorities are prevented from artificially disaggregating contracts[706].

When it comes to the nature of the contracting authority itself, which may also impact the conception of the objects of distinct contracts as unitary in nature, it would

[703] Directive 2014/24, Articles 5(8) to 5(10) and Article 46. Recital 78 of the Directive 2014/24 warns that «The contracting authority should have the duty to consider the appropriateness of dividing the contract 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».

[704] Opinion of the AG Jacobs delivered on 24 February 2000, case C-16/98, *Commission of the European Communities v French Republic* [ECLI:EU:C:2000:99], § 34. In line with this, Article 5(3) of the Directive 2014/24 expressly states 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». Also, *vide* Judgment of the Court of 5 October 2000, case C-16/98, *Commission of the European Communities v French Republic* [ECLI:EU:C:2000:541], §§ 38 and 50 to 70; Judgment of the Court of 27 October 2005, joined cases C-187/04 and C-188/04, *Commission v Italy* [ECLI:EU:C:2005:652], §§ 26 and 27; Judgment of the Court of 18 January 2007, case C-220/05, *Auroux, cit.*, § 41; Judgment of the Court of 21 February 2008, case C-412/04, *Commission v Italy, cit.*, §§ 29 to 47 and 72; Judgment of the Court (Third Chamber) of 15 March 2012, case C-574/10, *European Commission v Federal Republic of Germany* [ECLI:EU:C:2012:145], § 37.

[705] Judgment of the Court of 27 October 2005, joined cases C-187/04 and C-188/04, *Commission v Italy, cit.*, § 29. Also, *vide* Judgment of the General Court (First Chamber) of 29 May 2013, case T-384/10, *Kingdom of Spain v European Commission* [ECLI:EU:T:2013:277], § 68.

[706] Opinion of the AG Trstenjak delivered on 14 April 2010, case C-271/08, *European Commission v Federal Republic of Germany* [ECLI:EU:C:2010:183], § 165.

be considered that a separate operational unit of the contracting authority exists when that unit in question is independently responsible for its procurement procedures – that is, when 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[707]. Conversely, when the contracting authority merely organizes a procurement in a decentralized way, a subdivision is not justified and contracts are to be deemed lots of the same single contract[708].

Directive 2014/24, in its Article 46(1) establishes, in the following terms, the obligation of contracting authorities to subdivide into lots (emphasis added):

> 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.
>
> Contracting authorities shall, except in respect of contracts whose division has been made mandatory pursuant to paragraph 4 of this Article, provide an *indication of the main reasons for their decision not to subdivide into lots*, which shall be included in the procurement documents or the individual report referred to in Article 84.

And, Article 46(4) reads as follows (emphasis added):

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[707] Directive 2014/24, recital 20.

[708] Directive 2014/24, recital 20. Also, *vide* Judgment of the General Court (Eighth Chamber) of 11 July 2013, case T-358/08, *Kingdom of Spain v European Commission* [ECLI:EU:T:2013:371], §§ 85 to 87, which was set aside by the CJEU, but on grounds that the Commission invalidly adopted its Decision, as it did not respect the 6-month time limit it had to adopt such a Decision, Judgment of the Court (Eighth Chamber) of 4 December 2014, case C-513/13 P, *Kingdom of Spain v European Commission* [ECLI:EU:C:2014:2412], § 48; Judgment of the General Court of 29 May 2013, case T-384/10, *Spain v Commission, cit.*, § 70, which was set aside by the CJEU, but on grounds that essential procedural requirements were infringed, Judgment of the Court (Sixth Chamber) of 22 October 2014, case C-429/13 P, *Kingdom of Spain v European Commission* [ECLI:EU:C:2014:2310], § 40. Also, *vide* Opinion of the AG Kokott delivered on 15 June 2006, case C-220/05, *Jean Auroux and Others v Commune de Roanne* [ECLI:EU:C:2006:410], § 65 and fn 58; Opinion of the AG Ruiz-Jarabo Colomer delivered on 8 November 2006, case C-412/04, *Commission v Italy, cit.*, §§ 85 to 88; Opinion of the AG Mengozzi delivered on 15 February 2007, case C-237/05, *Commission of the European Communities v Hellenic Republic* [ECLI:EU:C:2007:98], §§ 76 to 79.

> Member States may implement the second subparagraph of paragraph 1 by *rendering 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. In such circumstances the first subparagraph of paragraph 2 and, where appropriate, paragraph 3 shall apply.

It is for the national law of each Member State, when implementing the provisions of the Directive 2014/24 into their national legal orders, to specify the cases where dividing into lots may be rendered compulsory. Being it optional, contracting authorities are expected to divide; if not, they are under a duty of justifying their decision not to do so – 'divide-or-explain' requirement. The reasons could for instance be that the contracting authority finds that such division could risk restricting competition, or risk 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 risks undermining the proper execution of the contract[709].

As for the number of lots to be the object of the contract divided into, a large number of lots –with smaller lots– is preferable to a division into an insufficient number of exceedingly big lots, since an excessive fragmentation could be compensated by the submission of bundled offers –which, additionally, may be more competitive than offers for independent lots or for all the lots–, but an insufficient division of the object cannot be compensated by tenderers submitting partial offers or offers for amounts smaller than the object of the tender, as they would be considered non-compliant and, hence, rejected[710].

Finally, the division into lots is desirable to encourage the participation of SMEs, but it may also bring about some risks, as, from a competition law perspective, it may facilitate potential tenderers' collusion; thus, contracting authorities must remain observant of detecting any tendency in the allocation of lots that might indicate the existence of a pattern and, hence, of a potential agreement between tenderers.

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[709] Directive 2014/24, recital 78.

[710] SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules, op. cit.,* pp. 350 to 352.

C. The subject eligible to take part in the procedure: unfoundedly anticompetitive restrictions either to access the tender or to be qualified as awardee of the contract

Whenever a public procurement procedure is designed, the (potential) maximum number of competitors is somehow restricted; otherwise, the administrative costs of assessing the countless offers submitted by a vast plurality of interested tenderers would render the procedure unmanageable. Therefore, focus should be placed on avoiding unnecessary, disproportionate or excessive restrictions to access the public procurement procedure, rather than on preserving a theoretical maximum level of potential competition[711].

There are different ways in which a contracting authority may restrict competition when drafting a specific public procurement procedure. Namely, as it will be explained in the following sections, it may restrict it when it assesses the suitability of candidates, as well as when, once assessed their suitability in general –together with the existence of any exclusion ground–, it further assesses their suitability to perform the contract in particular –qualitative selection criteria–. Even before getting into the analysis of the restrictions arising from the wording of the specific public procurement procedure, the contracting authority may harm competition by delaying the disclosure of the information required to prepare and submit a bid. A delay in making certain information available to tenders leads to an unequal treatment, both of tenderers that actually participated in the public procurement process and of potentially interested participants that decided not to take part in the procedure.

As for the participants in the procedure, it must be recall that the aim of the principle of equal treatment as between tenderers is to promote the development of healthy and effective competition between undertakings taking part in a public procurement procedure, so all tenderers are afforded equality of opportunity when formulating their tenders, which therefore implies that the tenders of all competitors are subject to the same conditions[712]. The principle of equal treatment, as explained above,

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[711] SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules, op. cit.,* p. 247.

[712] Judgment of the Court (Fifth Chamber) of 25 April 1996, case C-87/94, *Commission of the European Communities v Kingdom of Belgium* [ECLI:EU:C:1996:161], § 54; Judgment of the Court (Fifth

implies an obligation of transparency so that it is possible to verify that it has been complied with[713]. The principle of transparency, which is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority, implies, on one side, that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice of tendering specifications; and, on the other side, that all technical information relevant for the purpose of a sound understanding of the contract notice or the tendering specifications is made available as soon as possible to all the undertakings taking part in a public procurement procedure, first, to enable all reasonably well-informed and normally diligent tenderers to understand their precise scope and to interpret them in the same manner and, secondly, to enable the contracting authority to verify whether tenderers' bids meet the criteria of the contract in question[714].

However, we contend that, together with actual participants, potential participants may also be harmed by a delayed disclosure of the information. The principles of diligence and good administration, which, as we previously indicated, bounds the contracting authorities, requires them to wait until all relevant documents are

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Chamber) of 18 October 2001, case C-19/00, *SIAC Construction Ltd v County Council of the County of Mayo* [ECLI:EU:C:2001:553], § 34; Judgment of the Court of 12 December 2002, case C-470/99, *Universale-Bau*, *cit.*, § 93. Also, *vide* Judgment of the Court of First Instance (Third Chamber) of 12 March 2008, case T-345/03, *Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v Commission of the European Communities* [ECLI:EU:T:2008:67], § 143.

[713] Judgment of the Court of 18 November 1999, case C-275/98, *Unitron Scandinavia*, *cit.*, § 31; Judgment of the Court of 7 December 2000, case C-324/98, *Telaustria*, *cit.*, §§ 60-61; Judgment of the Court of 18 June 2002, case C-92/00, *HI*, *cit.*, § 45; Judgment of the Court of 12 December 2002, case C-470/99, *Universale-Bau*, *cit.*, § 91; Judgment of the Court of 29 April 2004, case C-496/99 P, *Succhi di Frutta*, *cit.*, § 109; Judgment of the Court of 4 February 2016, case C-336/14, *Ince*, *cit.*, § 87. Also, *vide* Judgment of the Court of First Instance of 12 March 2008, case T-345/03, *Evropaïki Dynamiki II*, *cit.*, § 142.

[714] Judgment of the Court of 29 April 2004, case C-496/99 P, *Succhi di Frutta*, *cit.*, §§ 110 and 111. Also, *vide* Judgment of the Court of First Instance of 12 March 2008, case T-345/03, *Evropaïki Dynamiki II*, *cit.*, §§ 144 and 145; Judgment of the General Court (Third Chamber) of 15 April 2011, case T-297/05, *IPK International – World Tourism Marketing Consultants GmbH v European Commission* [ECLI:EU:T:2011:185], § 124.

ready to be disclosed to all potential tenderers[715]. Furthermore, it is highly advisable that such documents are offered free of charge, and, in case that fees are imposed, that they reflect the real costs of the tender documentation in order to avoid unnecessary restrictions of the number of potential participants in the tender due to –even inadvertedly– setting a barrier to enter the public procurement procedure[716].

a. Exclusion criteria: the exclusion of the tendering procedure of competitively advantaged candidates

The Directive has codified a list of exclusion grounds that, but for the grounds based on objective considerations of professional quality, is not exhaustive – i.e., Member States may provide, in addition to those grounds of the second paragraph of Article 57(2) and of Article 57(4), for grounds for exclusion designed to ensure the observance of the principles of equal treatment and transparency, provided always that the principle of proportionality is observed and that no other objective consideration of professional quality –different from those of the second paragraph of Article 57(2) and of Article 57(4) of the Directive 2014/24– is included[717].

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[715] Judgment of the Court of First Instance (Third Chamber) of 10 September 2008, case T-59/05, *Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v Commission of the European Communities* [ECLI:EU:T:2008:326], §§ 151 to 159, confirmed by Judgment of the Court (Eighth Chamber) of 3 December 2009, case C-476/08 P, Judgment of the Court of First Instance (Third Chamber) of 10 September 2008, case T-59/05, *Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v European Commission* [ECLI:EU:C:2009:752], § 35; Judgment of the Court of First Instance (Second Chamber) of 11 April 2006, case T-394/03, *Flavia Angeletti v Commission of the European Communities* [ECLI:EU:T:2006:111], § 162. Charter of Fundamental Rights of the European Union, Article 41(1): «Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union».

[716] SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules, op. cit.,* pp. 280 and 281. However, the increasing resort to electronic means to conduct the public procurement procedures is leading to a significant decrease in the administrative costs of running such procedures; in the long run, then, it is expected that there will exist no good reason to charge any fee.

[717] Judgment of the Court of 10 February 1982, case 76/81, *SA Transporoute et travaux v Minister of Public Works* [ECLI:EU:C:1982:49], § 9; Judgment of the Court (First Chamber) of 9 February 2006, joined cases C-226/04 and C-228/04, *La Cascina Soc. coop. arl and Zilch Srl v Ministero della Difesa*

The exclusion criteria are intended to prevent the participation of tenderers that are advantaged with regard to the rest of competitors; consequently, the inclusion of additional grounds of exclusion should be limited to situations where there is a clear potential competitive advantage – that is, where contracting authorities are able to prove the existence of an actual advantage for the tenderer whose exclusion is under consideration[718]. That is the case, for example, of persons who have carried out certain preparatory works – they are not to be automatically precluded from the award procedure, as their participation in the procedure may have entailed no risk whatsoever for competition between tenderers, and, absence any distortion of competition, excluding them would unnecessarily restrict access to the public procurement procedure[719]. Furthermore, in the particular case of project consultants, their prior involvement is expressly authorized and regulated under Articles 40 –preliminary market consultations– and 41 –prior involvement of candidates or tenderers– of the Directive 2014/24[720]. To put it in other words, the tenderer whose exclusion is being

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and Others (C-226/04) and Consorzio G. f. M. v Ministero della Difesa and La Cascina Soc. coop. arl (C-228/04) [ECLI:EU:C:2006:94], §§ 21 to 23; Judgment of the Court (Grand Chamber) of 16 December 2008, case C-213/07, *Michaniki AE v Ethniko Symvoulio Radiotileorasis and Ypourgos Epikrateias* [ECLI:EU:C:2008:731], §§ 40 to 47; Judgment of the Court (Fourth Chamber) of 19 May 2009, case C-538/07, *Assitur Srl v Camera di Commercio, Industria, Artigianato e Agricoltura di Milano* [ECLI:EU:C:2009:317], §§ 20 and 21; Judgment of the Court (Third Chamber) of 15 July 2010, case C-74/09, *Bâtiments et Ponts Construction SA and WISAG Produktionsservice GmbH v Berlaymont 2000 SA* [ECLI:EU:C:2010:431], § 43; Judgment of the Court (Third Chamber) of 13 December 2012, case C-465/11, *Forposta SA and ABC Direct Contact sp. z o.o. v Poczta Polska SA* [ECLI:EU:C:2012:801], § 38

[718] Judgment of the Court of 16 December 2008, case C-213/07, *Michaniki, cit.*, § 62.

[719] Judgment of the Court of 3 March 2005, joined cases C-21/03 and C-34/03, *Fabricom*, *cit.*, §§ 33 to 35.

[720] Notwithstanding, it may not be denied that «A person who has been instructed to carry out research, experiments, studies or development in connection with works, supplies or services relating to a public contract […] is not necessarily in the same situations as regards participation in the procedure for the award of that contract as a person who has not carried out such works. Indeed, a person who has pariticipated in certain preparatory works may be at an advantage when formulating his tender on account of the information concerning the public contract in question which he has received when carrying out that work. However, all tenderers must have equality of opportunity when formulating their tenders […]. Furthermore, that person may be in a situation which may give rise to a conflict of interests in the sense that […] he may, without even intending to do so, where he himself is a tenderer for the public contract in question, influence the conditions of the contract in a manner favourable to himself. Such a situation

considered must be given an opportunity to show that no such advantage exists[721]. In any case, it is for the contracting authority to assess, on a case-by-case analysis, the circumstances that would ultimately lead to the exclusion of the tenderer, with a view of balancing them with the potential impact of the exclusion of the candidate on the level of competition, both within the tender and in the market[722].

Some exclusion grounds are mandatory –Article 57(1) and first paragraph of Article 57(2) of the Directive 2014/24–, while others are discretionary –second paragraph of Article 57(2) and Article 57(4) of the Directive 2014/24–. In any case, the Directive itself contains two derogations from the mandatory exclusion. The first one, on an exceptional basis, for overriding reasons relating to the public interest –such as public health or protection of the environment–[723]. The second one, where an exclusion would be 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 as provided for in the third subparagraph of paragraph 2 before expiration of the deadline for requesting participation or, in open procedures, the deadline for submitting its tender»[724]. It is for Member States, thus, to specify what 'minor amounts of taxes or social security contributions' are, so the scope of the derogation of that mandatory ground is sufficiently clear.

An additional source of competitive distortions would be a disproportionately long exclusion of a tenderer. If no measures are taken by the economic operator to

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would be capable of distorting competition between tenderers», *vide* § Judgment of the Court of 3 March 2005, joined cases C-21/03 and C-34/03, *Fabricom*, *cit.*, §§ 28 to 30.

[721] Judgment of the Court of 16 December 2008, case C-213/07, *Michaniki, cit.*, § 69; Judgment of the Court of 19 May 2009, case C-538/07, *Assitur*, *cit.*, § 30. Also, *vide* Judgment of the Court of First Instance of 14 February 2006, joined cases T-376/05 and T-383/05, *TEA-CEGOS*, *cit.*, § 65; Opinion of the AG Mazák delivered on 10 February 2009, case C-538/07, *Assitur Srl v Camera di Commercio, Industria, Artigianato e Agricoltura di Milano* [ECLI:EU:C:2009:71], § 44 and fn 22.

[722] Judgment of the Court of 13 December 2012, case C-465/11, *Forposta, cit.*, §§ 34 and 35.

[723] Directive 2014/24, first paragraph of Article 57(3).

[724] Directive 2014/24, second paragraph of Article 57(3).

demonstrate its reliability –in line with the provisions of Article 57(6) of the Directive 2014/24– and the period of exclusion has not been set by final judgment, it must not exceed five years from the date of the conviction by final judgment, in the case of mandatory exclusion; and three years from the date of the relevant event, in the case of discretionary exclusion[725]. However, it may be the case that the appreciation of the date of occurrence of the relevant event is not straight-forward or, further, that the infringement that led to the exclusion has not ceased. In the latter case, it is submitted, the exclusion should be maintained until the economic operator complies with the relevant legislation[726]. In cases where the date of the relevant event is unknown or where the contracting authority casts doubts about it, the contracting authority must be cautious when conducting its assessment to reach a balance between, on one side, the need to exclude a participant who, at some point in time, has been advantaged *vis-à-vis* the rest of competitors and, on the other side, its obligation not to unnecessarily restrict competition both in the tender and in the market affected.

Finally, in open procedures the Directive provides contracting authorities with the possibility of examining tenders before verifying the concurrence of any exclusion ground and the fulfilment of the selection criteria –ex Article 56(2)–. In practice, there is no apparent benefit in reversing the sequence, as contracting authorities, once they find the best offer, may feel tempted to obviate –or to be more lenient with– circumstances that would have otherwise made them exclude the tenderer. Furthermore, that would lead to a pointless evaluation of tenders that may not be suitable, as they do not comply with the qualitative selection criteria or as they have been submitted by a tenderer that should have been excluded pursuant to an exclusion ground.

b. Qualitative selection criteria: the acknowledgment of a limited discretionality in the hands of the contracting authority when setting the specific criteria for the assessment of the suitability of candidates to perform the contract

Contracts must be awarded on the basis of the qualitative selection criteria, provided that the contracting authority has verified that all of the following conditions

[725] Directive 2014/24, Article 57(7).

[726] SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules, op. cit.,* p. 291.

are fulfilled: (a) the tender complies with the requirements, conditions and criteria set out in the contract notice or the invitation to confirm interest and in the procurement documents –taking into account, where applicable, variants–; and (b) the tender comes from a tenderer that is not exclude in accordance with the exclusion grounds and that meets the selection criteria set out by the contracting authority –and, where applicable, the maximum number of tenderers or candidates invited, as contracting authorities may limit, in restricted procedures, competitive procedures with negotiation and competitive dialogue procedures, the number of candidates meeting the selection criteria that they will invite to tender or to conduct a dialogue–[727].

Once the contracting authority verifies that there concurs no exclusion ground, they must check tenderers' suitability to pursue the professional activity, its economic and financial standing, and its technical and professional ability[728]. Those requirements for participation, which may be expressed as minimum levels of ability, must be limited to ensure that the tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded, and they must all be related and proportionate to the subject-matter of the contract[729]. When setting the specific requirements that the contracting authority considers adequate for the evaluation of the suitability of candidates to perform the contract, it has a quite wide discretion, but it must take into account the aggregate effect of those qualitative selection criteria[730].

[727] Directive 2014/24, Article 56(1), with reference to Articles 45 –variants–, 57 –exclusion grounds–, 58 –selection criteria–, 59 –European Single Procurement Document–, 60 –means of proof–, 61 –online repository of certificates–, 65 –reduction of the number of otherwise qualified candidates to be invited to participate– and 67 to 69 –award of the contract–.

[728] Directive 2014/24, first paragraph of Article 58(1).

[729] Directive 2014/24, second paragraph of Article 58(1).

[730] Judgment of the Court of 23 November 1978, case 56/77, *Agence européenne d'interims SA v Commission of the European Communities* [ECLI:EU:C:1978:208], § 20; Judgment of the Court (Sixth Chamber) of 9 July 1987, joined cases 27/86, 28/86 and 29/86, *SA Constructions et entreprises industrielles (CEI) and others v Société coopérative "Association intercommunale pour les autoroutes des Ardennes" and others* [ECLI:EU:C:1987:355], §§ 13 to 15. Also, *vide* Judgment of the Court of First Instance (Fourth Chamber) of 8 May 1996, case T-19/95, *Adia Interim SA v Commission of the European Communities* [ECLI:EU:T:1996:59], § 49; Judgment of the Court of First Instance of 17 December 1998, case T-203/96, *Embassy Limousines & Services, cit.*, § 56; Judgment of the Court of First Instance of 24 February 2000, case T-145/98, *ADT Projekt v Commission, cit.*, § 147; Judgment of the Court of First

Selection criteria must be expressed, together with the appropriate means of proof, in the contract notice or in the invitation to confirm interest, and are aimed at ensuring that a compliant candidate can perform the contract, rather than that it will excel when performing the contract, what will eventually be addressed by the award criteria; all in all, excessively high selection criteria may restrict more the ability of the public buyer to obtain value for money than similar demanding standards in later phases of the procurement procedure[731].

In relation with the suitability to pursue the professional activity, contracting authorities may require economic operators to be enrolled in one of the professional or trade registers kept in their Member State of establishment[732]. Further, in procurement procedures for services, if economic operators have to possess a particular authorization or to be members of a particular organization to perform in their country of origin the

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Instance (Fifth Chamber) of 6 July 2000, case T-139/99, *Alsace International Car Service (AICS) v European Parliament* [ECLI:EU:T:2000:182], § 39; Judgment of the Court of First Instance of 26 February 2002, case T-169/00, *Esedra SPRL, cit.*, § 95; Judgment of the Court of First Instance (Fifth Chamber) of 25 February 2003, case T-183/00, *Strabag Benelux NV v Council of the European Union* [ECLI:EU:T:2003:36], § 73; Judgment of the Court of First Instance (Second Chamber) of 6 July 2005, case T-148/04, *TQ3 Travel Solutions Belgium SA v Commission of the European Communities* [ECLI:EU:T:2005:274], § 47; Judgment of the Court of First Instance of 14 February 2006, joined cases T-376/05 and T-383/05, *TEA-CEGOS*, *cit.*, § 50; Judgment of the Court of First Instance of 12 July 2007, case T-250/05, *Evropaïki Dynamiki I, cit.*, § 89; Judgment of the Court of First Instance of 21 May 2008, case T-495/04, *Belfass SPRL, cit.*, § 63; Judgment of the Court of First Instance of 12 November 2008, case T-406/06, *Evropaïki Dynamiki V, cit.*, § 64; Judgment of the Court of First Instance (Second Chamber) of 28 January 2009, case T-125/06, *Centro Studi Antonio Manieri Srl v Council of the European Union* [ECLI:EU:T:2009:19], § 62.

[731] Directive 2014/24, Article 58(5). Also, *vide* SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules, op. cit.,* pp. 303 and 304. On the distinction between selection criteria and award criteria, *vide* Judgment of the Court of 20 September 1988, case 31/87, *Beentjes, cit.*, §§ 15 to 24; C-Judgment of the Court (First Chamber) of 24 January 2008, case C-532/06, *Emm. G. Lianakis AE, Sima Anonymi Techniki Etaireia Meleton kai Epivlepseon and Nikolaos Vlachopoulos v Dimos Alexandroupolis and Others* [ECLI:EU:C:2008:40], §§ 30 to 32; Judgment of the Court of 12 November 2009, case C-199/07, *Commission v Greece, cit.*, §§ 55 and 56; Judgment of the Court (Eighth Chamber) of 9 October 2014, case C-641/13 P, *Kingdom of Spain v European Commission* [ECLI:EU:C:2014:2264], §§ 33 to 38.

[732] Directive 2014/24, first paragraph of Article 58(2).

service concerned, the contracting authority may require them to prove that they hold such authorization or membership[733].

With regard to the economic and financial standing, contracting authorities may impose requirements ensuring that economic operators possess the necessary economic and financial capacity to perform the contract – in particular, they may require a certain minimum yearly turnover, which shall not exceed two times the estimated contract value –except in duly justified cases–; a ratio, for instance, between assets and liabilities; or an appropriate level of professional risk indemnity insurance[734].

And, when it comes to the technical and professional ability, contracting authorities may impose requirements ensuring that economic operators possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard[735].

Previous experience is, thus, a relevant criterion when assessing tenderers' technical standing[736]. However, in so far as competition is not to be distorted, it must remain strictly proportionate to the subject-matter of the contract, not to unduly favor more experienced economic operators by raising an entry barrier for new entrants[737]. Additionally, when it comes to works, goods or services rendered to public authorities, unsatisfactory previous experience may be negatively valued by the contracting authority, pursuant to the discretionary exclusion ground included in Article 57(4)(g).

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[733] Directive 2014/24, second paragraph of Article 58(2).

[734] Directive 2014/24, Article 58(3).

[735] Directive 2014/24, Article 58(4).

[736] Judgment of the Court of 20 September 1988, case 31/87, *Beentjes, cit.*, § 24.

[737] Although the evaluation of the «experience of staff assigned to performing the contract» is specifically included as an award criteria (*vide* Article 67(2)(b) of the Directive 2014/24), the ECJ contends that «tenderers' experience, manpower and equipment, or their ability to perform the contract by the anticipated deadline concern the tenderers' suitability to perform the contract and, therefore, should not have the status of 'award criteria'». On the incorrect classification of experience as an award criteria, *vide* Judgment of the Court of 24 January 2008, case C-532/06, *Lianakis, cit.*, §§ 30 to 32; Judgment of the Court (Fourth Chamber) of 12 November 2009, case C-199/07, *Commission of the European Communities v Hellenic Republic* [ECLI:EU:C:2009:693], §§ 55 and 56; Judgment of the Court of 9 October 2014, case C-641/13 P, *Spain v Commission, cit.*, §§ 35 to 38.

In relation to technical specifications, contracting authorities must preserve technical neutrality – that is, they must draft technical specifications in a neutral and flexible manner, preparing themselves to accept both equivalent alternative references and references different from previous experience in the completion of the exact same type of works, goods or services[738]. Furthermore, technical specifications must allow, not only the opening of the public procurement to competition, but also achieving objectives of sustainability, while ensuring the satisfaction of the needs of the contracting authority[739]. An excessively narrow delimitation of the technical requirements risks excluding candidates that are either more generalist or that opt for alternative technologies and new methods and processes of delivery, restricting hence the scope for innovation and violating obligations of technical neutrality[740]. Consequently, technical specifications must be formulated in terms of performance or functional requirements, including environmental characteristics, or by reference to technical specifications and standards, accompanied by the words 'or equivalent', so their drafting serves the main purpose of clearly allowing tenderers to determine the subject-matter of the contract and it allows the contracting authority to take into consideration any technically and/or functionally equivalent tender – i.e., the contracting authority must accept any work, good or service that is capable of meeting its functional requirements, which it has freely chosen to make mandatory[741]. And, in

[738] Article 42(2) of the Directive 2014/24 stands as follows: «Technical specifications shall afford equal access of economic operators to the procurement procedure and shall not have the effect of creating unjustified obstacles to the opening up of public procurement to competition».

[739] Directive 2014/24, recital 74.

[740] SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules, op. cit.,* pp. 305 and 311.

[741] Directive 2014/24, Article 42(3). Also, *vide* Judgment of the Court (First Chamber) of 14 June 2007, case C-6/05, *Medipac-Kazantzidis AE v Venizeleio-Pananeio (PE.S.Y. KRITIS)* [ECLI:EU:C:2007:337], § 55; Judgment of the Court (Fourth Chamber) of 19 March 2009, case C-489/06, *Commission of the European Communities v Hellenic Republic* [ECLI.EU:C:2009:165], § 43; Opinion of the AG Jacobs delivered on 21 April 2005, case C-174/03, *Impresa Portuale di Cagliari Srl v Tirrenia di Navigazione SpA* [ECLI:EU:C:2005:244], § 72; Opinion of the AG Sharpston delivered on 21 November 2006, case C-6/05, *Medipac-Kazantzidis AE v Venizeleio-Pananeio (PE.S.Y. KRITIS)* [ECLI:EU:C:2006:724], § 78; Opinion of the AG Mazák delivered on 20 November 2008, case C-489/06, *Commission of the European Communities v Hellenic Republic* [ECLI:EU:C:2008:638], § 33; Judgment of the Court of First Instance (Third Chamber) of 28 November 2002, case T-40/01, *Scan Office Design SA v Commission of the*

case of not doing so, the contracting authority is obliged to provide reasons to the unsuccessful tenderer for its decisions of non-equivalence or its decision that the works, goods or services do not meet the performance or functional requirements[742].

Contracting authorites, provided that they wish to purchase works, goods or services with specific environmental, social or other characteristics, are entitled to incorporate label-related requirements into their procurement procedures[743]. When setting the labels, the contracting authority must observe the following conditions (emphasis added)[744]:

> a) the label requirements 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;

European Communities [ECLI:EU:T:2002:288], § 76. On the prohibition of any kind of discrimination that leads in fact to the same result, *vide* Judgment of the Court of 29 October 1980, case 22/80, *Boussac Saint-Frères SA v Brigitte Gerstenmeier* [ECLI:EU:C:1980:251], § 9; Judgment of the Court of 5 December 1989, case C-3/88, *Commission of the European Communities v Italian Republic* [ECLI:EU:C:1989:606], § 8; Judgment of the Court of 14 February 1995, case C-279/93, *Finanzamt Köln-Altstadt v Roland Schumacker* [ECLI:EU:C:1995:31], § 26; Judgment of the Court of 26 September 2000, case C-225/98, *Commission of the European Communities v French Republic* [ECLI:EU:C:2000:494], § 80; Judgment of the Court of 27 October 2005, case C-234/03, *Contse, cit.*, § 36; Judgment of the Court (Grand Chamber) of 5 February 2014, case C-385/12, *Hervis Sport- és Divatkereskedelmi Kft. v Nemzeti Adó- és Vámhivatal Közép-dunántúli Regionális Adó Főigazgatósága* [ECLI:EU:C:2014:47], § 30; Judgment of the Court (Sixth Chamber) of 19 November 2015, case C-632/13, *Skatterverket v Hilkka Hirvonen* [ECLI:EU:C:2015:765], § 29; Judgment of the Court (Second Chamber) of 14 December 2016, case C-238/15, *Maria do Céu Bragança Linares Verruga and Others v Ministre de l'Enseignement supérieur et de la recherche* [ECLI:EU:C:2016:949], § 41; Judgment of the Court (Second Chamber) of 2 March 2017, case C-496/15, *Alphonse Eschenbrenner v Bundesagentur für Arbeit* [ECLI:EU:C:2017:152], § 35. On the drafting of so specific and abstruse technical specifications that only certain candidates can discern their relevance, *vide* Judgment of the Court of 26 September 2000, case C-225/98, *Commission v France, cit.*, § 81.

[742] Directive 2014/24, Article 55(2)(b).

[743] Directive 2014/24, recital 75. Also, *vide* Judgment of the Court (Fourth Chamber) of 22 April 2010, case C-423/07, *European Commission v Kingdom of Spain* [ECLI:EU:C:2010:211], §§ 64 and 65; Judgment of the Court (Third Chamber) of 10 May 2012, case C-368/10, *European Commission v Kingdom of the Netherlands* [ECLI:EU:C:2012:284], §§ 65 to 70.

[744] Directive 2014/24, Article 43(1).

b) the label requirements are based on *objectively verifiable and non-discriminatory criteria*;

c) the labels are established in an *open and transparent procedure* in which all relevant stakeholders, including government bodies, consumers, social partners, manufacturers, distributors and non-governmental organisations, may participate;

d) the labels are *accessible to all interested parties*;

e) the label requirements are *set by a third party* over which the economic operator applying for the label cannot exercise a decisive influence.

Whenever the contracting authority requires a specific label, it must accept any other label that confirms that the works, goods or service meet equivalent label requirements[745]. In any case, the burden of proving equivalence rests on the tenderer, and it is for the contracting authority to decide whether the proposed solution is actually equivalent to the requirements of the technical specifications[746].

Similarly, with the aim of reducing the administrative costs and simplifying the documentation requirements, some Member States have established official lists of contractors and certification systems; in that regard, an objective, transparent and competition neutral way of organizing such registration systems requires that

[745] Directive 2014/24, third paragraph of Article 73(1).

[746] When initially defining the technical specifications and the award criteria, as well as when interpreting and applying them during the award procedure, contracting authorities are bound by the principles of non-discrimination, of transparency and by their duty to give reasons, *vide* Judgment of the Court of 4 June 2009, case C-250/07, *Commission v Greece, cit.*, §§ 67 to 72; Opinion of the AG Sharpston delivered on 21 November 2006, case C-6/05, *Medipac-Kazantzidis AE, cit.*, § 77; Judgment of the Court of First Instance of 8 May 1996, case T-19/95, *Adia Interim SA, cit.*, § 49; Judgment of the Court of First Instance of 24 February 2000, case T-145/98, *ADT Projekt v Commission, cit.*, § 147; Judgment of the Court of First Instance of 26 February 2002, case T-169/00, *Esedra SPRL, cit.*, § 95; Judgment of the Court of First Instance (First Chamber) of 27 September 2002, case T-211/02, *Tideland Signal Ltd v Commission of the European Communities* [ECLI:EU:T:2002:232], § 33; Judgment of the Court of First Instance of 6 July 2005, case T-148/04, *TQ3 Travel Solutions, cit.*, § 47; Judgment of the Court of First Instance (Third Chamber) of 10 September 2008, case T-465/04, Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v Commission of the European Communities [ECLI:EU:T:2008:324], §§ 45 to 49.

unregistered or uncertified operators are able to prove that they meet the applicable professional, technical, economic, financial, quality and environmental requirements by means other than the relevant certificates[747].

In an attempt to opening-up public contracts the widest possible to competition, the Directive 2014/24 specifically recognizes the possibility for tenderers to rely on the capacities of other entities, regardless of the legal nature of the links between them, in order to meet the criteria relating to economic and financial standing and/or the criteria relating to technical and professional ability[748]. The tenderer must prove that it will have at its disposal the resources necessary[749]. However, the Directive does foresee some restrictions in relation with the reliance on multiple third parties (emphasis added)[750]:

> 1. […] With regard to criteria relating to the *educational and professional qualifications* as set out in point (f) of Annex XII Part II, or to the relevant professional experience, economic operators may however only rely on the *capacities of other entities where the latter will perform the works or services for which these capacities are required*. Where an economic operator wants to rely on the capacities of other entities, 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.
>
> The contracting authority shall, in accordance with Articles 59, 60 and 61, *verify whether the entities on whose capacity the economic operator intends to rely fulfil*

[747] Directive 2014/24, Article 64(7).

[748] Directive 2014/24, Article 63(1). Also, *vide* Judgment of the Court (Fifth Chamber) of 2 December 1999, case C-176/98, *Holst Italia SpA v Comune di Cagliari, intervener: Ruhrwasser AG International Water Management* [ECLI:EU:C:1999:593], §§ 26 and 27; Judgment of the Court (Sixth Chamber) of 18 March 2004, case C-314/01, *Siemens AG Österreich and ARGE Telekom & Partner v Hauptverband der österreichischen Sozialversicherungsträger* [ECLI:EU:C:2004:159], § 43; Judgment of the Court of 23 December 2009, case C-305/08, *CoNISMa, cit.*, §§ 35 to 37; Judgment of the Court (Fifth Chamber) of 10 October 2013, case C-94/12, *Swm Costruzioni 2 SpA and Mannocchi Luigino DI v Provincia di Fermo* [ECLI:EU:C:2013:646], §§ 32 to 34.

[749] In that regard, Article 60 of the Directive 2014/24 sets out that «economic operators may rely on any appropriate means to prove to the contracting authority that they will have the necessary resources at their disposal».

[750] Directive 2014/24, Article 63.

> *the relevant selection criteria and whether there are grounds for exclusion pursuant to Article 57*. 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.
>
> 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*.
>
> […]
>
> 2. 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 as referred to in Article 19(2), by a participant in that group.

Tenderers may also opt for teaming, even temporarily, in order to participate in the procurement procedure. Once again, they must not be required to have a specific legal form to submit a tender or a request to participate[751]. However, on the basis of objective reasons, contracting authorities may impose conditions, as long as they are proportionate, for the performance of the contract by such groups of economic operators –such as the appointment of a joint representation or a lead partner for the purposes of the procurement procedure– and, furthermore, contracting authorities may require groups of economic operators to assume a specific legal form once they have been awarded the contract, provided that such a change is necessary for the satisfactory performance of the contract[752].

[751] Directive 2014/24, first paragraph of Article 19(2).

[752] Directive 2014/24, third paragraph of Article 19(2). Recital 15 of the Directive 2014/24 clarifies that, for instance, a specific form may be necessary where joint and several liability is required.

In any case, the specific regulation of bidding consortia is left to Member States, which are subject to compliance with the general principles and other requirements of EU Law[753]. And, from a competition law perspective, in so far as joint bidding reduces the number of competitors and it is prone to facilitate or enforce collusion among teamed bidders, it is for the joint bidders to prove, in case that their consortium is challenged by the contracting authority, either that they can only submit a compliant tender if they participate together or that there are specific and measurable efficiencies derived from the joint bidding strategy which prove that the terms of the joint tender are substantially better for the public buyer that those that they could offer independently[754].

Finally, contracting authorities may authorize or require tenderers to submit variants – that is, alternative offers that, in relation to the technical specifications laid down in the call for tenders, do not fully comply with all the tender requirements or substantially depart therefrom, but do satisfy the minimum requirements set by the contracting authority[755].

In order to accept variants, contracting authorities must indicate in the procurement documents that variants will be either allowed or required[756]. Provided that contracting authorities are to accept variants, they are required to specify the minimum requirements that such variants must meet[757]. In doing so, contracting authorities must

[753] Judgment of the Court (Sixth Chamber) of 23 January 2003, case C-57/01, *Makedoniko Metro and Michaniki AE v Elliniko Dimosio* [ECLI:EU:C:2003:47], §§ 61 to 69; Opinion of the AG Stix-Hackl delivered on 11 July 2002, case C-57/01, *Makedoniko Metro and Michaniki AE v Elliniko Dimosio* [ECLI:EU:C:2002:450], §§ 62 to 69.

[754] SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules, op. cit.,* p. 339.

[755] Directive 2014/24, Article 45. Also, *vide* Judgment of the Court (Sixth Chamber) of 16 October 2003, case C-421/01, *Traunfellner GmbH v Österreichische Autobahnen- und Schnellstraßen-Finanzierungs-AG (Asfinag)* [ECLI:EU:C:2003:549], §§ 26 and 27; Judgment of the Court of 22 April 2010, case C-423/07, *Commission v Spain*, *cit.*, § 65; Judgment of the General Court (Fourth Chamber) of 23 November 2011, case T-514/09, *bpost NV van publiek recht v European Commission* [ECLI:EU:T:2011:689], § 81.

[756] Directive 2014/24, Article 45(1).

[757] *Vide* Judgment of the Court of 16 October 2003, case C-421/01, *Traunfellner*, *cit.*, § 30 where the ECJ stated that «the obligation to set out the minimum specifications required by a contracting authority in order to talke variants into consideration is not satisfied where the contract documents merely refer to a

specifically distinguish minimum core requirements from additional waivable requirements, and only variants meeting the minimum requirements laid down by the contracting authorities can be taken into account[758]. Further, variants may not be taken into consideration if the contracting authority fails to state the minimum specifications[759]. All in all, while a certain flexibility in the procurement process may bring about better results –in terms of innovation– than the specific standard solution envisaged by the contracting authority, as interested candidates will be allowed to put forward alternatives, there are some minimum requirements that, considered indispensable by the contracting authority, will ensure that the alternative tender is suited to satisfy contracting authority's needs and proves to be superior to fully compliant bids[760].

D. The criteria to choose the awardee of the procedure: price- or quality-competition as the guiding –but potentially colluding– interests when designing the fundamental rule for the identification of the most economically advantageous tender

Contracting authorities enjoy –once again– a quite vast discretionality when selecting the criteria on which they propose to base their award of the contract; they are nevertheless limited to criteria aimed at identifying the most economically advantageous tender (hereinafter, MEAT) – that is, the tender chosen in accordance with what the individual contracting authority considers to be the economically best solution among those offered[761]. Any criteria essentially linked to evaluate the

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provision of national legislation requiring an alternative tender to ensure the performance of work which is qualitatively equivalent to that for which tenders are invited».

[758] Directive 2014/24, Article 45(3). Also, *vide* Order of the President of the Court of First Instance of 31 January 2005, case T-447/04 R, *Capgemini Nederland BV v Commission of the European Communities* [ECLI:EU:T:2005:27], § 29.

[759] Judgment of the Court of 22 April 2010, case C-423/07, *Commission v Spain*, *cit.*, § 65.

[760] Directive 2014/24, recital 45. Also, *vide* SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules, op. cit.,* pp. 397 and 398.

[761] Judgment of the Court of 20 September 1988, case 31/87, *Beentjes, cit.*, § 19; Judgment of the Court of 18 October 2001, case C-19/00, *SIAC Construction, cit.*, §§ 35 and 36; Judgment of the Court of 17

tenderers' ability to perform the contract in question –such as criteria related to experience, qualifications and means of ensuring the proper performance of the contract in question– are to be deemed selection criteria rather than award criteria[762].

Once selected, the award criteria will constitute the fundamental rule regulating the award of the contract, as their application will conduct to the objective determination of the MEAT: the award criteria ensure an objective comparison of the relative value of the tenders in order to determine, in conditions of effective competition, which tender is the MEAT[763]. Furthermore, with a view of avoiding any potential distortion of competition, the contracting authority must specify in the procurement documents the relative weighting which it gives to each award criteria – except where the MEAT is identified on the basis of price alone–, and, if the specification of such weighting is not objectively possible, the contracting authority must indicate the criteria in decreasing order of importance[764]. All in all, potential tenderers must be aware of all the elements to be taken into account by the contracting authority in identifying MEAT when they prepare their tenders – i.e., not only of the award criteria, but also of their weighting[765]. Consequently, if the specific weighting of

September 2002, case C-513/99, *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne* [ECLI:EU:C:2002:495], §§ 54 and 59, Judgment of the Court of 19 June 2003, case C-315/01, *GAT, cit.*, §§ 63 and 64; Judgment of the Court of 24 January 2008, case C-532/06, *Lianakis, cit.*, § 29. Also, Directive 2014/24, recital 89, which qualifies the terminology 'most economically advantageous tender' as "the overriding concept".

[762] Judgment of the Court of 24 January 2008, case C-532/06, *Lianakis, cit.*, §§ 30 and 31.

[763] Directive 2014/24, recital 90 and Article 67(4).

[764] Directive 2014/24, Article 67(5). Also, *vide* Judgment of the Court of 17 September 2002, case C-513/99, *Concordia Bus, cit.*, §§ 59 to 64; Judgment of the Court (Sixth Chamber) of 4 December 2003, case C-448/01, *EVN AG and Wienstrom GmbH v Republik Österreich* [ECLI:EU:C:2003:651], §§ 33 to 43, where the ECJ considered that a weighting of 45% for an environmental criterion was proportional, given the utmost importance of environmental considerations in the procurement of energy.

[765] Judgment of the Court of 25 April 1996, case C-87/94, *Commission v Belgium, cit.*, § 88; Judgment of the Court of 12 December 2002, case C-470/99, *Universale-Bau*, *cit.*, § 98; Judgment of the Court of 4 December 2003, case C-448/01, *EVN AG and Wienstrom, cit.*, § 39; Judgment of the Court (Second Chamber) of 24 November 2005, case C-331/04, *ATI EAC Srl e Viaggi di Maio Snc, EAC Srl and Viaggi di Maio Snc v ACTV Venezia SpA, Provincia di Venezia and Comune di Venezia* [ECLI:EU:C:2005:718], § 24; Judgment of the Court of 24 January 2008, case C-532/06, *Lianakis, cit.*, § 36.

the award criteria selected cannot be specified in the initial stage of the tender, it may be specified at a later stage as long as the decision to do so: (1) does not alter the criteria for the award of the contract set out in the contract documents; (2) does not contain elements which, if they had been known at the time the tenders were prepared, could have affected that preparation; and (3) was not adopted on the basis of matters likely to give rise to discrimination against one of the tenderers[766].

The MEAT must be identified through one of these two rules: either through the best price-quality ratio (hereinafter, BPQR) –which in the previous Directive 2004/18 was called the 'MEAT'– or through the most cost-effective offer (hereinafter, MCE offer) –which in the previous Directive 2004/18 was called the 'lowest priced tender'–[767]. Contracting authorities can thus opt for (a) taking into consideration only price or cost elements –MCE offer– or (b) taking into consideration other award criteria related to the subject-matter of the contract in a global assessment of the offer –BPQR–. If they opt of the MCE offer criterion, the contract should be awarded almost automatically to the most cost-efficient compliant tender[768]. However, if they opt for the BPQR criterion, contracting authorities may take into consideration the criteria included in Article 67(2) of Directive 2014/24:

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[766] Judgment of the Court of 24 November 2005, case C-331/04, *ATI EAC, cit.*, § 32; Judgment of the Court of 24 January 2008, case C-532/06, *Lianakis, cit.*, § 43; Judgment of the Court (Seventh Chamber) of 21 July 2011, case C-252/10 P, *Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v Agence européenne pour la sécurité maritime (EMSA)* [ECLI:EU:C:2011:512], § 33; Judgment of the Court (Fourth Chamber) of 14 July 2016, case C-6/15, *TNS Dimarso NV v Vlaams Gewest* [ECLI:EU:C:2016:555], § 26.

[767] Nowadays, as explained, the term MEAT is deemed an overriding concept, since all winning tenders should finally be chosen in accordance with what the contracting authority considers to be the economically best solution. Consequently, the MEAT has been substituted by the BPQR.

[768] A cost-effectiveness approach, such as life-cycle costing, includes the following costs over the life cycle of a product, service or works: «(a) costs, borne by the contracting authority or other users, such as: (i) costs relating to acquisition, (ii) costs of use, such as consumption of energy and other resources, (iii) maintenance costs, and (iv) end of life costs, such as collection and recycling costs; (b) costs imputed to environmental externalities linked to the product, service or works during its life cycle, provided their monetary value 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», *vide* Directive 2014/24, Article 68(1). Also, *vide* SÁNCHEZ GRAELLS, A. *Public Procurement and the EU competition rules, op. cit.,* p. 380.

(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.

In any case, although the list is not exhaustive, criteria must aim at identifying the MEAT and be linked to the subject-matter of the public contract in question[769]. In relation to the experience of the staff assigned to performing the contract, it is noteworthy stating that such criterion, if included, must be justified on the basis of the significant impact that the quality of that staff may have on the level of performance of the contract; otherwise, it must rather be included as a qualitative selection criterion. Absent that significant impact on the level of performance, it could not be defended that such a criterion aims at identifying the MEAT, but it would actually be intended to ensure the proper performance of the contract in question.

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[769] Article 67(3) of the Directive 2014/24 clarifies that «Award criteria shall be considered to be 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: (a) the specific process of production, provision or trading of those works, supplies or services; or (b) a specific process for another stage of their life cycle, even where such factors do not form part of their material substance». Also, *vide* Judgment of the Court of 10 May 2012, case C-368/10, *Commission v Netherlands*, *cit.*, § 91, where the ECJ stated that «there is no requirement that an award criterion relates to an intrinsic characteristic of a product»; and Judgment of the Court of 4 December 2003, case C-448/01, *EVN AG and Wienstrom, cit.*, § 34, where the ECJ underlined that insofar as the European Union legislation on public procurement does not preclude, in the context of a contract for the supply of electricity, a contracting authority from applying an award criterion requiring that the electricity supplied be produced from renewable energy sources, there is therefore nothing, in principle, to preclude such a criterion from referring to the fact that the product concerned was of fair trade origin.

When there is uncertainty about what combinations of price and quality are achievable, a weighing of price and quality may be the optimal option[770]. Notwithstanding, in some situations, pure price competition in combination with appropriate compulsory quality conditions is preferred. That is the case of contracts where there is little uncertainty concerning production costs for different product specifications or where there is important to reach a minimum quality threshold. In other situations, pure quality competition will be deemed appropriate. That is the case of contracts where achieving a particular quality level is not critical, but there are reasons to believe that excessive quality may be expensive.

In conclusion, whereas contracting authorities enjoy a theoretical broad discretion when drafting the criteria under which the MEAT will be identified and, hence, the contract will be awarded, they are compelled to opt for criteria that ensure an objective comparison of all the tenders submitted. The object of the contract procured, as well as the g0al that the contracting authority envisages to fulfil with that good, work or service –either in the public interest or to meet its operational needs– will condition the rule selected by the contracting authority to ultimately choose, in an objective manner, the criteria in application of which the MEAT will be determined.

[770] On all the possible combinations of price and quality that may impact contracting authority's decision, *vide* LUNDBERG, S. and BERGMAN, M. "Tender Evaluation and Award Methodologies in Public Procurement", *op. cit.*, pp. 31 to 33, where the authors conclude that in non-complex situations –when the cost of producing to different quality levels are well known– lowest price, being a simple and robust method, is to be preferred; while «highest quality may be a better choice when there is cost uncertainty and when the marginal cost of quality rises steeply, so that a lowest-price tender can result in unpleasantly large cost surprises».

CONCLUSIONS

1. Optimal EU public procurement regulation is key to guarantee the attainment of best value for money.

An adequate EU public procurement regulation sorts out to be essential to grant an efficient investment of public funds, that is, to the attainment of the public interest through the accomplishment of common societal goals. This requires the previous legislative identification and prioritization of those (maybe contradictory) public policy interests, which will ultimately play a determining role in the contracting public body's decision of which of the different alternatives constitutes, at each stage of the public procurement process, the best value for money.

2. The European market integration process explains the increasing submission of issues to EU Competition law.

The EU public procurement legal framework has experienced a consistent evolution towards the achievement of the single market through the design and maintenance of a competitive level playing field that enables market access to all operators under healthy and free competitive conditions.

It should not come as a surprise that is descending increasingly the number of issues that were either subject to exceptions or, directly, exempted from the scope of Competition law; this shows the commitment of the European institutions towards the submission, as a general rule, of the public entities' activity to competition constraints. The non-submission is, thus, the exception.

3. EU competition policy has turned away from promoting interests other than economic efficiency, in favor of a more economic analysis.

An evolutionary approach to the wide range of objectives that EU competition policy has historically pursued shows that, unlike EU public procurement, competition

is near to the conclusion of its modernizing process; thus, ignoring the risky temptations that once made competition authorities fall for public policies other than economic efficiency, it nowadays relies on a more economic analysis. On the opposite side, procuring public authorities have to cope with various –often divergent– goals when sourcing their works, services and goods as their procurement activities are frequently used as a means of promoting interests other than the pure provision of goods, services and works – i.e., other than their functional objectives.

Furthermore, competition must be taken into account when designing all types of economic regulation –e.g., both for the drafting of public procurement rules and for the application of such rules, that is, the design and execution of specific public tenders–.

4. In the socially responsible and sustainably growing EU, market integration stands in a preeminent position *vis-à-vis* competition.

Competition and market integration are placed at the same level as long as they do not conflict with each other and to the extent that they both serve the same aim: the establishment of a place, working under the dictates of a highly competitive social market economy, where peace, EU values and the well-being of peoples are promoted.

5. If the single market is not to be hindered, the preservation of market dynamics is the primary objective when designing public procurement processes.

Only if market dynamics are preserved and competition is undistorted, will growth be attained.

The different interests at stake must be balanced throughout the public procurement process. Consequently, a contracting authority must bear in mind that every decision that it has to take within a procurement process has to carefully respect the mandates of Competition law; that is, (economic) inefficiencies would only be accepted if they are proportionate to the object of the procurement process and to the extent that they are objectively justified.

6. Contracting authorities may, within its self-organizational prerogatives or, under certain circumstances, as a means of promoting the general interest, opt for resorting to procedures alternative to a public procurement process when sourcing a required good, work or service.

Contracting authorities have at their disposal different competitively compliant alternatives to provide goods, works and services without triggering the application of the usually more stringent public procurement regulations. When contracting authorities provide goods, works or services to satisfy their operational needs or to comply with a public obligation of general interest they have been assigned with, they are free to decide how they organize the performance of activities for which they are publicly responsible.

Public entities cannot be obliged to use any particular form to develop their public service tasks. While the decision not to externalize is intended to limit the risk of collusion on the side of the suppliers, it may also impact negatively competitive dynamics of the market concerned. Moreover, it may lead to a coordination of the contracting authorities' buying power and, hence, endanger the competitive dynamics of the market through the creation of an overwhelming public buying power to the detriment of both operators and fringe competitors.

Therefore, alternatives to calling upon firms for the provision of the good, work or services –that is, to the design of a public procurement process– are to be cautiously assessed by the procuring contracting authority, which must place its focus on whether the resort to such alternatives unduly harms competition in markets where the public buyer represents a large proportion of the demand.

7. The design of public-public cooperation schemes, albeit being excluded from the scope of public procurement rules, is subject to the basic principles of the EU Treaties, being freedom of competition a general principle of EU law.

Whereas genuine public-public cooperation falls outside the scope of the public procurement rules, even if contracting authorities design a public-public cooperation

mechanism to provide the good, work or service, they are nonetheless subject to respect the basic principles of the EU Treaties.

Consequently, it is submitted that competition authorities must remain vigilant in order to deter contracting authorities from distorting competition dynamics through the design of artificial schemes that actually imply the performance of market activities, rather than a mere self-organization.

Furthermore, an excessive recourse to self-organizational instruments may foreclose the market to actual and potential competitors that serve both the public and private demand-side and, hence, absent any competitive tension, it may hamper the attainment of the efficiency linked to the existence of vigorous competition in a market.

8. Although contracting authorities may design their needs in a way that allows them to escape from competition scrutiny –shielding behind the veil of the 'general interest'–, it is precisely Competition law what guarantees that the good of the community and the general interest are actually pursued.

The definition of the boundaries of what constitutes the 'general interest' has been used by contracting authorities to escape from competition scrutiny. The wider the general interest, the narrower the scope left to competitive concerns. However, Member States have failed to reach a consensus to codify the specific services that are considered throughout all territories to be performed in the general interest. As a consequence, the EU judicature has been obliged to interpret EU Law in order to make EU's and Member States' (often conflicting) interests reconcile.

We contend that if the good of the community is to be guaranteed, the most efficient public service provider needs to be selected; otherwise, the community risks to bear the costs of opting for a provider whose incentives to provide the best service at the lowest cost are none.

9. SGEI and competition are to be regarded as complementary: while competition is a tool to achieve the objectives of the EU, Member States' interests are to be accommodated, in application of Article 106(2) TFEU, with the EU interest in ensuring the preservation of the unity of the common market.

Maintaining competitive neutrality in the provision of SGEI is paramount, as, absent a truly effective and undistorted competition, an efficient provision of services in the public interest is impeded and the welfare state's financial viability risks to be menaced by the artificially increased costs of providing such services, which the society perceives as essential.

Competition and SGEI are to be regarded as complementary, in an attempt to reach a compromise between traditional state duties towards citizens and the demands of EU-wide competitive markets. Albeit complementary, should collusion occur, the determination of which one is prevalent –SGEI or competition– comes as indispensable. While some claims the maintenance of a free and competitive economic system to be an important SGI –placing it at the same range as the provision of SGEI–, from our standpoint, the adequate provision of SGEI is of greater importance than the accomplishment of competition law's goal – that is, the correct performance of state duties is to be viewed of further significance than the achievement of economic efficiency.

In any case, whereas Member States retain their discretion as to how define, organize and finance SGEI, to the extent that the decision to provide a SGEI by methods other than through a public procurement procedure –which ensures the least cost to the community– may lead to competitive distortions, attention is paid to whether an unduly economic advantage for the beneficiary has been created. Such benefit may be due to preventing entry to competitors or making easier the expansion of the beneficiary in other markets. At the end of the day, we contend that an open, transparent and non-discriminatory public procedure should be the preferred method to select the SGEI provider – that is, the Most Economically Advantageous Tender (MEAT) that meets the quality standards set by the contracting authority must be awarded the provision of the SGEI.

10. If best value for money is to be attainted, contracting authorities must seek to enhance competition when, within their (apparently) wide degree of discretionality, they specify and tailor public procurement rules to each tender procedure.

We state that, to the extent that best value for money is to be attained and an efficient expenditure of public funds is to be ensured, contracting authorities are bound to seek, within their discretion, the most competitively-compliant drafting of the procurement process: while in the different stages of a public procurement process several (theoretically) equally valid options would be at their disposal, competition concerns show their preference for that which ensures the achievement of best value for money. Notwithstanding, the identification of what constitutes best value for money at each stage of the procurement process asks for a case by case analysis.

11. Concessions are of high value for the provision of complex, long, high-value projects; however, even in cases where contracting authorities are duly entitled to resort to concession contracts, utmost cautions must be observed to avoid unlawful restrictions to competition, since concessions have the potential to foreclose a market.

For the provision of complex, long, high-value projects it is essential to reap private investment that undertakes the operational risk of performing the projects. Wider flexibility is required, in opposition to the stringent and inflexible application of the public procurement rules devised for the award of pure contracts. Hence, when drafting the specific public procurement procedure, contracting authorities must carefully identify the object to be procured, as it will condition the possibility for it to resort to mechanisms other than pure public contracts.

Qualifying a specific contract as a concession may lead to restrictions to competition; therefore, to prevent potential restrictions to competition that may arise from its incorrect qualification and may further vitiate its award, whenever doubts are casted over the nature of the risk transferred, the contracting authority may best qualify it as a contract and, consequently, follow the more stringent procurement rules.

Once the decision to resort to the design of a concession contract is taken, the observance of certain conditions is key to avoid the foreclosure of an otherwise competitive market. First, the recoupment mechanism has to be designed in a way that it does not run counter to the actual transfer of an operating risk. And, second, the delimitation of the duration of the concession contract must, on one hand, enable the

concessionaire to recoup its investment; but, on the other hand, it must be limited in order to avoid market foreclosure and restriction of competition. Therefore, it is for the contracting authority to find the balance between competition and recovery of investments, making both match and embodying them in the duration of the concession contract when drafting the procurement process.

12. In order to open the market concerned to EU-wide competition and enhance the review of the impartiality of the procurement process, equality of opportunity must be guaranteed at each and every stage of the tendering procedure.

Contracting authorities are obliged, in their procuring endeavors, to observe the obligation to guarantee equality of opportunity of tenderers at each and every stage of the tendering procedure, which requires a degree of advertising sufficient to enable, on one hand, to open the market concerned to EU-wide competition and, on the other hand, to review the impartiality of procurement procedures.

As for the rules and conditions governing the award procedure, the referred obligation of transparency entails that they are drawn up in a clear, precise and unequivocal manner so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way; and, second, the contracting authority conducting the public procurement procedure is able to ascertain whether the bids submitted satisfy the criteria applying to the contract in question.

13. The selection of the type of public procurement may impact the degree of competition for that contract in the market where tenderers compete, but practice shows that the inexistence of a perfect type of procedure hampers the straightforwardness of the decision.

Contracting authorities must, viewed the concurring circumstances of each case, enhance competition in the market of the procured good, work or service by selecting the type of procedure that ensures best that their needs will be efficiently met at best

value for money – the contracting authority ultimately aims at both optimizing the quality and minimizing the cost of acquiring a product with that quality.

Albeit being the paradigm of transparency, it is undeniable that the evaluation costs linked to an open procedure are higher, as the number of tenders received –which have to be evaluated equally– is also higher when compared to restricted procedures. Furthermore, in an open procedure tenderers may either compete less fiercely, as they perceive lower chances to be awarded the contract –due to the high level of competition–, or compromise the quality as they may mainly focus on price-driven competition.

A restricted procedure, on its side, may be vitiated by a more potential for corruption and a higher likeliness for collusion among tenderers.

As for negotiated procedures, the grounds that justify the recourse to them are *numerus clausus*. They are aimed at ensuring that contracting authorities are provided with works, supplies and services perfectly adapted to their specific needs. In line with this idea, it is undisputed that negotiated procedures should not be used in respect of off-the-self services or supplies that can be provided by many operators on the market.

We contend that, whenever in doubt, contracting authorities should best opt for conducting the most transparent procurement procedure available.

14. The division of the object of the contract into lots is, on the one hand, desirable, as it fosters competition among potential tenderers; but, on the other hand, it may facilitate collusion.

From a competitive standpoint, a large number of lots –with smaller lots– is preferable to a division into an insufficient number of exceedingly big lots, as an excessive fragmentation could be compensated by the submission of bundled offers, whereas an insufficient division of the object cannot be compensated by tenderers submitting partial offers or offers for amounts smaller than the object of the tender, as they would be considered non-compliant and, hence, rejected.

In any case, it must be acknowledged that the division into lots may also bring about the risk of facilitating collusion. Consequently, it is for the contracting authorities

to remain observant in order to detect any tendency in the allocation of lots that might indicate the existence of a pattern and, hence, of a potential agreement between tenderers.

15. The design of the procurement documents may restrict access to the tender as an incorrect design could lead to the anticompetitive exclusion of otherwise compliant or suitable tenderers.

The mere design of a public procurement process has the potential of reducing competition, as the potential maximum number of competitors is somehow limited. Focus is placed on whether access to the public procurement procedure is not unnecessarily, disproportionately or excessively restricted, rather than on preserving a theoretical maximum level of potential competition.

In relation with the assessment of the existence of an exclusion ground, it is for the contracting authority to assess, on a case-by-case analysis, the circumstances that would ultimately lead to the exclusion of the tenderer. We underline that the contracting authority must balance those circumstances with the potential impact of the exclusion of the candidate on the level of competition, both within the tender and in the market.

As for the qualitative selection criteria, whereas the contracting authority has a quite wide discretion when setting the specific qualitative selection criteria, it must take into account the aggregate effect of those qualitative selection criteria, as they may altogether unduly foreclose the access to the tender to otherwise suitable participants.

Finally, when it comes to technical specifications, they must be formulated in terms of performance or functional requirements, so technically and/or functionally equivalent tenders are not discarded; hence, the contracting authority must accept any work, good or service capable of meeting its functional requirements, which it has freely chosen to make mandatory. Furthermore, contracting authorities may authorize or require alternative offers –variants– that do not fully comply with all the technical specifications, but do satisfy the minimum requirements set. The acceptance of variants seeks to turn out better results in terms of innovation and, by requiring that certain minimum requirements are met, the alternative tender proves to be superior to fully compliant bids.

16. The competitively compliant design of the award criteria is paramount, as they constitute the fundamental rule regulating the award of the contract and are intended to identify which is the economically best solution among those offered.

Award criteria are intended to ensure an objective comparison of the relative value of the tenders in order to determine, in conditions of effective competition, which tender is the MEAT. Consequently, to avoid any distortion of competition, the contracting authority must specify in the procurement documents the relative weighting it gives to each award criteria, so that potential tenderers are aware of all the elements to be taken into account by the contracting authority in identifying the MEAT when they prepare their tenders – that is, not only of the award criteria themselves, but also of their weighting.

When the contracting authority is uncertain about what combinations of price and quality are achievable, a weighting of price and quality may be the optimal option. However, pure price competition is preferred in the case of contracts where there is little uncertainty concerning production costs for different product specifications or where there is important to reach a minimum quality threshold. And pure quality competition is deemed appropriate in the case of contracts where achieving a particular quality level is not critical, but there are reasons to believe that excessive quality may be expensive.

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Judgment of the Court (Sixth Chamber) of 23 April 1991, case C-41/90, *Klaus Höfner and Fritz Elser v Macrotron GmbH* [ECLI:EU:C:1991:161] (collectively, *Höfner*)

Judgment of the Court of 18 June 1991, case C-260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* [ECLI:EU:C:1991:254] (collectively, *ERT v DEP*)

Judgment of the Court of 25 July 1991, joined cases C-1/90 and C-176/90, *Aragonesa de Publicidad Exterior SA and Publivía SAE v Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña* [ECLI:EU:C:1991:327]

Judgment of the Court (Sixth Chamber) of 25 July 1991, case C-76/90, *Manfred Säger v Dennemeyer & Co. Ltd.* [ECLI:EU:C:1991:331]

Judgment of the Court of 21 November 1991, case C-269/90, *Tecnische Universität München v Hauptzollamt München-Mitte* [ECLI:EU:C:1991:438]

Judgment of the Court of 10 December 1991, case C-179/90, *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA* [ECLI:EU:C:1991:464] (collectively, *Porto di Genova*)

Judgment of the Court (Fifth Chamber) of 13 December 1991, case C-18/88, *Régie des télégraphes et des téléphones v GB-Inno-BM SA* [ECLI:EU:C:1991:474] (collectively, *RTT*)

Judgment of the Court (Sixth Chamber) of 20 May 1992, case C-106/91, *Claus Ramrath v Ministre de la Justice, and l'Institut de réviseurs d'entreprises* [ECLI:EU:C:1992:230]

Judgment of the Court of 17 November 1992, joined cases C-271/90, C-281/90 and C-289/90, *Kingdom of Spain, Kingdom of Belgium and Italian Republic v Commission of the European Communities* [ECLI:EU:C:1992:440]

Judgment of the Court of 17 February 1993, joined cases C-159/91 and C-160/91, *Christian Poucet v Assurances Générales de France and Caisse Mutuelle*

Régionale du Languedoc-Roussillon [ECLI:EU:C:1993:63] (collectively, *Poucet and Pistre*)

Judgment of the Court of 10 March 1993, case C-111/91, *Commission of the European Communities v Grand Duchy of Luxembourg* [ECLI:EU:C:1993:92]

Judgment of the Court of 17 March 1993, joined cases C-72/91 and C-73/91, *Firma Sloman Neptun Schiffahrts AG v Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts AG* [ECLI:EU:C:1993:97]

Judgment of the Court of 31 March 1993, case C-19/92, *Dieter Kraus v Land Baden-Württemberg* [ECLI:EU:C:1993:125]

Judgment of the Court of 19 May 1993, case C-320/91, *Criminal proceedings against Paul Corbeau* [ECLI:EU:C:1993:198] (collectively, *Corbeau*)

Judgment of the Court of 22 June 1993, case C-243/89, *Commission of the European Communities v Kingdom of Denmark* [ECLI:EU:C:1993:257]

Judgment of the Court of 27 October 1993, joined cases C-46/90 and C-93/91, *Procureur du Roi v Jean-Marie Lagauche and others* [ECLI:EU:C:1993:852]

Judgment of the Court of 27 October 1993, case C-69/91, *Criminal proceedings against Francine Gillon, née Decoster* [ECLI:EU:C:1993:853]

Judgment of the Court of 17 November 1993, case C-2/91, *Criminal proceedings against Wolf W. Meng* [ECLI:EU:C:1993:885]

Judgment of the Court of 17 November 1993, case C-185/91, *Bundesanstalt für den Güterfernverkehr v Gebrüder Reiff GmbH & Co. KG* [ECLI:EU:C:1993:886]

Judgment of the Court of 17 November 1993, case C-245/91, *Criminal proceedings against Ohra Schadeverzekeringen NV* [ECLI:EU:C:1993:887]

Judgment of the Court of 30 November 1993, case C-189/91, *Petra Kirsammer-Hack v Nurhan Sidal* [ECLI:EU:C:1993:907]

Judgment of the Court (Fifth Chamber) of 7 December 1993, case C-109/92, *Stephan Max Wirth v Landeshauptstadt Hannover* [ECLI:EU:C:1993:916]

Judgment of the Court (Fifth Chamber) of 16 December 1993, case C-334/92, *Teodoro Wagner Miret v Fondo de Garantía Salarial* [ECLI:EU:C:1993:945] (collectively, *Wagner Miret*)

Judgment of the Court of 19 January 1994, case C-364/92, *SAT Fluggesellschaft mbH v Eurocontrol* [ECLI:EU:C:1994:7] (collectively, *Eurocontrol*)

Judgment of the Court of 27 April 1994, case C-393/92, *Municipality of Almelo and others v NV Energiebedrijf Ijsselmij* [ECLI:EU:C:1994:171] (collectively, *Almelo*)

Judgment of the Court of 17 May 1994, case C-18/93, *Corsica Ferries Italia Srl v Corpo dei Piloti del Porto di Genova* [ECLI:EU:C:1994:195] (collectively, *Corsica Ferries*)

Judgment of the Court (Sixth Chamber) of 9 June 1994, case C-153/93, *Bundesrepublik Deutschland v Delta Schiffahrts- und Speditionsgesellschaft mbH* [ECLI:EU:C:1994:240]

Judgment of the Court of 14 July 1994, case C-91/92, *Paola Faccini Dori v Recreb Srl* [ECLI:EU:C:1994:292] (collectively, *Faccini Dori*)

Judgment of the Court of 14 July 1994, case C-379/92, *Criminal proceedings against Matteo Peralta* [ECLI:EU:C:1994:296] (collectively, *Peralta*)

Judgment of the Court of 9 August 1994, case C-43/93, *Raymond Vander Elst v Office des Migrations Internationales* [ECLI:EU:C:1994:310]

Judgment of the Court of 14 September 1994, case C-42/93, *Kingdom of Spain v Commission of the European Communities* [ECLI:EU:C:1994:326]

Judgment of the Court of 5 October 1994, case C-323/93, *Société Civile Agricole du Centre d'Insémination de la Crespelle v Coopérative d'Elevage et d'Insémination Artificielle du Département de la Mayenne* [ECLI:EU:C:1994:368]

Judgment of the Court (Fifth Chamber) of 10 November 1994, case C-320/93, *Lucien Ortscheit GmbH v Eurim-Pharm Arzneimittel GmbH* [ECLI:EU:C:1994:379]

Judgment of the Court of 14 February 1995, case C-279/93, *Finanzamt Köln-Altstadt v Roland Schumacker* [ECLI:EU:C:1995:31]

Judgment of the Court of 23 February 1995, joined cases C-358/93 and C-416/93, *Criminal proceedings against Aldo Bordessa, Vicente Marí Mellado and Concepción Barbero Maestre* [ECLI:EU:C:1995:54]

Judgment of the Court of 6 April 1995, joined cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities* [ECLI:EU:C:1995:98]

Judgment of the Court of 18 May 1995, case C-57/94, *Commission of the European Communities v Italian Republic* [ECLI:EU:C:1995:150]

Judgment of the Court (Sixth Chamber) of 5 October 1995, case C-96/94, *Centro Servizi Spediporto Srl v Spedizioni Marittima del Golfo Srl* [ECLI:EU:C:1995:308]

Judgment of the Court of 16 November 1995, case C-244/94, *Fédération Française des Sociétés d'Assurance, Société Paternelle-Vie, Union des Assurances de Paris-Vie and Caisse d'Assurance et de Prévoyance Mutuelle des Agriculteurs v Ministère de l'Agriculture et de la Pêche* [ECLI:EU:C:1995:392] (collectively, *FFSA*)

Judgment of the Court of 30 November 1995, case C-55/94, *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [ECLI:EU:C:1995:411]

Judgment of the Court of 14 December 1995, joined cases C-163/94, C-165/94 and C-250/94, *Criminal proceedings against Lucas Emilio Sanz de Lera, Raimundo Díaz Jiménez and Figen Kapanoglu* [ECLI:EU:C:1995:451]

Judgment of the Court of 15 December 1995, case C-415/93, *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* [ECLI:EU:C:1995:463]

Judgment of the Court (First Chamber) of 28 March 1996, case C-272/94, *Criminal proceedings against Michel Guiot and Climatec SA, as employer liable at civil law* [ECLI:EU:C:1996:147] (collectively, *Guiot*)

Judgment of the Court (Fifth Chamber) of 28 March 1996, case C-318/94, *Commission of the European Communities v Federal Republic of Germany* [ECLI:EU:C:1996:149]

Judgment of the Court (Fifth Chamber) of 25 April 1996, case C-87/94, *Commission of the European Communities v Kingdom of Belgium* [ECLI:EU:C:1996:161]

Judgment of the Court of 2 July 1996, case C-290/94, *Commission of the European Communities v Hellenic Republic* [ECLI:EU:C:1996:265]

Judgment of the Court of 11 July 1996, case C-39/94, *Syndicat français de l'Express international (SFEI) and others v La Poste and others* [ECLI:EU:C:1996:285]

Judgment of the Court of 11 July 1996, joined cases C-71/94, C-72/94 and C-73/94, *Eurim-Pharm Arzneimittel GmbH v Beiersdorf AG (C-71/94), Boehringer Ingelheim KG (C-72/94) and Farmitalia Carlo Erba GmbH (C-73/94)* [ECLI:EU:C:1996:286]

Judgment of the Court of 26 September 1996, case C-241/94, *French Republic v Commission of the European Communities* [ECLI:EU:C:1996:353]

Judgment of the Court (Fourth Chamber) of 26 September 1996, case C-168/95, *Criminal proceedings against Luciano Arcaro* [ECLI:EU:C:1996:363] (collectively, *Arcaro*)

Judgment of the Court of 18 March 1997, case C-343/95, *Diego Calì & Figli Srl v Servizi ecologici porto di Genova SpA (SEPG)* [ECLI:EU:C:1997:160]

Judgment of the Court of 15 May 1997, case C-250/95, *Futura Participations SA and Singer v Administration des contributions* [ECLI:EU:C:1997:239]

Judgment of the Court of 17 June 1997, case C-70/95, *Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl v Regione Lombardia* [ECLI:EU:C:1997:301] (collectively, *Sodemare*)

Judgment of the Court (Sixth Chamber) of 17 July 1997, case C-242/95, *GT-Link A/S v De Danske Statsbaner (DSB)* [ECLI:EU:C:1997:376]

Judgment of the Court of 17 September 1997, case C-54/96, *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH* [ECLI:EU:C:1997:413] (collectively, *Dorsch*)

Judgment of the Court of 23 October 1997, case C-157/94, *Commission of the European Communities v Kingdom of the Netherlands* [ECLI:EU:C:1997:499]

Judgment of the Court of 23 October 1997, case C-158/94, *Commission of the European Communities v Italian Republic* [ECLI:EU:C:1997:500]

Judgment of the Court of 23 October 1997, case C-159/94, *Commission of the European Communities v French Republic* [ECLI:EU:C:1997:501]

Judgment of the Court (Sixth Chamber) of 11 December 1997, case C-55/96, *Job Centre coop. arl.* [ECLI:EU:C:1997:603]

Judgment of the Court of 18 December 1997, case C-129/96, *Inter-Environnement Wallonie ASBL v Région wallonne* [ECLI:EU:C:1997:628]

Judgment of the Court of 15 January 1998, case C-44/96, *Mannesmann Anlagenbau Austria AG and Others v Strohal Rotationsdruck GesmbH* [ECLI:EU:C:1998:4]

Judgment of the Court (Fifth Chamber) of 12 February 1998, case C-163/96, *Criminal proceedings against Silvano Raso and Others* [ECLI:EU:C:1998:54]

Judgment of the Court of 28 April 1998, case C-120/95, *Nicolas Decker v Caisse de maladie des employés privés* [ECLI:EU:C:1998:167]

Judgment of the Court of 28 April 1998, case C-158/96, *Raymond Kohll v Union des caisses de maladie* [ECLI:EU:C:1998:171] (collectively, *Kohll*)

Judgment of the Court (Fourth Chamber) of 7 May 1998, joined cases C-52/97, C-53/97 and C-54/97, *Epifanio Viscido (C-52/97), Mauro Scandella and Others (C-53/97) and Massimiliano Terragnolo and Others (C-54/97) v Ente Poste Italiane* [ECLI:EU:C:1998:209]

Judgment of the Court (Fifth Chamber) of 18 June 1998, case C-35/96, *Commission of the European Communities v Italian Republic* [ECLI:EU:C:1998:303]

Judgment of the Court (Fifth Chamber) of 18 June 1998, case C-266/96, *Corsica Ferries France SA v Gruppo Antichi Ormeggiatori del porto di Genova Coop. arl, Gruppo Ormeggiatori del Golfo di La Spezia Coop. arl and Ministero dei Trasporti e della Navigazione* [ECLI:EU:C:1998:306] (collectively, *Corsica Ferries*)

Judgment of the Court (Sixth Chamber) of 25 June 1998, case C-203/96, *Chemische Afvalstoffen Dusseldorp BV and Others v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* [ECLI:EU:C:1998:316]

Judgment of the Court (Sixth Chamber) of 17 September 1998, case C-323/96, *Commission of the European Communities v Kingdom of Belgium* [ECLI:EU:C:1998:411]

Judgment of the Court (Sixth Chamber) of 24 September 1998, case C-76/97, *Walter Tögel v Niederösterreichische Gebietskrankenkasse* [ECLI:EU:C:1998:432] (collectively, *Tögel*)

Judgment of the Court of 10 November 1998, case C-360/96, *Gemeente Arnhem and Gemeente Rheden v BFI Holding BV* [ECLI:EU:C:1998:525] (collectively, *BFI Holding*)

Judgment of the Court (Fifth Chamber) of 1 December 1998, case C-200/97, *Ecotrade Srl v Altiforni e Ferriere di Servola SpA (AFS)* [ECLI:EU:C:1998:579]

Judgment of the Court (Fifth Chamber) of 17 December 1998, case C-353/96, *Commission of the European Communities v Ireland* [ECLI:EU:C:1998:611]

Judgment of the Court of 26 January 1999, case C-18/95, *F.C. Terhoeve v Inspecteur van de Belastingdienst Particulieren/Ondernemingen buitenland* [ECLI:EU:C:1999:22]

Judgment of the Court of 23 February 1999, case C-63/97, *Bayerische Motorenwerke AG (BMW) and BMW Nederland BV v Ronald Karel Deenik* [ECLI:EU:C:1999:82]

Judgment of the Court (Sixth Chamber) of 29 April 1999, case C-342/96, *Kingdom of Spain v Commission of the European Communities* [ECLI:EU:C:1999:210]

Judgment of the Court of 1 June 1999, case C-126/97, *Eco Swiss China Time Ltd v Benetton International NV* [ECLI:EU:C:1999:269] (collectively, *Eco Swiss*)

Judgment of the Court of 1 June 1999, case C-302/97, *Klaus Konle v Republik Österreich* [ECLI:EU:C:1999:271]

Judgment of the Court (Fifth Chamber) of 8 June 1999, case C-337/97, *C.P.M. Meeusen v Hoofddirectie van de Informatie Beheer Groep* [ECLI:EU:C:1999:284]

Judgment of the Court (Sixth Chamber) of 17 June 1999, case C-75/97, *Kingdom of Belgium v Commission of the European Communities* [ECLI:EU:C:1999:311]

Judgment of the Court (Fifth Chamber) of 17 June 1999, case C-295/97, *Industrie Aeronautiche e Meccaniche Rinaldo Piaggio SpA v International Factors Italia SpA (Ifitalia), Dornier Luftfahrt GmbH and Ministero della Difesa* [ECLI:EU:C:1999:313]

Judgment of the Court of 21 September 1999, case C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [ECLI:EU:C:1999:430] (collectively, *Albany*)

Judgment of the Court of 21 September 1999, joined cases C-115/97 to C-117/97, *Brentjens' Handelsonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* [ECLI:EU:C:1999:434]

Judgment of the Court of 21 September 1999, case C-219/97, *Maatschappij Drijvende Bokken BV v Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven* [ECLI:EU:C:1999:437] (collectively, *Drijvende Bokken*)

Judgment of the Court (Fifth Chamber) of 21 September 1999, case C-44/98, *BASF AG v Präsident des Deutschen Patentamts* [ECLI:EU:C:1999:440]

Judgment of the Court (Sixth Chamber) of 28 October 1999, case C-81/98, *Alcatel Austria AG and Others, Siemens AG Österreich and Sag-Schrack Anlagentechnik AG v Bundesministerium für Wissenschaft und Verkehr* [ECLI:EU:C:1999:534]

Judgment of the Court (Fifth Chamber) of 18 November 1999, case C-107/98, *Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia* [ECLI:EU:C:1999:562] (collectively, *Teckal*)

Judgment of the Court (First Chamber) of 18 November 1999, case C-275/98, *Unitron Scandinavia A/S and 3-S A/S, Danske Svineproducenters Serviceselskab v Ministeriet for Fødevarer, Landbrug og Fiskeri* [ECLI:EU:C:1999:567]

Judgment of the Court of 23 November 1999, joined cases C-369/96 and C-376/96, *Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL (C-369/96) and Bernard Leloup, Serge Leloup and Sofrage SARL (C-376/96)* [ECLI:EU:C:1999:575] (collectively, *Arblade*)

Judgment of the Court (Fifth Chamber) of 2 December 1999, case C-176/98, *Holst Italia SpA v Comune di Cagliari, intervener: Ruhrwasser AG International Water Management* [ECLI:EU:C:1999:593]

Judgment of the Court of 10 February 2000, joined cases C-147/97 and C-148/97, *Deutsche Post AG v Gesellschaft für Zahlungssysteme mbH GZS) (C-147/97) and Citicorp Kartenservice GmbH (C-148/97)* [ECLI:EU:C:2000:74] (collectively, *Deutsche Post*)

Judgment of the Court (Fifth Chamber) of 16 March 2000, joined cases C-395/96 P and C-396/96 P, *Compagnie maritime belge transports SA (C-395/96 P), Compagnie maritime belge SA (C-395/96 P) and Dafra-Lines A/S (C-396/96 P) v Commission of the European Communities* [ECLI:EU:C:2000:132]

Judgment of the Court (Sixth Chamber) of 18 May 2000, case C-206/98, *Commission of the European Communities v Kingdom of Belgium* [ECLI:EU:C:2000:256]

Judgment of the Court of 23 May 2000, case C-209/98, *Entreprenørforeningens Affalds/Miljøsektion (FFAD) v Københavns Kommune* [ECLI:EU:C:2000:279] (collectively, *Sydhavnens Sten & Grus*)

Judgment of the Court (Fifth Chamber) of 22 June 2000, case C-332/98, *French Republic v Commission of the European Communities* [ECLI:EU:C:2000:338]

Judgment of the Court of 4 July 2000, case C-424/97, *Salomone Haim v Kassenzahnärztliche Vereinigung Nordhein* [ECLI:EU:C:2000:357]

Judgment of the Court (First Chamber) of 13 July 2000, case C-456/98, *Centrosteel Srl v Adipol GmbH* [ECLI:EU:C:2000:402] (collectively, *Centrosteel*)

Judgment of the Court of 12 September 2000, joined cases C-180/98 to C-184/98, *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* [ECLI:EU:C:2000:428] (collectively, *Pavlov*)

Judgment of the Court of 26 September 2000, case C-225/98, *Commission of the European Communities v French Republic* [ECLI:EU:C:2000:494]

Judgment of the Court of 3 October 2000, case C-58/98, *Josef Corsten* [ECLI:EU:C:2000:527]

Judgment of the Court (Fifth Chamber) of 3 October 2000, case C-380/98, *The Queen v H.M. Treasury, ex parte The University of Cambridge* [ECLI:EU:C:2000:529]

Judgment of the Court (Sixth Chamber) of 3 October 2000, case C-9/99, *Echirolles Distribution SA v Association du Dauphiné and Others* [ECLI:EU:C:2000:532]

Judgment of the Court of 5 October 2000, case C-16/98, *Commission of the European Communities v French Republic* [ECLI:EU:C:2000:541]

Judgment of the Court (Fifth Chamber) of 23 November 2000, case C-135/99, *Ursula Elsen v Bundesversicherungsanstalt für Angestellte* [ECLI:EU:C:2000:647]

Judgment of the Court (Sixth Chamber) of 7 December 2000, case C-324/98, *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG, joined party: Herold Business Data AG* [ECLI:EU:C:2000:669] (collectively, *Telaustria*)

Judgment of the Court (Fifth Chamber) of 1 February 2001, case C-108/96, *Criminal proceedings agains Denis Mac Queen, Derek Pouton, Carla Godts, Youssef Antoun and Grandvision Belgium SA, being civilly liable, intervenir: Union professionnelle belge des médicins spécialistes en ophtalmologie et chirurgie oculaire* [ECLI:EU:C:2001:67]

Judgment of the Court (Fifth Chamber) of 1 February 2001, case C-237/99, *Commission of the European Communities v French Republic* [ECLI:EU:C:2001:70]

Judgment of the Court of 20 February 2001, case C-205/99, *Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir) and Others v Administración General del Estado* [ECLI:EU:C:2001:107] (collectively, *Analir*)

Judgment of the Court of 13 March 2001, case C-379/98, *PreussenElektra AG v Schhleswag AG, in the presence of Windpark Reußenköge III GmbH and Land Schleswig-Holstein* [ECLI:EU:C:2001:160]

Judgment of the Court (Sixth Chamber) of 17 May 2001, case C-340/99, *TNT Traco SpA v Poste Italiane SpA and Others* [ECLI:EU:C:2001:281]

Judgment of the Court of 12 July 2001, case C-368/98, *Abdon Vanbraekel and Others v Alliance nationale des mutualités chrétiennes (ANMC)* [ECLI:EU:C:2001:400]

Judgment of the Court of 12 July 2001, case C-157/99, *B.S.M. Geraets-Smits v Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v Stichting CZ Groep Zorgverzekeringen* [ECLI:EU:C:2001:404] (collectively, *Smits and Peerbooms*)

Judgment of the Court (Fifth Chamber) of 18 October 2001, case C-19/00, *SIAC Construction Ltd v County Council of the County of Mayo* [ECLI:EU:C:2001:553] (collectively, *SIAC Construction*)

Judgment of the Court (Fifth Chamber) of 25 October 2001, case C-475/99, *Firma Ambulanz Glöckner v Landkreis Südwestpfalz* [ECLI:EU:C:2001:577] (collectively, *Ambulanz Glöckner*)

Judgment of the Court (Sixth Chamber) of 22 November 2001, case C-53/00, *Ferring SA v Agence centrale des organisms de sécurité sociale (ACOSS)* [ECLI:EU:C:2001:627] (collectively, *Ferring*)

Judgment of the Court (Sixth Chamber) of 27 November 2001, joined cases C-285/99 and C-286/99, *Impresa Lombardini SpA - Impresa Generale di Costruzioni v ANAS - Ente nazionale per le strade and Società Italiana per Condotte d'Acqua SpA (C-285/99) and Impresa Ing. Mantovani SpA v ANAS - Ente nazionale per le strade and Ditta Paolo Bregoli (C-286/99)* [ECLI:EU:C:2001:640]

Judgment of the Court of 22 January 2002, case C-390/99, *Canal Satélite Digital SL v Adminstración General del Estado, and Distribuidora de Televisión Digital SA (DTS)* [ECLI:EU:C:2002:34] (collectively, *Canal Satélite Digital*)

Judgment of the Court of 22 January 2002, case C-218/00, *Cisal di Battistello Venanzio & C. Sas v Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL)* [ECLI:EU:C:2002:36] (collectively, *Cisal*)

Judgment of the Court of 19 February 2002, case C-309/99, *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, intervener: Raad van de Balies van de Europese Gemeenschap* [ECLI:EU:C:2002:98] (collectively, *Wouters*)

Judgment of the Court of 16 May 2002, case C-482/99, *French Republic v Commission of the European Communities* [ECLI:EU:C:2002:294]

Judgment of the Court of 4 June 2002, case C-367/98, *Commission of the European Communities v Portuguese Republic* [ECLI:EU:C:2002:326]

Judgment of the Court of 4 June 2002, case C-503/99, *Commission of the European Communities v Kingdom of Belgium* [ECLI:EU:C:2002:328]

Judgment of the Court (Sixth Chamber) of 18 June 2002, case C-92/00, *Hospital Ingenieure Krankenhaustecnnik Planungs-Gesellschaft mbH (HI) v Stadt Wien* [ECLI:EU:C:2002:379] (collectively, *HI*)

Judgment of the Court (Fifth Chamber) of 11 July 2002, case C-62/00, *Marks & Spencer plc v Commissioners of Customs & Excise* [ECLI:EU:C:2002:435] (collectively, *Marks and Spencer*)

Judgment of the Court of 17 September 2002, case C-513/99, *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne* [ECLI:EU:C:2002:495] (collectively, *Concordia Bus*)

Judgment of the Court of 22 October 2002, case C-94/00, *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities* [ECLI:EU:C:2002:603] (collectively, *Roquettes Frères*)

Judgment of the Court (Sixth Chamber) of 24 October 2002, case C-82/01 P, *Aéroports de Paris v Commission of the European Communities* [ECLI:EU:C:2002:617] (collectively, *Aéroports de Paris*)

Judgment of the Court (Fifth Chamber) of 21 November 2002, case C-436/00, *X and Y v Riksskatteverket* [ECLI:EU:C:2002:704]

Judgment of the Court (Sixth Chamber) of 12 December 2002, case C-470/99, *Universale-Bau AG, Bietergemeinschaft: 1) Hinteregger & Söhne Bauges.m.b.H. Salzburg, 2) ÖSTÜ-STETTIN Hoch- und Tiefbau GmbH v Entsorgungsbetriebe Simmering GmbH* [ECLI:EU:C:2002:746] (collectively, *Universale-Bau*)

Judgment of the Court (Sixth Chamber) of 23 January 2003, case C-57/01, *Makedoniko Metro and Michaniki AE v Elliniko Dimosio* [ECLI:EU:C:2003:47]

Judgment of the Court (Fifth Chamber) of 27 February 2003, case C-373/00, *Adolf Truley GmbH v Bestattung Wien GmbH* [ECLI:EU:C:2003:110]

Judgment of the Court (Fifth Chamber) of 10 April 2003, joined cases C-20/01 and C-28/01, *Commission of the European Communities v Federal Republic of Germany* [ECLI:EU:C:2003:220]

Judgment of the Court (Sixth Chamber) of 8 May 2003, case C-349/97, *Kingdom of Spain v Commission of the European Communities* [ECLI:EU:C:2003:251] (collectively, *Tragsa I*)

Judgment of the Court of 13 May 2003, case C-385/99, *V.G. Müller-Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA and E.E.M. van Riet v Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen* [ECLI:EU:C:2003:270]

Judgment of the Court (Sixth Chamber) of 15 May 2003, case C-214/00, *Commission of the European Communities v Kingdom of Spain* [ECLI:EU:C:2003:276]

Judgment of the Court (Fifth Chamber) of 15 May 2003, case C-160/01, *Karen Mau v Bundesanstalt für Arbeit* [ECLI:EU:C:2003:280]

Judgment of the Court (Fifth Chamber) of 22 May 2003, case C-462/99, *Connect Austria Gesellschaft für Telekommunikation GmbH v Telekom-Control-*

Kommission, and Mobilkom Austria AG [ECLI:EU:C:2003:297] (collectively, *Connect Austria*)

Judgment of the Court (Fifth Chamber) of 22 May 2003, case C-18/01, *Arkkitehtuuritoimisto Riitta Korhonen Oy, Arkkitehtitoimisto Pentti Toivanen Oy and Rakennuttajatoimisto Vilho Tervomaa v Varkauden Taitotalo Oy* [ECLI:EU:C:2003:300] (collectively, *Korhonen*)

Judgment of the Court (Sixth Chamber) of 19 June 2003, case C-315/01, *Gesellschaft für Abfallentsorgungs-Technik GmbH (GAT) v Österreichische Autobahnen und Schnellstraßen AG (ÖSAG)* [ECLI:EU:C:2003:360] (collectively, *GAT*)

Judgment of the Court of 24 July 2003, case C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht* [ECLI:EU:C:2003:415] (collectively, *Altmark*)

Judgment of the Court of 9 September 2003, case C-198/01, *Consorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato* [ECLI:EU:C:2003:430]

Judgment of the Court of 23 September 2003, case C-452/01, *Margarethe Ospelt and Schlössle Weissenberg Familienstiftung* [ECLI:EU:C:2003:493]

Judgment of the Court (Sixth Chamber) of 16 October 2003, case C-283/00, *Commission of the European Communities v Kingdom of Spain* [ECLI:EU:C:2003:544]

Judgment of the Court (Sixth Chamber) of 16 October 2003, case C-421/01, *Traunfellner GmbH v Österreichische Autobahnen- und Schnellstraßen-Finanzierungs-AG (Asfinag)* [ECLI:EU:C:2003:549] (collectively, *Traunfellner*)

Judgment of the Court (Sixth Chamber) of 4 December 2003, case C-448/01, *EVN AG and Wienstrom GmbH v Republik Österreich* [ECLI:EU:C:2003:651] (collectively, *EVN and Wienstrom*)

Judgment of the Court of 11 December 2003, case C-322/01, *Deutscher Apothekerverband eV v 0800 DocMorris NV and Jacques Waterval* [ECLI:EU:C:2003:664]

Judgment of the Court (Sixth Chamber) of 5 February 2004, case C-157/02, *Rieser Internationale Transporte GmbH v Autobahnen- und Schnellstraßen-Finanzierungs- AG* (Asfinag) [ECLI:EU:C:2004:76]

Judgment of the Court (Sixth Chamber) of 12 February 2004, case C-218/01, *Henkel KGaA* [ECLI:EU:C:2004:88] (collectively, *Henkel*)

Judgment of the Court (Fifth Chamber) of 11 March 2004, case C-9/02, *Hughes de Lasteyrie du Saillant v Ministère de l'Économie, des Finances et de l'Industrie* [ECLI:EU:C:2004:138]

Judgment of the Court of 16 March 2004, joined cases C-264/01, C-306/01, C-354/01 and C-355/01, *AOK Bundesverband, Bundesverband der Betriebskrankenkassen (BKK), Bundesverband der Innungskrankenkassen, Bundesverband der landwirtschaftlichen Krankenkassen, Verband der Angestelltenkrankenkassen eV, Verband der Arbeiter-Ersatzkassen, Bundesknappschaft and See-Krankenkasse v Ichthyol-Gesellschaft Cordes, Hermani & Co. (C-264/01), Mundipharma GmbH (C-306/01), Gödecke GmbH (C-354/01) and Intersan, Institut für pharmazeutische und klinische Forschung GmbH (C-355/01)* [ECLI:EU:C:2004:150] (collectively, *AOK Bundesverband*)

Judgment of the Court (Sixth Chamber) of 18 March 2004, case C-314/01, *Siemens AG Österreich and ARGE Telekom & Partner v Hauptverband der österreichischen Sozialversicherungsträger* [ECLI:EU:C:2004:159]

Judgment of the Court (Sixth Chamber) of 29 April 2004, case C-496/99 P, *Commission of the European Communities v CAS Succhi di Frutta SpA* [ECLI:EU:C:2004:236] (collectively, *Succhi di Frutta*)

Judgment of the Court (Sixth Chamber) of 29 April 2004, case C-371/02, *Björnekulla Fruktindustrier AB v Procordia Food AB* [ECLI:EU:C:2004:275]

Judgment of the Court (Grand Chamber) of 13 July 2004, case C-262/02, *Commission of the European Communities v French Republic* [ECLI:EU:C:2004:431]

Judgment of the Court (Second Chamber) of 14 September 2004, case C-385/02, *Commission of the European Communities v Italian Republic* [ECLI:EU:C:2004:522]

Judgment of the Court (First Chamber) of 21 October 2004, case C-445/03, *Commission of the European Communities v Grand Duchy of Luxembourg* [ECLI:EU:C:2004:655]

Judgment of the Court (Third Chamber) of 2 December 2004, case C-41/02, *Commission of the European Communities v Kingdom of the Netherlands* [ECLI:EU:C:2004:762]

Judgment of the Court (First Chamber) of 11 January 2005, case C-26/03, *Stadt Halle and RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna* [ECLI:EU:C:2005:5] (collectively, *Stadt Halle*)

Judgment of the Court (Second Chamber) of 13 January 2005, case C-84/03, *Commission of the European Communities v Kingdom of Spain* [ECLI:EU:C:2005:14]

Judgment of the Court (Second Chamber) of 3 March 2005, joined cases C-21/03 and C-34/03, *Fabricom SA v Belgian State* [ECLI:EU:C:2005:127] (collectively, *Fabricom*)

Judgment of the Court (Second Chamber) of 21 April 2005, case C-140/03, *Commission of the European Communities v Hellenic Republic* [ECLI:EU:C:2005:242]

Judgment of the Court (First Chamber) of 2 June 2005, case C-394/02, *Commission of the European Communities v Hellenic Republic* [ECLI:EU:C:2005:336]

Judgment of the Court (Third Chamber) of 7 July 2005, case C-227/03, *A. J. van Pommeren-Bourgondiën v Raad van bestuur van de Sociale verzekeringsbank* [ECLI:EU:C:2005:431]

Judgment of the Court (Grand Chamber) of 21 July 2005, case C-231/03, *Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti* [ECLI:EU:C:2005:487] (collectively, *Coname*)

Judgment of the Court (First Chamber) of 13 October 2005, case C-458/03, *Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG* [ECLI:EU:C:2005:605] (collectively, *Parking Brixen*)

Judgment of the Court (Third Chamber) of 20 October 2005, case C-264/03, *Commission of the European Communities v French Republic* [ECLI:EU:C:2005:620]

Judgment of the Court (Third Chamber) of 27 October 2005, case C-234/03, *Contse SA, Vivisol Srl and Oxigen Salud SA v Instituto Nacional de Gestión Sanitaria (Ingesa), formerly Instituto Nacional de la Salud (Insalud)* [ECLI:EU:C:2005:644] (collectively, *Contse*)

Judgment of the Court of 27 October 2005, joined cases C-187/04 and C-188/04, *Commission v Italy* [ECLI:EU:C:2005:652]

Judgment of the Court (First Chamber) of 10 November 2005, case C-29/04, *Commission of the European Communities v Republic of Austria* [ECLI:EU:C:2005:670]

Judgment of the Court (Second Chamber) of 24 November 2005, case C-331/04, *ATI EAC Srl e Viaggi di Maio Snc, EAC Srl and Viaggi di Maio Snc v ACTV Venezia SpA, Provincia di Venezia and Comune di Venezia* [ECLI:EU:C:2005:718] (collectively, *ATI EAC*)

Judgment of the Court (Second Chamber) of 10 January 2006, case C-222/04, *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SpA, Fondazione Cassa di Risparmio di San Miniato and Cassa di Risparmio di San Miniato SpA* [ECLI:EU:C:2006:8] (collectively, *Cassa di Risparmio di Firenze*)

Judgment of the Court (First Chamber) of 9 February 2006, joined cases C-226/04 and C-228/04, *La Cascina Soc. coop. arl and Zilch Srl v Ministero della Difesa and Others (C-226/04) and Consorzio G. f. M. v Ministero della Difesa and La Cascina Soc. coop. arl (C-228/04)* [ECLI:EU:C:2006:94]

Judgment of the Court (Second Chamber) of 23 March 2006, case C-237/04, *Enirisorse SpA v Sotacarbo SpA* [ECLI:EU:C:2006:197] (collectively, *Enirisorse*)

Judgment of the Court (Third Chamber) of 30 March 2006, case C-451/03, *Servizi Ausiliari Dottori Commercialisti Srl v Giuseppe Calafiori* [ECLI:EU:C:2006:208] (collectively, *Servizi Ausiliari Dottori Commercialisti*)

Judgment of the Court (First Chamber) of 6 April 2006, case C-410/04, *Associazione Nazionale Autotrasporto Viaggiatori (ANAV) v Comune di Bari and AMTAB Servizio SpA* [ECLI:EU:C:2006:237]

Judgment of the Court (First Chamber) of 11 May 2006, case C-340/04, *Carbotermo SpA and Consorzio Alisei v Comune di Busto Arsizio and AGESP SpA* [ECLI:EU:C:2006:308] (collectively, *Carbotermo*)

Judgment of the Court (Grand Chamber) of 16 May 2006, case C-372/04, *The Queen, on the application of Yvonne Watts v Bedford Primary Care Trust and Secretary of State for Health* [ECLI:EU:C:2006:325] (collectively, *Watts*)

Judgment of the Court (Grand Chamber) of 4 July 2006, case C-212/04, *Konstantinos Adeneler and Others v Ellinikos Organismos Galaktos (ELOG)* [ECLI:EU:C:2006:443] (collectively, *Adeneler*)

Judgment of the Court (Grand Chamber) of 11 July 2006, case C-205/03 P, *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v Commission of the European Communities* [ECLI:EU:C:2006:453] (collectively, *FENIN*)

Judgment of the Court (Third Chamber) of 18 July 2006, case C-519/04 P, *David Meca-Medina and Igor Majcen v Commission of the European Communities* [ECLI:EU:C:2006:492]

Judgment of the Court (Second Chamber) of 7 September 2006, case C-470/04, *N v Inspecteur van de Belastingdienst Oost/kantoor Almelo* [ECLI:EU:C:2006:525]

Judgment of the Court (First Chamber) of 14 September 2006, joined cases C-158/04 and C-159/04, *Alfa Vita Vassilopoulos AE (C-158/04) and Carrefour Marinopoulos AE (C-159/04) v Elliniko Dimosio and Nomarchiaki Aftodioikisi Ioanninon* [ECLI:EU:C:2006:562]

Judgment of the Court (Second Chamber) of 26 October 2006, case C-345/05, *Commission of the European Communities v Portuguese Republic* [ECLI:EU:C:2006:685]

Judgment of the Court (Third Chamber) of 23 November 2006, case C-238/05, *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Asociación de Usuarios de Servicios Bancarios (Ausbanc)* [ECLI:EU:C:2006:734]

Judgment of the Court (Third Chamber) of 11 January 2007, case C-208/05, *ITC Innovative Technology Center GmbH v Bundesagentur für Arbeit* [ECLI:EU:C:2007:16] (collectively, *ITC*)

Judgment of the Court (First Chamber) of 18 January 2007, case C-220/05, *Jean Auroux and Others v Commune de Roanne* [ECLI:EU:C:2007:31] (collectively, *Auroux*)

Judgment of the Court (Eighth Chamber) of 18 January 2007, case C-104/06, *Commission of the European Communities v Kingdom of Sweden* [ECLI:EU:C:2007:40]

Judgment of the Court (Third Chamber) of 15 March 2007, case C-95/04 P, *British Airways plc v Commission of the European Communities* [ECLI:EU:C:2007:166]

Judgment of the Court (Second Chamber) of 19 April 2007, case C-295/05, *Asociación Nacional de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa) and Administración del Estado* [ECLI:EU:C:2007:227] (collectively, *Tragsa II*)

Judgment of the Court (Grand Chamber) of 5 June 2007, case C-170/04, *Klas Rosengren and Others v Riksåklagaren* [ECLI:EU:C:2007:313]

Judgment of the Court (First Chamber) of 14 June 2007, case C-6/05, *Medipac-Kazantzidis AE v Venizeleio-Pananeio (PE.S.Y. KRITIS)* [ECLI:EU:C:2007:337]

Judgment of the Court (First Chamber) of 18 July 2007, case C-490/04, *Commission of the European Communities v Federal Republic of Germany* [ECLI:EU:C:2007:430]

Judgment of the Court (Second Chamber) of 18 July 2007, case C-503/04, *Commission of the European Communities v Federal Republic of Germany* [ECLI:EU:C:2007:432]

Judgment of the Court (Second Chamber) of 18 July 2007, case C-382/05, *Commission of the European Communities v Italian Republic* [ECLI:EU:C:2007:445]

Judgment of the Court (Grand Chamber) of 11 September 2007, case C-76/05, *Herbert Schwarz and Marga Gootjes-Schwarz v Finanzamt Bergisch Gladbach* [ECLI:EU:C:2007:492]

Judgment of the Court (Grand Chamber) of 11 September 2007, case C-318/05, *Commission of the European Communities v Federal Republic of Germany* [ECLI:EU:C:2007:495]

Judgment of the Court (Second Chamber) of 8 November 2007, case C-143/06, *Ludwigs - Apotheke München Internationale Apotheke v Juers Pharma Import-Export GmbH* [ECLI:EU:C:2007:656]

Judgment of the Court (Grand Chamber) of 13 November 2007, case C-507/03, *Commission of the European Communities v Ireland* [ECLI:EU:C:2007:676]

Judgment of the Court (Third Chamber) of 29 November 2007, case C-119/06, *Commission of the European Communities v Italian Republic* [ECLI:EU:C:2007:729]

Judgment of the Court (Grand Chamber) of 11 December 2007, case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [ECLI:EU:C:2007:772]

Judgment of the Court (Third Chamber) of 13 December 2007, case C-250/06, *United Pan-Europe Communications Belgium SA and Others v Belgian State* [ECLI:EU:C:2007:783] (collectively, *United Pan-Europe Communications*)

Judgment of the Court (Fourth Chamber) of 13 December 2007, case C-337/06, *Bayerischer Rundfunk and Others v GEWA - Gesellschaft für Gebäudereinigung und Wartung mbH* [ECLI:EU:C:2007:786] (collectively, *Bayerischer Rundfunk*)

Judgment of the Court (First Chamber) of 18 December 2007, case 220/06, *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v Administración General del Estado* [ECLI:EU:C:2007:815] (collectively, *Correos*)

Judgment of the Court (Third Chamber) of 18 December 2007, case C-281/06, *Hans-Dieter Jundt and Hedwig Jundt v Finanzamt Offenburg* [ECLI:EU:C:2007:816]

Judgment of the Court (Fourth Chamber) of 18 December 2007, case C-357/06, *Frigerio Luigi & C. Snc v Comune di Triuggio* [ECLI:EU:C:2007:818]

Judgment of the Court (Second Chamber) of 17 January 2008, case C-152/05, *Commission of the European Communities v Federal Republic of Germany* [ECLI:EU:C:2008:17]

Judgment of the Court (First Chamber) of 24 January 2008, case C-532/06, *Emm. G. Lianakis AE, Sima Anonymi Techniki Etaireia Meleton kai Epivlepseon and Nikolaos Vlachopoulos v Dimos Alexandroupolis and Others* [ECLI:EU:C:2008:40] (collectively, *Lianakis*)

Judgment of the Court (Fourth Chamber) of 31 January 2008, case C-380/05, *Centro Europa 7 Srl v Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni and Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni* [ECLI:EU:C:2008:59]

Judgment of the Court (Second Chamber) of 21 February 2008, case C-412/04, *Commission of the European Communities v Italian Republic* [ECLI:EU:C:2008:102]

Judgment of the Court (Third Chamber) of 6 March 2008, case C-196/07, *Commission of the European Communities v Kingdom of Spain* [ECLI:EU:C:2008:146]

Judment of the Court (Third Chamber) of 3 April 2008, case C-103/06, *Philippe Derouin v Union pour le recouvrement des cotisations de sécurité sociale et d'allocations familiales de Paris - Région parisienne (Urssaf de Paris - Région parisienne)* [ECLI:EU:C:2008:185]

Judgment of the Court (Grand Chamber) of 8 April 2008, case C-337/05, *Commission of the European Communities v Italian Republic* [ECLI:EU:C:2008:203]

Judgment of the Court (Fourth Chamber) of 10 April 2008, case C-393/06, *Ing. Aigner, Wasser-Wärme-Umwelt, GmbH v Fernwärme Wien GmbH* [ECLI:EU:C:2008:213]

Judgment of the Court (Fourth Chamber) of 15 May 2008, joined cases C-147/06 and C-148/06, *SECAP SpA (C-147/06) and Santorso Soc. coop. arl (C-148/06) v Comune di Torino* [ECLI:EU:C:2008:277] (collectively, *SECAP*)

Judgment of the Court (Grand Chamber) of 1 July 2008, joined cases C-341/06 P and C-342/06 P, *Chronopost SA and La Poste v Union française de l'express (UFEX) and Others* [ECLI:EU:C:2008:375]

Judgment of the Court (Grand Chamber) of 1 July 2008, case C-49/07, *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* [ECLI:EU:C:2008:376] (collectively, *MOTOE*)

Judgment of the Court (Second Chamber) of 17 July 2008, case C-371/05, *Commission of the European Communities v Italian Republic* [ECLI:EU:C:2008:410]

Judgment of the Court (Third Chamber) of 17 July 2008, case C-206/06, *Essent Netwerk Noord BV supported by Nederlands Elektriciteit Administratiekantoor BV v Aluminium Delfzijl BV, and in the indemnification proceedings Aluminium Delfzijl BV v Staat der Nederlanden and in the indemnification proceedings Essent Netwerk Noord BV v Nederlands Elektriciteit Administratiekantoor BV and Saranne BV* [ECLI:EU:C:2008:413] (collectively, *Essent Netwerk Noord*)

Judgment of the Court (Second Chamber) of 17 July 2008, case C-347/06, *ASM Brescia SpA v Comune di Rodengo Saiano* [ECLI:EU:C:2008:416]

Judgment of the Court (Fourth Chamber) of 11 September 2008, case C-141/07, *Commission of the European Communities v Federal Republic of Germany* [ECLI:EU:C:2008:492]

Judgment of the Court (Grand Chamber) of 16 September 2008, joined cases C-468/06 to 478/06, *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEVE* [ECLI:EU:C:2008:504] (collectively, *Syfait II*)

Judgment of the Court (Third Chamber) of 13 November 2008, case C-324/07, *Coditel Brabant SA v Commune d'Uccle and Région de Bruxelles-Capitale* [ECLI:EU:C:2008:621] (collectively, *Coditel Brabant*)

Judgment of the Court (Third Chamber) of 20 November 2008, case C-209/07, *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd* [ECLI:EU:C:2008:643]

Judgment of the Court (Grand Chamber) of 16 December 2008, case C-213/07, *Michaniki AE v Ethniko Symvoulio Radiotileorasis and Ypourgos Epikrateias* [ECLI:EU:C:2008:731] (collectively, *Michaniki*)

Judgment of the Court (Second Chamber) of 5 March 2009, case C-222/07, *Unión de Televisiones Comerciales Asociadas (UTECA) v Administración General del Estado* [ECLI:EU:C:2009:124]

Judgment of the Court (Third Chamber) of 5 March 2009, case C-350/07, *Kattner Stahlbau GmbH v Maschinenbau- und Metall-Berufsgenossenschaft* [ECLI:EU:C:2009:127] (collectively, *Kattner Stahlbau*)

Judgment of the Court (Grand Chamber) of 10 March 2009, case C-169/07, *Hartlauer Handelsgesellschaft mbH v Wiener Landesregierung and Oberösterreichische Landesregierung* [ECLI:EU:C:2009:141]

Judgment of the Court (Fourth Chamber) of 19 March 2009, case C-489/06, *Commission of the European Communities v Hellenic Republic* [ECLI.EU:C:2009:165]

Judgment of the Court (Second Chamber) of 26 March 2009, case C-113/07 P, *SELEX Sistemi Integrati SpA v Commission of the European Communities and Organisation européenne pour la sécurité de la navigation aérienne (Eurocontrol)* [ECLI:EU:C:2009:191] (collectively, *SELEX*)

Judgment of the Court (First Chamber) of 2 April 2009, case C-202/07 P, *France Télécom SA v Commission of the European Communities* [ECLI:EU:C:2009:214]

Judgment of the Court (First Chamber) of 23 April 2009, case C-292/07, *Commission of the European Communities v Kingdom of Belgium* [ECLI:EU:C:2009:246]

Judgment of the Court (Grand Chamber) of 19 May 2009, case C-531/06, *Commission of the European Communities v Italian Republic* [ECLI:EU:C:2009:315]

Judgment of the Court (Grand Chamber) of 19 May 2009, joined cases C-171/07 and C-172/07, *Apothekerkammer des Saarlandes and Others (C-171/07) and Helga Neumann-Seiwert (C-172/07) v Saarland and Ministerium für Justiz, Gesundheit und Soziales* [ECLI:EU:C:2009:316]

Judgment of the Court (Fourth Chamber) of 19 May 2009, case C-538/07, *Assitur Srl v Camera di Commercio, Industria, Artigianato e Agricoltura di Milano* [ECLI:EU:C:2009:317] (collectively, *Assitur*)

Judgment of the Court (First Chamber) of 4 June 2009, case C-250/07, *Commission of the European Communities v Hellenic Republic* [ECLI:EU:C:2009:338]

Judgment of the Court (Third Chamber) of 4 June 2009, case C-8/08, *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [ECLI:EU:C:2009:343]

Judgment of the Court (Grand Chamber) of 9 June 2009, case C-480/06, *Commission of the European Communities v Federal Republic of Germany* [ECLI:EU:C:2009:357] (collectively, *Hamburg*)

Judgment of the Court (Fourth Chamber) of 11 June 2009, case C-300/07, *Hans & Christophorus Oymanns GbR, Orthopädie Schuhtechnik v AOK Rheinland/Hamburg* [ECLI:EU:C:2009:358] (collectively, *Hans & Christophorus Oymanns*)

Judgment of the Court (Third Chamber) of 10 September 2009, case C-573/07, *Sea Srl v Comune di Ponte Nossa* [ECLI:EU:C:2009:532] (collectively, *Sea*)

Judgment of the Court (Third Chamber) of 10 September 2009, case C-206/08, *Wasser- und Abwasserzweckverband Gotha und Landkreisgemeinden (WAZV Gotha) v Eurawasser Aufbereitungs- und Entsorgungsgesellschaft mbH* [ECLI:EU:C:2009:540] (collectively, *Eurawasser*)

Judgment of the Court (Third Chamber) of 6 October 2009, joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services Unlimited v Commission of the European Communities (C-501/06 P) and Commission of the European Communities v GlaxoSmithKline Services Unlimited (C-513/06 P) and European Association of Euro Pharmaceutical Companies (EAEPC) v Commission of the European Communities (C-515/06 P) and Asociación de exportadores españoles de productos farmacéuticos (Aseprofar) v Commission of the European Communities (C-519/06 P)* [ECLI:EU:C:2009:610] (collectively, *GlaxoSmithKline*)

Judgment of the Court (Third Chamber) of 15 October 2009, case C-196/08, *Acoset SpA v Conferenza Sindaci e Presidenza Prov. Reg. ATO Idrico Ragusa and Others* [ECLI:EU:C:2009:628] (collectively, *Acoset*)

Judgment of the Court (Fourth Chamber) of 29 October 2009, case C-536/07, *Commission of the European Communities v Federal Republic of Germany* [ECLI:EU:C:2009:664]

Judgment of the Court (Fourth Chamber) of 12 November 2009, case C-199/07, *Commission of the European Communities v Hellenic Republic* [ECLI:EU:C:2009:693]

Judgment of the Court (Eighth Chamber) of 3 December 2009, case C-476/08 P, Judgment of the Court of First Instance (Third Chamber) of 10 September 2008, case T-59/05, *Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v European Commission* [ECLI:EU:C:2009:752]

Judgment of the Court (Fourth Chamber) of 23 December 2009, case C-305/08, *Consorzio Nazionale Interuniversitario per le Scienze del Mare (CoNISMa) v Regione Marche* [ECLI:EU:C:2009:807] (collectively, *CoNISMa*)

Judgment of the Court (Fourth Chamber) of 23 December 2009, *Serrantoni Srl and Consorzio stabile edili Scrl v Comune di Milano* [ECLI:EU:C:2009:808]

Judgment of the Court (Grand Chamber) of 16 March 2010, case C-325/08, *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC* [ECLI:EU:C:2010:143]

Judgment of the Court (Grand Chamber) of 13 April 2010, case C-91/08, *Wall AG v La ville de Francfort-sur-le-Main and Frankfurter Entsorgungs- und Service (FES) GmbH* [ECLI:EU:C:2010:182] (collectively, *Wall*)

Judgment of the Court (Fourth Chamber) of 22 April 2010, case C-423/07, *European Commission v Kingdom of Spain* [ECLI:EU:C:2010:211]

Judgment of the Court (Grand Chamber) of 1 June 2010, joined cases C-570/07 and C-571/07, *José Manuel Blanco Pérez and María del Pilar Chao Gómez v Consejería de Salud y Servicios Sanitarios (C-570/07) and Principado de Asturias (C-571/07)* [ECLI:EU:C:2010:300]

Judgment of the Court (Second Chamber) of 3 June 2010, case C-203/08, *Sporting Exchange Ltd v Minister van Justitie* [ECLI:EU:C:2010:307] (collectively, *Sporting Exchange*)

Judgment of the Court (Fourth Chamber) of 10 June 2010, case C-140/09, *Fallimento Traghetti del Mediterraneo SpA v Presidenza del Consiglio dei Ministri* [ECLI:EU:C:2010:335]

Judgment of the Court (First Chamber) of 8 July 2010, case C-171/08, *European Commission v Portuguese Republic* [ECLI:EU:C:2010:412]

Judgment of the Court (Third Chamber) of 15 July 2010, case C-74/09, *Bâtiments et Ponts Construction SA and WISAG Produktionsservice GmbH v Berlaymont 2000 SA* [ECLI:EU:C:2010:431]

Judgment of the Court (Second Chamber) of 14 October 2010, case C-280/08 P, *Deutsche Telekom AG v European Commission* [ECLI:EU:C:2010:603]

Judgment of the Court (Third Chamber) of 22 December 2010, C-215/09, *Mehiläinen Oy and Terveystalo Healthcare Oy v Oulun kaupunki* [ECLI:EU:C:2010:807]

Judgment of the Court (First Chamber) of 20 January 2011, case C-155/09, *European Commission v Hellenic Republic* [ECLI:EU:C:2011:22]

Judgment of the Court (First Chamber) of 17 February 2011, case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB* [ECLI:EU:C:2011:83]

Judgment of the Court (Second Chamber) of 17 February 2011, case C-251/09, *European Commission v Republic of Cyprus* [ECLI:EU:C:2011:84]

Judgment of the Court (First Chamber) of 3 March 2011, case C-437/09, *AG2R Prévoyance v Beaudout Père et Fils SARL* [ECLI:EU:C:2011:112] (collectively, *AG2R Prévoyance*)

Judgment of the Court (Third Chamber) of 10 March 2011, case C-274/09, *Privater Rettungsdienst und Krankentransport Stadler v Zweckverband für Rettungsdienst und Feuerwehralarmierung Passau* [ECLI:EU:C:2011:130] (collectively, *Privater Rettungsdienst*)

Judgment of the Court (Seventh Chamber) of 21 July 2011, case C-252/10 P, *Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v Agence européenne pour la sécurité maritime (EMSA)* [ECLI:EU:C:2011:512]

Judgment of the Court (Second Chamber) of 10 November 2011, case C-348/10, *Norma-A SIA and Dekom SIA v Latgales plānošanas regions* [ECLI:EU:C:2011:721] (collectively, *Norma-A and Dekom*)

Judgment of the Court (First Chamber) of 1 December 2011, case C-253/09, *European Commission v Republic of Hungary* [ECLI:EU:C:2011:795]

Judgment of the Court (Third Chamber) of 21 December 2011, case C-271/09, *European Commission v Republic of Poland* [ECLI:EU:C:2011:855]

Judgment of the Court (Fourth Chamber) of 16 February 2012, joined cases C-72/10 and C-77/10, *Criminal proceedings against Marcello Costa and Ugo Cifone* [ECLI:EU:C:2012:80]

Judgment of the Court (Third Chamber) of 15 March 2012, case C-574/10, *European Commission v Federal Republic of Germany* [ECLI:EU:C:2012:145]

Judgment of the Court (Grand Chamber) of 27 March 2012, case C-209/10, *Post Danmark A/S v Konkurrencerådet* [ECLI:EU:C:2012:172] (collectively, *Post Danmark*)

Judgment of the Court (Fourth Chamber) of 29 March 2012, case C-417/10, *Ministero dell'Economia e delle Finanze and Agenzia delle Entrate v 3M Italia SpA* [ECLI:EU:C:2012:184]

Judgment of the Court (Fourth Chamber) of 29 March 2012, case C-599/10, *SAG ELV Slovensko a.s. and Others v Úrad pre verejné obstarávanie* [ECLI:EU:C:2012:191]

Judgment of the Court (Third Chamber) of 10 May 2012, case C-368/10, *European Commission v Kingdom of the Netherlands* [ECLI:EU:C:2012:284]

Judgment of the Court (Third Chamber) of 12 July 2012, case C-138/11, *Compass-Datenbank GmbH v Republik Österreich* [ECLI:EU:C:2012:449] (collectively, *Compass-Datenbank*)

Judgment of the Court (Fourth Chamber) of 8 November 2012, case C-244/11, *European Commission v Hellenic Republic* [ECLI:EU:C:2012:694]

Judgment of the Court (Third Chamber) of 29 November 2012, joined cases C-182/11 and C-183/11, *Econord SpA v Comune di Cagno and Comune di Varese (C-182/11) and Comune di Solbiate and Comune di Varese (C-183/11)* [ECLI:EU:C:2012:758] (collectively, *Econord*)

Judgment of the Court (Third Chamber) of 13 December 2012, case C-465/11, *Forposta SA and ABC Direct Contact sp. z o.o. v Poczta Polska SA* [ECLI:EU:C:2012:801] (collectively, *Forposta*)

Judgment of the Court (Grand Chamber) of 19 December 2012, case C-159/11, *Azienda Sanitaria Locale di Lecce and Università del Salento v Ordine degli Ingegneri della Provincia di Lecce and Others* [ECLI:EU:C:2012:817] (collectively, *Ordine degli Ingegneri della Provincia di Lecce*)

Judgment of the Court (Tenth Chamber) of 7 February 2013, case C-68/12, *Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa a.s.* [ECLI:EU:C:2013:71]

Judgment of the Court (Second Chamber) of 28 February 2013, case C-1/12, *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência* [ECLI:EU:C:2013:127] (collectively, *Ordem dos Técnicos Oficiais de Contas*)

Judgment of the Court (Grand Chamber) of 16 April 2013, case C-202/11, *Anton Las v PSA Antwerp NV* [ECLI:EU:C:2013:239]

Judgment of the Court (First Chamber) of 8 May 2013, joined cases C-197/11 and C-203/11, *Eric Libert and Others v Gouvernement flamand (C-197/11) and All Projects & Developments NV and Others v Vlaamse Regering (C-203/11)* [ECLI:EU:C:2013:288] (collectively, *Libert and others*)

Judgment of the Court (Fifth Chamber) of 13 June 2013, case C-386/11, *Piepenbrock Dienstleistungen GmbH & Co. KG v Kreis Düren* [ECLI:EU:C:2013:385] (collectively, *Piepenbrock*)

Judgment of the Court (Fifth Chamber) of 12 September 2013, case C-526/11, *IVD GmbH & Co. KG v Ärztekammer Westfalen-Lippe* [ECLI:EU:C:2013:543]

Judgment of the Court (Fifth Chamber) of 10 October 2013, case C-94/12, *Swm Costruzioni 2 SpA and Mannocchi Luigino DI v Provincia di Fermo* [ECLI:EU:C:2013:646]

Judgment of the Court (Tenth Chamber) of 10 October 2013, case C-336/12, *Ministeriet for Forskning, Innovation og Videregående Uddannelser v Manova A/S* [ECLI:EU:C:2013:647]

Judgment of the Court (Grand Chamber) of 22 October 2013, joined cases C-105/12 to C-107/12, *Staat der Nederlanden v Essent NV (C-105/12), Essent Nederland BV (C-105/12), Eneco Holding NV (C-106/12) and Delta NV (C-107/12)* [ECLI:EU:C:2013:677]

Judgment of the Court (Fourth Chamber) of 14 November 2013, case C-388/12, *Comune di Ancona v Regione Marche* [ECLI:EU:C:2013:734] (collectively, *Comune di Ancona*)

Judgment of the Court (Tenth Chamber) of 14 November 2013, case C-221/12, *Belgacom NV v Interkommunale voor Teledistributie van het Gewest Antwerpen (INTEGAN) and Others* [ECLI:EU:C:2013:736]

Judgment of the Court (Fourth Chamber) of 5 December 2013, case C-561/12, *Nordecon AS and Ramboll Eesti AS v Rahandusministeerium* [ECLI:EU:C:2013:793]

Judgment of the Court (Fourth Chamber) of 12 December 2013, case C-327/12, *Ministero dello Sviluppo economico and Autorità per la vigilanza sui contratti pubblici*

di lavori, servizi e forniture v SOA Nazionale Costruttori - Organismo di Attestazione SpA [ECLI:EU:C:2013:827] (collectively, *SOA Nazionale Costruttori*)

Judgment of the Court (Grand Chamber) of 5 February 2014, case C-385/12, *Hervis Sport- és Divatkereskedelmi Kft. v Nemzeti Adó- és Vámhivatal Közép-dunántúli Regionális Adó Főigazgatósága* [ECLI:EU:C:2014:47]

Judgment of the Court (Fifth Chamber) of 8 May 2014, case C-15/13, *Technische Universität Hamburg-Harburg and Hochschul-Informations-System GmbH v Datenlotsen Informationssysteme GmbH* [ECLI:EU:C:2014:303] (collectively, *Datenlotsen Informationssysteme*)

Judgment of the Court (Fifth Chamber) of 19 June 2014, case C-574/12, *Centro Hospitalar de Setúbal EPE and Serviço de Utilização Comum dos Hospitais (SUCH) v Eurest (Portugal) - Sociedade Europeia de Restaurantes Lda.* [ECLI:EU:C:2014:2004] (collectively, *Setúbal*)

Judgement of the Court (Second Chamber) of 10 July 2014, case C-213/13, *Impresa Pizzarotti & C. Spa v Comune di Bari and Others* [ECLI:EU:C:2014:2067]

Judgment of the Court (Third Chamber) of 17 July 2014, case C-553/12 P, *European Commission v Dimosia Epicheirisi Ilektrismou AE (DEI)* [ECLI:EU:C:2014:2083]

Judgment of the Court (Fifth Chamber) of 11 September 2014, case C-19/13, *Ministero dell'Interno v Fastweb SpA* [ECLI:EU:C:2014:2194] (collectively, *Fastweb*)

Judgment of the Court (Eighth Chamber) of 9 October 2014, case C-641/13 P, *Kingdom of Spain v European Commission* [ECLI:EU:C:2014:2264]

Judgment of the Court (Sixth Chamber) of 22 October 2014, case C-429/13 P, *Kingdom of Spain v European Commission* [ECLI:EU:C:2014:2310]

Judgment of the Court (Tenth Chamber) of 6 November 2014, case C-42/13, *Cartiera dell'Adda SpA v CEM Ambiente SpA* [ECLI:EU:C:2014:2345]

Judgment of the Court (Eighth Chamber) of 4 December 2014, case C-513/13 P, *Kingdom of Spain v European Commission* [ECLI:EU:C:2014:2412]

Judgment of the Court (Fifth Chamber) of 11 December 2014, case C-113/13, *Azienda sanitaria locale n. 5 «Spezzino» and Others v San Lorenzo Soc. coop. sociale and Croce Verde Cogema cooperativa sociale Onlus* [ECLI:EU:C:2014:2440] (collectively, *Spezzino*)

Judgment of the Court (Fifth Chamber) of 18 December 2014, case C-568/13, *Azienda Ospedaliero-Universitaria di Careggi-Firenze v Data Medical Service srl.* [ECLI:EU:C:2014:2466]

Judgment of the Court (Second Chamber) of 22 October 2015, case C-185/14, *"EasyPay" AD and "Finance Engineering" AD v Ministerski savet na Republika Bulgaria and Natsionalen osiguritelen institut* [ECLI:EU:C:2015:716] (collectively, *EasyPay*)

Judgment of the Court (Sixth Chamber) of 19 November 2015, case C-632/13, *Skatterverket v Hilkka Hirvonen* [ECLI:EU:C:2015:765]

Judgment of the Court (Fifth Chamber) of 17 December 2015, joined cases C-25/14 and C-26/14, *Union des syndicats de l'immobilier (UNIS) v Ministre du Travail, de l'Emploi et de la Formation professionnelle et du Dialogue social et Syndicat national des résidences de tourisme (SNRT) and Others and Beaudout Père et Fils SARL v Ministre du Travail, de l'Emploi et de la Formation professionnelle et du Dialogue social and Others* [ECLI:EU:C:2015:821] (collectively, *UNIS*)

Judgment of the Court (First Chamber) of 4 February 2016, case C-336/14, *Criminal proceedings against Sebat Ince* [ECLI:EU:C:2016:72] (collectively, *Ince*)

Judgment of the Court (Grand Chamber) of 23 February 2016, case C-179/14, *European Commission v Hungary* [ECLI:EU:C:2016:108]

Judgment of the Court (First Chamber) of 7 April 2016, case C-324/14, *Partner Apelski Dariusz v Zarząd Oczyszczania Miasta* [ECLI:EU:C:2016:214] (collectively, *Partner Apelski Dariusz*)

Judgment of the Court (Fourth Chamber) of 14 July 2016, case C-6/15, *TNS Dimarso NV v Vlaams Gewest* [ECLI:EU:C:2016:555]

Judgment of the Court (Second Chamber) of 14 December 2016, case C-238/15, *Maria do Céu Bragança Linares Verruga and Others v Ministre de l'Enseignement supérieur et de la recherche* [ECLI:EU:C:2016:949]

Judgment of the Court (Second Chamber) of 2 March 2017, case C-496/15, *Alphonse Eschenbrenner v Bundesagentur für Arbeit* [ECLI:EU:C:2017:152]

b. Reasoned orders

Order of the Court (Second Chamber) of 3 December 2001, case C-59/00, *Bent Mousten Vestergaard v Spøttrup Boligselskab* [ECLI:EU:C:2001:654]

Order of the Court (Second Chamber) of 30 May 2002, case C-358/00, *Buchhändler-Vereinigung GmbH v Saur Verlag GmbH & Co. KG and Die Deutsche Bibliothek* [ECLI:EU:C:2002:317]

Order of the Court (Seventh Chamber) of 10 April 2008, case C-323/07, *Termoraggi SpA v Comune di Monza* [ECLI:EU:C:2008:219]

Order of the President of the Sixth Chamber of the Court of 11 November 2010, case C-20/10, *Vino Cosimo Damiano v Poste Italiane SpA* [ECLI:EU:C:2010:677]

Order of the Court (Fifth Chamber) of 3 February 2015, case C-68/14, *Equitalia Nord SpA v CLR di Camelliti Serafino & C. Snc* [ECLI:EU:C:2015:57] (collectively, *Equitalia Nord*)

B. Court of First Instance and General Court

a. Judgments

Judgment of the Court of First Instance (First Chamber) of 24 January 1992, case T-44/90, *La Cinq SA v Commission of the European Communities* [ECLI:EU:T:1992:5]

Judgment of the Court of First Instance (Second Chamber) of 1 April 1993, case T-65/89, *BPB Industries Plc and British Gypsum Ltd v Commission of the European Communities* [ECLI:EU:T:1993:31]

Judgment of the Court of First Instance (Fourth Chamber) of 8 May 1996, case T-19/95, *Adia Interim SA v Commission of the European Communities* [ECLI:EU:T:1996:59] (collectively, *Adia Interim SA*)

Judgment of the Court of First Instance (First Chamber, extended composition) of 11 July 1996, joined cases T-528/93, T-542/93, T-543/93 and T-546/93, *Metropole télévision SA and Reti Televisive Italiane SpA and Gestevisión Telecinco SA and Antena 3 de Televisión v Commission of the European Communities* [ECLI:EU:T:1996:99]

Judgment of the Court of First Instance (Third Chamber, extended composition) of 27 February 1997, case T-106/95, *Fédération française des sociétés d'assurances (FFSA), Union des sociétés étrangères d'assurance (USEA), Groupe des assurances mutuelles agricoles (Groupama), Fédération nationale des syndicats d'agents généraux d'assurances (FNSAGA), Fédération française des courtiers d'assurances et de reassurances (FCA) and Bureau international des producteurs d'assurances et de réassurances (BIPAR) v Commission of the European Communities* [ECLI:EU:T:1997:23]

Judgment of the Court of First Instance (Second Chamber, extended composition) of 19 June 1997, case T-260/94, *Air Inter SA v Commission of the European Communities* [ECLI:EU:T:1994:265]

Judgment of the Court of First Instance (Fourth Chamber) of 17 December 1998, case T-203/96, *Embassy Limousines & Services v European Parliament* [ECLI:EU:T:1998:302] (collectively, *Embassy Limousines & Services*)

Judgment of the Court of First Instance (First Chamber, extended composition) of 28 January 1999, case T-14/96, *Bretagne Angleterre Irlande (BAI) v Commission of the European Communities* [ECLI:EU:T:1999:12]

Judgment of the Court of First Instance (Third Chamber, extended composition) of 20 April 1999, joined cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, *Limburgse Vinyl Maatschappij*

NV, Elf Atochem SA, BASF AG, Shell International Chemical Company Ltd, DSM NV, DSM Kunststoffen BV, Wacker-Chemie GmbH, Hoechst AG, Société artésienne de vinyle, Montedison SpA, Imperial Chemical Industries plc, Hüls AG and Enichem SpA v Commission of the European Communities [ECLI:EU:T:1999:80] (collectively, *PVC II*)

Judgment of the Court of First Instance (Third Chamber) of 15 June 1999, case T-277/97, *Ismeri Europa Srl v Court of Auditors of the European Communities* [ECLI:EU:T:1999:124]

Judgment of the Court of First Instance (Fifth Chamber) of 6 July 1999, joined cases T-112/96 and T-115/96, *Jean-Claude Séché v Commission of the European Communities* [ECLI:EU:T:1999:134]

Judgment of the Court of First Instance (Third Chamber) of 7 October 1999, case T-228/97, *Irish Sugar plc v Commission of the European Communities* [ECLI:EU:T:1999:246] (collectively, *Irish Sugar*)

Judgment of the Court of First Instance (Third Chamber) of 24 February 2000, case T-145/98, *ADT Projekt Gesellschaft der Arbeitsgemeinschaft Deutscher Tierzüchter mbH v Commission of the European Communities* [ECLI:EU:T:2000:54] (collectively, *ADT Projekt v Commission*)

Judgment of the Court of First Instance (Fifth Chamber, extended composition) of 30 March 2000, case T-513/93, *Consiglio Nazionale degli Spedizionieri Doganali v Commission of the European Communities* [ECLI:EU:T:2000:91]

Judgment of the Court of First Instance (Fifth Chamber, extended composition) of 13 June 2000, case jointes T-204/97 and T-270/97, *EPAC - Empresa para a Agroalimentação e Cereais, SA v Commission of the European Communities* [ECLI:EU:T:2000:148]

Judgment of the Court of First Instance (Fifth Chamber) of 6 July 2000, case T-139/99, *Alsace International Car Service (AICS) v European Parliament* [ECLI:EU:T:2000:182]

Judgment of the Court of First Instance (Third Chamber) of 12 December 2000, case T-128/98, *Aéroports de Paris v Commission of the European Communities* [ECLI:EU:T:2000:290]

Judgment of the Court of First Instance (Fifth Chamber) of 26 February 2002, case T-169/00, *Esedra SPRL v Commission of the European Communities* [ECLI:EU:T:2002:40] (collectively, *Esedra SPRL*)

Judgment of the Court of First Instance (Third Chamber) of 11 September 2002, case T-70/99, *Alpharma Inc. v Council of the European Union* [ECLI:EU:T:2002:210]

Judgment of the Court of First Instance (First Chamber) of 27 September 2002, case T-211/02, *Tideland Signal Ltd v Commission of the European Communities* [ECLI:EU:T:2002:232] (collectively, *Tideland Signal*)

Judgment of the Court of First Instance (Third Chamber) of 28 November 2002, case T-40/01, *Scan Office Design SA v Commission of the European Communities* [ECLI:EU:T:2002:288]

Judgment of the Court of First Instance (Fifth Chamber) of 25 February 2003, case T-183/00, *Strabag Benelux NV v Council of the European Union* [ECLI:EU:T:2003:36]

Judgment of the Court of First Instance (First Chamber, extended composition) of 4 March 2003, case T-319/99, *Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental (FENIN) v Commission of the European Communities* [ECLI:EU:T:2003:50]

Judgment of the Court of First Instance (Third Chamber) of 30 September 2003, case T-203/01, *Manufacture française des pneumatiques Michelin v Commission of the European Communities* [ECLI:EU:T:2003:250] (collectively, *Michelin II*)

Judgment of the Court of First Instance (First Chamber) of 17 December 2003, case T-219/99, *British Airways plc v Commission of the European Communities* [ECLI:EU:T:2003:343]

Judgment of the Court of First Instance (Fourth Chamber) of 26 January 2005, case T-193/02, *Laurent Piau v Commission of the European Communities* [ECLI:EU:T:2005:22] (collectively, *Piau*)

Judgment of the Court of First Instance (Fifth Chamber) of 17 March 2005, case T-160/03, *AFCon Management Consultants, Patrick Mc Mullin and Seamus O’Grady v Commission of the European Communities* [ECLI:EU:T:2005:107]

Judgment of the Court of First Instance (Fifth Chamber) of 17 March 2005, case T-160/03, *AFCon Management Consultants, Patrick Mc Mullin and Seamus O'Grady v Commission of the European Communities* [ECLI:EU:T:2005:107]

Judgment of the Court of First Instance (Fifth Chamber) of 7 June 2006, joined cases T-213/01 and T-214/01, *Österreichische Postsparkasse AG and Bank für Arbeit und Wirtschaft AG v Commission of the European Communities* [ECLI:EU:T:2006:151]

Judgment of the Court of First Instance (Second Chamber, extended composition) of 15 June 2005, case T-17/02, *Fred Olsen, SA v Commission of the European Communities* [ECLI:EU:T:2005:218] (collectively, *Olsen*)

Judgment of the Court of First Instance (Second Chamber) of 6 July 2005, case T-148/04, *TQ3 Travel Solutions Belgium SA v Commission of the European Communities* [ECLI:EU:T:2005:274] (collectively, *TQ3 Travel Solutions*)

Judgment of the Court of First Instance (Second Chamber) of 14 February 2006, joined cases T-376/05 and T-383/05, *TEA-CEGOS, SA, Services techniques globaux (STG) SA (T-376/05) and GHK Consulting Ltd (T-383/05) v Commission of the European Communities* [ECLI:EU:T:2006:47] (collectively, *TEA-CEGOS*)

Judgment of the Court of First Instance (Second Chamber) of 11 April 2006, case T-394/03, *Flavia Angeletti v Commission of the European Communities* [ECLI:EU:T:2006:111]

Judgment of the Court of First Instance (Fourth Chamber, extended composition) of 27 September 2006, case T-168/01, *GlaxoSmithKline Services Unlimited v Commission of the European Communities* [ECLI:EU:T:2006:265]

Judgment of the Court of First Instance (Second Chamber) of 12 December 2006, case T-155/04, *SELEX Sistemi Integrati SpA v Commission of the European Communities* [ECLI:EU:T:2006:387]

Judgment of the Court of First Instance (Fourth Chamber) of 18 April 2007, case T-195/05, *Deloitte Business Advisory NV v Commission of the European Communities* [ECLI:EU:T:2007:107]

Judgment of the Court of First Instance (Fourth Chamber) of 4 July 2007, case T-475/04, *Bouygues SA and Bouygues Télécom SA v Commission of the European Communities* [ECLI:EU:T:2007:196]

Judgment of the Court of First Instance (Fourth Chamber) of 12 July 2007, case T-250/05, *Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v Commission of the European Communities* [ECLI:EU:T:2007:225] (collectively, *Evropaïki Dynamiki I*)

Judgment of the Court of First Instance (Grand Chamber) of 17 September 2007, case T-201/04, *Microsoft Corp. v Commission of the European Communities* [ECLI:EU:T:2007:289]

Judgment of the Court of First Instance (Third Chamber, extended composition) of 12 February 2008, case T-289/03, *British United Provident Association Ltd (BUPA), BUPA Insurance Ltd and BUPA Ireland Ltd v Commission of the European Communities* [ECLI:EU:T:2008:29]

Judgment of the Court of First Instance (Third Chamber) of 12 March 2008, case T-332/03, *European Service Network (ESN) SA v Commission of the European Communities* [ECLI:EU:T:2008:66]

Judgment of the Court of First Instance (Third Chamber) of 12 March 2008, case T-345/03, *Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v Commission of the European Communities* [ECLI:EU:T:2008:67] (collectively, *Evropaïki Dynamiki II*)

Judgment of the Court of First Instance (Fifth Chamber) of 21 May 2008, case T-495/04, *Belfass SPRL v Council of the European Union* [ECLI:EU:T:2008:160] (collectively, *Belfass SPRL*)

Judgment of the Court of First Instance (Third Chamber) of 10 September 2008, case T-465/04, Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis

kai Tilematikis AE v Commission of the European Communities [ECLI:EU:T:2008:324] (collectively, *Evropaïki Dynamiki III*)

Judgment of the Court of First Instance (Third Chamber) of 10 September 2008, case T-59/05, *Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v Commission of the European Communities* [ECLI:EU:T:2008:326] (collectively, *Evropaïki Dynamiki IV*)

Judgment of the Court of First Instance (First Chamber) of 12 November 2008, case T-406/06, *Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v Commission of the European Communities* [ECLI:EU:T:2008:484] (collectively, *Evropaïki Dynamiki V*)

Judgment of the Court of First Instance (Second Chamber) of 28 January 2009, case T-125/06, *Centro Studi Antonio Manieri Srl v Council of the European Union* [ECLI:EU:T:2009:19]

Judgment of the Court (First Chamber) of 17 February 2011, case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB* [ECLI:EU:C:2011:83] (collectively, *TeliaSonera*)

Judgment of the General Court (Third Chamber) of 15 April 2011, case T-297/05, *IPK International – World Tourism Marketing Consultants GmbH v European Commission* [ECLI:EU:T:2011:185]

Judgment of the General Court (Fourth Chamber) of 23 November 2011, case T-514/09, *bpost NV van publiek recht v European Commission* [ECLI:EU:T:2011:689]

Judgment of the General Court (Seventh Chamber) of 15 March 2012, case T-236/09, *Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v European Commission* [ECLI:EU:T:2012:127] (collectively, *Evropaïki Dynamiki VI*)

Judgment of the Court (Grand Chamber) of 27 March 2012, case C-209/10, *Post Danmark A/S v Konkurrencerådet* [ECLI:EU:C:2012:172] (collectively, *Post Danmark*)

Judgment of the General Court (First Chamber) of 20 March 2013, case T-415/10, *Nexans France v European Joint Undertaking for ITER and the Development of Fusion Energy* [ECLI:EU:T:2013:141]

Judgment of the General Court (First Chamber) of 29 May 2013, case T-384/10, *Kingdom of Spain v European Commission* [ECLI:EU:T:2013:277]

Judgment of the General Court (Fifth Chamber) of 6 June 2013, case T-668/11, *VIP Car Solutions SARL v European Parliament* [ECLI:EU:T:2013:302]

Judgment of the General Court (Eighth Chamber) of 11 July 2013, case T-358/08, *Kingdom of Spain v European Commission* [ECLI:EU:T:2013:371]

Judgment of the General Court (Fifth Chamber) of 12 September 2013, case T-347/09, *Federal Republic of Germany v European Commission* [ECLI:EU:T:2013:418]

Judgment of the General Court (First Chamber) of 16 September 2013, case T-402/06, *Kingdom of Spain v European Commission* [ECLI:EU:T:2013:445]

Judgment of the General Court (Third Chamber) of 11 June 2014, case T-4/13, *Communicaid Group Ltd v European Commission* [ECLI:EU:T:2014:437]

Judgment of the General Court (Fifth Chamber) of 16 July 2014, case T-309/12, *Zweckverband Tierkörperbeseitigung in Rheinland-Pfalz, im Saarland, im Rheingau-Taunus-Kreis und im Landkreis Limburg-Weilburg v European Commission* [ECLI:EU:T:2014:676]

b. Reasoned orders

Order of the President of the Court of First Instance of 31 January 2005, case T-447/04 R, *Capgemini Nederland BV v Commission of the European Communities* [ECLI:EU:T:2005:27]

C. Opinions of the Advocates General

Opinion of the AG Van Gerven delivered on 19 September 1991, case C-179/90, *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA* [ECLI:EU:C:1991:347]

Opinion of the AG Fennelly delivered on 6 February 1997, case C-70/95, *Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl v Regione Lombardia* [ECLI:EU:C:1997:55]

Opinion of the AG Tesauro delivered on 16 September 1997, case C-120/95, *Nicolas Decker v Caisse de maladie des employés privés* [ECLI:EU:C:1997:399]

Opinion of the AG Alber delivered on 18 March 1999, case C-108/98, *RI.SAN. Srl v Comune di Ischia, Italia Lavoro SpA and Ischia Ambiente SpA* [ECLI:EU:C:1999:161]

Opinion of the AG Cosmas delivered on 1 July 1999, case C-107/98, *Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia* [ECLI:EU:C:1999:344]

Opinion of the AG Jacobs delivered on 24 February 2000, case C-16/98, *Commission of the European Communities v French Republic* [ECLI:EU:C:2000:99]

Opinion of the AG Léger delivered on 15 June 2000, case C-94/99, *ARGE Gewässerschutz v Bundesministerium für Land- und Forstwirtschaft* [ECLI:EU:C:2000:677]

Opinion of the AG Alber delivered on 29 May 2001, case C-439/99, *Commission of the European Communities v Italian Republic* [ECLI:EU:C:2001:295]

Opinion of the AG Léger delivered on 19 March 2002, case C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht* [ECLI:EU:C:2002:188]

Opinion of the AG Jacobs delivered on 30 April 2002, case C-126/01, *Ministère de l'Économie, des Finances et de l'Industrie v GEMO SA* [ECLI:EU:C:2002:273]

Opinion of the AG Stix-Hackl delivered on 11 July 2002, case C-57/01, *Makedoniko Metro and Michaniki AE v Elliniko Dimosio* [ECLI:EU:C:2002:450]

Opinion of the AG Stix-Hackl delivered on 7 November 2002, joined cases C-34/01 to C-38/01, *Enirisorse SpA v Ministero delle Finanze* [ECLI:EU:C:2002:643]

Opinion of the AG Jacobs delivered on 22 May 2003, joined cases C-264/01, C-306/01, C-354/01 and C-355/01, *AOK Bundesverband, Bundesverband der Betriebskrankenkassen (BKK), Bundesverband der Innungskrankenkassen, Bundesverband der landwirtschaftlichen Krankenkassen, Verband der Angestelltenkrankenkassen eV, Verband der Arbeiter-Ersatzkassen, Bundesknappschaft and See-Krankenkasse v Ichthyol-Gesellschaft Cordes, Hermani & Co. (C-264/01), Mundipharma GmbH (C-306/01), Gödecke GmbH (C-354/01) and Intersan, Institut für pharmazeutische und klinische Forschung GmbH (C-355/01)* [ECLI:EU:C:2003:304]

Opinion of the AG Stix-Hackl delivered on 23 September 2004, case C-26/03, *Stadt Halle and RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna* [ECLI:EU:C:2004:553]

Opinion of the AG Kokott delivered on 1 March 2005, case C-458/03, *Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG* [ECLI:EU:C:2005:123]

Opinion of the AG Jacobs delivered on 21 April 2005, case C-174/03, *Impresa Portuale di Cagliari Srl v Tirrenia di Navigazione SpA* [ECLI:EU:C:2005:244]

Opinion of the AG Geelhoed delivered on 21 April 2005, case C-29/04, *Commission of the European Communities v Republic of Austria* [ECLI:EU:C:2005:247]

Opinion of the AG Poiares Maduro delivered on 10 November 2005, case C-205/03 P, *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v Commission of the European Communities* [ECLI:EU:C:2005:666]

Opinion of the AG Stix-Hackl delivered on 12 January 2006, case C-340/04, *Carbotermo SpA and Consorzio Alisei v Comune di Busto Arsizio and AGESP SpA* [ECLI:EU:C:2006:24]

Opinion of the AG Kokott delivered on 23 February 2006, case C-95/04 P, *British Airways plc v Commission of the European Communities* [ECLI:EU:C:2006:133]

Opinion of the AG Kokott delivered on 15 June 2006, case C-220/05, *Jean Auroux and Others v Commune de Roanne* [ECLI:EU:C:2006:410]

Opinion of the AG Geelhoed delivered on 28 September 2006, case C-295/05, *Asociación Nacional de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa) and Administración del Estado* [ECLI:EU:C:2006:619]

Opinion of the AG Ruiz-Jarabo Colomer delivered on 8 November 2006, case C-412/04, *Commission of the European Communities v Italian Republic* [ECLI:EU:C:2006:699]

Opinion of the AG Sharpston delivered on 21 November 2006, case C-6/05, *Medipac-Kazantzidis AE v Venizeleio-Pananeio (PE.S.Y. KRITIS)* [ECLI:EU:C:2006:724]

Opinion of the AG Mengozzi delivered on 15 February 2007, case C-237/05, *Commission of the European Communities v Hellenic Republic* [ECLI:EU:C:2007:98]

Opinion of the AG Bot delivered on 20 September 2007, case C-220/06, *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v Administración General del Estado* [ECLI:EU:C:2007:540]

Opinion of the AG Trstenjak delivered on 4 June 2008, case C-324/07, *Coditel Brabant SA v Commune d'Uccle and Région de Bruxelles-Capitale* [ECLI:EU:C:2008:317]

Opinion of the AG Mazák delivered on 20 November 2008, case C-489/06, *Commission of the European Communities v Hellenic Republic* [ECLI:EU:C:2008:638]

Opinion of the AG Mazák delivered on 10 February 2009, case C-538/07, *Assitur Srl v Camera di Commercio, Industria, Artigianato e Agricoltura di Milano* [ECLI:EU:C:2009:71]

Opinion of the AG Kokott delivered on 19 February 2009, case C-8/08, *T-Mobile Netherlands BV and Others* [ECLI:EU:C:2009:110]

Opinion of the AG Bot delivered on 17 December 2009, case C-203/08, *Sporting Exchange Ltd v Minister van Justitie* [ECLI:EU:C:2009:791]

Opinion of the AG Trstenjak delivered on 14 April 2010, case C-271/08, *European Commission v Federal Republic of Germany* [ECLI:EU:C:2010:183]

Opinion of the AG Trstenjak delivered on 23 May 2012, case C-159/11, *Azienda Sanitaria Locale di Lecce and Università del Salento v Ordine degli Ingegneri della Provincia di Lecce and Others* [ECLI:EU:C:2012:303]

Opinion of the AG Cruz Villalón delivered on 19 July 2012, case C-182/11, *Econord SpA v Comune di Cagno and Comune di Varese (C-182/11) and Comune di Solbiate and Comune di Varese (C-183/11)* [ECLI:EU:C:2012:494]

Opinion of the AG Mengozzi delivered on 23 January 2014, case C-15/13, *Technische Universität Hamburg-Harburg and Hochschul-Informations-System GmbH v Datenlotsen Informationssysteme GmbH* [ECLI:EU:C:2014:23]

Opinion of the AG Mengozzi delivered on 27 February 2014, case C-574/12, *Centro Hospitalar de Setúbal EPE and Serviço de Utilização Comum dos Hospitais (SUCH) v Eurest (Portugal) - Sociedade Europeia de Restaurantes Lda.* [ECLI:EU:C:2014:120]

Opinion of the AG Wahl delivered on 30 April 2014, case C-113/13, *Azienda sanitaria locale n. 5 «Spezzino» and Others v San Lorenzo Soc. coop. sociale and Croce Verde Cogema cooperativa sociale Onlus* [ECLI:EU:C:2014:291]

Opinion of the AG Jääskinen delivered on 19 March 2015, joined cases C-25/14 and C-26/14, *Union des syndicats de l'immobilier (UNIS) v Ministre du Travail, de l'Emploi et de la Formation professionnelle et du Dialogue social et Syndicat national des résidences de tourisme (SNRT) and Others and Beaudout Père et Fils SARL v Ministre du Travail, de l'Emploi et de la Formation professionnelle et du Dialogue social and Others* [ECLI:EU:C:2015:191]

Opinion of the AG Wathelet delivered on 1 July 2015, case C-357/14 P, *Electrabel SA, Dunamenti Erõmū Zrt. v European Commission* [ECLI:EU:C:2015:435]

Opinion of the AG Szpunar delivered on 22 October 2015, case C-336/14, *Criminal proceedings against Sebat Ince* [ECLI:EU:C:2015:724]

Opinion of the AG Saugmandsgaard Øe delivered on 6 July 2016, case C-216/15, *Betriebsrat der Ruhrlandklinik gGmbH v Ruhrlandklinik gGmbH* [ECLI:EU:C:2016:518]

2. Member States

A. Italy

Judgment of the Italian State Council (First Section), no. 4080/2013, of 1 October 2013

B. Spain

Decision 121/2012 of the Spanish Central Administrative Tribunal, in the case 98/2012, of 23 May

3. International jurisdictional bodies

Judgment of the EFTA Court of 21 February 2008, case E-5/07, *Private Barnehagers Landsforbund v EFTA Surveillance Authority* [2008] EFTA Ct. Rep. 62