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**Distortions of Competition Generated by the Public (Power) Buyer:  
A Perceived Gap in EC Competition Law and Proposals to Bridge It**

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**Abstract:** *This paper focuses on the treatment of public procurement activities under EC competition law. After briefly outlining the competition economics of public procurement, the paper shows the perceived shortcomings of current EC competition rules and case-law to effectively tackle publicly-generated restrictions and distortions of market competition, and advances possible amendments to case-law and doctrine that aim towards the development of a more competition-oriented public procurement system.*

**Keywords:** competition, public procurement, monopsony, buyer power, undertaking, economic activity, State action doctrine, more economic approach.

**JEL Codes:** K21, K23, K39.

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## 1. INTRODUCTION

From a competition law and policy perspective, the phenomenon of public procurement has attracted significant attention and enforcement efforts on the ‘private side’ of the market. International organisations, enforcement agencies and scholars have tended to focus on instances of bid-rigging and collusion amongst tenderers, on the impact of public procurement activities in the prospective analysis conducted in merger control cases, and on the impact of State aid in so-called ‘public markets’, particularly as regards the participation of State aid beneficiaries in subsequent public tenders. These are very relevant issues that determine the competitiveness of the markets where the public buyer sources goods, works and services—and, ultimately, limit the possibilities for the public buyer to obtain value for money. Therefore, they constitute a relevant *corpus* of competition law.

However, the ‘public side’ of the procurement phenomenon and, most notably, the impact of the market behaviour of the public (power) buyer on competition dynamics have remained substantially unexplored. The effects that public procurement regulation and practice can generate in the market—and, chiefly, the distortions and welfare losses that restrictive public procurement can provoke—stand in the shadows of current competition policy and law enforcement. It is noteworthy that the current situation is not the result of the random development of competition law and policy, but a prime (socio-regulatory) option of the case-law of the European Court of Justice. Hence, it is probably unlikely that public procurement can be fully subjected to competition law.

Nonetheless, given that public procurement represents between 15% and 20% of the GDP of EU member States, substantially shielding it from competition enforcement can generate major (negative) economic effects. In that regard, it is submitted that the (re)design of a competition policy that took into account the effects of the market behaviour of the public buyer (and, hence, promoted economic efficiency and social welfare in such a large tranche of the economy) could have a major impact and generate significant benefits, to the advantage of citizens—both as consumers and as taxpayers. In that regard, the current situation seems to merit further scrutiny.

The purpose of this paper is to revisit the treatment of the publicly-generated restrictions of competition in the public procurement setting. In order to do so, the economic effects that public procurement regulation and practice can generate in market dynamics will be briefly described, and identified as the main justification for a review of their current treatment under competition law (§2). Afterwards, the treatment of public procurement under some of the main regulatory blocks of EC competition rules will be summarily reviewed (§3). The treatment of procurement under the rules regarding State aid (§3.1), the rules controlling the grant of special and exclusive rights by the State (§3.2), the ‘core’ competition prohibitions (§3.3), and the ‘State action doctrine’ (§3.4) will be revisited. As a preliminary conclusion, it will be shown how none of those rules is capable of tackling the competition distortions generated unilaterally by the public buyer (§4). In order to bridge this perceived gap in EC competition law, and from a

more economic or effects-based perspective, two proposals will be explored (§5); which are respectively aimed towards enabling the application of the ‘core’ competition prohibitions to the public buyer as an ‘undertaking’ (§5.1), and developing a ‘market participant exception’ to the State action doctrine that gives it more teeth (§5.2). General conclusions will be presented at the end of the paper (§6).

## **2. EFFECTS OF PUBLIC PROCUREMENT ACTIVITIES ON MARKET DYNAMICS: POTENTIAL COMPETITION DISTORTIONS GENERATED BY THE PUBLIC BUYER**

From an economic point of view, the competition facet of public procurement has been a relatively unexplored area of study<sup>1</sup>—and economists have been generally more concerned with tender-specific issues (such as the allocation of risks, the generation of incentives, overcoming information asymmetries and other agency issues, preventing bidders’ collusion, etc.) and their implications from the perspective of auction theory.<sup>2</sup> Differently, the study of public procurement from the standpoint of industrial organization has received limited attention—probably due to the fact that, from an economic viewpoint, its analysis belongs with the relatively secondary field of microeconomics dedicated to the study of monopsony and buyer power.<sup>3</sup> An attempt to briefly describe the economics of public procurement from this perspective will be conducted in this section.

As a preliminary remark, it should be stressed that the competition analysis of public procurement regulation and activities and their effects in the market cannot be properly conducted in the extreme situations where the public buyer is the only buyer (*i.e.* in pure ‘public markets’) or where it holds no significant market power (*i.e.* in pure ‘private markets’). While the former are probably better seen through the lenses of sectoral regulation (as a result of the pure monopsony held by the public buyer), in the latter the effects of public procurement will be practically negligible (due to the absence of public buyer power), and will probably remain below all significance thresholds. Therefore, it seems preferable to focus the analysis in *publicly-dominated markets*,<sup>4</sup> where the public

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<sup>1</sup> In general, public procurement has received less attention than it merits from the academic economic community; see Khi V. Thai, *Public Procurement Re-examined*, 1 J. PUB. PROC. 9, 10 (2001). See also OECD, *Procurement Markets*, 1 OECD J. COMP. L. & POL’Y. 83, 110 (1999), where it is clearly pointed out that ‘*the economics of purchasing is less well developed than the economics of auctions*’.

<sup>2</sup> General studies in this area include the very remarkable contributions of R. PRESTON MCAFEE & JOHN MCMILLAN, *INCENTIVES IN GOVERNMENT CONTRACTING* (1987); and JEAN-JACQUES LAFFONT & JEAN TIROLE, *A THEORY OF INCENTIVES IN PROCUREMENT AND REGULATION* (1993). For recent comprehensive studies, see also PAUL D. KLEMPERER, *AUCTIONS: THEORY AND PRACTICE* (2004) and PAUL R. MILGROM, *PUTTING AUCTION THEORY TO WORK* (2004). For a recent non-technical survey of auction theory, see Paul D. Klemperer, *Auction Theory*, in 1 ISSUES IN COMPETITION LAW AND POLICY 539 (ABA, 2008).

<sup>3</sup> On this, the basic reference is to ROGER D. BLAIR & JEFFREY L. HARRISON, *MONOPSONY: ANTITRUST LAW AND ECONOMICS* (1993). For a recent overview, see Roger D. Blair & Christine Piette Durrance, *The Economics of Monopsony*, in 1 ISSUES IN COMPETITION LAW AND POLICY 393 (ABA, 2008).

<sup>4</sup> OFT / •econ, *ASSESSING THE IMPACT OF PUBLIC SECTOR PROCUREMENT ON COMPETITION* 97 (2004), available at [www.of.gov.uk/shared\\_of/reports/comp\\_policy/oft742c.pdf](http://www.of.gov.uk/shared_of/reports/comp_policy/oft742c.pdf).

buyer holds significant buying power and interacts with fringe competing buyers. In such markets, the effects of the behaviour of the public buyer can be readily identified.

Building upon this basic insight, and as mentioned in passing, the appraisal of the competitive effects of public procurement seems particularly suited for the application of economic theory related to monopsonistic or quasi-monopsonistic markets. In order to analyse the potential competition distortions that public procurement can generate, a first approximation or partial analysis should focus on the *pricing* distortions that it can produce in the market. The insights and conclusions derived from such pricing distortions will be a useful guidance for the analysis of *non-pricing* distortions—which will arguably be more relevant and widespread, and which analysis is harder to specify in a model<sup>5</sup>—even if it should be kept in mind that the conclusions of the model based on pricing theory cannot be uncritically extended to other types of non-price competitive distortions—which might merit further scrutiny.

Regarding the first type of restrictions that can derive from public procurement (*i.e.* pricing distortions), the analysis of the market dynamics and competitive impacts in this type of markets with a *single dominant (public) buyer* can be represented as an extension of a basic monopsony model where there is no pure monopsonist, but a dominant buyer.<sup>6</sup> Alternative models of economic analysis, such as those based on a concept of ‘*one-shot competition*’ or ‘*competition for the market*’ are not appropriate, since competition in public procurement markets takes place ‘*in the market*’ (except in the case of public concessions or similarly exceptional circumstances). Indeed, ‘*competition for the market*’ is not the relevant paradigm because most of the conditions required for a ‘*bidding market*’ to exist are not present in most public procurement markets.<sup>7</sup> Therefore, the mere presence of a ‘*bidding system*’ is insufficient to warrant

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<sup>5</sup> Indeed, the analysis of non-pricing competition—and, as a specification, of non-pricing competitive distortions—is not easily apprehensible in widely accepted economic models. The issue is not new; see, *e.g.* George J. Stigler, *Price and Non-Price Competition*, 76 J. POL. ECON. 149 (1968) (as a seminal attempt to model non-price competition); and Michael Spence, *Nonprice Competition*, 67 AM. ECON. REV. 255 (1977). Notwithstanding the advances made, to date, non-price competition and its implications substantially remain a contentious area of economic theory; see Oliver Budzinski, *Modern Industrial Economics and Competition Policy: Open Problems and Possible Limits* 15–18 (University of Southern Denmark, Department of Environmental and Business Economics, IME Working Paper No. 93/09, 2009), available at [http://www.sdu.dk/~media/Files/Om\\_SDU/Institutter/Miljo/ime/wp/budzinski93.ashx](http://www.sdu.dk/~media/Files/Om_SDU/Institutter/Miljo/ime/wp/budzinski93.ashx) (with further references to other works and a summary literature review).

<sup>6</sup> On this market structure, characterised by the presence of a dominant buyer and a fringe of competitive buyers, BLAIR & HARRISON, *MONOPSONY*, *supra* note 3, 49–51; *id.*, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297, 322–324 (1990-1991); and Blair & Durrance, *The Economics of Monopsony*, *supra* note 3, 402–403. The description of this model follows closely that provided by the Blair and Harrison. Even if it could be argued that public buyers do not act exactly as a rational single dominant buyer and public procurement practices might not be expressly (or exclusively) oriented towards profit-maximization, it is submitted that the model is useful in identifying the impact of public procurement in competitive market dynamics and, consequently, serves well as the conceptual basis for the analyses conducted in this paper.

<sup>7</sup> See Paul D. Klemperer, *Competition Policy in Auctions and Bidding Markets*, HANDBOOK OF ANTITRUST ECONOMICS 583, 585–589 (Paolo Buccirossi ed., 2008); the conditions being that competition is ‘winner takes all’, ‘lumpy’ and ‘begins afresh for each contract, and for each customer’, easy entry of

the analysis of public procurement markets under the paradigm of ‘competition for the market’ that characterizes (economically-defined) bidding markets.

In the proposed model, the *single large buyer* is accompanied by several smaller buyers, which are termed *fringe buyers*.<sup>8</sup> Due to its size, the dominant buyer acts as a price setter,<sup>9</sup> whereas the fringe buyers act as price takers because their purchases are too small to influence price in the market.<sup>10</sup> Therefore, behaving competitively, fringe firms will buy the input up to the point where their collective demand equals the price set by the dominant buyer. In this setting, the dominant buyer’s problem is to adjust its purchases to maximize profit subject to the competitive behaviour of the fringe buyers.

Complications and further developments to this model might be required in cases where fringe buyers can be relatively large and/or the industry surrounding the public buyer is relatively concentrated. Similarly, when there are significant (or power) buyers other than the dominant public buyer. Also, when the single or various dominant buyers face a supply that is not perfectly competitive, in which case issues regarding two-sided monopoly negotiations and the countervailing nature of monopsony power arise.<sup>11</sup>

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new suppliers into the market, and the presence of a ‘bidding system’ or ‘bidding process’. If for one, as Klemperer himself points out, public procurement regulation usually creates barriers to entry (*rectius*, barriers to gain access to the public tranche of the market) and oftentimes a given contract does not represent a large part of a total supplier’s sales in that period. Similarly, stressing most of those characteristics; see SIMON BISHOP & MIKE WALKER, *ECONOMICS OF EC COMPETITION LAW: CONCEPTS, APPLICATION AND MEASUREMENT* 434–443 (2nd edtn. 2002).

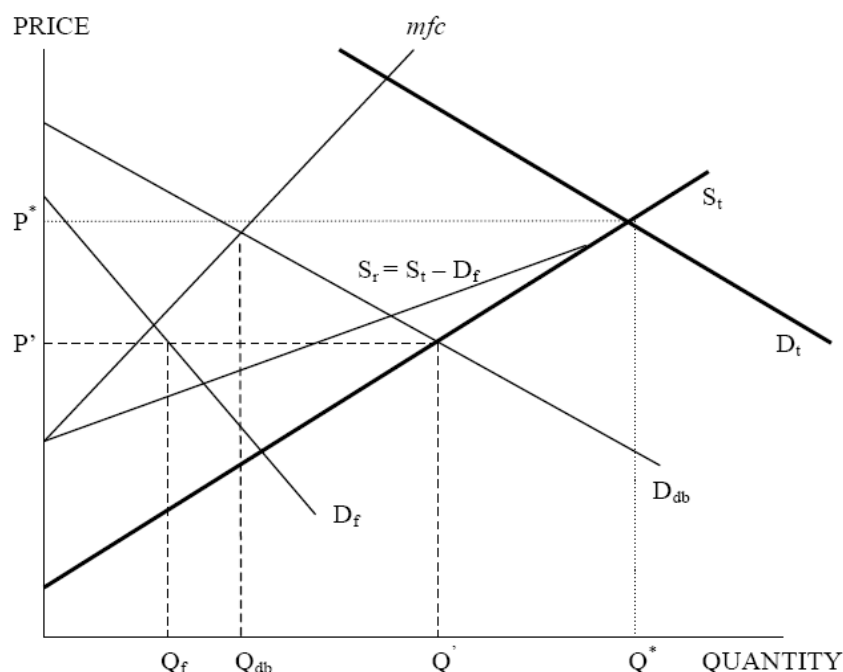
<sup>8</sup> It should also be stressed that the model assumes the existence of economies of scale and perfectly competitive supply (*i.e.* complies with the ‘zero profit condition’ as regards suppliers).

<sup>9</sup> In this dominant buyer framework, the greater the control of the market by the key buyer, in terms of its market share with respect to that of the competitive fringe, the greater is its ability to exert power to reduce price below the competitive level; see Paul W. Dobson *et al.*, *The Welfare Consequences of the Exercise of Buyer Power* (Office of Fair Trading, Research Paper No. 16, 1998), available at [http://www.offt.gov.uk/shared\\_offt/reports/comp\\_policy/oft239.pdf](http://www.offt.gov.uk/shared_offt/reports/comp_policy/oft239.pdf). Similarly, see Roman Inderst, *Leveraging Buyer Power*, 25 INT’L. J. IND. ORG. 908 (2007). However, measurement of buyer power cannot exclusively rely on market shares, but needs to take into account the critical effects of the elasticities of supply and of fringe demand; see Roger D. Blair & Jeffrey L. Harrison, *The Measurement of Monopsony Power*, 37 ANTITRUST BULL. 133, 142–150 (1992); and Jonathan M. Jacobson & Gary J. Dorman, *Monopsony Revisited: A Comment of Blair and Harrison*, 37 ANTITRUST BULL. 151, 165 (1992).

<sup>10</sup> The working of the model necessarily focuses on price formation. However, it is submitted that other public procurement practices not directly related to price can generate similar market failures. Similarly, on alternative (*i.e.* non-price) strategic behaviour by power buyers, see Dobson *et al.*, *The Welfare Consequences of the Exercise of Buyer Power*, *supra* note 9, 22–26 (who offer ten examples of non-price exercise of monopsony power in retail markets for consumer products).

<sup>11</sup> For a general analysis of some of these alternative (more complicated) scenarios, see FREDERIC M. SCHERER & DAVID ROSS, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 519–536 (3rd edtn. 1990) (providing a general theory of the exercise of buyer power in cases of bilateral monopoly and bilateral oligopoly); Paul W. Dobson & Michael Waterson, *Countervailing Power and Consumer Prices*, 107 ECON. J. 418 (1997); and *id.* *Retailer Power: Recent Developments and Policy Implications*, 14 ECON. POL’Y. 133, 147 *et seq.* (1999). As regards the analysis of a market situation where there is a power buyer and fringe buyers facing a power seller and fringe sellers (*i.e.* a so-called *oligoemporic market*)—which could reflect the situation in some public procurement markets where one or relatively few power suppliers can be identified—see E. C. H. Veendorp, *Oligoemporic Competition and the Countervailing Power Hypothesis*, 20 CAN. J. ECON. 519 (1987) (who, interestingly, proves that the result of competition in this market structure *also* generates a reduction in total surplus as a result of an

However, regardless of the potential theoretical complications, it is submitted that the general economic insights required for the purposes of this paper can be properly grasped from the basic model regarding a *single dominant public buyer*.



Source: Own elaboration, based on Blair & Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297, 323 (1990-1991).

In the figure,  $D_f$  represents the demand by the competitive fringe,  $D_{db}$  represents the demand of the dominant buyer, and  $D_t$  represents the total demand curve (which aggregates  $D_f$  and  $D_{db}$ ).  $S_t$  is the supply curve (or total supply). Knowing that, for any price that it sets, the competitive fringe will purchase the quantity where  $D_f$  equals the price (*i.e.* the competitive fringe acts as a price taker); the dominant buyer incorporates this behaviour into its decision calculus by subtracting  $D_f$  from  $S_t$  to obtain the residual supply, which is denoted as  $S_r$ . The curve marginal to  $S_r$ , which is labelled  $mfc$ , represents the marginal factor cost for the dominant buyer (*i.e.* its incremental costs incurred by employing one additional unit of input). The exercise of *monopsony power* leads the dominant buyer to purchase  $Q_{db}$  where  $mfc$  equals  $D_{db}$ ,<sup>12</sup> which determines

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inefficient level of production). For further complications of the model, based on information asymmetries, see Gregor Langus, *Essays in Competition Economics—Buyer Power under Imperfect Price Information and Uncertain Valuation*, (Dissertation (Ph.D.) European University Institute, Department of Economics, 2008) available at [http://cadmus.iue.it/dspace/bitstream/1814/9863/2/2008\\_Langus.pdf](http://cadmus.iue.it/dspace/bitstream/1814/9863/2/2008_Langus.pdf).

<sup>12</sup> Circumscribing our analysis to the ‘residual’ market isolated by the dominant buyer, and in the absence of monopsony power, the dominant buyer would purchase a larger quantity determined by the intersection of  $S_r$  with  $D_{db}$ . Therefore, the exercise of monopsony power can be seen in the withholding of demand conducted by the dominant buyer, which decides to limit the purchases where  $mfc$  intersects  $D_{db}$ .

price equal to  $P'$  from the residual supply. At a price of  $P'$  the fringe will purchase  $Q_f$  where  $P'$  equals  $D_f$ . As a result, sellers will provide  $Q'$ , which is equal to the sum of  $Q_{db}$  and  $Q_f$ . The marginal factor cost (*mfc*) exceeds the price of the input ( $P'$ ) and, consequently, *there is a loss in allocative efficiency derived from the fact that sub-optimal quantities of the input are traded—i.e.  $Q'$  is lower than the quantity that would result of a competitive equilibrium in this market ( $Q^*$ ).* As a result, the behaviour of the dominant buyer leads to the same sort of allocative inefficiency that would result from pure monopsony: *i.e. there are unrealised gains from further trade.* Since *mfc* exceeds  $P'$ , the value created by employing one more unit of the input exceeds the social cost of doing so (but not the *private* cost to the power buyer)—so that society would be better off by an increase in trade, while the dominant buyer would be worse off (since it would be paying a higher price for *all* of its inputs). In other words, the dominant buyer internalizes the effect on market prices of its own demand and restricts it to the point where its position is optimal (*i.e. maximizes its profits*)—imposing a significant loss of social welfare.<sup>13</sup> In short, the behaviour of the *dominant buyer leads to a deadweight social welfare loss analogous to that of pure monopsony.*<sup>14</sup>

Even if it can be argued that the public buyer does not have a pricing behaviour identical to that of a hypothetical (private) single dominant buyer—because public buyers generally do not (willingly) withhold demand in order to lower prices in the market—in the public procurement setting, ‘equivalent’ pricing effects can be generated;<sup>15</sup> particularly by rules imposing price caps that are lower than the prices that would be payable in an unregulated market equilibrium ( $P^*$ ); or by rules and administrative practices that, for other reasons, generate the same truncation or fractionation of supply that is captured in the model (although such reasons admittedly might require some adjustments for their analysis as non-pricing distortions). In the public procurement setting, this ‘break-up’ of the supply function can be generated by rules and practices that restrict the possibilities for some or most potential suppliers to take part in tendering procedures (*e.g. by imposing disproportionate qualitative selection requirements or restrictive technical specifications*)—so that a ‘residual’ supply curve is *de facto* generated artificially by public procurement rules and practices and, in the end, results in pricing distortions.

In such cases of truncation of the supply curve, the ‘excluded’ suppliers find their market opportunities limited to supplying fringe buyers (for which non-excluded

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<sup>13</sup> For a succinct description of these effects and the necessary conditions for their generation, see ROGER D. BLAIR & DAVID L. KASERMAN, *ANTITRUST ECONOMICS* 309–311 (1985); and RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 333–335 (7th edtn. 2007).

<sup>14</sup> E. THOMAS SULLIVAN & JEFFREY L. HARRISON, *UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS* 303 (4th edtn. 2003). On the welfare effects of the exercise of monopsony power, with greater detail; Dobson *et al*, *The Welfare Consequences of the Exercise of Buyer Power*, *supra* note 9.

<sup>15</sup> BundesKartellamt, *Buyer Power in Competition Law – Status and Perspectives* 3 (Background Paper, 2008) available at [http://www.bundeskartellamt.de/wEnglisch/download/pdf/2008\\_ProfTagung\\_E.pdf](http://www.bundeskartellamt.de/wEnglisch/download/pdf/2008_ProfTagung_E.pdf).

suppliers also compete).<sup>16</sup> As a result, the market ‘shrinks’—since total quantities are reduced if compared with the optimal equilibrium—and social welfare is reduced.<sup>17</sup> In extreme cases, the restrictions imposed by public procurement rules and practices can be such as to effectively break-up the market in two: one exclusively for the public buyer and another for fringe buyers (which, then, become the only buyers in the ‘spun-off’ or ‘private’ market). It is submitted that these (pricing and non-pricing) effects of public procurement on market dynamics and the ensuing loss of social welfare will be largely the same in these cases and in the more stylized case considered in the model.<sup>18</sup>

Moreover, this loss of social welfare is not the only effect generated by the behaviour of the dominant buyer, since it adds up to the redistributive effects that result from the extraction of surplus by the dominant buyer from both suppliers and fringe buyers.<sup>19</sup> Even if these redistributive effects are neutral from an efficiency standpoint—and, consequently, it is our view that they should generally not become determinant factors in shaping a competition policy in the public procurement environment—given that the result is that the public buyer extracts value from other undertakings and/or consumers (depending on the type of market where competition-restrictive public procurement takes place), this redistributive effects might merit closer attention than in other economic settings.<sup>20</sup> It should also be recalled that the deadweight loss identified by the model refers only to *static welfare considerations* and that, from a dynamic perspective, *the exercise of monopsony power can generate additional detrimental welfare effects in the long-run* arising from damage to the viability of producers and, probably, of all or some of the fringe buyers (at least if they develop downstream market activities).

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

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<sup>16</sup> Implicitly, the public buyer is considered an ‘obligatory trading partner’ because there are no sufficient or reasonable alternative sources of demand—which is consistent with the fact that the analysis is limited to publicly-dominated markets. This should not be strictly understood as requiring that *each and all* suppliers must contract with the public buyer in order to remain in the market—but that very few (or, in the extreme, none) of them can develop their activities viably without satisfying public demand.

<sup>17</sup> In similar terms, the effect that a ‘shrinkage’ of the market would generate was indicated in OFT, ASSESSING THE IMPACT OF PROCUREMENT ON COMPETITION, *supra* note 4, 128–133.

<sup>18</sup> Therefore, even if it may imply a substantial level of simplification (particularly as regards the analysis of non-pricing distortions), the model described above will be used as the basic analytical framework in the remainder of this section.

<sup>19</sup> As stressed by OFT, ASSESSING THE IMPACT OF PROCUREMENT ON COMPETITION, *supra* note 4, 69.

<sup>20</sup> See Roger G. Noll, “Buyer Power” and Economic Policy, 72 ANTITRUST L. J. 589, 591–592 (2005).



In general, competition concerns generated by public procurement can be classified in three categories: *category I* refers to the failure by the public sector to exercise countervailing market power against suppliers with market power; *category II* identifies restrictions on competition arising from procurement practices such as participation restrictions, high participation costs, excessive contract aggregation or long-term contracts, as well as additional long-term effects and effects on other buyers (*i.e. waterbed or knock-on effects*); and *category III* refers to an excessive focus on short-run price competition at the expense of long-run, non-price competition.<sup>21</sup> This paper will be particularly concerned with *category II effects*, since in our view these are the ones that can generate clearer negative impacts on competitive dynamics, as well as those that might be easier to correct by means of a system of more competition-oriented public procurement rules.

### ***2.1. Direct Competition-Distorting Effects: Waterbed Effects***

As a specification of the detrimental welfare effects that competition-distorting public procurement can generate according to the extension of the ‘classical’ monopsony model just reviewed, the distortions that can arise from the behaviour of the public buyer can also be analysed from the perspective of the creation of *waterbed effects* in the market. By ‘*waterbed effects*’, reference is usually made to situations whereby differential buyer power results in a gain for some buyers at both the relative and absolute expense of other buyers.<sup>22</sup> Ultimately, as a result of this waterbed effect, welfare is likely to be reduced—be it is a result of increases in prices for the rivals of the power buyer (assuming certain additional conditions leading to price discrimination are met),<sup>23</sup> or as a result of the exit of weaker suppliers or fringe competitors from the market.<sup>24</sup> Indeed, if the rise of a powerful buyer erodes suppliers’ profits, then in the long run some suppliers may be forced to exit or merge with other suppliers in order to survive. This may put upward pressure in particular on the wholesale prices faced by

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<sup>21</sup> OFT, ASSESSING THE IMPACT OF PROCUREMENT ON COMPETITION, *supra* note 4, 23 & 142–147.

<sup>22</sup> In its most characteristic example, the term ‘waterbed effect’ is used as a shorthand term for a situation in which (non cost-related) price reductions are negotiated with suppliers by large buyers and result in higher prices being charged by suppliers to smaller buyers. The expression was coined by the UK’s competition authorities in a series of inquiries into the grocery retailing sector. See Roman Inderst & Tommaso M. Valletti, *Buyer Power and the ‘Waterbed Effect’* (CEPR Working Paper, 2007), available at <http://www3.imperial.ac.uk/portal/pls/portallive/docs/1/7799702.pdf>. For a general overview of the abovementioned sectoral inquiries, with a clear focus on the treatment of buyer power, Paul W. Dobson, *Exploiting Buyer Power: Lessons from the British Grocery Trade*, 72 ANTITRUST L. J. 529 (2004-2005).

<sup>23</sup> Paul W. Dobson & Roman Inderst, *Differential Buyer Power and the Waterbed Effect: Do Strong Buyers Benefit or Harm Consumers?*, 28 E.C.L.R. 393, 393 & 397–399 (2007); and *id.*, *The Waterbed Effect: Where Buying and Selling Power Come Together*, 225 WIS. L. REV. 331, 333 & 341–352 (2008). See also Albert A. Foer, *Mr. Magoo Visits Wal-Mart: Finding the Right Lens for Antitrust*, 39 CONN. L. REV. 1307, 1326–1327 (2006-2007).

<sup>24</sup> See Adrian Majumdar, *Waterbed Effects, ‘Gatekeepers’ and Buyer Mergers* (University of East Anglia, CCP Working Paper 05-7, 2006) available at <http://else.econ.ucl.ac.uk/conferences/supermarket/maj.pdf>. See also Warren S. Grimes, *Buyer Power and Retail Gatekeeper Power: Protecting Competition and the Atomistic Seller*, 72 ANTITRUST L. J. 563, 566 fn 14 (2004-2005).

less powerful retailers.<sup>25</sup> As a result of this additional concentration of the upstream industry and higher wholesale prices, fringe input buyers can eventually be forced to exit the downstream market. The aggregate effect of the reduction in competition in both wholesale and retail markets is very likely to produce a loss of welfare.<sup>26</sup>

Even if waterbed effects have so far been analysed in wholesale markets or markets for intermediate products—where the anti-competitive effect leading to a loss in consumer welfare largely derives from the distortions of market competition in the downstream market (and where they can be more easily analysed in standard pricing models)—it is submitted that public procurement both in final products markets and in wholesale markets can also generate market distortions of a ‘waterbed-type’ (even if as a consequence of non-price distortions)<sup>27</sup> and, particularly, can result in higher prices in the non-public fringe of the market (and, particularly, for consumers).<sup>28</sup> In these instances, the waterbed effect generated by public procurement regulations and administrative practices is highly likely to affect welfare negatively.<sup>29</sup>

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<sup>25</sup> This is particularly clear in retail markets, see Roman Inderst & Nicola Mazzarotto, *Buyer Power in Distribution*, in 3 ISSUES IN COMPETITION LAW AND POLICY 1953, 1965–1968 (ABA, 2008).

<sup>26</sup> See Chris Doyle & Roman Inderst, *Some Economics on the Treatment of Buyer Power in Antitrust*, 28 E.C.L.R. 210, 216 (2007); Dobson & Inderst, *The Waterbed Effect*, *supra* note 23, 333; and Inderst & Valletti, *Buyer Power and the ‘Waterbed Effect’*, *supra* note 22, 1–3. This dynamic potentially harmful effect for consumers is embedded in some competition policy guidance documents, such as the *Communication from the Commission – Notice – Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements* [OJ C3, 06.01.2001, 2–30], ¶¶ 126 & 135. However, some studies report positive effects on suppliers’ incentives to innovate and increase competitiveness; see Inderst & Mazzarotto, *Buyer Power in Distribution*, *supra* note 25, 1970–1972; Roman Inderst & Christian Wey, *Buyer Power and Supplier Incentives*, 51 EUR. ECON. REV. 647 (2007); and *id.*, *Countervailing Power and Dynamic Efficiency* (CEPR WP, 2007) available at [www.nice.tu-berlin.de/fileadmin/documents/nice/forschung/countervailing\\_power\\_dynamic\\_efficiency\\_inderst\\_vey.pdf](http://www.nice.tu-berlin.de/fileadmin/documents/nice/forschung/countervailing_power_dynamic_efficiency_inderst_vey.pdf). Such potential dynamic efficiencies could offset, in part, the inefficiencies generated by waterbed effects in the same markets. However, this question remains an empirical one and needs to be taken into account on a case-by-case basis.

<sup>27</sup> Along the same lines, the importance of waterbed effects in this context has been stressed by BundesKartellamt, *Buyer Power in Competition Law – Status and Perspectives*, *supra* note 15, 3–4.

<sup>28</sup> This theoretical possibility has already been supported by empirical studies; see Mark Duggan & Fiona M. Scott Morton, *The Distortionary Effects of Government Procurement: Evidence From Medicaid Prescription Drug Purchasing*, 121 Q. J. ECON. 1, 23–24 (2006), who report that current pricing rules of the US Medicaid program substantially increase equilibrium prices for non-Medicaid consumers (*i.e.*, prices would have been 13.3 percent lower in 2002 in the absence of Medicaid’s pricing rule); and convincingly make the case that their results suggest that *government procurement can alter the equilibrium prices in the private sector* (*id.* at 4 & 12–19). A similar effect of Medicaid rules (in that instance, the adoption of a more-favoured-customer clause) on pharmaceutical prices was previously reported by Fiona M. Scott Morton, *The Strategic Response by Pharmaceutical Firms to the Medicaid Most-Favored-Customer Rules*, 28 RAND J. ECON. 269 (1997).

<sup>29</sup> On the possibility that competitive distortions generated by a ‘waterbed effect’ result in a reduction of aggregate welfare—equivalent to the generation of a negative externality—see Grimes, *Buyer Power and Retail Gatekeeper Power*, *supra* note 24, 574–575. From a different perspective, it has been suggested that consumers could be made better-off as a result of a waterbed effect (or an equivalent competitive distortion) if the government could make use of its buyer power to impose on its contractors—at least on those with significant market power and excess profits (*sic*)—a reduction in the prices paid *both* by the government itself and by the fringe consumers; see David K. Round, *Countervailing Power and a Government Purchasing Commission: An Opportunity to Promote Increased Competition in Australian*

The waterbed effect in certain ‘public procurement’ markets (*i.e.* in *exclusive markets* and in other ‘*publicly-dominated*’ markets) might be less self-evident than in other markets because the public buyer is generally not considered a (buying) competitor of the undertakings procuring inputs for their market activities or of the consumers towards which the products are finally marketed. However, from an economic perspective, whenever the public buyer sources goods, services or works that could as well be demanded by undertakings or consumers, it is effectively competing in the market for the purchase of those goods, the hiring of those services, or the commissioning of those works. Therefore, ‘*publicly-dominated*’ markets cannot be considered in isolation, nor can it be assumed that public demand does not interact with private demand. On the contrary, it is particularly important to stress the existing buying competition between the public and other buyers (*i.e.* *fringe buyers*) and to analyse the possible existence of *waterbed effects* that result from competition-distorting public procurement rules and that negatively impact the commercial conditions applicable to non-public buyers.<sup>30</sup>

In order to properly assess when the public buyer is to be found in such a competitive position, the characteristics of the sourced goods or services (or of the admissible suppliers) that are ‘created’ by public procurement regulations themselves should be disregarded because, *in the absence of public procurement regulations*, the public buyer would be shopping in the exact same markets as undertakings and consumers do. For instance, when the public buyer sources information and communication technology (ICT) products, the fact that it restricts the potential supply to vendors proving more than a given number of years’ experience does not generate a separate ‘public’ market for ICT products where only those vendors and the public buyer are active (*i.e.* an exclusive or monopsonistic market). It is submitted that, under the proper lenses, that phenomenon should be analysed under the model proposed as a ‘*fractionation*’ or ‘*truncation*’ of the supply curve by the public buyer—either willingly, or as a result of mandatory public procurement regulations<sup>31</sup>—whereby it ‘skims’ the market offer and

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*Industries*, 36 AUST. J. PUB. ADMIN. 197, 201–204 (1977). However, in our view, Round’s proposal remains too vague, is probably impossible to implement in a free market economy, could result in higher prices being charged to the public buyer, and it is rather dubious that it could generate positive welfare effects (given the long-term negative impacts of such policy on the incentives of bidders to participate).

<sup>30</sup> As already mentioned (*supra* note 10), other types of (non-price) effects can also be identified as a result of public procurement rules and practices, such as an impact on the number of suppliers, the range of products available, or the technologies used; see OFT, ASSESSING THE IMPACT OF PROCUREMENT ON COMPETITION, *supra* note 4, 13–14.

<sup>31</sup> Indeed, in publicly-dominated markets, public procurement regulations can have the negative effect of ‘truncating’ or ‘fractioning’ the offer function—even to the point of artificially generating two markets for a same product. In general terms, the effect of such an artificial division of the market is well known (as it is exactly the same of collusive market fragmentation or allocation practices), and *both* the government and the rest of buyers (and, in the end, consumers) end up paying more than they would absent public procurement regulations. Moreover, as has already been seen, it is more than likely to generate a deadweight welfare loss. Therefore, as will be stressed later, the benefits of public procurement regulations—and particularly of the rules that are more likely to result in this type of negative economic effects—need to be assessed against these very relevant (non-trivial) economic costs.

e.g. leaves the fringe buyers more exposed to deal with less experienced suppliers (and, from the opposite perspective, limits relatively inexperienced suppliers' market opportunities to serve non-public buyers).

By selecting the type of vendors that have access to public demand (*i.e.* the *residual* supply, in terms of the model), the public buyer is setting the framework for the appearance of waterbed effects. For instance, in the previous example, excluded vendors might need to raise their prices in the non-public tranche of the market in order to be able to recoup their fixed costs. Also, having a relatively large part of their production committed to serving the public buyer, experienced vendors can indulge in (or be pressed to, depending on the commercial conditions that they can extract from the public buyer) charging supra-competitive prices in the non-public tranche of the market. Alternatively, and depending on the concurring circumstances, public contractors can find themselves in a good position to undercut their rivals' prices in the non-public tranche of the market, as a part of a predatory strategy to prevent them from acquiring the required experience and, thus, from becoming effective competitors in the public tranche of the market.<sup>32</sup> As a result of either of these strategies, the competitive dynamics of the market will be altered—compared to the conditions prevailing in a scenario free from public procurement rules and requirements.<sup>33</sup>

In these cases, the waterbed effect does not necessarily derive from a strategy of exercise of buying power on the part of the public buyer, but more probably from similar price and non-price effects generated—maybe unnoticed and most probably unwillingly—by public procurement regulations and administrative practices. In this cases, it is remarkable that *the expected welfare losses derived from competition-restricting public procurement rules and practices could be larger than in the case of a 'wilful' monopsonist*, since the public buyer might not be in a position to appropriately capture most of the economic rent extracted from suppliers and other buyers—

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<sup>32</sup> Generally, this issue was analysed by Charles W. Sherrer, *Predatory Pricing: An Evaluation of its Potential for Abuse under Government Procurement Contracts*, 6 J. CORP. L. 531 (1980-1981). Unfortunately, the case-law of the ECJ in relation with 'buyer power' or monopsonistic situations is relatively limited. However, new trends of development in this area can be identified in other jurisdictions—remarkably, the US, and the recent S.Ct. decision in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 US 312 (2007)—which might indicate that future developments of the ECJ case-law might be anticipated, among others, in cases of predatory (over)bidding. On the economics underlying predatory (over)buying, see BLAIR & HARRISON, MONOPSONY, *supra* note 3, 64–68 & 154–156; Steven C. Salop, *Anticompetitive Overbuying by Power Buyers*, 72 ANTITRUST L. J. 669, 671 (2004-2005); John B. Kirkwood, *Buyer Power and Exclusionary Conduct: Should Brooke Group Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding*, 72 ANTITRUST L. J. 625 (2004-2005); and Richard O. Zerbe Jr., *Monopsony and the Ross-Simmons Case: A Comment on Salop and Kirkwood*, 72 ANTITRUST L. J. 717, 718–719 (2004-2005). See also Grimes, *Buyer Power and Retail Gatekeeper Power*, *supra* note 24, 563. For a more general and comparative approach to the treatment of buyer power, see Richard Scheelings & Joshua D. Wright, 'Sui Generis'?: *An Antitrust Analysis of Buyer Power in the United States and European Union*, 39 AKRON L. REV. 207, 210 (2006).

<sup>33</sup> Some of these situations could be captured by existing antitrust rules and remedies (particularly predatory strategies), but other types of milder waterbed effects or other practices that directly impose anti-competitive behaviour on public contractors could pass antitrust muster (see *infra* §3).

particularly where the economic rent generates additional compliance costs that are not fully recoverable through higher procurement prices by public contractors, or when price increases in the non-public tranche are only partially captured as producer surplus by government contractors—in which case, the economic rent generated by procurement regulations will mainly dissipate in welfare losses as a result of inappropriate or excessive regulation of market activity. In such cases, a revision of public procurement rules with a more pro-competitive view could result in welfare increases without having a negative impact on the public buyer—and could even result in an improvement of the welfare of the public buyer, depending on how the market forces allocate the increase in welfare derived from more efficient rules. Once the effects of more pro-competitive procurement are taken into account,<sup>34</sup> the expected benefits on social welfare expansion are likely to be even larger.

In light of this analysis, it is submitted that, from an economic perspective, public procurement rules should be designed in the most pro-competitive (or least competition-restricting) possible way, after conducting a cost and benefit analysis between the advantages that a given public procurement rule, practice or requirement can generate, and the waterbed and other (anti-)competitive effects that they are likely to cause. Acknowledging the existence of these possible distortions—that result in a welfare loss for society and that, somehow, can also result in a cross-subsidy of public procurement by other economic agents—can help measure the cost of public procurement regulations<sup>35</sup> and, consequently, to improve their design with the aim of reaching superior results in terms of economic efficiency.

## ***2.2. Indirect Competition-Distorting Effects: Increased Bidder Collusion and Other Effects of Price Signalling***

*‘The formal rules governing public procurement can make communication among rivals easier, promoting collusion among bidders. While collusion can emerge in both procurement and “ordinary” markets, procurement regulations may facilitate collusive arrangements’.*<sup>36</sup> Indeed, that public procurement rules increase the likelihood of collusion among bidders has been convincingly proven in economic literature,<sup>37</sup> and has

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<sup>34</sup> On the importance to incorporate dynamic effects’ considerations into public procurement policy analysis, see Amy Finkelstein, *Static and Dynamic Effects of Health Policy: Evidence from the Vaccine Industry*, 119 Q. J. ECON. 527 (2004).

<sup>35</sup> It is to be stressed that ‘a potentially important *cost* [of public procurement regulations] is the distortion of equilibrium outcomes in the private market, with this effect increasing with the government’s share of the market’; Duggan & Scott Morton, *The Distortionary Effects of Government Procurement*, *supra* note 28, 24 (emphasis added).

<sup>36</sup> OECD, PUBLIC PROCUREMENT: THE ROLE OF COMPETITION AUTHORITIES IN PROMOTING COMPETITION 7 (2007), available at <http://www.oecd.org/dataoecd/25/48/39891049.pdf>.

<sup>37</sup> George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44, 48 (1964); R. Preston McAfee & John McMillan, *Bidding Rings*, 82 AM. ECON. REV. 579 (1992); Dimitrios Konstadakopoulos, *The Linked Oligopoly Concept in the Single European Market: Recent Evidence from Public Procurement*, 5 PUB. PROC. L. REV. 213, 216 (1995); Gian Luigi Albano *et al*, *Preventing Collusion in Procurement*, in HANDBOOK OF PROCUREMENT 347, 351–352, 357–358 & 371 (Nicola Dimitri *et al* eds., 2006);

also been stressed for a long time by legal doctrine.<sup>38</sup> It is out of question that, under most common conditions, procurement regulations increase the transparency of the market and facilitate collusion among bidders through repeated interaction.<sup>39</sup>

However, this key finding has not generated as strong a legislative reaction as could have been expected—and most public procurement regulations still contain numerous rules that tend to increase transparency and result in competition-restrictive outcomes (such as bid disclosure, pre-bid meetings, restrictions on the issuance of invitations to participate in bidding processes to a relatively pre-defined or stable group of firms, etc.).<sup>40</sup> Nonetheless, the situation remains relatively unclear, since in some limited circumstances transparency can prove pro-competitive and ‘reserve prices’ might have a function to play in non-highly competitive scenarios,<sup>41</sup> and can be used strategically by the public buyer to induce competition among bidders.<sup>42</sup> Moreover, price transparency can be a deterrent to private participation in some cases, particularly in industries where pricing information might be particularly sensitive. Therefore, choosing the adequate level of transparency is a complicated task—also because it has major implications as regards other objectives of the public procurement system (oversight, anti-fraud, etc.)—and the generation of a pro-collusion scenario seems intrinsic to the system.

In the end, given that public procurement regulations are likely to facilitate collusion amongst bidders, it is not surprising that a large number of cartel cases prosecuted in

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Klemperer, *Competition Policy in Auctions and Bidding Markets*, *supra* note 7, 584 & 590–597; ROGER D. BLAIR & DAVID L. KASERMAN, *ANTITRUST ECONOMICS* 188 (2nd edn. 2008); OFT, *ASSESSING THE IMPACT OF PROCUREMENT ON COMPETITION*, *supra* note 4, 79–81; and Giancarlo Spagnolo, *Self-Defeating Antitrust and Procurement Laws?* (FEEM Working Paper No. 52.00, 2002), available at <http://www.cepr.org/meets/wkcn/6/6607/papers/spagnolo.pdf>.

<sup>38</sup> See *e.g.* WILLIAM E. KOVACIC, *THE ANTITRUST GOVERNMENT CONTRACTS HANDBOOK* (1990); and Peter A. Trepte, *Public Procurement and the Community Competition Rules*, 2 *PUB. PROC. L. REV.* 93, 114 (1993).

<sup>39</sup> See OECD, *Procurement Markets*, *supra* note 1, 85–87 & 92–95; *id.*, *COMPETITION IN BIDDING MARKETS* 11, 19 & 23–32 (2006), available at <http://www.oecd.org/dataoecd/44/1/38773965.pdf>; B. Douglas Bernheim & Michael D. Whinston, *Multimarket Contact and Collusive Behavior*, 21 *RAND J. ECON.* 1 (1990); Andrzej Skrzypacz & Hugo Hopenhayn, *Tacit Collusion in Repeated Auctions*, 114 *J. ECON. THEO.* 153 (2004); Albano *et al.*, *Preventing Collusion in Procurement*, *supra* note 37, 352–353; William E. Kovacic *et al.*, *Bidding Rings and the Design of Anti-Collusive Measures for Auctions and Procurements*, in *HANDBOOK OF PROCUREMENT* 381, 402 (Nicola Dimitri *et al.* eds., 2006); Richard A. Miller, *Economy, Efficiency and Effectiveness in Government Procurement*, 42 *BROOK. L. REV.* 208, 215–233 (1975-1976); and John M. Kuhlman, *Price Fixing, Non-Price Competition and “Focal Point” Pricing: A Rose by Any Other Name?*, 10 *ANTITRUST L. & ECON. REV.* 75 (1978).

<sup>40</sup> However, some contracting authorities do adopt certain anti-collusion measures when designing their public procurement processes; see Laura Carpineti *et al.*, *The Variety of Procurement Practice: Evidence from Public Procurement*, in *HANDBOOK OF PROCUREMENT* 14, 37–38 (Nicola Dimitri *et al.* eds., 2006).

<sup>41</sup> Lawrence M. Ausubel & Peter Cramton, *Dynamic Auctions in Procurement*, in *HANDBOOK OF PROCUREMENT* 220, 226–227 (Nicola Dimitri *et al.* eds., 2006). Similarly, Kovacic *et al.*, *Bidding Rings and the Design of Anti-Collusive Measures*, *supra* note 39, 401 and Gian Luigi Albano *et al.*, *Fostering Participation*, in *HANDBOOK OF PROCUREMENT* 267, 272–283 (Nicola Dimitri *et al.* eds., 2006).

<sup>42</sup> MCAFEE & McMILLAN, *INCENTIVES IN GOVERNMENT CONTRACTING*, *supra* note 2, 144–146; and Carpineti *et al.*, *Variety of Procurement Practice* *supra* note 40, 26. See also Charles J. Thomas, *Using Reserve Prices to Deter Collusion in Procurement Competition*, 53 *J. IND. ECON.* 301, 303 (2005). Also on this, see Hongbin Cai *et al.*, *Reserve Price Signalling*, 135 *J. ECON. THEO.* 253 (2007).

recent years has taken place in public procurement settings,<sup>43</sup> and that the main focus of the (still very limited) antitrust enforcement efforts in the public procurement setting lies with bid-rigging and collusion amongst bidders.<sup>44</sup> Nonetheless, if the main concern of competition policy in the public procurement environment were to lie with *private* restrictions of competition (*i.e.* bid rigging), there would not be a need to implement changes other than those already proposed—which will not be analysed in detail here.<sup>45</sup> However, in our view, this is not the case.

Maybe most noteworthy from the perspective of public restrictions and distortions of competition in public procurement markets, the potential for *collusion or coordination among public buyers*,<sup>46</sup> and other *non-collusive effects* on bidders' and buyers' behaviour derived from *price signalling*,<sup>47</sup> have received significantly less attention by both the legal and the economic doctrine. Collusion or coordination among public buyers might be a result of public procurement rules or practices when they impose a certain degree of harmonisation or homogenization of the economic conditions under which different (independent) public bodies conduct their procurement activities.

For instance, if the maximum reservation prices used by (otherwise) independent public buyers are set by a centralized unit, the effect on prices will be the same as that derived from a private buying cartel. Similarly, even if there is no express or formal centralization of pricing conditions, a problem of 'collusion' between buyers (loosely defined) can arise, since they are (or can be) fully informed of the prices paid in previous tenders by other public buyers. It is similar to an exchange of information

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<sup>43</sup> Kara L. Haberbusch, *Limiting the Government's Exposure to Bid Rigging Schemes: A Critical Look at the Sealed Bidding Regime*, 30 PUB. CONT. L. J. 97, 98 (2000-2001); and Robert D. Anderson & William E. Kovacic, *Competition Policy and International Trade Liberalisation: Essential Complements to Ensure Good Performance in Public Procurement Markets*, 18 PUB. PROC. L. REV. 67, 76–86 (2009). For a description of cartel activity related to procurement markets in the US, see Kovacic *et al*, *Bidding Rings and the Design of Anti-Collusive Measures*, *supra* note 39, 381–398 & 407.

<sup>44</sup> See, amongst others, Haberbusch, *Limiting the Government's Exposure to Bid Rigging Schemes*, *supra* note 43, 114–120.

<sup>45</sup> An interesting summary of proposals for the reform of procurement regulations to reduce the likelihood of collusion can be found in OECD, PUBLIC PROCUREMENT: THE ROLE OF COMPETITION AUTHORITIES IN PROMOTING COMPETITION, *supra* note 36, 8–9 & 17–42. See also *id.*, ENHANCING INTEGRITY IN PUBLIC PROCUREMENT: A CHECKLIST (2008).

<sup>46</sup> See Alexander Winterstein, *Nailing the Jellyfish: Social Security and Competition Law*, 6 E.C.L.R. 324, 333 (1999), who reports that the doctrine of the German Bundeskartellamt has consistently considered that joint buying by State bodies constitutes an *illegal buyers' cartel* and are, consequently, prohibited by competition law. A different issue is that of collusion between buyers and bidders, which has strong corruption components and will not be analysed in detail. On that issue, see Allan T. Ingraham, *A Test for Collusion between a Bidder and an Auctioneer in Sealed-Bid Auctions*, 4 B. E. J. ECON. ANAL. & POL'Y. 10 (2005).

<sup>47</sup> See Martin Dufwenberg & Uri Gneezy, *Information Disclosure in Auctions: An Experiment*, 48 J. ECON. BEHAV. & ORG. 431, 442 (2002). Along the same lines, see R. Mark Isaac & James M. Walker, *Information and Conspiracy in Sealed-Bid Auctions*, 6 J. ECON. BEHAV. & ORG. 139, 140–141 & 146–149 (1985); and Axel Ockenfels & Reinhard Selten, *Impulse Balance Equilibrium and Feedback in First Price Auctions*, 51 GAMES & ECON. BEHAV. 155 (2005). The signalling effect of price or cost estimates has been reported also by legal scholars; see SUE ARROWSMITH *et al*, REGULATING PUBLIC PROCUREMENT: NATIONAL AND INTERNATIONAL PERSPECTIVES 440 (2000).

between public purchasers (which, in the private sector, would be tantamount to a buying cartel). This potentially negative effect, derived from a limitation of the (already scarce) competition amongst public buyers that could be expected to take place in publicly-dominated markets, has been largely omitted in the analysis of competition dynamics in public procurement markets. The same reasoning applies when independent buyers are forced to use common technical specifications, or when any other price or non-price aspect of their demand is (unduly) harmonised by regulations or administrative practices in the public procurement field. Therefore, in view of these economic insights, it is submitted that the transparency generally associated to public procurement procedures should be minimised to the maximum possible extent when designing the procurement system.

### **2.3. Other Competition-Distorting Effects**

Additional competition distorting effects can derive from tendering procedures which generate significant flows of information between the candidates and the public buyer, and amongst candidates. In cases where the procurement process facilitates the exchange of information that would otherwise remain confidential to the parties, there seems to be scope for further restrictions of competition, both generated by the public buyer or as a result of coordination or collusion amongst candidates. That seems to be the case of particularly complex tender procedures and, most noteworthy, of competitive dialogue.<sup>48</sup> This new procedure was introduced by Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.<sup>49</sup> Its basic aim is to allow for a close cooperation between undertakings and public agencies in the definition of particularly complex projects.

The scope and purpose of the new competitive dialogue procedure makes it particularly prone to the generation of competitive distortions. Given that contracting authorities which carry out particularly complex projects might resort to this procedure when they find it objectively impossible to define the means of satisfying their needs or of assessing what the market can offer in the way of technical solutions and/or financial/legal solutions, their need to rely strongly on tenderers' proposals and *know-how* and to try to find a common solution—or, at least, a 'core' common definition of the project that operates as the basis for (price) competition within the tender

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<sup>48</sup> For a description of the new competitive dialogue procedure, see Anne Rubach-Larsen, *Competitive Dialogue*, in *NEW EU PUBLIC PROCUREMENT DIRECTIVES 67* (Ruth Nielsen & Steen Treumer eds., 2005); and Steen Treumer, *Competitive Dialogue*, 13 *PUB. PROC. L. REV.* 178 (2004). See also Christopher Bovis, *Public Procurement in the European Union: Lessons from the Past and Insights to the Future*, 12 *COLUM. J. EUR. L.* 53, 86–88 (2005-2006); and *id.*, *EC PUBLIC PROCUREMENT: CASE LAW AND REGULATION* 171–173 (2006).

<sup>49</sup> [OJ L 134, 30.4.2004, 114–240].



procedure—sets the stage for important distortions of competition to take place and, most noteworthy, for *technical levelling*<sup>50</sup> and further *price signalling*.<sup>51</sup>

EC public procurement Directives have established certain mechanisms to try to prevent these undesired effects, such as the provision that the solutions proposed by a bidder cannot be disclosed to other tenderers or to third parties without its previous consent [art. 29(3) *in fine* Directive 2004/18]. However, the practical implications of such a *Chinese wall* or *ban on cherry-picking* remain largely controversial<sup>52</sup> and the development of the competitive dialogue itself is particularly prone to *leakage of information*, specially because the dialogue that is to take place in the stage before the invitation to tender is designed to cover *all aspects of the contract* [art. 29(3) Directive 2004/18], *including price*.<sup>53</sup> Even more, in this setting, tenderers could find incentives to agree to such disclosure of proposals and other confidential information for collusive (or strategic) purposes—and the fact that the contracting authority mediates among them should not insulate the practice from standard competition law scrutiny.

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

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Taken together, the effects that public procurement rules and practice can generate in the market seem to constitute a significant source of potential distortions of markets dynamics—and, in short, show that the public buyer can *generate the effects which competition rules seek to prevent*. This preliminary conclusion will be the basic insight

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<sup>50</sup> On this distortion potentially derived from procurement procedures where significant discussion and exchanges of information is involved, see Steven W. Feldman, *Traversing the Tightrope between Meaningful Discussions and Improper Practices in Negotiated Federal Acquisitions: Technical Transfusion, Technical Levelling, and Auction Techniques*, 17 PUB. CONT. L. J. 211 (1987-1988).

<sup>51</sup> A risk already pointed out in the *Green Paper of the Commission—Public Procurement in the European Union: “Exploring the Way Forward”*, COM(96) 583, where express mention was made to the fact that contracting authorities risked ‘*requesting or accepting information that [c]ould have the effect of restricting competition*’. Similarly, Treumer, *Competitive Dialogue*, *supra* note 48, 186. See also PETER A. TREPTE, *REGULATING PROCUREMENT: UNDERSTANDING THE ENDS AND MEANS OF PUBLIC PROCUREMENT REGULATION* 279 (2004). However, this risk has nonetheless been underestimated or simply overseen by some commentators; *e.g.* Rubach-Larsen, *Competitive Dialogue*, *supra* note 48, 76.

<sup>52</sup> Since, for instance, a confidentiality waiver could be imposed as a condition to participate in the tender; see Treumer, *Competitive Dialogue*, *supra* note 48, 182 (who raises the question of whether this solution is acceptable). *Contra*, Rubach-Larsen, *Competitive Dialogue*, *supra* note 48, 76–77 (who rejects such alternative as the imposition of an impermissible selection criteria). Concern has been expressed as to the impossibility of the buyer to come up with a combined solution constructed upon different parts of several bidders’ proposals (as a potential instance of unnecessary rigidity of the procurement process); see Peter A. Trepte, *Transparency Requirements*, in *NEW EU PUBLIC PROCUREMENT DIRECTIVES* 49, 61–62 (Ruth Nielsen & Steen Treumer eds., 2005).

<sup>53</sup> See Rubach-Larsen, *Competitive Dialogue*, *supra* note 48, 75; and Treumer, *Competitive Dialogue*, *supra* note 48, 185.

upon which a more economic approach for the treatment of public procurement activities under EC competition rules will be developed (*infra* §5).

### **3. TREATMENT OF PUBLIC PROCUREMENT UNDER CURRENT EC COMPETITION LAW**

Given the potential negative effects of public procurement on competitive market dynamics (*supra* §2) and that the main goal of competition law is to prevent distortions of competition in the market as a means to promote economic efficiency and maximize social welfare,<sup>54</sup> it would seem reasonable to expect competition rules to provide instruments against distortions or restrictions generated by the public buyer. This section will briefly explore to what extent that is the situation.

*A priori*, not all competition rules seem to be equally well-placed to tackle publicly-created restrictions of competition.<sup>55</sup> From a theoretical basis, it would seem logical for competition rules directly aimed at the public sector to offer well-adapted mechanisms to prevent competitive distortions in the public procurement setting. In this regard, the first approach in this section will be to examine whether the EC competition rules aimed specifically at member States (*i.e.* the competition rules applicable to the grant of State aid; arts. 87 to 89 ECT) (§3.1) and/or the rules aimed to undertakings with which the States maintain a close link through the grant of special or exclusive rights (art. 86 ECT) (§3.2), provide such tools to rein in anti-competitive purchasing behaviour. In view of the limitations of those rules to tackle publicly-generated restrictions of competition, the inquiry will then focus on the *direct* application of ‘core’ competition law prohibitions (art. 81 and 82 ECT) to the public buyer (§3.3)—which will prove an even more limited legal instrument for these purposes. Finally, the possibility for *indirect* application of competition rules to the public buyer under the ‘*State action doctrine*’ [art. 3, 10(2) and 81 and 82 ECT jointly] will be considered (§3.4).

#### ***3.1. Public Procurement under Art. 87 ECT: Public Contracts as Undue Economic Advantage?***

Article 87(1) ECT proscribes as incompatible with the common market any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, in so far as it affects trade between member States. The exception to this

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<sup>54</sup> A discussion on the objectives of competition law exceeds the possibilities of this paper. For recent references detailing the approach hereby adopted, see BISHOP & WALKER, *ECONOMICS OF EC COMPETITION LAW*, *supra* note 7, 23–27; MASSIMO MOTTA, *COMPETITION POLICY: THEORY AND PRACTICE* 30 (2004); MICHAEL D. WHINSTON, *LECTURES ON ANTITRUST ECONOMICS* 6–7 (2006); Joseph Farrell & Michael L. Katz, *The Economics of Welfare Standards in Antitrust* (Univ. California, Berkley, CPC Paper 06-061, 2006) available at [http://works.bepress.com/joseph\\_farrell/6/](http://works.bepress.com/joseph_farrell/6/); Ken Heyer, *Welfare Standards and Merger Analysis: Why Not the Best?*, 2 *COMP. POL’Y. INT’L.* 54 (2006); Dennis W. Carlton, *Does Antitrust Need to be Modernized?*, 21 *J. ECON. PERSP.* 155, 156–158 (2007); and Paolo Buccirossi, *Introduction*, in *HANDBOOK OF ANTITRUST ECONOMICS* xiii (id. ed., 2008).

<sup>55</sup> Some of them, such as merger control rules, are automatically left outside of the analysis herein conducted, since their inability to tackle those restrictions and distortions of competition are straightforward—and, consequently, deserve no further consideration.

general prohibition of State aid is contained in paragraphs 87(2) and 87(3) ECT—which respectively establish automatic exemptions to certain types of State aid and possible justifications to State aid—subject to the authorisation procedure before the Commission set up by article 88 ECT and its implementing regulations. It follows that, in order to qualify as State aid and be subject to the general prohibition and to the authorisation procedure, four cumulative conditions have to be met: i) the measure has to be granted out of State resources, ii) it has to confer an economic advantage to undertakings, iii) the advantage has to be selective and distort or threaten to distort competition, and iv) the measure has to affect intra-Community trade.<sup>56</sup>

The possibility of treating the award of public contracts as State aid has been intensely debated, as most of the conditions laid down in article 87(1) ECT for the prohibition of anti-competitive aid are easily met by certain public procurement activities.<sup>57</sup> Public contracts are generally financed, either completely or partially, out of State resources,<sup>58</sup> and most public contracts are directly or indirectly attributable to public bodies included in the broad definition of ‘State’ for the purpose of article 87(1) ECT.<sup>59</sup> Also, the award of public contracts is necessarily selective,<sup>60</sup> as it only favours a given tenderer or grouping of tenderers at a time, and might generate competitive distortions (as analysed in detail *supra* §2). Moreover, given the value of certain public contracts—particularly those covered by EC public procurement Directives, an effect on intra-Community trade will also be usually appreciable.<sup>61</sup> Consequently, in general terms, the most controversial condition will be to determine whether the award of a public contract

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<sup>56</sup> For a recent summary of the case-law (with numerous references), see Jdgmt. CFI of 26 June 2008, in case T-442/03 – *SIC v Commission* [ECR 2008, II-1161]. See also PAUL CRAIG & GRAINNE DE BÚRCA, *EU LAW* 1090–1092 (4th edtn. 2007); ERIKA SZYSZCZAK, *THE REGULATION OF THE STATE IN COMPETITIVE MARKETS IN THE EU* 179–184 (2007); Richard Plender QC, *Definition of Aid*, in *THE LAW OF STATE AID IN THE EUROPEAN UNION* 3–39 (Andrea Biondi *et al* eds., 2004). Also LEIGH HANCHER *et al*, *EC STATE AIDS* 30–101 (3rd edtn. 2006); Jens-Daniel Braun & Jürgen Kühling, *Article 87 EC and the Community Courts: From Revolution to Evolution*, 45 *CML REV.* 465 (2008). See also José L. Buendía & Ben Smulders, *The Limited Role of the ‘Refined Economic Approach’*, in *EC STATE AID LAW. LIBER AMICORUM FRANCISCO SANTAOLALLA GADEA* 1, 11–14 (Gil Carlos Rodríguez Iglesias *et al* eds., 2008); and WOLF SAUTER & HARM SCHEPEL, *STATE AND MARKET IN EUROPEAN UNION LAW* 193–210 (2009).

<sup>57</sup> SUE ARROWSMITH, *THE LAW OF PUBLIC AND UTILITIES PROCUREMENT* 219–232 (2nd edtn. 2005).

<sup>58</sup> In fact, the proportion of public finance is one of the reasons to extend the applicability of EC public procurement rules to private agents, at least in relation with certain types of works and services contracts—where the subsidisation of more than 50% of the contract value triggers compliance with the EC rules on public procurement; see article 8 of Directive 2004/18. See PETER A. TREPTE, *PUBLIC PROCUREMENT IN THE EU: A PRACTITIONER’S GUIDE* 221–222 (2nd edtn. 2007).

<sup>59</sup> However, the situation might be different in case of public undertakings autonomously managed; see Jdgmt. ECJ of 16 May 2002, in case C-482/99 – *Stardust Marine* [2002, I-4397] ¶¶ 52 *et seq.*; and Jens Hillger, *The Award of a Public Contract as State Aid within the Meaning of Article 87(1) EC*, 12 *PUB. PROC. L. REV.* 109, 121–125 (2003).

<sup>60</sup> *Contra*, Martin Dischendorfer & Martin Stempowski, *The Interplay between the E.C. Rules on Public Procurement and State Aid*, 11 *PUB. PROC. L. REV.* NA47, NA51 (2002). More generally, see Bartłomiej Kurcz & Dimitri Vallindas, *Can General Measures Be ... Selective? Some Thoughts on the Interpretation of a State Aid Definition*, 45 *CML REV.* 159 (2008).

<sup>61</sup> See TONY PROSSER, *THE LIMITS OF COMPETITION LAW* 130 (2005); and Richard Burnley, *Interstate Trade Revisited—The Jurisdictional Criterion for Articles 81 and 82 EC*, 23 *E.C.L.R.* 217 (2002).

confers an *economic advantage* which the public contractor would not receive under normal market conditions.<sup>62</sup> In other words, it is to be analysed whether the procurement activities of the State result in normal commercial transactions—*i.e.* whether the same decision would have been made by a ‘disinterested buyer’ or a ‘market economy buyer’.<sup>63</sup>

In this sense, it is noteworthy that, based on the case-law of the Community judicature, the practice of the European Commission has established a presumption that no State aid incompatible with the EC Treaty exists where the award of the contract: i) is a pure procurement transaction, *and* ii) the procurement procedure is compliant with the EC public procurement Directives and suitable for achieving best value for money—inasmuch as no economic advantage which would go beyond normal market conditions will usually arise under these circumstances.<sup>64</sup> Hence, according to the Commission’s

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<sup>62</sup> This issue has given rise to a substantial body of literature; see José María Fernández Martín & Oliver Stehmann, *Product Market Integration versus Regional Cohesion in the Community*, 15 EUR. L. REV. 216, 239–243 (1990); Sue Arrowsmith, *Public Procurement as an Instrument of Policy and the Impact of Market Liberalisation*, 111 L. Q. REV. 235, 256–268 (1995); Andreas Bartosch, *The Relationship between Public Procurement and State Aid Surveillance – The Toughest Standard Applies?*, 39 CML REV. 551, 570–574 (2002); Pablo Asbo Baistrocchi, *Can the Award of a Public Contract be Deemed to Constitute State Aid?*, 24 E.C.L.R. 510, 514–516 (2003); Hillger, *The Award of a Public Contract as State Aid*, *supra* note 59, 110–115; R. Kovar, *Les Achats Publics et l’Interdiction des Aides d’État*, 8 CONTRATS ET MARCHÉS PUBLICS 8 (2004); Alik Doern, *The Interaction between EC Rules on Public Procurement and State Aid*, 13 PUB. PROC. L. REV. 97, 121–128 (2004); Baudonin Heuninckx, *Defence Procurement: The Most Effective Way to Grant Illegal State Aid and Get Away With It ... Or Is It?*, 46 CML REV. 191, 198–200 & 202–209 (2009); Christopher Bovis, *Financing Services of General Interest, Public Procurement and State Aid: The Delineation between Market Forces and Protection*, 10 COLUM. J. EUR. L. 419, 430–440 (2003–2004); *id.*, *Financing Services of General Interest in the EU: How do Public Procurement and State Aids Interact to Demarcate between Market Forces and Protection?*, 11 EUR. L. J. 79, 94–106 (2005); *id.*, EC PUBLIC PROCUREMENT: CASE LAW AND REGULATION 33–42 & 341–358 (2006); TREPTE, REGULATING PROCUREMENT, *supra* note 51, 159–166; and *id.*, PUBLIC PROCUREMENT IN THE EU, *supra* note 58, 54–63.

<sup>63</sup> Jdgmt. CFI of 28 January 1999, in case T-14/96 – *BAI v Commission* [ECR 1999, II-139] ¶¶ 71–76. See also HANCHER *et al.*, EC STATE AIDS, *supra* note 56, 84; Bartosch, *Relationship between Public Procurement and State Aid*, *supra* note 62, 574–576; Doern, *Interaction between EC Rules on Public Procurement and State Aid*, *supra* note 62, 111–116; and SZYSZCZAK, REGULATION OF THE STATE IN COMPETITIVE MARKETS, *supra* note 56, 191.

<sup>64</sup> As regards the Commission’s practice, see Assessment of the Commission of 30 May 2007, in case N 46/2007 – *Welsh Public Sector Network Scheme*, C(2007) 2212 final, ¶ 18. See also Nóra Tosics & Norbert Gaál, *Public Procurement and State Aid Control—The Issue of Economic Advantage*, 2007(3) EC COMPETITION POLICY NEWSLETTER 15, 19 (2008); in similar terms, Hillger, *The Award of a Public Contract as State Aid*, *supra* note 59, 115–121; Baistrocchi, *Can the Award of a Public Contract be Deemed to Constitute State Aid?*, *supra* note 62, 517; Dischendorfer & Stempowski, *Interplay between the E.C. Rules on Public Procurement and State Aid*, *supra* note 60, NA50; Bovis, *Financing Services of General Interest*, *supra* note 62, 443; and Christophe Giolito, *La Procédure de Contrôle des Aides d’État Peut-Elle Être Utilisée pour Contrôler la Bonne Application d’Autres Dispositions de Droit Communautaire?*, in EC STATE AID LAW. LIBER AMICORUM FRANCISCO SANTAOLALLA GADEA 145, 159–160 (Gil Carlos Rodríguez Iglesias *et al.* eds., 2008).

This approach is consistent with the *Altmark* case-law on compensation for the conduct of services of general economic interest, which attributes a key role to the tendering of the contract in the determination of the adequacy of the compensation to the services provider; see Jdgmt. ECJ of 24 July 2003, in case C-280/00 – *Altmark* [ECR 2003, I-7747] ¶¶ 93 & 95; Ulrich Schnelle, *Unconditional and Non-Discriminatory Bidding Procedures in EC State Aid Surveillance over Public Services*, 2 ESTAL 195 (2002); JEAN-YVES CHÉROT, DROIT PUBLIC ÉCONOMIQUE 196–202 (2nd edtn. 2007); Peter

practice, compliance with the EC public procurement Directives in the tendering of a contract that would otherwise raise *prima facie* concerns about its compatibility with the State aid rules establishes a rebuttable presumption of compliance with the State aid regime (*rectius*, of the inexistence of illegal State aid).<sup>65</sup> To rebut such presumption, it would be necessary to determine that, despite having complied with procurement rules, the public contractor actually received an economic advantage because the terms of the contract did not reflect normal market conditions.<sup>66</sup> As was properly stressed by Advocate General Jacobs, ‘*bilateral arrangements or more complex transactions involving mutual rights and obligations are to be analysed as a whole. Where for example the State purchases goods or services from an undertaking, there will be aid only if and to the extent that the price paid exceeds the market price*’.<sup>67</sup>

It follows that, absent a clear disproportion between the obligations imposed on the public contractor and the consideration paid by the public buyer (which needs to be assessed in light of such complex criteria as the risks assumed by the contractor, technical difficulty, delay for implementation, prevailing market conditions, etc.),<sup>68</sup> State aid rules impose a very limited constraint on the development of anti-competitive public procurement—i.e. determining whether an award was properly made according to the public procurement rules will generally be the acid test to decide whether potential State aid has been granted, which results in a circular test to establish in the first place whether the award of the public contract constitutes State aid in and by itself.

Therefore, the restriction of the scope of ECT rules on State aid to cases where public contractors obtain an undue economic advantage significantly restricts its ability to

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Dethlefsen, *Public Services in the EU—Between State Aid and Public Procurement*, 16 PUB. PROC. L. REV. NA53, NA57 (2007); SZYSZCZAK, REGULATION OF THE STATE IN COMPETITIVE MARKETS, *supra* note 56, 193–194; ARROWSMITH, LAW OF PUBLIC AND UTILITIES PROCUREMENT, *supra* note 57, 224; and José L. Buendía, *Finding the Right Balance: State Aid and Services of General Economic Interest*, in EC STATE AID LAW. LIBER AMICORUM FRANCISCO SANTAOLALLA GADEA 191, 210–214 (Gil Carlos Rodríguez Iglesias *et al* eds., 2008). However, the absence of a tendering procedure does not preclude finding that State aid and other competition rules have not been violated; see Jdgmt. CFI of 15 June 2005, in case T-17/02 – *Olsen v Commission* [ECR 2005, II-2031] ¶¶ 237–239, confirmed by the ECJ through Order of 4 October 2007, in case C-320/05 P – *Olsen v Commission and Spain* [ECR 2007, I-131].

<sup>65</sup> Such approach is consistent with the understanding that these rules hold a common control device, i.e. that competition for a public contract is an indication of fair and equal market access in accordance with the procurement rules and, likewise, as regards State aid, of a fair balance of the obligations imposed and the economic advantages granted to the public contractor; see Dethlefsen, *Between State Aid and Public Procurement*, *supra* note 64, NA 54. However, as has been rightly stressed, merely formalistic compliance with public procurement rules is not enough to guarantee the absence of economic advantage and it would be necessary to carry out a more substantive analysis; see Buendía, *Finding the Right Balance*, *supra* note 64, 211.

<sup>66</sup> As regards the importance of the analysis of ‘*consideration*’ in public contracts to exclude the existence of a gratuitous advantage to the government contractor, see Jan A. Winter, *Re(de)fining the Notion of State Aid in Article 87(1) of the EC Treaty*, 41 CML REV. 475, 487–501 (2004).

<sup>67</sup> See Op. AG Jacobs of 30 April 2002, in case C-126/01 – *GEMO*, ¶ 122; and Op. AG Fennelly of 26 November 1998, in case C-251/97 – *France v Commission*, ¶ 19.

<sup>68</sup> In similar terms, Doern, *Interaction between EC Rules on Public Procurement and State Aid*, *supra* note 62, 117; and ARROWSMITH, LAW OF PUBLIC AND UTILITIES PROCUREMENT, *supra* note 57, 224–227.

serve as an effective instrument to tackle publicly-generated restrictions of competition—since, in most cases, distortions of competition can arise without the public contractor receiving such undue economic advantage—unless the conduct of competition-distorting public procurement is considered to generate a situation that excludes ‘normal market conditions’ and, as a result, the award of the public contract under those circumstances is to be considered an undue economic advantage (which, in our view, is a highly unforeseeable development of EC State aid law).

### ***3.2. Public Procurement under Art. 86 ECT: Public Contracts as Special or Exclusive Rights?***

#### ***a) The General Rule of Art. 86(1) ECT***

Similarly to what happens with the State aid regime in the sphere of public procurement, it is noteworthy to stress that the award of a public contract will seldom meet the conditions for the application of article 86(1) ECT,<sup>69</sup> as it will only under very specific circumstances be considered the granting of a ‘special or exclusive right’ for the purposes of that provision.<sup>70</sup> According to the case-law of the ECJ, special or exclusive rights within the meaning of article 86(1) ECT are rights i) granted by the authorities of a member State, ii) to one undertaking or to a limited number of undertakings, iii) which substantially affect the ability of other undertakings to exercise the economic activity in question in the same geographical area under substantially equivalent conditions.<sup>71</sup>

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<sup>69</sup> Article 86(1) ECT covers both the cases of public undertakings and of undertakings to which Member States grant special or exclusive rights. The analysis in this paper will be restricted to the second group of cases, since the analysis of how competition rules apply to the procurement activities of public undertakings will be conducted in further detail later (see *infra* §3.3, dealing with the direct application of ‘core’ competition prohibitions to undertakings). It might be worthy to clarify that, given that public undertakings are fully subject to the competition rules of the ECT—unless they are covered by the ‘*public mission exception*’ regulated in article 86(2) ECT—their procurement activities will be substantially covered by the ‘core’ competition rules contained in articles 81 and 82 ECT and, consequently, for the analytical purposes of this paper, do not seem to merit specific treatment. In general, on the relevance of article 86 ECT in the context of public procurement, see ARROWSMITH, *LAW OF PUBLIC AND UTILITIES PROCUREMENT*, *supra* note 57, 232–239.

<sup>70</sup> On the concept of exclusive or special rights, JOSÉ L. BUENDÍA, *EXCLUSIVE RIGHTS AND STATE MONOPOLIES UNDER EC LAW* 3–71 (1999); *id.* *Derechos Especiales y Exclusivos, Servicios Públicos y Servicios de Interés Económico General*, in 2 *TRATADO DE DERECHO DE LA COMPETENCIA. UNIÓN EUROPEA Y ESPAÑA* 1055–1154 (J. M. Beneyto & J. Maillo eds., 2005); and *id.*, *Article 86—Exclusive Rights and Other Anti-Competitive State Measures*, in *THE EC LAW OF COMPETITION* 593 (Jonathan Faull & Ali Nikpay eds., 2nd edtn. 2007).

<sup>71</sup> See Op. AG Jacobs of 17 May 2001, in case C-475/99 – *Ambulanz Glöckner* ¶¶ 88 & 89 and Jdgmt. ECJ of 25 October 2001, in case C-475/99 – *Ambulanz Glöckner* [ECR 2001, I-8089] ¶ 24. There is substantial discussion on whether the same definition of exclusive or special rights applies under Directive 2004/17/EC, regulating procurement in the ‘excluded sectors’ (energy, water, transport and post). However, such discussion cannot be detailed here, due to space limitations. Suffice it to point out that, in our view, there is no good reason to adopt a separate definition in the excluded sectors. On this, see Martin André Dittmer, *The New Utilities Directive*, in *NEW EU PUBLIC PROCUREMENT DIRECTIVES* 29, 33 (Ruth Nielsen & Steen Treumer eds., 2005); Ulla B. Neergaard, *The Concept of Concession in EU Public Procurement Law versus EU Competition Law and National Law*, in *NEW EU PUBLIC PROCUREMENT DIRECTIVES* 149, 173–174 (Ruth Nielsen & Steen Treumer eds., 2005); and Totis

Public contracts (for works, services, supplies, etc.) will difficultly meet the third of these conditions, as tenderers that do not receive a particular public contract will generally be able to continue competing with the government contractor(s) for private and public business in the same geographical area and under substantially equivalent conditions. Then, article 86(1) ECT will have a very limited role in the assessment of the conduct of the public buyer, unless very particular and infrequent circumstances concur—under which the award of the public contract constitutes the only option for companies active in a given sector to remain in business or, otherwise, the award of the contract significantly restricts the ability of the rest of the firms to compete with the public contractor.<sup>72</sup> This will not be the case in most common public procurement circumstances and, consequently, the suitability of article 86(1) ECT to discipline public procurement activities will remain substantially *marginal*. The only relatively clear exception to this general premise can be found in the case of the award of *concessions*,<sup>73</sup> as their inherent exclusivity and quasi-monopolistic features will negatively impact (if not completely exclude) the ability of other tenderers to compete with the concessionaire in the same geographical area under substantially equivalent conditions during the lifespan of the concession contract; and, thus, result in a ‘special or exclusive right’ for the purposes of article 86(1) ECT.<sup>74</sup>

However, even under the very specific circumstances in which the award of a public contract triggers its application (given that, by its restrictive effects on competition, must be considered a ‘special or exclusive right’ granted to the public contractor), article 86(1) ECT will still have a very limited role in disciplining anti-competitive public procurement, particularly *during* the public procurement phase or the previous decisions regarding its *design*. According to article 86(1) ECT, the State that has concluded the public contract that results in a special or exclusive right will have to refrain from enacting or maintaining in force any measure that runs contrary to the rules

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Kotsonis, *The Definition of Special or Exclusive Rights in the Utilities Directive: Leased Lines or Crossed Wires*, 16 PUB. PROC. L. REV. 68, 70 (2007).

<sup>72</sup> An even more stringent approach towards the application of article 86(1) ECT in the public procurement setting would be to absolutely exclude its applicability to the award of public contracts, on the basis that it is not a discretionary activity of the State; see RICHARD WHISH, *COMPETITION LAW* 223 (5th edn. 2003). However, such approach seems to raise significant doubts as to the consideration of contract award as a non-discretionary activity of the public buyer, particularly because the public buyer retains almost absolute discretion in the design of the contract and the restrictions to participation in the tender; generally, see Buendía, *Derechos Especiales y Exclusivos*, *supra* note 70, 1066. Consequently, a more cautious approach is hereby adopted.

<sup>73</sup> The term *concession* is hereby used broadly, to identify the award of a public contract that guarantees the exclusivity of a given activity (of services or otherwise) to the public contractor. On the concept of concession and its different treatment in EC and member States’ law; Neergaard, *The Concept of Concession*, *supra* note 71, 163–174.

<sup>74</sup> Although in very succinct and slightly obscure terms, see Jdgmt. ECJ of 13 October 2005, in case C-458/03 – *Parking Brixen* [ECR 2005, I-8585] ¶ 51.

contained in the ECT and, particularly, competition rules—*i.e.* the State will not be able to exempt the public contractor from complying with competition law mandates.<sup>75</sup>

Consequently, article 86(1) ECT will usually be triggered by the award of the public contract itself and will mostly discipline the behaviour of the State *pro futuro*—trying to avoid subsequent distortions of the competitive environment in which the execution of the public contract will take place. Hence, it can hardly be operative to discipline the procurement activities of the public buyer, at least in the early (and most crucial) stages of the process of award of special or exclusive rights—insofar as article 86(1) ECT is an improper legal basis to impose specific and positive obligations on member States as regards the award of these rights.

Therefore, it is submitted that, in view of its restricted applicability to the award of public contracts that do not generate significant exclusionary effects on market competition (such as, under strict circumstances, the award of *concessions*), and its forward-looking nature, the practical relevance of article 86(1) ECT as a tool to avoid publicly-generated distortions in the public procurement setting is very limited.

#### b) The ‘Public Mission Exception’ of Art. 86(2) ECT

As an exception to the general rule of article 86(1) ECT, in case the public contractor is entrusted with the operation of ‘services of general economic interest’<sup>76</sup> (and particularly if it is the holder of a services concession), articles 16 and 86(2) ECT will empower the State to relax the regulation of its activities and to allow for certain competition-restricting behaviour (*i.e.* to enact regulation that departs from general EC law and, notably, from the competition rules of the ECT), as long as it is necessary for

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<sup>75</sup> Generally, on the scope and implications of article 86(1) ECT, see D. G. GOYDER, EC COMPETITION LAW 482–485 (4th edtn. 2003); Richard Wainwright & André Bouquet, *State Intervention and Action in EC Competition Law*, 2003 FORDHAM CORP. L. INST. 539, 562–568 (Barry Hawk ed., 2004); WHISH, COMPETITION LAW, *supra* note 72, 220–242; VALENTINE KORAH, AN INTRODUCTORY GUIDE TO EC COMPETITION LAW AND PRACTICE 225–231 (9th edtn. 2007); PETER ROTH & VIVIEN ROSE eds., BELLAMY & CHILD EUROPEAN COMMUNITY LAW OF COMPETITION 1038–1047 (6th edtn. 2008); CHÉROT, DROIT PUBLIC ÉCONOMIQUE, *supra* note 64, 147–165; CRAIG & DE BÚRCA, EU LAW, *supra* note 56, 1073–1079; BUENDÍA, EXCLUSIVE RIGHTS, *supra* note 70, 129–256; and Jerónimo Maillo, *Article 86—Services of General Interest and Competition Law*, in COMPETITION LAW. A CRITICAL ASSESSMENT 591, 596–603 (Giuliano Amato & Claus-Dieter Ehlermann eds., 2007). See also LOUIS DUBOIS & CLAUDE BLUMANN, DROIT MATÉRIEL DE L’UNION EUROPÉENNE 544–550 (4th edtn. 2006); and SAUTER & SCHEPEL, STATE AND MARKET IN EUROPEAN UNION LAW, *supra* note 56, 142–163. For a review of the main case-law, see ARIEL EZRACHI, EC COMPETITION LAW. ANALYTICAL GUIDE TO THE LEADING CASES 259–269 (2008).

<sup>76</sup> On the concept of services of general economic interest, see *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions—Services of General Interest, Including Social Services of General Interest: A New European Commitment*, COM(2007) 725 final. Also Erika Szyszczak, *Public Service Provision in Competitive Markets*, 20 YEL 35 (2001); *id.*, REGULATION OF THE STATE IN COMPETITIVE MARKETS, *supra* note 56, 211–253; and Ulla B. Neergaard, *Services of General (Economic) Interest: What Aims and Values Count?*, in INTEGRATING WELFARE FUNCTIONS INTO EU LAW—FROM ROME TO LISBON 191, 211 *et seq* (*id. et al* eds., 2009).



the performance, in law or in fact, of the particular tasks assigned to the public contractor.<sup>77</sup>

Along these lines, in cases where the narrow conditions that trigger the application of article 86(1) ECT are met by the award of a public contract, article 86(2) ECT could arguably be used as the legal basis to disapply the EC rules on public procurement by using the argument that compliance with their procedures or basic principles would jeopardize the task of carrying on services of general interest by the awardee of the contract. Then, article 86(2) ECT would exclude the application of public procurement rules and could justify the conduct of competition-distorting public procurement by the member States in the granting of contracts associated to the deployment of services of general economic interest—which runs contrary to the approach hereby adopted.

In this respect, and interestingly, the case-law of the Community judicature has set the conditions required to avoid the use of the ‘public mission exception’ in article 86(2) ECT to subvert the basic principles that inspire the EC public procurement rules in relation to the activities that member States conduct in preparation for the granting of the special or exclusive rights. The basis for such an interpretation is straightforward. The proper performance of the tasks entrusted to the public contractor generally does not require a departure from the basic principles of the ECT and public procurement rules in the *award* of special or exclusive rights by the member States. Since compliance with public procurement rules and principles concerns the contracting authority (not the public contractor) and must take place *before* the undertaking starts rendering the services of general interest, it does not affect in any material way the ability of the public contractor or concessionaire to effectively discharge an obligation that (as of the time of conducting the procurement process) still does not exist.<sup>78</sup> Hence,

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<sup>77</sup> On the scope of the so-called ‘public mission exception’, see BUENDÍA, EXCLUSIVE RIGHTS, *supra* note 70, 271–360; GOYDER, EC COMPETITION LAW, *supra* note 75, 485–487; KORAH, EC COMPETITION LAW, *supra* note 75, 231–232; WHISH, COMPETITION LAW, *supra* note 72, 233–239; BELLAMY & CHILD EC LAW OF COMPETITION, *supra* note 75, 1061–1069; CRAIG & DE BÚRCA, EU LAW, *supra* note 56, 1079–1081; Wainwright & Bouquet, *State Intervention and Action in EC Competition Law*, *supra* note 75, 569–572; CHRISTOPHE CABANES & BENOÎT NEVEU, DROIT DE LA CONCURRENCE DANS LES CONTRATS PUBLICS 96–98 (2008); SZYSZCZAK, REGULATION OF THE STATE IN COMPETITIVE MARKETS, *supra* note 56, 119–121; Maillo, *Services of General Interest and Competition Law*, *supra* note 75, 604–612; PROSSER, LIMITS OF COMPETITION LAW, *supra* note 61, 132–141; See also DUBOIS & BLUMANN, DROIT MATÉRIEL DE L’UE, *supra* note 75, 550–561; SAUTER & SCHEPEL, STATE AND MARKET IN EUROPEAN UNION LAW, *supra* note 56, 164–192; and Liyang Hou, *Uncovering the Veil of Article 86(2) EC* (ICRI-KULeuven-IBBT Working Paper, 2007), available at <http://ssrn.com/abstract=1025407>. See also Leonor Moral Soriano, *How Proportionate Should Anti-Competitive State Intervention Be?*, 28 EUR. L. REV. 112, 122 (2003); *contra* see Julio Baquero, *Beyond Competition: Services of General Interest and European Community Law*, in EU LAW AND THE WELFARE STATE: IN SEARCH OF SOLIDARITY 169, 209 & 212 (Grainne De Búrca ed., 2005). Finally, Mário Marques Mendes, *State Intervention / State Action – A US and EC Perspective from Cassis de Dijon to Altmark Trans and Beyond*, 2003 FORDHAM CORP. L. INST. 495, 495–501 (Barry Hawk ed., 2004).

<sup>78</sup> This reasoning would not apply automatically to the procurement practices conducted later on by the undertaking entrusted with the operation of ‘services of general economic interest’ (be it a private contractor or a public undertaking, see *supra* note 69). However, in those cases, the possibilities to apply the exemption of article 86(2) ECT to exclude the applicability of EC public procurement Directives are restricted (and partially excluded) by the rules on their subjective scope of application—see article 3 of

the award of the special or exclusive right to provide services of general economic interest in breach of public procurement rules will hardly ever fulfil the conditions of article 86(2) ECT. Consequently, a complete exclusion of competition in the award of special or exclusive rights could constitute a breach of EC law.<sup>79</sup>

However, where the EC public procurement rules do not apply (*i.e.* under the relevant thresholds, or in case of contracts not covered, such as service concessions<sup>80</sup>) this exclusion of the applicability of article 86(2) ECT in the granting of exclusive or special rights is basically restricted to a member States' obligation to award the contract through a process that ensures that the principles of non-discrimination and transparency are respected. That, however, does not imply an obligation to hold a tender,<sup>81</sup> much less to do so according to the rules and procedures set out in the EC public procurement Directives.<sup>82</sup>

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Directive 2004/18 and articles 2 to 7 of Directive 2004/17. Also, in the cases not covered by those rules, the need to conduct procurement activities without subjection to competition requirements would still need to be proven to be required for the performance, in law or in fact, of the particular tasks assigned to the public contractor—which sets a high burden of proof. Therefore, it is submitted that the ability of article 86(2) ECT to exempt the conduct by undertakings entrusted with the operation of 'services of general economic interest' of procurement activities not subject to competition requirements is largely *marginal* and, consequently, does not deserve further analysis.

<sup>79</sup> Indeed, applying the public procurement rules to putting the task of conducting the services of general economic interest up for competition has not been considered an obstruction to the development of those services and cannot be the object of an automatic exemption under article 86(2) ECT; see Op. AG Stix-Hackl of 14 September 2006, in case C-532/03 – *Commission v Ireland*, ¶¶ 98–108. Along the same lines, see Op. AG Mazák of 19 February 2009, in case C-480/06 – *Commission v Germany*, ¶¶ 56–63. Compare with Héléne M. Stergiou, *The Increasing Influence of Primary EU Law and EU Public Procurement Law: Must a Concession to Provide Services of General Economic Interest be Tendered?*, in *THE EU AND WTO LAW ON SERVICES: LIMITS TO THE REALISATION OF GENERAL INTEREST POLICIES WITHIN THE SERVICES MARKETS?* 159, 184 (Johan W. van de Gronden ed., 2009).

<sup>80</sup> For a detailed analysis of the case of concessions, see Neergaard, *The Concept of Concession*, *supra* note 71, 149–157; and, more specifically, *id.* *Public Service Concessions and Related Concepts—The Increased Pressure from Community Law on Member States' Use of Concessions*, 16 *PUB. PROC. L. REV.* 387 & 394–395 (2007).

<sup>81</sup> Indeed the case-law related to the award of special or exclusive rights, even if not directly related to the scope and application of article 86 ECT, is relevant in this respect. See Jdgmt. ECJ of 7 December 2000, in case C-324/98 – *Telaustria and Telefonadress* [ECR 2000, I-10745] ¶¶ 60–62; Jdgmt. ECJ of 21 July 2005, in case C-231/03 – *Coname* [ECR 2005, I-7287] ¶¶ 17–28; Jdgmt. ECJ of 13 October 2005, in case C-458/03 – *Parking Brixen* [ECR 2005, I-8585] ¶ 52; Jdgmt. ECJ of 6 April 2006, in case C-410/04 – *ANAV* [ECR 2006, I-3303] ¶ 23; and Jdgmt. ECJ of 18 December 2007, in case C-220/06 – *Correos* [ECR 2007, I-12175] ¶¶ 70–88. See also Stergiou, *Must a Concession to Provide Services of General Economic Interest be Tendered?*, *supra* note 79, 173–184; PROSSER, *LIMITS OF COMPETITION LAW*, *supra* note 61, 149–151 & 241–244; and, Buendía, *Finding the Right Balance*, *supra* note 64, 212–213.

<sup>82</sup> As regards the scope of this transparency obligation, see Op. AG Ruiz-Jarabo Colomer of 8 November 2006 in case C-412/04 – *Commission v Italy*, ¶¶ 48–65; and Jdgmt. ECJ of 21 February 2008, in case C-412/04 – *Commission v Italy* [ECR 2008, I-619] ¶¶ 66 & 94. See also Adrian Brown, *Transparency Obligations under the EC Treaty in Relation to Public Contracts that Fall Outside the Procurement Directives: A Note on C-231/03, Coname*, 14 *PUB. PROC. L. REV.* NA153, NA156–NA158 (2005); *id.*, *Seeing Through Transparency: The Requirement to Advertise Public Contracts and Concessions under the EC Treaty*, 16 *PUB. PROC. L. REV.* 1, 3 (2007); and Steen Treumer, *The Discretionary Powers of Contracting Entities – Towards a Flexible Approach in the Recent Case Law of the Court of Justice?*, 15 *PUB. PROC. L. REV.* 71, 82–84 (2006); all of them critical with the case-law of the ECJ for its lack of clarity as regards the extension of the transparency obligations.

### c) Overall Assessment of Public Procurement under Art. 86 ECT

To sum up, article 86 ECT will only be relevant under very specific circumstances. And, even in those instances, its ability to discipline the behaviour of the public buyer prior to the award of the contract will be limited to flagrant violations of the principles that derive from the ECT and secondary legislation and that result in a breach of the principles of transparency and non-discrimination. From a general perspective, hence, article 86 ECT is a very limited instrument to rein in anti-competitive public procurement practices by member States.

### **3.3. Public Procurement under Art. 81 and 82 ECT: Public Buyers as Undertakings?**

Whereas the EC ‘core’ competition rules aimed at undertakings are based in open-ended standards that cover almost every kind of private anti-competitive behaviour, the applicability of those same rules to curb public behaviour that can negatively impact market dynamics has followed a restrictive approach and yields more limited results.

#### a) In General, the Concept of ‘Undertaking’ as the Key Element of Analysis

In general terms, EC ‘antitrust’ rules are addressed to ‘undertakings’<sup>83</sup> and do not apply directly to member State’s activities.<sup>84</sup> However, in order to generate a level playing field between public and private competitors, and as a matter of principle, EC competition rules aimed at undertakings apply *equally* to private and to public undertakings that carry on activities of an industrial or commercial nature.<sup>85</sup>

Indeed, the ECJ has declared that competition rules apply equally to private and to public undertakings,<sup>86</sup> but it has restricted their scope to the cases where the public undertaking develops an economic activity,<sup>87</sup> consequently excluding the application of

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<sup>83</sup> See Wouter P. J. Wils, *The Undertaking as Subject of E.C. Competition Law and the Imputation of Infringements to Natural or Legal Persons*, 25 EUR. L. REV. 99 (2000); and Victoria Louri, ‘Undertaking’ as a Jurisdictional Element for the Application of EC Competition Rules, 29 LEG. ISS. ECON. INTEGRATION 143 (2002). See also Okeoghene Odudu, *The Meaning of Undertaking Within Article 81*, 7 CYELS 211 (2005); Ali Nikpay & Jonathan Faull, *Article 81*, in THE EC LAW OF COMPETITION 181, 188–195 (id. eds., 2nd edtn. 2007); Akos G. Toth, *Undertaking*, in 3 THE OXFORD ENCYCLOPAEDIA OF EUROPEAN COMMUNITY LAW—COMPETITION LAW AND POLICY 757–767 (id. ed., 2008); and SAUTER & SCHEPEL, STATE AND MARKET IN EUROPEAN UNION LAW, *supra* note 56, 75–78.

<sup>84</sup> On their *indirect* application through the so-called State action doctrine; see *infra* §3.4.

<sup>85</sup> The emergence of the general principle of competition on equal terms between public and private undertakings in EC law has been emphasised; Gabriel Eckert, *L’Égalité de Concurrence entre Opérateurs Publics et Privés sur le Marché*, in GOUVERNER, ADMINISTRER, JUGER. LIBER AMICORUM JEAN WALINE 207, 210–211 (2002); also GUYLAIN CLAMOUR, INTERET GENERAL ET CONCURRENCE 504–553 (2006).

<sup>86</sup> This principle has been consistently applied by the ECJ and never raised substantial interpretation difficulties; see Aurelio Pappalardo, *Measures of the States and Rules of Competition of the EEC Treaty*, 1984 FORDHAM CORP. L. INST. 515, 517–519 (Barry Hawk ed., 1985).

<sup>87</sup> See, among others, Jdgmt. ECJ of 20 March 1985, in case 41/83 – *Italy v Commission* [ECR 1985, 873]; Jdgmt. ECJ of 23 April 1991, in case C-41/90 – *Höfner and Elser* [ECR 1991, I-1979]; and Jdgmt. ECJ of 17 February 1993, in joined cases C-159/91 and C-160/91 – *Poucet and Pistre* [ECR 1993, I-637]; and Jdgmt. ECJ of 16 March 2004, in joined cases C-264/01, C-306/01, C-354/01 and C-355/01 – *AOK Bundesverband and others* [ECR 2004, I-2493]. The most recent case-law on the concept of undertaking as applied to public bodies can be found in Jdgmt. CFI of 4 March 2003, in case T-319/99 – *FENIN v Commission* [ECR 2003, II-357], confirmed on appeal by the ECJ in its Jdgmt. ECJ of 11 July 2006, in

‘antitrust’ rules in cases of exercise of *public powers*. According to the relevant case-law, the distinction between conducting an economic activity and the exercise of public powers cannot be made in general terms, but needs to take into account the particular circumstances of the case.<sup>88</sup> Where, according to such specific circumstances, the State is found to be carrying on economic activities of an industrial or commercial nature by offering goods or services in the market,<sup>89</sup> the instrumental entity (be it comprised in the public administration, be it a publicly-held corporation, or otherwise) will be considered an ‘undertaking’ for the purposes of articles 81 and 82 ECT.

On the contrary, where the activities of the State imply the exercise of public powers—that is, where the activities in question are connected by their nature, their aims and the rules to which they are subject with the exercise of powers which are typically those of a public authority;<sup>90</sup> the State unit or entity will not be considered an ‘undertaking’ for the purposes of EC competition law, and it will not be subject to the ‘antitrust’ rules.<sup>91</sup> In this regard, the fact that private entities (also) develop a given activity will be considered an important indication that it does not imply the exercise of public powers and, consequently, that it can be described as a business or economic activity.<sup>92</sup> Most noteworthy, all the activities carried on by a given entity do not need to be analysed together, and the EC competition rules ‘*are applicable to the [economic] activities of an entity which can be severed from those in which it engages as a public authority*’.<sup>93</sup>

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case C-205/03 P – *FENIN v Commission* [ECR 2006, I-6295]; and Jdgmt. CFI of 12 December 2006, in case T-155/04 – *Selex v Commission* [ECR 2006, II-4797], confirmed on appeal by the ECJ in its Jdgmt. ECJ of 26 March 2009, in case C-113/07 P – *Selex v Commission* [ECR 2009, nyr]. On the *FENIN-Selex* doctrine, see *infra* §5.1.

<sup>88</sup> The differentiation is far from clear-cut in the majority of cases, and most activities can be conceived of as lying in a continuum between pure ‘market activities’ and pure ‘exercises of public authority’—with a relatively large spectrum of activities in the ‘grey area’ to be found in between them; see Ulla B. Neergaard, *Services of General Economic Interest: The Nature of the Beast*, in *THE CHANGING LEGAL FRAMEWORK FOR SERVICES OF GENERAL INTEREST IN EUROPE—BETWEEN COMPETITION AND SOLIDARITY* (Markus Krajewski *et al* eds., 2009) (forth.).

<sup>89</sup> Jdgmt. ECJ of 16 June 1987, in case 118/85 – *Commission v Italy* [ECR 1987, 2599] ¶ 7; Jdgmt. ECJ of 18 March 1997, in case C-343/95 – *Porto di Genova II* [ECR 1997, I-1547] ¶ 16.

<sup>90</sup> See Jdgmt. ECJ of 4 May 1988, in case 30/87 – *Bodson* [ECR 1988, 2479] ¶¶ 17–18, where the ECJ held that article 81 ECT does not apply to acts conducted by bodies ‘*acting in their capacity as public authorities*’; Jdgmt. ECJ of 19 January 1994, in case C-364/92 – *Eurocontrol* [ECR 1994, I-43] ¶ 30; Jdgmt. ECJ of 14 December 1995, in case C-387/93 – *Banchero* [ECR 1995, I-4663] ¶ 43; and Jdgmt. ECJ of 18 March 1997, in case C-343/95 – *Porto di Genova II* [ECR 1997, I-1547] ¶ 23. See LENNART RITTER & W. DAVID BRAUN, *EUROPEAN COMPETITION LAW: A PRACTITIONER’S GUIDE* 50–51 & 951 (3rd edn. 2004); and WHISH, *COMPETITION LAW*, *supra* note 72, 87–88.

<sup>91</sup> Jdgmt. ECJ of 19 February 2002, in case C-309/99 – *Wouters* [ECR 2002, I-1577] ¶ 57. See Louri, ‘*Undertaking as a Jurisdictional Element*, *supra* note 83, 146–147 & 159–169. Also VAN BAELE & BELLIS, *COMPETITION LAW OF THE EUROPEAN COMMUNITY* 980 (4th edn. 2005); DOMINIQUE BRAULT, *POLITIQUE ET PRATIQUE DU DROIT DE LA CONCURRENCE EN FRANCE* 274–279 (2004); BELLAMY & CHILD *EC LAW OF COMPETITION*, *supra* note 75, 91–102; and WHISH, *COMPETITION LAW*, *supra* note 72, 82–88.

<sup>92</sup> Jdgmt. ECJ of 23 April 1991, in case C-41/90 – *Höfner and Elser* [ECR 1991, I-1979] ¶ 22; Jdgmt. CFI of 12 December 2000, in case T-128/98 – *Aéroports de Paris* [ECR 2000, II-3929] ¶ 124; and Jdgmt. ECJ of 25 October 2001, in case C-475/99 – *Ambulanz Glöckner* [ECR 2001, I-8089] ¶ 20.

<sup>93</sup> Jdgmt. ECJ of 11 July 1985, in case 107/84 – *Commission v Germany* [ECR 1985, 2655] ¶¶ 14 & 15; Jdgmt. CFI of 12 December 2000, in case T-128/98 – *Aéroports de Paris* [ECR 2000, II-3929] ¶¶ 108 &

As a general criterion, the differentiation between commercial or economic activity and the exercise of public powers seems fit for the purpose of identifying the type of public conduct that should be subjected to EC competition rules, as it excludes their application in the case of *sovereign* activities of the State, but subjects all other activities to the basic rules governing market activities and competition amongst undertakings. At this point, it should seem possible to subject public procurement activities to the ‘core’ competition rules of the ECT, since it can be argued that they are of a clear commercial or economic nature—or, at least, are hard to conceptualize as the exercise of public powers. However, as we will see, the specific interpretation of the concept of ‘undertaking’—and, more specifically, of the requirement to conduct an ‘economic activity’, significantly condition the consistency of the case-law of the ECJ with this general criterion, and restrain the ability of articles 81 and 82 ECT to directly address publicly-generated distortions of competition in the public procurement field.<sup>94</sup>

*b) The Carrying on of an Economic Activity as the Distinctive Criterion: The General Functional Approach to the Concept of ‘Economic Activity’*

In general terms, the Community case-law has adopted a *functional or anti-formalistic approach* to the concept of ‘undertaking’,<sup>95</sup> and has developed criteria that have broadened the scope of this concept in order to cover any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed.<sup>96</sup> The concept of undertaking, then, has been developed and further refined around its two basic elements: ‘entity’ and ‘economic activity’. Both have been developed in very wide terms.<sup>97</sup> The concept of ‘entity’ has been interpreted broadly, so as to include both natural and legal persons, as well as State bodies and other public entities.<sup>98</sup> The

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112; and Jdgmt. CFI of 12 December 2006, in case T-155/04 – *Selex v Commission* [ECR 2006, II-4797] ¶ 54. On this important point, see *infra* §5.1.

<sup>94</sup> Similarly, see NICOLAS CHARBIT, *DROIT DE LA CONCURRENCE ET SECTEUR PUBLIC* 11 & 21–27 (2002). See also SZYSZCZAK, *REGULATION OF THE STATE IN COMPETITIVE MARKETS*, *supra* note 56, 8–9.

<sup>95</sup> For a recent review of the settled case-law in this regard, see Op. AG Mazák of 18 November 2008, in case C-350/07 – *Kattner Stahlbau*, ¶¶ 39 *et seq.* See also OKEOGHENE ODUDU, *THE BOUNDARIES OF EC COMPETITION LAW: THE SCOPE OF ARTICLE 81* 23–45 (2006).

<sup>96</sup> The principle was formulated in Jdgmt. ECJ of 23 April 1991, in case C-41/90 – *Höfner and Elser* [ECR 1991, I-1979] ¶ 21; and has been applied consistently ever since. For recent references, see Jdgmt. ECJ of 28 June 2005, in joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P – *Dansk Rørindustri and Others v Commission* [ECR 2005, I-5425] ¶ 112; Jdgmt. ECJ of 10 January 2006, in case C-222/04 – *Cassa di Risparmio di Firenze and Others* [ECR 2006, I-289] ¶ 107; Jdgmt. ECJ of 11 July 2006, in case C-205/03 P – *FENIN v Commission* [ECR 2006, I-6295] ¶ 25; Jdgmt. ECJ of 11 December 2007, in case C-280/06 – *ETI and Others* [ECR 2007, I-10893] ¶ 38; and Jdgmt. ECJ of 5 March 2009, in case C-350/07 – *Kattner Stahlbau* [ECR 2009, nyr] ¶ 34.

<sup>97</sup> BELLAMY & CHILD *EC LAW OF COMPETITION*, *supra* note 75, 92–107; RICHARD WHISH, *COMPETITION LAW* 82–91 (6th edtn. 2009); ALISON JONES & BRENDA SUFRIN, *EC COMPETITION LAW: TEXT, CASES, AND MATERIALS* 128–147 (3rd edtn. 2008); Louri, ‘Undertaking’ as a *Jurisdictional Element*, *supra* note 83; and CARL VON QUITZOW, *STATE MEASURES DISTORTING FREE COMPETITION IN THE EC* 90 (2002).

<sup>98</sup> For a detailed analysis of the case-law developing the ‘entity’ element of the concept of undertaking, see Christopher Townley, *The Concept of an ‘Undertaking’: The Boundaries of the Corporation—A Discussion of Agency, Employees and Subsidiaries*, in *COMPETITION LAW. A CRITICAL ASSESSMENT* 3, 8–16 (Giuliano Amato & Claus-Dieter Ehlermann eds., 2007).

inclusion of public bodies, public enterprises and other State units in the concept of ‘entity’—and, consequently, in the concept of ‘undertaking’ for the purposes of EC competition law is not controversial. Therefore, most noteworthy for the analytical purposes of this paper, the concept of ‘undertaking’ is largely dependent on the prerequisite of the carrying on of an economic activity; or, more clearly, the concept of ‘undertaking’ is dependent on the twin concept of ‘economic activity’.<sup>99</sup>

On the other hand, the ‘economic activity’ element of the definition of ‘undertaking’ has maintained a less clear-cut evolution. Over the years, the CFI and the ECJ have developed a case-law that determines that an ‘economic activity’ *involves the participation of the undertaking in a market or the development of the activity in a market context*—i.e. an activity will be considered ‘economic’ when it is developed under market conditions.<sup>100</sup> According to this case-law,<sup>101</sup> the pursuit of profit by a public body, or the existence of (sufficient) competition between the public body and private undertakings,<sup>102</sup> will exclude the consideration that the activity is developed in the general interest or otherwise as the result of the exercise of public powers *as such*. In turn, this will determine that, for the purposes of articles 81 and 82 ECT, the activity being developed is of an ‘economic’ nature and, hence, the public body will be considered an ‘undertaking’ and will be subject to the EC ‘antitrust’ rules.<sup>103</sup>

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<sup>99</sup> As has been clearly described, ‘*in defining this Community concept [of undertaking,] the Community Courts look at what the entity does, as opposed to its legal status*’; see Townley, *The Concept of an ‘Undertaking’*, *supra* note 98, 3; and that EC competition law, particularly article 81(1) EC is ‘*not addressed to entities at all; it addresses activities*’ (emphasis in the original); ODUDU, *BOUNDARIES OF EC COMPETITION LAW*, *supra* note 95, 25. For an interesting discussion on the concept of ‘economic activity’ and its treatment in the case-law, see Baquero, *Beyond Competition*, *supra* note 77, 179–185; and SAUTER & SCHEPEL, *STATE AND MARKET IN EUROPEAN UNION LAW*, *supra* note 56, 79–85.

<sup>100</sup> See Op. AG Poiares Maduro of 10 November 2005, in case C-205/03 P – *FENIN v Commission*, ¶ 13, who stresses that market conditions are distinguished by conduct which is undertaken with the objective of capitalisation, which is incompatible with the principle of solidarity. However, as we will see, the criterion of development of the activity for profit or based on solidarity or other social principles is tricky when it is used to determine the economic nature of an activity; see *infra* §5.1. As indicated by AG Jacobs, ‘*the non-profit-making character of an entity or the fact that it pursues non-economic objectives is in principle immaterial*’ to the question whether the entity is to be regarded as an undertaking; see Op. AG Jacobs of 28 January 1999, in case C-67/96 – *Albany*, ¶ 312.

<sup>101</sup> For a structured review, see ODUDU, *BOUNDARIES OF EC COMPETITION LAW*, *supra* note 95, 26.

<sup>102</sup> In this regard, it could be argued that the case-law of the ECJ has generated a ‘*de minimis*’ requirement as regards the existence of competitive relations; see Jdgmt. ECJ of 16 March 2004, in joined cases C-264/01, C-306/01, C-354/01 and C-355/01 – *AOK Bundesverband and others* [ECR 2004, I-2493] ¶ 56. See Somaya Belhaj & Johan W. van de Gronden, *Some Room for Competition Does Not Make a Sickness Fund an Undertaking. Is EC Competition Law Applicable to the Health Care Sector?* (Joined Cases C-264/01, C-306/01, C-453/01 and C-355/01 AOK), 25 E.C.L.R. 682, 684–685 (2004); Markus Krajewski & Martin Farley, *Limited Competition in National Health Systems and the Application of Competition Law: The AOK Bundesverband Case*, 29 EUR. L. REV. 842, 850–851 (2004); and Jennifer Skilbeck, *The EC Judgment in AOK: Can a Major Public Sector Purchaser Control the Prices it Pays or is it Subject to the Competition Act?* Cases C – 264/01, C – 306/01, C – 354/01 and C – 355/01: AOK Bundesverband v Ichthyol ECJ, March 16, 2004, 13 PUB. PROC. L. REV. NA95 (2004).

<sup>103</sup> To be sure, there is an element of ‘policy’ in this determination, as some decisions of the ECJ show (such as, it is submitted, the *FENIN-Selex* doctrine discussed *infra* §5.1). This has been clearly stressed by SAUTER & SCHEPEL, *STATE AND MARKET IN EUROPEAN UNION LAW*, *supra* note 56, 83. Suffice it to anticipate here that, in our opinion, this is a largely objectionable *method* of construction and enforcement

As an exception or a restriction to this functional approach, if a *prima facie* economic activity is developed on the basis of the principle of *solidarity*<sup>104</sup> and subject to supervision by the State<sup>105</sup>—*i.e.* isolated from the discipline of the market<sup>106</sup>—it will not qualify as an ‘economic activity’ for the purposes of articles 81 and 82 ECT.<sup>107</sup> However, it is noteworthy to stress that, according to settled Community case-law, the mere pursuit of social aims is not in itself sufficient to preclude the activity in question from being classified as an ‘economic activity’; so that the isolation of the entity from the market (*i.e.* substituting market discipline with State supervision) and the adoption of a principle of solidarity as the (exclusive) basis for the development of its activities have to be closely scrutinised.<sup>108</sup>

However, it should also be stressed that, given that judgments regarding the principle of solidarity have been adopted in relation with the organization of *social security systems* by member States; the Community case-law has systematically put a strong emphasis on the social aims pursued by the entities integrated in those systems—so that the distinction between such ‘social aims’ and the ‘principle of solidarity’ is oftentimes hard to draw,<sup>109</sup> and the difference between economic and social activities becomes increasingly blurry.<sup>110</sup> Therefore, the limits between economic activities and the types of social activities carved-out of this concept for the purposes of the application of competition law remain obscure, particularly when the activities of public entities lie in a relatively *grey zone* in between economic and social activities<sup>111</sup>—or, probably more often, when public entities develop *both* economic and social activities at the same time.

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of EC competition law—particularly for its disregard of the deep (future) implications that it usually has. In similar terms, see Josh Holmes, *Fixing the Limits of EC Competition Law: State Action and the Accommodation of the Public Services*, 57 CURR. LEG. PROBL. 149, 150–151 & 172–173 (2004). See also SZYSZCZAK, REGULATION OF THE STATE IN COMPETITIVE MARKETS, *supra* note 56, 8–9.

<sup>104</sup> See Jdgmt. ECJ of 22 January 2002, in case C-218/00 – *Cisal* [ECR 2002, I-691] ¶¶ 38–42; Jdgmt. ECJ of 5 March 2009, in case C-350/07 – *Kattner Stahlbau* [ECR 2009, nyr] ¶¶ 44–59. On the principle of solidarity, see Nina Boeger, *Solidarity and EC Competition Law*, 32 EUR. L. REV. 319 (2007); Malcolm G. Ross, *Promoting Solidarity: From Public Services to a European Model of Competition?*, 44 CML REV. 1057 (2007); and *id.*, *The Value of Solidarity in European Public Services Law*, in THE CHANGING LEGAL FRAMEWORK FOR SERVICES OF GENERAL INTEREST IN EUROPE—BETWEEN COMPETITION AND SOLIDARITY (Markus Krajewski *et al* eds., 2009) (forth.).

<sup>105</sup> See Jdgmt. ECJ of 22 January 2002, in case C-218/00 – *Cisal* [ECR 2002, I-691] ¶¶ 43–44; and Jdgmt. ECJ of 5 March 2009, in case C-350/07 – *Kattner Stahlbau* [ECR 2009, nyr] ¶¶ 60–68.

<sup>106</sup> See Baquero, *Beyond Competition*, *supra* note 77, 182.

<sup>107</sup> See SAUTER & SCHEPEL, STATE AND MARKET IN EUROPEAN UNION LAW, *supra* note 56, 85–90.

<sup>108</sup> Jdgmt. ECJ of 21 September 1999, in case C-67/96 – *Albany* [ECR 1999, I-5751] ¶ 86; Jdgmt. ECJ of 12 September 2000, in joined cases C-180/98 to C-184/98 – *Pavlov and Others* [ECR 2000, I-6451] ¶ 118; Jdgmt. ECJ of 22 January 2002, in case C-218/00 – *Cisal* [ECR 2002, I-691] ¶ 37; and Jdgmt. ECJ of 5 March 2009, in case C-350/07 – *Kattner Stahlbau* [ECR 2009, nyr] ¶ 42.

<sup>109</sup> See, for instance, Jdgmt. ECJ of 5 March 2009, in case C-350/07 – *Kattner Stahlbau* [ECR 2009, nyr] ¶ 66; and Jdgmt. ECJ of 22 January 2002, in case C-218/00 – *Cisal* [ECR 2002, I-691] ¶ 45.

<sup>110</sup> Along the same lines, Baquero, *Beyond Competition*, *supra* note 77, 182. Compare with Maillo, *Services of General Interest and Competition Law*, *supra* note 75, 594.

<sup>111</sup> See Neergaard, *Services of General Economic Interest*, *supra* note 88; and Baquero, *Beyond Competition*, *supra* note 77, 184.

In these instances, the case-law of the Community judicature is less straightforward,<sup>112</sup> and generates some interpretative difficulties.

Notwithstanding those difficulties, it can be deduced from the case-law that the applicability of EC competition rules to (public) ‘undertakings’ could seem granted in all cases where a body governed by public law develops an ‘economic activity’ in market conditions or, put otherwise, when the public entity *participates or interacts in the market*.<sup>113</sup> It is submitted that public procurement activities should be covered by this broad conception of economic activity, since they are activities developed in the market—or, put differently, through which the public buyer *interacts* with other agents in the market (*i.e.* its suppliers and, indirectly, with competing buyers). However, as we will now see, procurement activities constitute a particular instance where the case-law has departed from the functional approach just described.

*c) The Approach to Purchasing Activities As Such: A Departure from the General Functional Approach to the Concept of ‘Economic Activity’*

As briefly mentioned, notwithstanding the general functional approach to the concepts of undertaking and economic activity systematically applied in Community case-law and in a rather surprising *formalistic twist*, the CFI and the ECJ have recently developed a string of case-law that excludes the direct applicability of competition rules to procurement or purchasing activities by adopting what, in our opinion, can be seen as an *exceedingly narrow and non-functional (sub-)concept of ‘economic activity’*.

According to the CFI and ECJ latest case-law, procurement activities are not to be considered ‘economic’ for and by themselves—even if they are developed under market conditions and clearly represent an instance of participation in the market or market interaction by the public buyer. Rather, according to this case-law, the nature of these purchasing activities must be determined according to whether or not the *subsequent use* of the purchased goods amounts to an ‘economic’ activity.<sup>114</sup> In other terms, procurement that is *ancillary* to a non-economic activity does not by itself qualify as ‘economic activity’ for the purposes of articles 81 and 82 ECT.<sup>115</sup> Hence, all

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<sup>112</sup> Baquero, *Beyond Competition*, *supra* note 77, 182.

<sup>113</sup> In this regard, it is important to stress that any activity developed in market conditions or that implies the participation or economic interaction with other undertakings in the market will qualify as ‘economic’ activity and will trigger the consideration of the State as an ‘undertaking’. See Jdgmt. CFI of 12 December 2000, in case T-128/98 – *Aéroports de Paris* [ECR 2000, II-3929] ¶¶ 120–121.

<sup>114</sup> See Jdgmt. CFI of 4 March 2003, in case T-319/99 – *FENIN v Commission* [ECR 2003, II-357] ¶ 36; confirmed on appeal by Jdgmt. ECJ of 11 July 2006, in case C-205/03 P – *FENIN v Commission* [ECR 2006, I-6295] ¶ 26; and Jdgmt. CFI of 12 December 2006, in case T-155/04 – *Selex v Commission* [ECR 2006, II-4797] ¶ 65, confirmed on appeal by Jdgmt. ECJ of 26 March 2009, in case C-113/07 P – *Selex v Commission* [ECR 2009, nyr] ¶¶ 102.

<sup>115</sup> This finding of the Community judicature with which this paper takes issue (see *infra* §5.1) has been accepted by some relevant commentators as a *praetorian* exclusion of certain public activities from competition scrutiny; see WHISH, *COMPETITION LAW*, *supra* note 72, 88; and, more clearly, Buendía, *Derechos Especiales y Exclusivos*, *supra* note 70, 1062; Olivier Guézou, *Droit Communautaire de la Concurrence et Achats: Certains Demandeurs Sont des Offreurs comme les Autres. Note sous FENIN*,



procurement activities conducted by public buyers that do not develop a subsequent or ‘downstream’ economic activity (but carry on an activity of a social nature or otherwise in the public interest) are deemed insufficient to qualify as economic activities for the purposes of EC competition law—and, hence, the public buyer will not be considered an ‘undertaking’ and will not be subject to the prohibitions of articles 81(1) and 82 ECT. It is submitted that this finding deserves additional scrutiny; particularly because it departs substantially from the previous general criteria related to the *functional* definition of economic activity for the purposes of articles 81 and 82 ECT.

It is our view that, while generally holding that EC competition rules apply equally to private and to public undertakings, in the particular case of purchasing activities, the ECJ has departed from its general *functional approach*, has significantly eroded and reduced the scope of antitrust rules as regards public sector activities, and has generated an important difference on the scope of the ‘antitrust’ rules applicable to public and private undertakings—as *only the activities of public undertakings as suppliers of goods or services in the market are subject to competition rules*. All other commercial activities of the public sector that do not qualify *per se* as ‘economic activities’ (remarkably, public procurement) are off-bounds for ‘antitrust’ rules—unless they are ‘attracted’ to its scope by the subsequent development of ‘proper’ economic activities by the same undertaking. It is submitted that this excessively formalistic approach (hardly compatible with most basic economic considerations, *infra* §5.1) generates an important gap in the EC competition law system.

This jurisprudence of the ECJ has exclusively focused on one side of the commercial activities exercised by the State: that of the State acting as an *offeror* of goods or services in the market. To be sure, that is an activity where subjection of the State’s commercial activities to competition rules is essential to guarantee that competition in the market is not distorted and that public and private undertakings compete on equal footing. However, in a departure from the general functional approach to the concept of undertaking, *commercial activities of the State as buyer, not only have received significantly less attention, but have been automatically left outside the scope of EC competition rules—apparently for substantially no good reason*. As we have already seen (*supra* §2), this type of public commercial activities has a significant potential to distort competition in the market—but has nonetheless been set free from competition rules’ constraints by a formalistic twist in the case-law of the Community judicature. Consequently, the current jurisprudential approach to the economic activities of the public sector from a competition standpoint neglects an important sector of activity (that of the market behaviour of the public buyer) and gives way to undeterred competition-distorting public procurement practices.

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CP-ACCP 59 (2003); and *id.*, *Champ d'Action du Droit de la Concurrence et Marchés Publics*, in 3 DROIT DES MARCHES PUBLICS III-133, 6–7 (C. Bréchon-Moulènes ed., 2006).

In view of this perceived short-coming (further explored and criticised *infra* §5.1), which prevents the direct application of the ‘core’ competition rules to the public buyer in those instances in which it does not carry on subsequent or downstream ‘economic’ activities, the focus of inquiry should now turn to their potential *indirect* application through the so-called State action doctrine, which has expanded the scope and applicability of EC ‘antitrust’ rules to certain activities of the State that do not qualify as ‘economic’ activities for the purposes of articles 81 and 82 ECT.

### ***3.4. Public Procurement under the State Action Doctrine: Can it Catch Unilateral Public (Commercial) Conduct?***

#### ***a) The Potential for Publicly-Created Distortions of Competition as the Rationale behind the Development of the State Action Doctrine***

Regardless of the specific interpretation of articles 81 and 82 ECT and the limits of their applicability to public entities, in our view, it is manifest that some (or most) cases of anticompetitive State action do not directly or exclusively imply economic or commercial activities, but derive from the passing of legislation or administrative regulations that restrict competition or, even more often, from governmental action that may distort or negatively affect the competitive dynamics of the market.<sup>116</sup> Therefore, competition rules addressed at undertakings (even if they were applied to public undertakings to a further extent than currently allowed for by the interpreting case-law) might be insufficient, and additional rules seem required to rein in anti-competitive or competition-distorting governmental activity.<sup>117</sup> With this purpose, the so-called *State action doctrine* has been developed by the Community judicature to capture those cases in which the exercise of public powers by the State distorts competition. Given the wide potential for public distortions of competition and the absence of specific rules in the ECT, the need to expand the applicability of the EC rules on competition to the activities of the State was soon felt, and the ECJ case-law undertook the mission to build basic piece-meal competition rules applicable to public intervention in the market through the so-called State action doctrine.<sup>118</sup>

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<sup>116</sup> See Julio Baquero, *The State Action Doctrine*, in COMPETITION LAW. A CRITICAL ASSESSMENT 551, 554 (Giuliano Amato & Claus-Dieter Ehlermann eds., 2007). See also OECD, REPORT ON REGULATORY REFORM: SYNTHESIS 33 (1997).

<sup>117</sup> To be sure, indirect limits on anti-competitive governmental activity can be found in the rules on free movement and on the rules on State aid; see Luc Gyselen, *State Action and the Effectiveness of the EEC Treaty's Competition Provisions*, 26 CML REV. 33, 34 (1989). However, even with the complement of such rules, competition law still seems to lack specific rules against anti-competitive or competition-distorting governmental activity—at least if it is to constitute a complete *system*.

<sup>118</sup> See René Joliet, *National Anti-Competitive Legislation and Community Law*, 12 FORDHAM INT'L. L. J. 163 (1989); MICHEL WAELEBROECK & ALDO FRIGNANI, COMMENTAIRE MÉGRET—DROIT COMMUNAUTAIRE DE LA CONCURRENCE 193–205 (2nd edtn. 1997); ULLA B. NEERGAARD, COMPETITION & COMPETENCES: THE TENSIONS BETWEEN EUROPEAN COMPETITION LAW AND ANTI-COMPETITIVE MEASURES BY THE MEMBER STATES 29–121 (1998); Javier Viciano Pastor, *Les Responsabilités Assumées par les États Membres par Rapport au Système de Concurrence Non Faussée*, in ÉTUDES DE DROIT EUROPEEN ET INTERNATIONAL. MÉLANGES EN HOMMAGE À MICHEL WAELEBROECK 1675, 1695–1696

### b) A Quick Overview on the Development of the State Action Doctrine

The creation of the State action doctrine has been progressive and incremental, and a relatively large number of ECJ decisions were required to achieve the current level of development.<sup>119</sup> Indeed, State action that restricts or distorts competition has only gradually been subjected to the EC competition rules.<sup>120</sup> Arguably, however, it is still incomplete—at least as regards its boundaries (see *infra*).

In the beginning, the absence of specific competition provisions in the ECT aimed at the behaviour of the public sector (other than the rules regarding State aid and the granting of exclusive or special rights) led the ECJ to develop a too lenient initial approach towards State anti-competitive action. Indeed, the first cases where allegedly anti-competitive behaviour of a member State or competition-distorting domestic regulations were brought before the ECJ were dismissed on formal grounds and based on a literal interpretation of the ECT—where the ‘core’ competition rules are located under the heading ‘rules applying to undertakings’ and so, in the first opinions of the ECJ, were inapplicable to the member States.<sup>121</sup>

However, this approach yielded unsatisfactory results and exempted all types of State anti-competitive regulation and intervention in the markets from competition-oriented scrutiny. This potentially jeopardized the effectiveness of EC competition law, as member States were in principle free to adopt legislation or otherwise interfere in the market in ways that run contrary to its objectives—and, potentially, to protect certain undertakings (*national champions*) or shield them from effective competition.<sup>122</sup> So this

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(Michel Waelbroeck & M. Doni eds., 1999); Baquero, *State Action Doctrine*, *supra* note 116, 552; and SZYSZCZAK, REGULATION OF THE STATE IN COMPETITIVE MARKETS, *supra* note 56, 14–15.

<sup>119</sup> For a review of the early decisions of the ECJ in this field, see DAVID J. GERBER, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS 382–384 (1998); Manuel López Escudero, *Intervencionismo Estatal y Derecho Comunitario de la Competencia en la Jurisprudencia del TJCE*, 16 REV. INSTIT. EUR.725 (1989); and JAVIER VICIANO PASTOR, LIBRE COMPETENCIA E INTERVENCIÓN PÚBLICA EN LA ECONOMÍA 303–424 (1995).

<sup>120</sup> Most significant developments at the EC level have taken place in the last two decades. VAN BAEL & BELLIS, COMPETITION LAW, *supra* note 91, 980.

<sup>121</sup> This ‘minimalist’ approach was followed by the ECJ in its Jdgmt. of 18 October 1979, in case 5/79 – *Buys* [ECR 1979, 3203] ¶¶ 29–31, which denied the joint applicability of articles 10(2) and 81 ECT to member States’ rules and regulations because they don’t constitute an ‘*agreement between undertakings*’; and also in Jdgmt. ECJ of 7 February 1984, in case 238/82 – *Duphar* [ECR 1984, 523] ¶ 30, and in Jdgmt. ECJ of 5 April 1984, in joined cases 177 and 178/82 – *van de Haar* [ECR 1984, 1797] ¶ 24 where, following a narrow literal interpretation, the ECJ held that the provisions of the rules on competition ‘applying to undertakings’ were irrelevant to the question whether legislation is compatible with Community law or not. For an assessment of the earlier developments of this doctrine, see Piet Jan Slot, *The Application of Articles 3(f), 5 and 85 to 94 EEC*, 12 EUR. L. REV. 179 (1987); and NEERGAARD, COMPETITION & COMPETENCES, *supra* note 118, 29–33 & 38–41. See also Gyselen, *State Action and Effectiveness of Competition Provisions*, *supra* note 117, 42; and Andrea Filippo Gagliardi, *United States and European Union Antitrust versus State Regulation of the Economy: Is There a Better Test?*, 25 EUR. L. REV. 353, 360 (2000). This minimalist approach was reiterated in Jdgmt. ECJ of 16 September 1999, in case C-22/98 – *Becu & Others* [ECR 1999, I-5665] ¶ 31.

<sup>122</sup> Along these lines, see Deborah P. Majoras, *State Intervention: A State of Displaced Competition*, 13 GEO. MASON L. REV. 1175, 1177 (2006).

initial too formal approach was soon abandoned by the ECJ in favour of a more materially-oriented interpretation of the basic tenets of the competition rules.

Progressively, the ECJ developed a new string of case-law (*i.e.* the State action doctrine) that attributes key interpretative value to the general goals and policies set by the ECT and, particularly, to the objective of building up ‘*a system ensuring that competition in the internal market is not distorted*’ [art. 3(1)(g) ECT], as well as on the general requirement that the activities of the member States and the Community be conducted ‘*in accordance with the principle of an open economy with free competition*’ (art. 4 ECT).<sup>123</sup> With recourse to the general obligation of member States to promote and effectively contribute to the development of the EC policies and objectives, and not to adopt measures that could jeopardize their effectiveness (art. 10 ECT);<sup>124</sup> the ECJ extended the applicability of the EC competition rules contained in articles 81 and 82 ECT (*i.e.* the ‘core’ of the competition rules applicable to undertakings) to certain public non-commercial activities.<sup>125</sup>

Indeed, adopting such a *teleological approach*,<sup>126</sup> the ECJ developed a case-law that limits the ability of the State to adopt anti-competitive legislation that jeopardizes the effectiveness of the application of articles 81 and 82 ECT to the conduct of undertakings.<sup>127</sup> Therefore, the State action doctrine has been developed as a mechanism to resolve a conflict between two bodies of regulation: EC competition rules

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<sup>123</sup> As noted by WHISH, *COMPETITION LAW*, *supra* note 72, 213, the ECJ stressed the importance of article 4 ECT in its Jdgmt. of 9 September 2003, in case C-198/01 – *CIF* [ECR 2003, I-8055] ¶ 47.

<sup>124</sup> Recourse to article 10 ECT (formerly, 5 EECT) has been a constant in the ECJ jurisprudence as a mechanism to reinforce member States’ obligations, since its first expression in Jdgmt. ECJ of 8 June 1971, in case 78/70 – *Deutsche Grammophon* [ECR 1971, 487] ¶ 5. However, the scope of the obligations imposed by article 10 ECT has given rise to substantial doctrinal debate—which cannot be fully recorded here. For some references on this issue, see MARC BLANQUET, *L’ARTICLE 5 DU TRAITE CEE—RECHERCHE SUR LES OBLIGATIONS DE FIDELITE DES ETATS MEMBRES DE LA COMMUNAUTE* 171–221 & 241–321 (1994); HENRY G. SCHERMERS & DENIS F. WAELEBROECK, *JUDICIAL PROTECTION IN THE EUROPEAN UNION* 112–115 (6th edtn. 2001); KOEN LENAERTS & PIET VAN NUFFEL, *CONSTITUTIONAL LAW OF THE EUROPEAN UNION* 115–123 (2nd edtn. 2005); Armin von Bogdandy, *Constitutional Principles*, in *PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW* 3, 49–51 (id. & Jürgen Bast eds., 2006); and the various works by John Temple Lang, recently, *id.*, *State Measures Restricting Competition under European Union Law*, in *1 ISSUES IN COMPETITION LAW AND POLICY* 221, 231 (ABA, 2008); and *id.*, *Article 10 EC—The Most Important ‘General Principle’ of Community Law*, in *GENERAL PRINCIPLES OF EC LAW IN A PROCESS OF DEVELOPMENT* 75 (Ulf Bernitz *et al* eds., 2008).

<sup>125</sup> Ulrich Ehricke, *State Intervention and EEC Competition Law: Opportunities and Limits of European Court of Justice’s Approach—A Critical Analysis of Four Key-Cases*, 14 *WORLD COMP.* 79, 80 (1990).

<sup>126</sup> See SZYSZCZAK, *REGULATION OF THE STATE IN COMPETITIVE MARKETS*, *supra* note 56, 46–48.

<sup>127</sup> See, Gyselen, *State Action and Effectiveness of Competition Provisions*, *supra* note 117, 36; Giuliano Marengo, *Le Traité CEE Interdit-Il Aux États Membres de Restreindre la Concurrence?*, 22 *CAHIERS DR. EUR.* 285, 287–307 (1986); Michel Waelbroeck, *Les Rapports entre les Règles sur la Libre Circulation des Marchandises et les Règles de Concurrence Applicables aux Entreprises dans la CEE*, in *DU DROIT INTERNATIONAL AU DROIT DE L’INTEGRATION. LIBER AMICORUM PIERRE PESCATORE* 781, 786, 787–793 (F. Capoport *et al* eds., 1987); Wainwright & Bouquet, *State Intervention and Action in EC Competition Law*, *supra* note 75, 541–551; BELLAMY & CHILD *EC LAW OF COMPETITION*, *supra* note 75, 1031–1037 & 1051–1056; CHÉROT, *DROIT PUBLIC ÉCONOMIQUE*, *supra* note 64, 134–146.

and State anticompetitive legislation,<sup>128</sup> or put differently, as a mechanism to establish a coherent nexus between these two levels of governance<sup>129</sup>—which ultimate rationale lies on the fact that member States cannot adopt regulatory measures that generate distortions of competition in the internal market and, consequently, difficult the attainment of the basic objectives of the ECT.

In general terms, the approach followed by the ECJ seemed to potentially give leeway to significant restrictions on member States' ability to impair the effectiveness of competition rules or otherwise generate anti-competitive effects, as the ECJ got to declare that '*member States are [...] obliged [...] not to detract, by means of national legislation, from the full and uniform application of Community law or from the effectiveness of its implementing measures; nor may they introduce or maintain in force measures, even of a legislative nature, which may render ineffective the competition rules applicable to undertakings*'.<sup>130</sup> Indeed, a joint reading of articles 3(1)(g) and 10(2) ECT gives way to a broad principle imposing member States the obligation to abstain from restricting or distorting competition<sup>131</sup> in any manner that would adversely affect the functioning of the internal market.<sup>132</sup> However, the specific developments of the State action doctrine—and, particularly, the development of a strict and largely formalistic test for the evaluation of member States' activities have significantly departed from this general approach (and, somehow, limited it).

Indeed, it is hereby submitted that the case-law of the ECJ has still not gone far enough in bringing such a general principle to life,<sup>133</sup> and has excessively restricted its scope by linking the obligation imposed by articles 3(1)(g) and 10(2) ECT on member States to

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<sup>128</sup> Fernando Castillo de la Torre, *State Action Defence in EC Competition Law*, 28 WORLD COMP. 407, 407 (2005); and id. *Reglamentaciones Públicas Anticompetitivas*, in 2 TRATADO DE DERECHO DE LA COMPETENCIA. UNIÓN EUROPEA Y ESPAÑA 1301, 1303–1304 (J. M. Beneyto & J. Mailló eds., 2005).

<sup>129</sup> NEERGAARD, COMPETITION AND COMPETENCES, *supra* note 118, 111. See also MIGUEL POIARES MADURO, WE THE COURT. THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC CONSTITUTION. A CRITICAL READING OF ARTICLE 30 OF THE EC TREATY 104–110 (1998, repr. 2002).

<sup>130</sup> Jdgmt. ECJ of 10 January 1985, in case 229/83 – *Leclerc v Au blé vert* [ECR 1985, 1] ¶ 14.

<sup>131</sup> Baquero, *State Action Doctrine*, *supra* note 116, 559; CHARBIT, DROIT DE LA CONCURRENCE ET SECTEUR PUBLIC, *supra* note 94, 55–65 & 75; and CLAMOUR, INTERET GENERAL ET CONCURRENCE, *supra* note 85, 261–284. See also CRAIG & DE BURCA, EU LAW, *supra* note 56, 1083–1084; Dimitris Triantafyllou, *Les Règles de Concurrence et l'Activité Étatique y Compris les Marchés Publics*, 32 REV. TRIM. DROIT EUR. 57, 59–60 (1996); VAN BAEL & BELLIS, COMPETITION LAW, *supra* note 91, 981; WHISH, COMPETITION LAW, *supra* note 72, 213–220; RITTER & BRAUN, EUROPEAN COMPETITION LAW, *supra* note 90, 951–958; and John Temple Lang, *State Measures Restricting Competition under EU Law*, *supra* note 124, 223. In very strong terms, see SZYSZCZAK, REGULATION OF THE STATE IN COMPETITIVE MARKETS, *supra* note 56, 14.

<sup>132</sup> A related, although separate issue, regards the restriction of competition that member States can undertake by means of anti-competitive legislation when EC competition rules are not applicable (*i.e.* when there is no effect on intra-Community trade). However, that is an issue to be addressed under domestic law and, consequently, will not be further explored in this study. Suffice it to indicate, however, that in our view the flexible approach undertaken by the Community judicature to the identification of effects on intra-Community trade (*supra* note 61) severely limits member States' possibilities to adopt any kind of anti-competitive legislation, subject to the tests, checks and balances proposed *infra* §5.2.

<sup>133</sup> WAELBROECK & FRIGNANI, DROIT COMMUNAUTAIRE DE LA CONCURRENCE, *supra* note 118, 203.

the particular policies contained in other specific articles and parts of the ECT. Rather than interpreting the principle as prohibiting publicly-generated distortions of competition *in broad terms*, the case-law has narrowed down its scope by pegging it to an analysis of the effectiveness of articles 81 and 82 ECT—on the basis that the general objectives of the Treaty detailed in articles 2 to 4 ECT are made specific through the ECT’s particular provisions; and, in the case of the objective established by article 3(1)(g) ECT, through the competition provisions of articles 81 and 82 ECT. An independent application of articles 3(1)(g) and 10(2) ECT by themselves has not yet taken place—and, indeed, remains a debatable possibility, since these articles might fall short of complying with the requirements of *direct effect*.<sup>134</sup> However, in our view, as it is currently formulated, the State action doctrine is insufficient to overcome the shortages in EC competition rules that gave rise to its development in the first place—or, put otherwise, is still underdeveloped.

*c) The Current Formulation and Boundaries of the State Action Doctrine*

According to the settled case-law of the Community judicature, where a member State’s legislation or regulation i) *requires* undertakings to conduct anti-competitive behaviour, ii) *reinforces* the effects of previous anti-competitive behaviour adopted by the undertakings, or iii) *delegates* responsibility for decisions affecting the economic activity to undertakings,<sup>135</sup> the ECJ will analyse whether it frustrates the *effet utile*<sup>136</sup> of the EC competition rules applicable to undertakings—which take preference over anti-competitive State regulation by virtue of the principle of *supremacy* of EC law.<sup>137</sup> If so,

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<sup>134</sup> See Ulla B. Neergaard, *State Action and European Competition Rules: A New Path?*, 6 MAASTRICHT J. EUR. & COMP. L. 380, 381 & 390–392 (1999); and *id.*, *The Duties of Co-operation of National Authorities and Courts and the Community Institutions under Article 5 of the Treaty of Rome*, in THE DUTIES OF CO-OPERATION OF NATIONAL AUTHORITIES AND COURTS AND THE COMMUNITY INSTITUTIONS UNDER ARTICLE 10 EC 63, 66 (FIDE, 2000). See also VON QUITZOW, STATE MEASURES DISTORTING FREE COMPETITION, *supra* note 97, 11 & 49–51; and Manuel López Escudero, *Las Reglamentaciones Nacionales Anticompetitivas. Comentario a las sentencias del TJCE de 17 de Noviembre de 1993, Asuntos Meng, Ohra y Reiff*, 21 REV. INSTIT. EUR. 917, 933–942 (1994).

<sup>135</sup> Jdgmt. ECJ of 21 September 1988, in case 267/86 – *Van Eycke* [ECR 1988, 4769] ¶ 16. Given that the State action doctrine reached its more complete formulation in this case, the doctrine is usually also referred to as the *Van Eycke test*. That test was consistently applied shortly after its formulation in Jdgmt. ECJ of 24 January 1991, in case C-339/89 – *Alsthom Atlantique* [ECR 1991, I-107]; Jdgmt. ECJ of 28 February 1991, in case C-332/89 – *Marchandise* [ECR 1991, I-1027]; Jdgmt. ECJ of 18 June 1991, in case C-260/89 – *ERT* [ECR 1991, I-2925]; and Jdgmt. ECJ of 19 March 1992, in case C-60/91 – *Batista Morais* [ECR 1992, I-2085]. See NEERGAARD, COMPETITION & COMPETENCES, *supra* note 118, 73–77; and SZYSZCZAK, REGULATION OF THE STATE IN COMPETITIVE MARKETS, *supra* note 56, 63–65.

<sup>136</sup> Building on more general statements made in Jdgmt. ECJ of 13 February 1969, in case 14/68 – *Walt Wilhelm* [ECR 1969, 1], the doctrine of the *effet utile* was extended to the competition field in Jdgmt. ECJ of 16 November 1977, in case 13/77 – *INNO v ATAB* [ECR 1977, 2115] ¶¶ 31 & 33. See Waelbroeck, *Rapports entre les Règles sur la Libre Circulation et les Règles de Concurrence*, *supra* note 127, 787; NEERGAARD, COMPETITION & COMPETENCES, *supra* note 118, 33–35; SZYSZCZAK, REGULATION OF THE STATE IN COMPETITIVE MARKETS, *supra* note 56, 49–59; and SAUTER & SCHEPEL, STATE AND MARKET IN EUROPEAN UNION LAW, *supra* note 56, 104–124.

<sup>137</sup> Castillo de la Torre, *State Action*, *supra* note 128, 410. On the relevance of taking into account general principles of EC law in the construction of EC competition law, see Bastiaan van der Esch, *The Principles*

it will declare the incompatibility of the State regulation<sup>138</sup> and, eventually, an infringement of the ECT by the member State.<sup>139</sup> Therefore, the basic criterion to determine that certain State anti-competitive regulation is in breach of EC law is not the more general principle that could be extracted from the joint reading of articles 3(1)(g) and 10(2) ECT (*i.e.* that member States shall abstain from restricting or distorting competition in any manner that would adversely affect the functioning of the internal market). Instead, the assessment of State regulation is conducted according to the narrower criteria focused on whether it imposes, or strengthens anti-competitive practices of private undertakings, or whether it deprives legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere and, in so doing, jeopardizes the effectiveness of the EC competition rules applicable to undertakings.<sup>140</sup>

The broadest possible reading of this case-law is that it will consider that member States infringe their obligations when they impose or endorse previous anti-competitive behaviour of undertakings, or when they delegate or assign public powers of economic regulation to undertakings who can use them to pursue private goals rather than the public interest—and, hence, can significantly alter the competitive dynamics of the market for their own benefit.<sup>141</sup> However, this case-law does not capture unilateral

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*of Interpretation Applied by the Court of Justice of the European Communities and Their Relevance for the Scope of EEC Competition Rules*, 15 FORDHAM INT'L. L. J. 366, 368 (1991-1992).

<sup>138</sup> See VAN BAEL & BELLIS, COMPETITION LAW, *supra* note 91, 981 *et seq.* Declarations of incompatibility of member States' anti-competitive regulation can be found in Jdgmt. ECJ of 1 October 1987, in case 311/85 – *Vlaamse Reisbureaus* [ECR 1987, 3801]; Jdgmt. ECJ of 3 December 1987, in case 136/86 – *BNIC v Aubert* [ECR 1987, 4789]; Jdgmt. ECJ of 11 April 1989, in case 66/86 – *Ahmed Saeed* [ECR 1989, 803]; or Jdgmt. ECJ of 9 September 2003, in case C-198/01 – *CIF* [ECR 2003, I-8055].

<sup>139</sup> So far, given that most of the decisions of the ECJ have been adopted in the framework of a pre-judicial ruling, the only case where such an infringement has been declared is Jdgmt. ECJ of 18 June 1998, in case C-35/96 – *Commission v Italy* [ECR 1998, I-3851].

<sup>140</sup> This formulation has been recently reiterated by the ECJ in Jdgmt. ECJ of 5 December 2006, in joined cases C-94/04 and C-202/04 – *Cipolla* [ECR 2006, I-11421] ¶¶ 46–47; and in Jdgmt. ECJ of 13 March 2008, in case C-446/05 – *Doulamis* [ECR 2008, I-1377] ¶¶ 19–20. Generally, see GOYDER, EC COMPETITION LAW, *supra* note 75, 475–478; KORAH, EC COMPETITION LAW, *supra* note 75, 218–225 and LORENZO FEDERICO PACE, EUROPEAN ANTITRUST LAW 157–161 (2007).

<sup>141</sup> This excludes State liability where the undertakings to which decision-making powers are delegated are independent experts that act in the public interest, as held by the ECJ in leading cases such as Jdgmt. ECJ of 17 November 1993, in case C-185/91 – *Reiff* [ECR 1993, I-5801] and Jdgmt. ECJ of 19 February 2002, in case C-35/99 – *Arduino* [ECR 2002, I-1529]. Other cases along the same lines include the Jdgmt. ECJ of 12 September 2000, in joined cases C-180/98 to C-184/98 – *Pavlov and Others* [ECR 2000, I-6451]; Jdgmt. ECJ of 21 September 1999 in case C-67/96 – *Albany* [ECR 1999, I-5751]; Jdgmt. ECJ of 21 September 1999, in joined cases C-115/97 to C-117/97 – *Brentjens'* [ECR 1999, I-6025]; and Jdgmt. ECJ of 21 September 1999, in case C-219/97 – *Drijvende Bokken* [ECR 1999, I-6121]; Jdgmt. ECJ of 1 October 1998, in case C-38/97 – *Librandi* [ECR 1998, I-5955]; Jdgmt. ECJ of 18 June 1998, in case C-35/96 – *Commission v Italy* [ECR 1998, I-3851]; Jdgmt. ECJ of 5 October 1995, in case C-96/94 – *Spediporto* [ECR 1995, I-2883]; or Jdgmt. ECJ of 9 June 1994, in case C-153/93 – *Delta* [ECR 1994, I-2517]. See Niels Fenger & Morten P. Broberg, *National Organisation of Regulatory Powers and Community Competition Law*, 16 E.C.L.R. 364, 365–368 (1995); Harm Schepel, *Delegation of Regulatory Powers to Private Parties under EC Competition Law: Towards a Procedural Public Interest Test*, 39 CML REV. 31, 33–44 (2002); Neergaard, *State Action and European Competition Rules*, *supra*

competition-distorting behaviour by member States when it does not result in anti-competitive behaviour of undertakings or strengthens its effects.<sup>142</sup> In some sense, State liability for the breach of EC competition law is *derivative*, in that it can only arise where the competition rules that apply to undertakings are relevant—*i.e.* when undertakings are involved or the State behaviour is not ‘purely’ unilateral.<sup>143</sup> In the end, the doctrine results in a *purely formal test*<sup>144</sup> that neither scrutinizes the policy objectives of the anti-competitive regulation, nor does it balance the intended benefits or policy goals of the restrictive regulation at stake with its anti-competitive effects.<sup>145</sup>

#### d) Assessment of the State Action Doctrine under its Current Formulation

Under its current formulation, the State action doctrine restricts its scope to determining whether a given State regulation reduces the effectiveness of, or renders superficial, the

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note 134, 384–386 & 394–395; *id.* COMPETITION & COMPETENCES, *supra* note 118, 117–121; and GOYDER, EC COMPETITION LAW, *supra* note 75, 481–482.

<sup>142</sup> Although an initial approach by the ECJ seemed to point in the other direction (see *supra* note 130 and accompanying text), the ECJ case-law requires that private undertakings be involved in the anti-competitive practices, so no State liability will be found in the absence of any such involvement. See Jdgmt. ECJ of 29 January 1985, in case 231/83 – *Cullet v Leclerc* [ECR 1985, 305] ¶¶ 17–18; Jdgmt. ECJ of 28 February 1991, in case C-332/89 – *Marchandise* [ECR 1991, I-1027] ¶ 23; Jdgmt. ECJ of 17 November 1993, in case C-2/91 – *Wolf W. Meng* [ECR 1993, I-5751] ¶ 22; and Jdgmt. ECJ of 17 November 1993, in case C-245/91 – *Ohra* [ECR 1993, I-5851]. See also Jdgmt. ECJ of 17 October 1995, in joined cases C-140 to C-142/94 – *DIP* [ECR 1995, I-3257] ¶¶ 14–16; and Jdgmt. ECJ of 18 June 1998, in case C-266/96 – *Corsica Ferries* [ECR 1998, I-3949] ¶¶ 50–54. See WOLF SAUTER, COMPETITION LAW AND INDUSTRIAL POLICY IN THE EU 146–147 (1997); Pappalardo, *Measures of the States and Rules of Competition*, *supra* note 86, 528–529; Wainwright & Bouquet, *State Intervention and Action in EC Competition Law*, *supra* note 75, 543–545; and Castillo de la Torre, *Reglamentaciones Públicas Anticompetitivas*, *supra* note 128, 1301 & 1330–1339.

<sup>143</sup> See Bastiaens van der Esch, *Loyauté Fédérale et Subsidiarité: à Propos des Arrêts du 17 Novembre 1993 dans les Affaires C-2/91 (Meng), C-245/91 (Ohra) et C-185/91 (Reiff)*, 30 CAHIERS DR. EUR. 523 (1994); VAN BAEL & BELLIS, COMPETITION LAW, *supra* note 91, 984 & 987; and Malin Thunström *et al.*, *State Liability under the EC Treaty Arising from Anti-Competitive State Measures*, 25 WORLD COMP. 515, 518–519 & 527 (2002). Also SZYSZCZAK, REGULATION OF THE STATE IN COMPETITIVE MARKETS, *supra* note 56, 102–103.

<sup>144</sup> The formalism of the approach followed by the ECJ was stressed by Norbert Reich, *The 'November Revolution' of the European Court of Justice: Keck, Meng and Audi Revisited*, 31 CML Rev. 459, 468–469, 472–473, 475–476 & 488–491 (1994). See the criticism of Baquero, *State Action Doctrine*, *supra* note 116, 580; and Castillo de la Torre, *State Action*, *supra* note 128, 429–430. The formalist approach to this issue has also been criticised by John Temple Lang, *The Core of the Constitutional Law of the Community—Article 5 EC*, in CURRENT AND FUTURE PERSPECTIVES ON EC COMPETITION LAW 41, 59 (Lawrence W. Gormley ed., 1997); NEERGAARD, COMPETITION & COMPETENCES, *supra* note 118, 78–89; Van der Esch, *Loyauté Fédérale et Subsidiarité*, *supra* note 143, 536; and Schepel, *Delegation of Regulatory Powers*, *supra* note 141, 33. See also SZYSZCZAK, REGULATION OF THE STATE IN COMPETITIVE MARKETS, *supra* note 56, 71–73; BUENDÍA, EXCLUSIVE RIGHTS, *supra* note 70, 26; and Francisco Marcos, *Los Precios de Abogados y Procuradores frente al Derecho de la Competencia: ¿Un Formalismo Excesivo?*, in ANUARIO DE LA COMPETENCIA 2002 507, 525–528 (Lluís Cases ed., 2003).

<sup>145</sup> A situation criticized by almost all commentators; see Jean-François Verstryngne, *The Obligation of Member States as Regards Competition in the EEC Treaty*, 1988 FORDHAM CORP. L. INST. 21–26 (Barry Hawk ed., 1989); Gyselen, *State Action and Effectiveness of Competition Provisions*, *supra* note 117, 55 and JULIO BAQUERO, BETWEEN COMPETITION AND FREE MOVEMENT: THE ECONOMIC CONSTITUTIONAL LAW OF THE EUROPEAN COMMUNITY 144 & 153–154 (2002). *But see* Alan B. Hoffman, *Anti-Competitive State Legislation Condemned Under Articles 5, 85 and 86 of the EEC Treaty: How Far Should the Court Go after Van Eycke?*, 11 E.C.L.R. 11, 12, 23–24 & 27 (1990).



EC rules addressed to undertakings. Inasmuch as no negative effect on the application of articles 81 and 82 ECT is identified under the circumstances of the case (what arguably will always occur in the absence of direct involvement by undertakings) the regulatory activities of the State will not be further scrutinised under the State action doctrine, regardless of their potential or actual effects on competition. Hence, it is hereby submitted that the State action doctrine falls short from instituting a full-fledged competition rule applicable to public action because it only proscribes anti-competitive *regulation* but not other forms of anti-competitive market *intervention*,<sup>146</sup> and because it limits its scope to a formal argument based on the impact of such regulation on the effectiveness of the competition rules applicable to undertakings—disregarding the potential competition-distorting effects that independent and unilateral public behaviour can generate on the competitive dynamics of the market.

Given that the State action doctrine is not of a general scope, nor is it designed to review all public activity outside the scope of specific EC competition rules;<sup>147</sup> it is submitted that this jurisprudentially created theory still leaves relatively wide space for State anti-competitive or competition-distorting activity. In other terms, the State action doctrine, as it currently stands, has the rather limited purpose of guaranteeing that member States do not limit the effectiveness of EC antitrust rules aimed at undertakings (*i.e.* arts. 81 and 82 ECT). In so doing, it neglects the anti-competitive effects that other types of legislation, public regulation and administrative practice (*i.e.* unilateral State action) can generate,<sup>148</sup> and misses on the opportunity to flesh out a fuller principle derived from articles 3(1)(g), 4 and 10(2) ECT that prohibited publicly-generated distortions of competition in broad terms and required that they abstained from distorting competition in any manner that would adversely affect the functioning of the internal market.

It is furthermore advanced that this case-law is incomplete and does not clearly delineate the limits of the doctrine, in that it exclusively establishes the ‘upper’ bound for State Action immunity (or the point at which State intervention in the market

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<sup>146</sup> Even if it was convincingly shown that case-law could support that not only legislative or regulatory activities of member States, but also any other ‘*national policies, even unwritten, are likely to be included in the concept of national measures to be evaluated according to [the] general principle [governing the interaction of articles 3(1)(g), 10(2) and 81 ECT]*’—see NEERGAARD, *COMPETITION & COMPETENCES*, *supra* note 118, 54–56; with reference to Jdgmt. ECJ of 18 February 1986, in case 174/84 – *Bulk Oil* [ECR 1986, 559]; and SZYSZCZAK, *REGULATION OF THE STATE IN COMPETITIVE MARKETS*, *supra* note 56, 58—it seems clear from later developments of the State action doctrine case-law that this broad approach to the scrutiny of member States’ intervention in economic activity has unfortunately been largely unexplored by the ECJ. Indeed, as it has been pointed out by some commentators, the approach of the ECJ to the development of the State action doctrine has been rather cautious; see Triantafyllou, *Les Règles de Concurrence et l’Activité Étatique y Compris les Marchés Publics*, *supra* note 131, 68; and POIARES MADURO, *WE THE COURT*, *supra* note 129, 75–76.

<sup>147</sup> Baquero, *State Action Doctrine*, *supra* note 116, 556 & 580.

<sup>148</sup> A situation criticised by, among others, Chan-Mo Chung, *The Relationship Between State Regulation and EC Competition Law: Two Proposals for a Coherent Approach*, 16 E.C.L.R. 87, 90 (1995); as well as by Gagliardi, *US and EU Antitrust versus State Regulation*, *supra* note 121, 365.

‘begins’ to be exempted from competition analyses) but completely disregards its ‘bottom’ limits. The application of the *Van Eycke test* merely determines that State legislation or regulation will not run contrary to articles 3(1)(g), 10(2) and 81 and 82 ECT (*i.e.* will be *shielded* from competition scrutiny) when the State adopts legislation that *independently* generates anti-competitive effects—that is, legislation that does not impose, reinforce or delegate anti-competitive behaviour on undertakings.

Therefore, the State action doctrine sets the *point of departure* (or point of ‘*entry*’) of the antitrust immunity conferred upon member States—which is to be found where their activity is *unilateral* and is (apparently) derived from the exercise of sovereignty or public powers. However, the doctrine remains largely under-developed as regards the equally necessary *point of exit* of the immunity provided by the exemption—*i.e.* it does not set the proper (legitimacy) thresholds below which State intervention should ‘stop’ being automatically exempted from competition scrutiny, nor the thresholds below which State economic intervention through (non-)regulatory measures should be subjected to a general competition principle and proportionality requirements. This situation generates a relatively large and fuzzy area of State economic intervention in the market where the applicability of the State action doctrine remains unclear and questionable. In the end, in our view, the State action doctrine cannot be applied uncritically to all types of State economic intervention.

Consequently, it is submitted that, if competition rules are to be adapted to the reality of the markets and are to continue serving their general purpose of guaranteeing that the internal market is based on a system that ensures that competition is not distorted [art. 3(1)(g) ECT] and that economic policy is conducted in accordance with the principle of an open market economy with free competition [art. 4(1) ECT], the current case-law of the Community judicature needs to be further developed as regards the limits of State action immunity. It is our opinion that, under its current formulation, the State action doctrine is the result of patchy development<sup>149</sup> and results in an *implicit and exceedingly broad exemption from EC competition rules for State anti-competitive regulation unrelated to the anti-competitive practices of undertakings and for unilateral competition-distorting (non-)regulatory State action*;<sup>150</sup> which falls short of constructing a complete doctrine aimed at guaranteeing that member States fully comply with their general obligations to refrain from adopting any measures that jeopardize or run against the internal market policy, properly understood as comprising a system that ensures

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<sup>149</sup> NEERGAARD, COMPETITION AND COMPETENCES, *supra* note 118, 111.

<sup>150</sup> Although in relation with the situation in the US, a similar criticism has been expressed by Peter J. Hammer & William M. Sage, *Monopsony as an Agency and Regulatory Problem in Health Care*, 71 ANTITRUST L. J. 949, 950 & 979–986 (2003–2004). *Contra*, see Castillo de la Torre, *Reglamentaciones Públicas Anticompetitivas*, *supra* note 128, 1331–1333, who considers that the attempts to further develop the State action doctrine in a more effects-based or non-formalistic approach are *recalcitrant* or even *surrealistic* (*sic*)—and, particularly, those made by Gagliardi, *US and EU Antitrust versus State Regulation*, *supra* note 121; and Temple Lang, *State Measures Restricting Competition*, *supra* note 124. It is our hope that this paper will be similarly recalcitrant and surrealistic as such interesting works.

undistorted competition—as has been established jointly by articles 3(1)(g), 4 and 10(2) ECT. It is argued that the development of such a more general doctrine, based on a wide principle prohibiting publicly-generated distortions of competition in broad terms, is desirable. Therefore, it seems to deserve further consideration, particularly in light of possible future developments in EC law.

*e) The State Action Doctrine and the Treaty of Lisbon (ToL)*

In this regard, we consider that the general approach outlined above—based on articles 3(1)(g), 4 and 10(2) ECT as they currently stand, will remain substantially unaltered and will continue to be supported by a joint reading of articles 3(3) EUT, 4(3) EUT, 3(1)(b) EUFT and Protocol (27) EUFT. It should be noted that during the process of reform of the ECT, the substitution of article 3(1)(g) ECT with a Competition Protocol has been approved by the ToL and, as of the time of writing, is pending final ratification. If and when such change is finally implemented, the effectiveness and validity of some of the jurisprudential constructions based on that provision of the ECT could seem to be jeopardised—and, most noteworthy, the State action doctrine hereby discussed.<sup>151</sup> However, it is submitted that, given that the amended Treaty establishes that the Union shall have exclusive competence for the establishment of the competition rules necessary for the functioning of the internal market [article 3(1)(b) EUFT] and that member States have expressly declared that ‘*the internal market includes a system ensuring that competition is not distorted*’;<sup>152</sup> it remains highly debatable whether any significant changes to competition policy (and, particularly, to the State action doctrine) should be envisaged, and most probably none should be expected.<sup>153</sup> Indeed, a joint reading of articles 3(3) EUT, 4(3) EUT, 3(1)(b) EUFT—and, if necessary, Protocol (27) EUFT, should allow the ECJ to keep the State action doctrine unaffected. All in all, ‘*freedom of competition stands as a general principle of EC Law*’,<sup>154</sup> and competition

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<sup>151</sup> See Alan Riley, *The EU Reform Treaty and the Competition Protocol: Undermining EC Competition Law*, 28 E.C.L.R. 703, 705–706 (2007).

<sup>152</sup> See Protocol (27) EUFT on the internal market and competition, whereby member States agree that the Union shall, if necessary, take action under the provisions of the Treaties to this end, including action under article 352 EUFT—which provides for legislative initiative of the Council, based on unanimity, in case it should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers.

<sup>153</sup> See Heike Schweitzer, *Competition Law and Public Policy: Reconsidering an Uneasy Relationship. The Example of Art. 81* (European University Institute Working Papers, LAW 2007/30), available at <http://ssrn.com/abstract=1092883>. In similar terms, see ALINA KACZOROWSKA, EUROPEAN UNION LAW 50 (2009). Also, in very rotund terms, Christian Joerges, *A Renaissance of the European Constitution?*, in INTEGRATING WELFARE FUNCTIONS INTO EU LAW—FROM ROME TO LISBON 29, 30 (Ulla B. Neergaard *et al* eds., 2009). With a more conservative approach, see Michael Dougan, *The Treaty of Lisbon 2007: Winning Minds, Not Hearts*, 45 CML REV. 617, 653–654 (2008). More doubt is expressed by SAUTER & SCHEPEL, STATE AND MARKET IN EUROPEAN UNION LAW, *supra* note 56, 19–21.

<sup>154</sup> Jdgmt. ECJ of 7 February 1985, in case 240/83 – *Waste oils* [ECR 1985, 531] ¶ 9. See also CHÉROT, DROIT PUBLIC ÉCONOMIQUE, *supra* note 64, 130; and JAN M. BROEKMAN, A PHILOSOPHY OF EU LAW. POSITIONS IN LEGAL SPACE AND THE CONSTRUCTION OF A JURIDICAL WORLD IMAGE 343 *et seq.* (1999).

provisions are ‘essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market’.<sup>155</sup>

In our view, by recognising the key importance of undistorted competition for the internal market and, consequently, by strengthening its case-law on the fundamental character of freedom of competition as a general principle of EC law, the ECJ would be in a good position to maintain and further develop the State action doctrine in the future. However, the likeliness of such a development remains unclear.<sup>156</sup> In any case, proposals will hereby be advanced to contribute to that potential future development, particularly with the aim of adopting a more substantive (or less formal) approach to the State action doctrine that gives wider room to the balancing of economic and non-economic considerations in the treatment of State action (*infra* §5.2)—which, in our view, would be highly desirable.

#### 4. PRELIMINARY CONCLUSIONS: A PERCEIVED GAP IN EC COMPETITION LAW

The analysis of current EC competition law institutions has shown that, in general terms, they are ill-equipped to effectively address publicly-generated competitive distortions in the public procurement field, except in very specific and rather marginal circumstances.<sup>157</sup>

Firstly, rules applicable to *State aid* (art. 87 ECT) will only play a role when the terms of the public contract result in an undue economic advantage for the public contractor—*i.e.* if they do not reflect normal market conditions. Also, given that the case-law and the practice of the Commission have generated a rebuttable presumption that excludes the existence of such undue economic advantage when the award of the contract is compliant with EC public procurement rules, recourse to State aid rules to prevent competition-distorting public procurement practices seems to be doomed by a *vicious circle* of inquiry that will only be broken when and if there is a blatant disproportion between the obligations imposed on the public contractor and the consideration paid by the public buyer—which is not likely to occur in the majority of cases. Therefore, State aid rules cannot be the basis for a general competition law-based solution to competition-distorting practices in public procurement.<sup>158</sup>

Secondly, rules applicable to *undertakings enjoying exclusive or special rights* and, more specifically, rendering services of general economic interest (art. 86 ECT) are

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<sup>155</sup> Jdgmt. ECJ of 1 June 1999, in case C-126/97 – *Eco Swiss* [ECR 1999, I-3055] ¶ 36; see also SZYSZCZAK, REGULATION OF THE STATE IN COMPETITIVE MARKETS, *supra* note 56, 45–46.

<sup>156</sup> Indeed, reticence in the ECJ to further expand the State action doctrine has been reported; see KORAH, EC COMPETITION LAW, *supra* note 75, 223–225; and Leigh Hancher, *Community, State, and Market, in THE EVOLUTION OF EU LAW* 721, 734 (Paul Craig & Grainne De Burca eds., 1999). See also WHISH, COMPETITION LAW, *supra* note 72, 215. Future developments are, hence, difficult to anticipate; see SAUTER & SCHEPEL, STATE AND MARKET IN EUROPEAN UNION LAW, *supra* note 56, 128.

<sup>157</sup> Similarly, see DAVID KATZ, JUGE ADMINISTRATIF ET DROIT DE LA CONCURRENCE 112–113 (2004).

<sup>158</sup> Along the same lines, stressing the limited scope of State aid rules, see Winter, *Re(de)fining the Notion of State Aid*, *supra* note 66, 484; who encompassess the views advanced by AG Jacobs, in his Opinion of 26 October 2000, in case C-379/98 – *PreussenElektra*, ¶¶ 151–155.

similarly irrelevant to prevent competition-distorting public procurement practices. The general prohibition of article 86(1) ECT will only be applicable in the largely unlikely cases in which the award of the contract generates a restriction of competition in the market by having exclusionary effects on the undertakings that have not been awarded the contract—which, mainly, are restricted to the case of *concessions*. Moreover, article 86(1) ECT imposes obligations on member States *pro futuro* and consequently, even in the relatively rare cases in which it is applicable, it provides an insufficient legal basis to constrain the behaviour of the granting authority prior to the award of the contract—particularly, during preparatory phases of the procurement procedure. Similarly, the fact that the public contractor renders *services of general economic interest* is also irrelevant for public procurement processes, as the award of the contract lies outside of the ‘public service’ exception regulated in article 86(2) ECT. Overall, article 86 ECT constitutes a very limited instrument to fight anti-competitive public procurement practices.

Thirdly, as regards purchasing activities, the relevant case-law has adopted an exceedingly narrow interpretation of the concept of ‘undertaking’ and, more precisely, has departed from the *functional approach* generally adopted as regards the prior requirement to carry on an ‘economic activity’. In a rather *formal twist* of the concept of ‘economic activity’, some of the latest developments of the Community case-law have left public procurement ‘*as such*’ outside the scope of the prohibitions laid down in articles 81(1) and 82 ECT. To be sure, public procurement conducted by public bodies that develop a subsequent or ‘downstream’ economic activity are the object of competition law analysis and are subject to EC ‘antitrust’ rules—but that is largely circumstantial and does not properly place the focus on the competition analysis of the undertaking *as a buyer*. In our view, this approach results in a double insufficiency. On the one hand, the scope and results of such circumstantial analysis of procurement activities will be strongly influenced by the competitive situation of the public buyer in the ‘downstream’ market and, hence, no satisfactory independent test for ‘pure’ buying activities can be expected to be developed in that analytical framework. Even if that was irrelevant (which, in our view, is not) the situation is such that a given competition-distorting public procurement practice would run contrary to EC ‘antitrust’ rules or not depending on considerations regarding *other* activities developed by the public purchaser—what would most probably result in a lack of consistency of interpretative criteria, in discriminatory situations and, in the end, in a loss of legal certainty as regards the application of competition rules in the public procurement arena. On the other hand, competition-restrictive public procurement practices would be relatively easy to shield from competition law scrutiny by the simple device of getting them conducted by public entities not developing *subsequent* economic activities for the purposes of article 81 and 82 ECT. Be it as it may, under the current case-law, ‘core’ EC competition rules are substantially incapable of fighting anti-competitive public procurement practices *as such*.

Finally, the extension of such ‘core’ prohibitions to public intervention in the markets by recourse to articles 3(1)(g), 4 and 10(2) ECT (*i.e.*, the *State action doctrine*) is limited to those instances where member States’ regulation jeopardizes the effectiveness of the application of the antitrust prohibitions laid down in articles 81(1) and 82 ECT to the conduct of undertakings, and does not capture member States’ unilateral competition-distorting behaviour that is unrelated to competition violations by undertakings. It has been submitted that a more general approach is possible (both under the rules of the current ECT and the expected EUFT), and that current State action doctrine results in an implicit and exceedingly broad exemption from competition rules for anti-competitive regulation unrelated to the practices of undertakings and for unilateral competition-distorting non-regulatory State action. Nonetheless and unavoidably, *de lege lata*, current State action doctrine is also substantially incapable of preventing anti-competitive public procurement.

To sum up, given the various restrictions and limits of current competition instruments, there is no EC competition rule generally applicable to public procurement activities as such—which, it is submitted, constitutes *a gap in EC competition law*. The need to develop effective, consistent and comprehensive EC competition rules applicable to the public sector is almost undeniable—particularly as regards the public procurement arena. The perceived gap shows that the *system* of competition rules in the ECT is still incomplete, or does not go full-circle—since it is still open on its extremes as regards the market or commercial activities carried on by public entities. On the one end, ‘core’ competition rules are indistinctly applicable to private and public undertakings and go a long way in disciplining and reigning in their market behaviour. However, the strict interpretation as regards the concept of ‘economic activity’ for their purposes leaves public procurement *as such* off-bounds. On the other end, State action doctrine has extended the material prohibitions of those ‘core’ competition rules to the activities of public authorities, but too strict an interpretation of the requirements for its application—and, particularly, of the need for undertakings to be involved in the anti-competitive situation, has left unilateral public action (and, most noteworthy, public procurement) also out of bounds. Therefore, enlarging any of these two ends of the system of competition rules (or both), will close the circle and effectively bring public procurement within its scope.<sup>159</sup> In our view, such a development of EC law would result in a more competition-oriented public procurement system, which would contribute to attain the common aims of competition and public procurement law—and, in the end, would further social welfare.

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<sup>159</sup> Differently, it is submitted that developments related to articles 86 and 87 ECT are harder to envisage, since those provisions will always be constrained by some of their basic elements—*i.e.*, respectively, by the concept of ‘exclusive or special rights’ and the requirement of ‘undue economic advantage’. Consequently, this paper will not explore proposals that have them as a legal basis.

## 5. A MORE ECONOMIC AND EFFECTS-BASED APPROACH: TWO PROPOSALS TO SUBJECT PUBLIC PROCUREMENT TO EC COMPETITION LAW

In view of the above, it is our opinion that a *more economically-sound* (or less formalistic) approach to these issues would significantly contribute to bridge the perceived gap in EC competition law and to develop a more consistent set of competition rules applicable to public interventions in the market and, particularly, to competition-distorting public procurement rules and practices. To be sure, such re-interpretative task might not be easy to conduct (particularly inasmuch as it affects some trends of ECJ case-law consolidated for a relatively long period of time), and some obstacles in the adoption of such more pragmatic approach might be encountered in the structure of EC competition rules (and, particularly, in the limited scope of articles 81 and 82 ECT to incorporate non-economic considerations). However, such approach can easily be subsumed under basic ECT principles and mandates for the construction of the internal market and, consequently, in our view, some proposals can be advanced *de lege ferenda*.

Along these lines, it is submitted that the gap between the competition rules applicable to undertakings (public or private) and those applicable to the State has still not been sufficiently narrowed down by the case-law, which can be refined in two complementary ways. On the one hand, through a (more effects-based) *revision of the concept of 'economic activity' to include 'pure' public procurement activities*—which exclusion from that concept for the purposes of EC competition rules is based on a too formal approach and lacks sufficient economic justification. Consequently, a revision of that approach to bring public procurement under the scope of those rules—at least when it is susceptible of generating the effects that competition law aims to prevent, seems a clearly desirable development.

On the other hand, further developments of the State action doctrine based on a more elaborate distinction between sovereign activities and commercial or market activities also seem desirable. In this respect, it is submitted that constructing a '*market-participant exception*' to the State action doctrine would significantly contribute to clarify its scope (*i.e.*, to set its '*lower bounds*') and would provide competition policy with a more economically-oriented instrument to tackle publicly-originated restrictions of competition that, so far, remain out of reach.<sup>160</sup>

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<sup>160</sup> Proposals along the same lines have been made by Pierre Pescatore, *Public and Private Aspects of Community Competition Law*, 10 FORDHAM INT'L. L. J. 373 (1986-1987); Bastiaan van der Esch, *The System of Undistorted Competition of Article 3(f) of the EEC Treaty and the Duty of Member States to Respect the Central Parameters Thereof*, 11 FORDHAM INT'L. L. J. 409, 409-431 (1988); Verstrynge, *The Obligation of Member States as Regards Competition*, *supra* note 145, 21-26; and Gyselen, *State Action and Effectiveness of Competition Provisions*, *supra* note 117, 56-58, and *ib.*, *Anti-Competitive State Measures under the EC Treaty: Towards a Substantive Legality Standard*, SUPPL EUR. L. REV. (1993). *Contra*, see Hoffman, *Anti-Competitive State Legislation*, *supra* note 145, 23-24. *But see* NEERGAARD, COMPETITION & COMPETENCES, *supra* note 118, 219 & 225-226; Waelbroeck, *Rapports entre les Règles sur la Libre Circulation et les Règles de Concurrence*, *supra* note 127, 795-797; and VON QUITZOW,

In our opinion, these are the main changes and revisions that could be conducted in ECJ case-law in order to allow for such a more economic approach towards the subjection of competition-distorting public procurement rules and practices to EC competition rules—and, indirectly, of other types of public market intervention. While any of those further developments of the case-law would by itself contribute to improve the economic consistency and the logic rationale of the current competition rules, arguably none of the proposed changes would by itself suffice to achieve the desired result of reining in public anti-competitive or competition-distorting behaviour. Moreover, a piece-meal approach might result in further inconsistencies and newly created gaps in EC ‘public’ competition rules. Therefore, it is submitted that a simultaneous and consistent revision of both prongs of current case-law—*i.e.* the too stringent definition of ‘economic activity’ and the too formalistic approach to State action doctrine, should be conducted in a coordinated manner.

### ***5.1. Reinstating the Public Buyer as an ‘Undertaking’, or Public Procurement as an ‘Economic Activity’***

#### ***a) The Current Approach: The Analysis of Public Procurement Activities Is Pegged to the Subsequent Use of the Purchased Goods or Services***

As has already been mentioned, it is submitted that the CFI and the ECJ have recently developed an overly formalistic and restrictive approach towards the analysis of public procurement activities from a competition law perspective. The CFI initiated this case-law in *FENIN*,<sup>161</sup> where it analysed the specific issue whether purchasing activities qualify *per se* as ‘economic activities’ in the sense of EC competition law—and particularly as regards their instrumental role for the definition of ‘undertaking’ in the context of articles 81(1) and 82 ECT. The CFI found that:

‘36. [...] *it is the activity consisting in offering goods and services on a given market that is the characteristic feature of an economic activity [...], not the business of purchasing, as such. Thus, [...] it would be incorrect, when determining the nature of that subsequent activity (sic),*

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STATE MEASURES DISTORTING FREE COMPETITION, *supra* note 97, 15. It is submitted that there is scope for development of the State action doctrine through *effects-based* tests. *Contra*, Castillo de la Torre, *Reglamentaciones Públicas Anticompetitivas*, *supra* note 128, 1331–1333.

<sup>161</sup> The procedure was initiated in appeal of Commission’s Decision of 26 August 1999, in case IV.F.1./36.834-FENIN; where the Commission held the position later adopted by the Community judicature, albeit in still less convincing terms. It is particularly noteworthy that the Commission based its claim on the indissociability of procurement and subsequent activities on the basis that ‘*the autonomous exercise as a single market activity of the part of the activity that is allegedly dissociable must be economically viable in the short, medium, or long term*’ (emphasis added, original in Spanish, *id.* at ¶ 20 *in fine*). In our view, recourse to such criterion of economic viability is at odds (or, at least, completely foreign) with Community case-law regarding the concept of undertaking—not to mention with economic theory—and should have been the object of further analysis (and, probably, rejection) by the Community judicature in the process of appeal of the Commission’s Decision. *Compare with* ODUDU, BOUNDARIES OF EC COMPETITION LAW, *supra* note 95, 35–45, who seems to support the position that, for the purposes of EC competition law and according to the relevant case-law, an ‘economic activity’ must generate a ‘potential to make profit’ in order to grant the entity that develops such an activity the consideration of ‘undertaking’. However, as already mentioned, in our view it is more appropriate to disregard the profit criterion for these purposes (*supra* note 100).



*to dissociate the activity of purchasing goods from the subsequent use to which they are put. The nature of the purchasing activity must therefore be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity.*

37. *Consequently, an organisation which purchases goods—even in great quantity—not for the purpose of offering goods and services as part of an economic activity, but in order to use them in the context of a different activity, such as one of a purely social nature, does not act as an undertaking simply because it is a purchaser in a given market. Whilst an entity may wield very considerable economic power, even giving rise to a monopsony, it nevertheless remains the case that, if the activity for which that entity purchases goods is not an economic activity, it is not acting as an undertaking for the purposes of Community competition law and is therefore not subject to the prohibitions laid down in Articles 81(1) EC and 82 ECT” (emphasis added).<sup>162</sup>*

On appeal, the ECJ upheld the main findings of the CFI (albeit no express confirmation of the broader holding in ¶ 37 of the CFI judgment was made as regards shielding public *monopsony* situations from competition law scrutiny) by determining that, as indicated by the CFI in ¶ 36 of the appealed judgment:

*‘there is no need to dissociate the activity of purchasing goods from the subsequent use to which they are put in order to determine the nature of that purchasing activity [...] the nature of the purchasing activity must be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity’ (emphasis added).<sup>163</sup>*

This initial approach has been recently confirmed by the CFI in *Selex*, where it has reiterated the position advanced in *FENIN*:

*‘65. [...] economic activity consists of the offer of goods and services on a given market and not the acquisition of such goods and services. In that regard, it has been held that it is not the business of purchasing, as such, which is the characteristic feature of an economic activity and that it would be incorrect, when determining whether or not a given activity is economic, to dissociate the activity of purchasing goods from the subsequent use to which they are put. The nature of the purchasing activity must therefore be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity.*

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68. [...] whilst an entity purchasing a product to be used for the purposes of a non-economic activity “may wield very considerable economic power, even giving rise to a monopsony, it nevertheless remains the case that, if the activity for which that entity purchases goods is not an economic activity, it is not acting as an undertaking for the purposes of Community competition law and is therefore not subject to the prohibitions laid down in Articles 81(1) EC and 82 EC” (emphasis added).<sup>164</sup>

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<sup>162</sup> Jdgmt. CFI of 4 March 2003, in case T-319/99 – *FENIN v Commission* [ECR 2003, II-357] ¶¶ 36–37.

<sup>163</sup> Jdgmt. ECJ of 11 July 2006, in case C-205/03 P – *FENIN v Commission* [ECR 2006, I-6295] ¶ 26. See Robert Lane, *Current Developments: European Union Law – Competition Law*, 56 INT’L. & COMP. L. Q. 422, 433 (2007), who stressed that ‘although there is much, economically, to criticize this, the Court upheld the CFI on appeal’.

<sup>164</sup> Jdgmt. CFI of 12 December 2006, in case T-155/04 – *Selex v Commission* [ECR 2006, II-4797] ¶¶ 65 & 68. See also Jean-Philippe Kovar, *Scope of Competition Law: The CFI Gives Precise Details about the Notion of Economic Activity and Confirms the Case Law FENIN about the Qualification of the Purchase Act (Selex Sistemi Integrati)*, 1 CONCURRENCES 168 (2007).

Again, on appeal, the *FENIN-Selex* approach has been upheld by the ECJ (albeit, also in this instance, not giving express confirmation of the broader holdings regarding the shielding of public *monopsony* situations from competition law scrutiny), in the following terms:

*‘it would be incorrect, when determining whether or not a given activity is economic, to dissociate the activity of purchasing goods from the subsequent use to which they are put [...] the nature of the purchasing activity must therefore be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity’* (emphasis added).<sup>165</sup>

As a further clarification, the ECJ concluded that this line of reasoning *‘can obviously be applied to activities other than those that are social in nature or are based on solidarity’*<sup>166</sup>—and, consequently, has dissipated the doubts on whether the *FENIN* case-law should be restricted to that area. In view of this clarification, then, the *FENIN-Selex* approach should clearly be seen as the current and general approach of the Community judicature to the treatment of purchasing activities *‘as such’* from a competition law perspective. As anticipated, and for the reasons provided in what follows, it is our view that this approach departs from the general *functional approach* to the concepts of ‘economic activity’ and ‘undertaking’ and that it results in a too narrow and formalistic position that seriously limits the ability of current EC competition rules to ensure undistorted competition in public procurement markets.

#### *b) An Assessment of the Current Approach in the Community Case-Law*

The approach adopted by the Community case-law has been the object of strong criticism by scholars and practitioners for being excessively formalistic and having a weak economic justification.<sup>167</sup> However, rejection of the Community’s judicature position is not unanimous.<sup>168</sup> In our view, the *FENIN-Selex* case-law represents a misled

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<sup>165</sup> Jdgmt. ECJ of 26 March 2009, in case C-113/07 P – *Selex v Comm.* [ECR 2009, nyr] ¶¶ 102 & 114.

<sup>166</sup> Jdgmt. ECJ of 26 March 2009, in case C-113/07 P – *Selex v Commission* [ECR 2009, nyr] ¶ 103. Such ‘extension’ of the *FENIN* case-law had already been advocated; see Markus Krajewski & Martin Farley, *Non-Economic Activities in Upstream and Downstream Markets and the Scope of Competition Law after FENIN*, 32 EUR. L. REV. 111, 112 (2007).

<sup>167</sup> This position has been criticised by Catriona Munro, *Competition Law and Public Procurement: Two Sides of the Same Coin?*, 15 PUB. PROC. L. REV. 352, 357 (2006); and Victoria Louri, *The FENIN Judgment: The Notion of Undertaking and Purchasing Activity. Case T-319/99, Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental v. Commission*, 32 LEG. ISS. ECON. INTEGRATION 87, 87 (2005). See also K. P. E. Lasok, *When is an Undertaking Not an Undertaking?*, 25 E.C.L.R. 383, 383–385 (2004); PROSSER, LIMITS OF COMPETITION LAW, *supra* note 61, 129–130; and, Wulf-Henning Roth, *Comment: Case C-205/03 P, Federación Española de Empresas de Tecnología Sanitaria (FENIN) v. Commission, Judgment of the Grand Chamber of 11 July 2006*, [2006] ECR I-6295, 44 CML Rev. 1131, 1135–1142 (2007).

<sup>168</sup> See Piet Jan Slot, *Applying Competition Rules in the Healthcare Sector*, 24 E.C.L.R. 580, 587–588 (2003); and, similarly, Johan W. van de Gronden, *Purchasing Care: Economic Activity or Service of General (Economic) Interest?*, 25 E.C.L.R. 87, 88–92 (2004); *id.*, *The Internal Market, the State and Private Initiative—A Legal Assessment of National Mixed Public-Private Arrangements in the Light of*

development of EC competition law, for various reasons. First, it runs contrary to previous practice in several member States without even taking that factor into due consideration. Second, it disregards alternative approaches previously suggested to the Community judicature. Third, as already mentioned, it runs contrary to the general *functional* approach to the concept of undertaking for the purposes of articles 81 and 82 ECT. Fourth, it makes poor economic sense. Finally, it seems to be ill-equipped and disproportionate to attain the apparent underlying goal of affording differential competition treatment to entities developing social and other activities in the public interest. These reasons will be discussed in what follows.

***i) The FENIN-Selex Doctrine Runs Contrary to Previous Practice in Member States***

As has been anticipated, the position adopted by the Community judicature in the *FENIN-Selex* case-law runs contrary to the previous practice in various member States—at least the United Kingdom, Germany, The Netherlands, France and Spain—where a clear and largely consistent approach towards subjecting public procurement activities *as such* to competition rules seems to exist.<sup>169</sup>

As regards the *United Kingdom*, it has been stressed by several commentators that the *FENIN-Selex* approach runs contrary to the findings of the previous *UK CAT BetterCare* decision,<sup>170</sup> that expressly dismissed the argument that ‘*the simple act of purchasing without resale is not an «economic» activity*’ on the basis that the relevant factor for the analysis was ‘*whether the undertaking in question was in a position to generate the effects which competition rules seek to prevent*’.<sup>171</sup>

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*European Law*, 33 LEG. ISS. ECON. INTEGRATION 105, 110–112 (2006); and Krajewski & Farley, *Non-Economic Activities in Upstream and Downstream Markets*, *supra* note 166, 120. Also, in very strong terms, see Triantafyllou, *Les Règles de Concurrence et l'Activité Étatique y Compris les Marchés Publics*, *supra* note 124, 70–71. In mild (but supporting) terms, see SAUTER & SCHEPEL, STATE AND MARKET IN EUROPEAN UNION LAW, *supra* note 56, 88.

<sup>169</sup> In our view, even such a non-exhaustive comparative review of member States domestic case-law is relevant for the construction of the EC rule. On the importance of the comparative method for the proper development and interpretation of EC law, see Koen Lenaerts, *Le Droit Comparé dans le Travail du Juge Communautaire*, in *L'UTILISATION DE LA METHODE COMPARATIVE EN DROIT EUROPEEN* 111 (François R. van der Mensbrugge ed., 2004); and Vlad Constantinesco, *Brève Note sur l'Utilisation de la Méthode Comparative en Droit Européen*, in *L'UTILISATION DE LA METHODE COMPARATIVE EN DROIT EUROPEEN* 169 (François R. van der Mensbrugge ed., 2004).

<sup>170</sup> Judgment of 1 August 2002, in *BetterCare Group Ltd v Dir Gral Fair Trading*, [2002] CAT 7, ¶ 264.

<sup>171</sup> See Jennifer Skilbeck, *The Circumstances in Which a Public Body May Be Regarded as an 'Undertaking' and thus Subject to the Competition Act 1998 Solely Because of its Function as a Purchaser of Particular Goods and Services: BetterCare Group Limited v The Director General of Fair Trading*, 12 PUB. PROC. L. REV. NA71, NA72 (2003); WHISH, COMPETITION LAW, *supra* note 72, 329–331; and Laura Montana & Jane Jellis, *The Concept of Undertaking in EC Competition Law and its Application to Public Bodies: Can You Buy Your Way into Article 82?*, 2 COMP. L. J. 110, 114–117 (2003). See also Barry J. Rodger, *The Competition Act 1998 and State Entities as Undertakings: Promises to Be an Interesting Debate* (CLaSF Working Paper No. 1, 2003) available at <http://www.clasf.org/assets/CLaSF%20Working%20Paper%2001.pdf>; PROSSER, LIMITS OF COMPETITION LAW, *supra* note 61, 54–57 & 129–130; ARROWSMITH, LAW OF PUBLIC AND UTILITIES PROCUREMENT, *supra* note 57, 64–67; and Bill Allan, *United Kingdom*, in COMPETITION CASES FROM THE EUROPEAN UNION 1221, 1261–1263 (Ioannis Kokkoris ed., 2008).

The *FENIN-Selex* approach also runs contrary to precedents in *Germany*, where the Federal Supreme Court (*Bundesgerichtshof*) has consistently ruled that activities in the ‘upstream’ (purchasing) market should be considered economic and, thus, within the scope of competition law since, in most cases, the effects of such activity in the upstream market are not insignificant.<sup>172</sup>

Similarly, the Community case-law opposes precedents in *The Netherlands*, where the national competition authority (*NMa*) decided that public healthcare entities should be regarded as undertakings in relation to their purchasing policy to the extent that they had sufficient freedom to influence the activities of their providers in the healthcare sector.<sup>173</sup>

As regards the situation in *France*, it is remarkable that the *Cour de Cassation* (overruling the prior criteria of the *Conseil de la Concurrence* and the Paris Court of Appeals) also held that competition rules apply to public procurement, even if it is conducted by administrative bodies with no (subsequent) commercial activities—hence, expressly overruling an approach coincident with the *FENIN-Selex* case-law.<sup>174</sup>

Finally, the *FENIN-Selex* case-law also runs contrary to precedents in *Spain*, where the practice of the competition authority (*Comisión Nacional de la Competencia*) and the jurisprudence of the Spanish Supreme Court (*Tribunal Supremo*) holds that competition law is fully applicable to public procurement activities and, in more general terms, to all activities of public authorities.<sup>175</sup>

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<sup>172</sup> See Winterstein, *Social Security and Competition Law*, *supra* note 46, 333; Van de Gronden, *Purchasing Care*, *supra* note 168, 90; and Louri, *The Notion of Undertaking and Purchasing Activity*, *supra* note 168, 94. See also Roth, *Comment: Case C-205/03 P (FENIN)*, *supra* note 167, 1140–1141; and BundesKartellamt, *Buyer Power in Competition Law – Status and Perspectives*, *supra* note 15.

<sup>173</sup> Van de Gronden, *Purchasing Care*, *supra* note 168, 91; and Louri, *The Notion of Undertaking and Purchasing Activity*, *supra* note 168, 94.

<sup>174</sup> On the situation prior to the intervention by the *Cour de Cassation*, see Michel Bazex, *Le Conseil de la Concurrence et les Marchés Publics*, n° spécial AJDA 103 (1994). On the ‘new’ approach, CONSEIL DE LA CONCURRENCE, COLLECTIVITES PUBLIQUES ET CONCURRENCE 231 (2002) available <http://lesrapports.ladocumentationfrancaise.fr/BRP/024000128/0000.pdf>. See also CHARBIT, DROIT DE LA CONCURRENCE ET SECTEUR PUBLIC, *supra* note 94, 35; PROSSER, LIMITS OF COMPETITION LAW, *supra* note 61, 109; Olivier Guézou, *Droit de la Concurrence et Contrats Publics. Contentieux Administratif et Pratiques Anticoncurrentielles*, in 1 CONTRATS PUBLICS. MELANGES EN L’HONNEUR DU PROFESSEUR MICHEL GUIBAL 107 (Guylain Clamour & Marion Ubaud–Bergeron eds., 2006); Jean-Yves Chérot, *Les Méthodes du Juge Administratif dans le Contentieux de la Concurrence*, 9 AJDA 687, 691 (2000); Sophie Nicinski, *Les Évolutions du Droit Administratif de la Concurrence*, 14 AJDA 751, 751–752 (2004); and LAURENT RICHER, DROIT DES CONTRATS ADMINISTRATIFS 208–216 (5th edtn. 2006).

<sup>175</sup> This position has been consistently held by the Spanish competition authority and has been recently stressed by the Spanish Supreme Court in its Judgment of 19 June 2007, confirming a decision of the National Competition Commission of 2000. For a summary of this case-law, see Francisco Uría, *Apuntes para una Reforma de la Legislación sobre Contratos de las Administraciones Públicas*, 165 RAP 297, 311–312 (2004); Santiago González-Varas, *La Aplicación del Derecho de la Competencia a los Poderes Públicos. Últimas Tendencias*, 239 RDM 249, 261 (2001); Francisco Marcos, *Conductas Exentas por Ley*, in COMENTARIO A LA LEY DE DEFENSA DE LA COMPETENCIA 222, 246–248 (José Massaguer *et al* eds., 2008); and *id.*, *¿Pueden las Administraciones Públicas Infringir la LDC cuando Adquieren Bienes o Contratan Servicios en el Mercado?*, 29 ACTAS DE DERECHO INDUSTRIAL Y DE AUTOR (2009) (forth.).

In general terms, an overview of these precedents seems to make it clear that national competition authorities and judicial bodies in these member States generally tended to answer in the affirmative to the question whether public procurement or purchasing activities *as such* have to be considered ‘economic activities’ and, hence, suffice for the entities conducting them to qualify as ‘undertakings’ and thus be subject to the corresponding ‘core’ competition rules—*i.e.* to the prohibitions set by the domestic equivalents of articles 81 and 82 ECT.

The common rationale underlying the solutions adopted at member State level seems to be that the potential anti-competitive effects generated by certain public procurement practices triggered the application of those rules. Therefore, it should be seen as rather surprising that Advocate General Poiares Maduro concluded that ‘*a study of comparative law shows that the national law of the Member States adopts criteria similar to those developed by the Court*’<sup>176</sup>—given that the brief overview hereby conducted seems to point rather clearly in the opposite direction.<sup>177</sup>

#### ***ii) The FENIN-Selex Doctrine Runs Contrary to Alternative Approaches Previously Suggested to the Community Judicature***

Interestingly, the same approach followed by the abovementioned member States had been suggested to the ECJ by Advocate General Jacobs in *Cisal*, expressly stressing the important point that a *key consideration* when determining if an undertaking is engaged in an economic activity is to analyse whether the undertaking in question is in a position to ‘*generate the effects which competition rules seek to prevent*’.<sup>178</sup> Also in very clear terms, Advocate General Jacobs held in *Cassa di Risparmio di Firenze* that ‘*an entity should qualify as an undertaking for the purposes of the EC competition rules not only when it offers goods and services on the market but also when it carries out other activities which are economic in nature and which could lead to distortions in a market where competition exists*’;<sup>179</sup> consequently adopting a clearly functional approach to the concept of undertaking<sup>180</sup>—which, in our view, would have been consistent with the previous Community case-law. However, by departing from these proposals on the basis of flawed and insufficient reasoning,<sup>181</sup> the CFI and the ECJ have set a course that

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<sup>176</sup> Op. AG Poiares Maduro of 10 November 2005, in case C-205/03 P – *FENIN v Commission*, ¶ 23.

<sup>177</sup> In similar terms; see Krajewski & Farley, *Non-Economic Activities in Upstream and Downstream Markets*, *supra* note 166, 121–122.

<sup>178</sup> See Op. AG Jacobs of 22 January 2002, in case C-218/00 – *Cisal*, ¶ 71. On the importance of the criterion of the effects of State activity on the market for the development of competition law; see SZYSZCZAK, *REGULATION OF THE STATE IN COMPETITIVE MARKETS*, *supra* note 56, 10.

<sup>179</sup> See Op. AG Jacobs of 27 October 2005, in case 222/04 – *Cassa di Risparmio di Firenze*, ¶ 78.

<sup>180</sup> See Montana & Jellis, *The Concept of Undertaking in EC Competition Law*, *supra* note 171, 114; ODUDU, *BOUNDARIES OF EC COMPETITION LAW*, *supra* note 95, 28–30; and Ronit Kreisberger, *FENIN: Immunity from Competition Law Attack for Public Buyers?*, 15 *PUB. PROC. L. REV.* NA214 (2006).

<sup>181</sup> Particularly since any analysis of the sort is completely omitted in the *FENIN* judgements, and bluntly rejected it in the CFI *Selex* judgment; see Jdgmt. CFI of 12 December 2006, in case T-155/04 – *Selex v Commission* [ECR 2006, II-4797] ¶ 68.

runs contrary to the general functional approach to the concept of undertaking by means of the *FENIN-Selex* case-law.

***iii) The FENIN-Selex Doctrine Runs Contrary to the General Functional Approach to the Concept of ‘Undertaking’***

On this point, the ECJ *FENIN* judgment seems to implicitly rely on the Opinion of Advocate General Poiares Maduro that (somehow obscurely) restricted the importance of the effects criterion by stressing that it should be considered in the context of the broader analysis of whether the activities concerned are developed under market conditions (*i.e.* according to the criterion of participation in a market or the carrying on of an activity in a market context). In this regard, the Opinion stressed that:

*‘That is the context in which the references in case-law to the capacity to commit infringements of competition law can be understood, as the basis for categorising an entity as an undertaking. Even if no profit-making activity is carried on, there may be participation in the market capable of undermining the objectives of competition law. The Court’s case-law should not be interpreted as meaning that that criterion is sufficient to establish that an entity is to be classified as an undertaking, but it supports a conclusion that competition law should apply’ (emphasis added and footnote omitted).<sup>182</sup>*

This preliminary approach already shows a significant restriction on the *functional* approach adopted by member States’ previous practice and suggested by Advocate General Jacobs in *Cisal* and *Cassa di Risparmio di Firenze*. In fiercer terms, when specifically addressing the applicability of the effects criterion, the Opinion of Advocate General Poiares Maduro adopts a formal and very restrictive theoretical approach that substantially amounts to denying any analytical relevance to the potential effects of public procurement on competition—*i.e.* moves away from the functional approach.

*‘The appellant claims that, in determining whether the purchasing activity [...] was economic in nature, the Court of First Instance should have considered whether it was liable to have anti-competitive effects in order not to create ‘unjustified areas of immunity’. However, such a criterion cannot be accepted, since it would amount to subjecting every purchase by the State, by a State entity or by consumers to the rules of competition law. On the contrary, as the judgment under appeal rightly pointed out, a purchase falls within the scope of competition law only in so far as it forms part of the exercise of an economic activity. Moreover, if the appellant’s argument were to be adopted, the effectiveness of the rules relating to public procurement would be reduced (Case C-76/97 *Tögel* [1998] ECR I-5357)’ (emphasis added and footnote omitted).<sup>183</sup>*

In our view, other than substantially departing from the criteria and practice existing at national level,<sup>184</sup> it is noteworthy to stress that the arguments put forward for the blunt

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<sup>182</sup> Op. AG Poiares Maduro of 10 November 2005, in case C-205/03 P – *FENIN v Commission*, ¶ 14.

<sup>183</sup> Op. AG Poiares Maduro of 10 November 2005, in case C-205/03 P – *FENIN v Commission*, ¶ 65.

<sup>184</sup> Interestingly, though, the AG makes reference to the existence of such effects-based criteria at national level (with specific reference to *BetterCare*; *id.* at ¶¶ 23–25) but does not subsequently take them into consideration and, most importantly, rejects them without specific explanations for such a departure.

rejection of the effects criterion in the assessment of the economic nature of an activity for the purposes of articles 81 and 82 ECT are exclusively formal and substantially insufficient to support the exclusion of an effects-based functional analysis.

Firstly, as regards the apparently exorbitant implications of the adoption of an effects criterion—which ‘*would amount to subjecting every purchase by the State, by a State entity or by consumers to the rules of competition law*’; serious doubts can be cast as to its accuracy and relevance. On the one hand, reference to consumers (at least understood individually) is completely irrelevant and misleading, since only in extraordinarily rare circumstances purchases conducted by consumers will be able to ‘*generate the effects which competition rules seek to prevent*’.<sup>185</sup> On the other hand, referring to *every* purchase also might seem disproportionate, since general rules controlling the application of competition law would automatically be applicable<sup>186</sup> (*i.e. de minimis*, article 81(3) ECT, block exemption regulations, etc.).

Secondly, as regards the suggested undesirability of subjecting the purchases conducted by the State and State entities to competition law and its potentially negative impact on the effectiveness of the rules relating to public procurement, the stark formulation in the *FENIN* opinion makes its interpretation difficult. Nonetheless, given the general need for public procurement to take place in competitive markets if it is to attain its specific objectives,<sup>187</sup> and the existence of a very substantial commonality of principles between both areas of economic regulation, the argument seems basically void of specific meaning and resembles a general remark difficult to support.<sup>188</sup> It is thus hereby submitted that it is an ‘*obiter dictum*-like’ consideration that should not be given excessive analytical weight.

Hence, given that the formal reasons so far put forward to reject the conduct of an effects-based analysis as regards the subjection of public procurement to ‘core’ competition law prohibitions do not seem convincing, an economically-oriented analysis of the nature of public procurement *as such* and of its potential effects on competition seems appropriate to determine whether the current EC case-law should be left unchanged or, on the contrary, should be revisited and aligned to the previous national practices in several member States and the previous Opinions of Advocate General Jacobs.

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<sup>185</sup> See Roth, *Comment: Case C-205/03 P (FENIN)*, *supra* note 167, 1138.

<sup>186</sup> See Roth, *Comment: Case C-205/03 P (FENIN)*, *supra* note 167, 1138–1139.

<sup>187</sup> See ANDREW COX, PUBLIC PROCUREMENT IN THE EUROPEAN COMMUNITY—THE SINGLE MARKET RULES AND THE ENFORCEMENT REGIME AFTER 1992 259–278 (1993); Steven L. Schooner, *Pondering the Decline of Federal Government Contract Litigation in the United States*, 8 PUB. PROC. L. REV. 242, 248 (1999); Anderson & Kovacic, *Competition and International Trade: Essential Complements in Public Procurement*, *supra* note 43, 70–72 ; and Dean E. Brunk, *Governmental Procurement: “FAR” from a Competitive Process*, in ADVANCING PUBLIC PROCUREMENT: PRACTICES, INNOVATION AND KNOWLEDGE-SHARING 156 (Gustavo Piga & Khi V. Thai eds., 2006).

<sup>188</sup> Moreover, in our view, the reference to Jdgmt. ECJ of 24 September 1998, in case C-76/97 – *Tögel* [ECR 1998, I-5357] seems unwarranted. Along the same lines, Roth, *Comment: Case C-205/03 P (FENIN)*, *supra* note 167, 1139 fn 34.

#### *iv) The FENIN-Selex Doctrine Makes Poor Economic Sense*

In furtherance to the above, it seems remarkable that the reasoning followed by the CFI and the ECJ in *FENIN* and *Selex* makes poor economic sense and brings about decision-making criteria that will hardly lead to economically meaningful outcomes in the future. Considering that an ‘*economic activity consists of the offer of goods and services on a given market and not the acquisition of such goods and services*’ does not hold water.<sup>189</sup> A proper understanding of the ‘economic’ nature of the market determines that activities in either side of it (*i.e. both* supply and demand) are equally economic and equally important to its analysis.<sup>190</sup> Purchasing activities are clearly economic in nature by themselves,<sup>191</sup> regardless of the type of ‘downstream’ activities to which the goods and services procured are dedicated.<sup>192</sup> Remarkably, this was acknowledged in the Opinion of Advocate General Poiares Maduro

*‘The essential characteristic of a market is that it involves exchanges between economic operators in the form of supplies and purchases. In that context, it is impossible to see how the one can be made subject to review under competition law while the other is excluded from it, as the two are reciprocal’* (emphasis added).<sup>193</sup>

However, the Opinion of Advocate General Poiares Maduro considered that this analysis does not by itself invalidate the reasoning of the CFI that led it to treat the classification of a purchase as an ‘economic’ activity or not depending on the subsequent use of the goods purchased; which is a conclusion that in our opinion is, at least, questionable—as the logic of economic dependence or reciprocity of the activities on both sides of the market and their equally economic nature gets lost.

Furthermore, the position adopted by Advocate General Poiares Maduro can be doubted in view of some of the basic reasons that are claimed to support it. In this regard, it is noteworthy that the *FENIN* Opinion excludes the existence of negative economic effects derived from the conduct of public procurement activities, considering that

*‘[if] a purchase is linked to the performance of non-economic functions, it may fall outside the scope of competition law. That conclusion is consistent with the economic theory according to which the existence of a monopsony does not pose a serious threat to competition since it does not necessarily have any effect on the downstream market’* (emphasis added).<sup>194</sup>

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<sup>189</sup> *Contra*, see Krajewski & Farley, *Non-Economic Activities in Upstream and Downstream Markets*, *supra* note 166, 119–121. However, Krajewski and Farley do not advance one single economic argument in support their claim that the *FENIN* Opinion is economically sound—which lacks analytical weight.

<sup>190</sup> Henk W. De Jong, *On Market Theory*, in *PERSPECTIVES IN INDUSTRIAL ORGANIZATION* 29, 29 (Ben Dankbaar *et al* eds., 1990).

<sup>191</sup> TREPTE, *REGULATING PROCUREMENT*, *supra* note 51, 5 & 64.

<sup>192</sup> CHARBIT, *DROIT DE LA CONCURRENCE ET SECTEUR PUBLIC*, *supra* note 94, 38. See also Winterstein, *Social Security and Competition Law*, *supra* note 46, 331.

<sup>193</sup> *Op. AG Poiares Maduro of 10 November 2005, in case C-205/03 P – FENIN v Commission*, ¶ 62.

<sup>194</sup> *Op. AG Poiares Maduro of 10 November 2005, in case C-205/03 P – FENIN v Commission*, ¶ 66. In the same terms, albeit with a less elaborate reasoning, see *Op. AG Verica Trstenjak of 3 July 2008, in case C-113/07 P – Selex v Commission*, ¶ 126.



On this point, the Opinion relies on scholarly economic commentary.<sup>195</sup> However, it is submitted that it does so in a clear *misunderstanding* of the applicability of the reasoning to the case at stake.<sup>196</sup> The *FENIN* Opinion seems to overlook the fact that, under most common circumstances, *the exercise of monopsony power leads to a reduction in social welfare*.<sup>197</sup> Most noteworthy, it is submitted that the generation of such a social loss—*i.e.* a reduction of global efficiency (which is undoubtedly acknowledged by all commentators), must be the relevant concern in the design of competition rules in a public procurement setting because in most cases there is no relevant downstream market to take into consideration (particularly in the type of cases decided in *FENIN* and *Selex* that are excluded from the scope of competition law *precisely because* the public buyer is not engaged in subsequent commercial activity).<sup>198</sup> If, as hereby submitted the goal of competition law and policy is to protect and promote economic efficiency (through protection and promotion of competition as a process) as a means to contribute to social welfare (understood as aggregate welfare)—*i.e.* if competition policy is to focus on the avoidance of welfare losses produced by certain market failures, these considerations are particularly relevant (see *supra* §2).

However, in our opinion, by establishing a direct link between the procurement activities and the subsequent activities developed by the public buyer, the CFI and the ECJ *artificially deny the economic character of most public procurement activities and isolate them from competition rules whenever they are not carried on by entities developing subsequent market activities*, adopt an overly-restrictive and exceedingly formalistic view, and set up a flawed analytical framework that will hardly be operative and that will offer wide coverage to anti-economic decisions in the future.<sup>199</sup> An economically sound analysis should have led the Community judicature to determine

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<sup>195</sup> Indeed, reference is made to the work of Noll, “*Buyer Power*” and *Economic Policy*, *supra* note 20.

<sup>196</sup> Given that, for one reason, the exercise of monopsony power in public procurement does not necessarily occur in an intermediate market—which is the case considered by Noll in his analysis of the market of retail consumer products; see Noll, “*Buyer Power*” and *Economic Policy*, *supra* note 20. The improper reading of Noll’s work has also been emphasised by Roth, *Comment: Case C-205/03 P (FENIN)*, *supra* note 167, 1140.

<sup>197</sup> As clearly demonstrated, amongst others, by GEORGE J. STIGLER, *THE THEORY OF PRICE* 216–218 (4th edtn. 1987); BLAIR & HARRISON, *MONOPSONY*, *supra* note 3, 36–43; and Blair & Durrance, *The Economics of Monopsony*, *supra* note 3, 397–399; and, remarkably, as acknowledged by Noll himself in the same work quoted by AG Póitias Maduro; see Noll, “*Buyer Power*” and *Economic Policy*, *supra* note 20, where he clearly states that ‘*if one adopts either the “harm to consumers” standard or the “dead-weight loss” standard for evaluating monopsony, exercise of monopsony power is likely to be harmful*’ (at 591, emphasis added); or, even more clearly: ‘*The exercise of monopoly power almost always causes inefficiency and always harms at least some consumers; the effects of monopsony are basically the same*’ (*id.* at 623, emphasis added). See also Laura Alexander, *Monopsony and the Consumer Harm Standard*, 95 *GEO. L. J.* 1611, 1614–1619 (2006-2007); and Ioannis Kokkoris, *Buyer Power Assessment in Competition Law: A Boon or a Menace?*, 29 *WORLD COMP.* 139, 150–153 (2006).

<sup>198</sup> Along these lines, Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 *ANTITRUST L. J.* 707, 724 *et seq.* (2007); and Richard O. Zerby, Jr., *Monopsony and the Ross-Simmons Case: A Comment on Salop and Kirkwood*, 72 *ANTITRUST L. J.* 717, 718–719 (2004-2005).

<sup>199</sup> Similarly, see Louri, *The Notion of Undertaking and Purchasing Activity*, *supra* note 163, 93–96.

that purchasing activities are by themselves ‘economic or commercial’ and, consequently, subject to EC competition law scrutiny.

Indeed, the position of the Community judicature boils down to denying the economic nature of purchasing activities and to making their assessment for competition law purposes conditional on the subsequent activities that the public purchaser develops and to which the goods and services procured are destined. By ‘tying’ the analysis of the purchasing activities to the other activities conducted by the public buyer, the Community case-law blurs the distinction between the conduct of commercial activities and the exercise of public powers that has traditionally informed the analysis of public activity under the prism of articles 81(1) and 82 ECT—and seems to depart from that generally functional approach and move towards more formalistic positions. In the end, the *FENIN-Selex* case-law comes to *establish a double-commercial purpose criterion* for the analysis of public procurement activities—which it is submitted to have inadvertently taken a diverging path from previous case-law.

According to previous jurisprudence, it was the commercial character or the public power nature *of the activity under consideration in and of itself* that determined whether it should be considered an ‘economic activity’ for the purposes of EC competition law. Displacing the analysis from the particular activity under consideration to other (subsequent) activities developed by the same body breaks this line of reasoning and, if applied across the board, might lead to different results than previous case-law. Such an approach is limited and exceedingly rigid. In general terms, in the cases where the public buyer develops *subsequent* activities that are not economic, there seems to be no good reason not to conduct a more detailed analysis that subjects the commercial activities (*i.e.* purchases) of the public buyer to competition scrutiny, while setting the exercise of public powers aside—subject, nevertheless, to the application of State action doctrine to the latter.<sup>200</sup>

As anticipated, with the *FENIN-Selex* case-law, the Community judicature has come to adopt and establish a ‘*principle of indivisibility of analysis*’ for public procurement and subsequent activities performed by the public buyer and to consolidate a double commercial requirement for the subjection of public procurement activities to antitrust scrutiny.<sup>201</sup> Put otherwise, this case-law *eliminates the possibility to conduct an independent competition assessment of public procurement practices*, inasmuch as only procurement practices conducted by public buyers carrying on subsequent ‘economic’ activities might be the object of such competition inquiry. As already pointed out, the

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<sup>200</sup> *Contra*, see Michel Bazex, *Le Droit Public de la Concurrence*, 14 RFDA 781, 785 (1998).

<sup>201</sup> This approach, where the exercise of public powers and economic activities is not distinguishable for the purposes of competition law has been criticised; see CLAMOUR, INTÉRÊT GÉNÉRAL ET CONCURRENCE, *supra* note 85, 274–284; and MIREILLE BERBARI, MARCHÉS PUBLICS. LA RÉFORME À TRAVERS LA JURISPRUDENCE 48–49 (2001). In similarly general terms, on the adoption of such a holistic approach towards the exercise of public functions and their isolation from competition law rules, see CHARBIT, DROIT DE LA CONCURRENCE ET SECTEUR PUBLIC, *supra* note 94, 120–124.

results of such analysis will probably be strongly influenced by the competitive situation of the public buyer in the ‘downstream’ market and, hence, no satisfactory independent test for pure buying activities can be properly developed in that framework. This approach generates the censurable situation that identically competition-restrictive procurement practices conducted by public buyers holding similar buyer power (in the extreme, anti-competitive purchasing conduct carried out by two monopsonistic public buyers) will receive different competition treatment depending on the subsequent or ‘downstream’ activities carried on by those public buyers. The CFI and the ECJ have regrettably overlooked the fact that competitive dynamics in ‘upstream’ markets—*i.e.* in the markets where the public buyer sources goods and services, will be identically distorted regardless of the subsequent activity involved in the particular case. Then, such restrictive approach gives rise to potential discrimination of affected public contractors depending on the irrelevant fact of whether the subsequent activities conducted by the public buyer are ‘economic activities’ for the purposes of articles 81 and 82 ECT or not.<sup>202</sup> Also, doubts can be cast on which will be the approach when a public purchaser develops *both* economic and non-economic subsequent activities.<sup>203</sup>

***v) A Possible Justification to the FENIN-Selex Doctrine: Aiming to Afford a Different Competition Treatment to Social and Other Public Interest Activities***

Even if not expressed by the Community judicature (or, at least, not in clear terms), the reason for the abovementioned overly-formalistic approach might be found in the reluctance of the CFI and the ECJ to impose the strict requirements of EC competition law to public bodies developing social,<sup>204</sup> or other type of activities in the public interest<sup>205</sup>—since, in those cases ‘*the action by the State is governed only by an*

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<sup>202</sup> Similarly, putting the emphasis of the discrimination on the entities in the upstream market (*i.e.* public buyers), see Roth, *Comment: Case C-205/03 P (FENIN)*, *supra* note 167, 1139.

<sup>203</sup> See Montana & Jellis, *The Concept of Undertaking in EC Competition Law*, *supra* note 171, 117; and ARROWSMITH, *LAW OF PUBLIC AND UTILITIES PROCUREMENT*, *supra* note 57, 67.

<sup>204</sup> On the distortions that the insulation of entities conducting social protection activities from competition law has generated in the case-law of the Community judicature, particularly as regards the definition of the concept of ‘undertaking’, see Winterstein, *Social Security and Competition Law*, *supra* note 46, 325–331; Luc Gyselen, *Comment: Cases C-67/96, Albany; Joined Cases C-115-117/97, Brentjens*; and *C-219/97, Drijvende Bokken*, 37 CML REV. 425, 439 (2000); Louri, ‘Undertaking’ as a *Jurisdictional Element*, *supra* note 83, 169–172; CHARBIT, *DROIT DE LA CONCURRENCE ET SECTEUR PUBLIC*, *supra* note 94, 38–47; and Szyszczak, *Public Service in Competitive Markets*, *supra* note 76, 43–44 & 67–70; *id.*, *State Intervention and the Internal Market*, in 2 EU LAW FOR THE 21ST CENTURY 217, 228–236 (Takis Tridimas & Paolissa Nebbia eds., 2004); and *id.*, *REGULATION OF THE STATE IN COMPETITIVE MARKETS*, *supra* note 56, 113–119. See also Adam Cygan, *Public Healthcare in the European Union: Still a Service of General Interest?*, 57 INT’L. & COMP. L. Q. 529, 532–542 (2008).

<sup>205</sup> As already mentioned, the ECJ has been explicit in not restricting the scope of the *FENIN-Selex* approach to the field of social activities developed on the basis of the principle of solidarity—see Jdgmt. ECJ of 26 March 2009, in case C-113/07 P – *Selex v Commission* [ECR 2009, nyr] ¶ 103. However, given that the exclusion of the economic nature of the procurement activities under the *FENIN-Selex* approach follows from the fact that the ‘subsequent activities’ are not economic, the holding can only be expanded to activities that, not being ‘strictly’ social, imply the exercise of public powers. Those are, consequently, the activities to which reference is made as activities otherwise in the public interest—as it is implicit that the exercise of public powers shall be in the public interest.

*objective of solidarity* [so that] *it bears no relation to the market*'.<sup>206</sup> Underlying the poor reasoning that purchasing is not to be considered by itself an economic activity runs a different discourse by the CFI and the ECJ that might be stated as follows: entities developing social or other public interest activities should not be subject to the competitive requirements applicable to (profit-maximizing) undertakings because the State (directly or indirectly) acts with the sole aim of attaining redistributive objectives. If one was to accept such an approach (which is, in our view and in itself, largely objectionable),<sup>207</sup> then a complex issue would potentially arise from the different structure of articles 81 and 82 ECT, as well as their limited scope to take non-economic aspects into consideration.

It is to be recalled that article 81(1) ECT establishes a general prohibition against collusive behaviour that can be disapplied in cases of efficient restrictions to competition by virtue of the legal exemption of article 81(3) ECT.<sup>208</sup> However, the prohibition of abuse of a dominant position contained in article 82 ECT is non-exemptible for efficiency reasons.<sup>209</sup> Moreover, from a broader perspective, exempting competition-restrictive activities on the basis of non-economic considerations remains largely controversial under both articles 81(3) and 82 ECT—particularly under the more economic approach or effects-based approach to EC competition law.

Therefore, while the cases in which the market behaviour of the bodies developing activities in the public interest had to be analysed under article 81 ECT may allow for an exemption based on efficiency considerations and, it could be argued, also on the basis of alternative public interest considerations [*ex art. 81(3) ECT*];<sup>210</sup> those possibilities

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<sup>206</sup> Op. AG Poiares Maduro of 10 November 2005, in case C-205/03 P – *FENIN v Commission*, ¶ 27.

<sup>207</sup> As indicated by AG Jacobs and already mentioned, ‘*the non-profit-making character of an entity or the fact that it pursues non-economic objectives is in principle immaterial*’ to the question whether the entity is to be regarded as an undertaking; see Op. AG Jacobs of 28 January 1999, in case C-67/96 – *Albany*, ¶ 312. A different (but related) discussion would focus on whether the ECJ is exercising (quasi)legislative powers and, consequently, is engaging in unacceptable *judicial activism*. Even if, in our view, there would be grounds to justify such a claim, pursuing that discussion would depart too significantly from the focus of this paper. Hence, this issue will not be pursued any further.

<sup>208</sup> See ODUDU, BOUNDARIES OF EC COMPETITION LAW, *supra* note 95, 128–158.

<sup>209</sup> In rather clear terms, see Ekaterina Rousseva, *Abuse of Dominant Position Defences—Objective Justification and Article 82 EC in the Era of Modernization*, in COMPETITION LAW. A CRITICAL ASSESSMENT 377, 382 (Giuliano Amato & Claus-Dieter Ehlermann eds., 2007); and *id.*, *The Concept of ‘Objective Justification’ of an Abuse of a Dominant Position: Can it Help to Modernise the Analysis under Article 82 EC?*, 2 COMP. L. REV. 27 (2005). *But see* Op. AG Ruiz-Jarabo Colomer of 1 April 2008 in joined cases C-468/06 to C-478/06 – *Sot. Lelos kai Sia EE and Others v GlaxoSmithKline A EVE Farmakeftikon Proionton*, ¶ 119—where he expressly supported ‘*the view that undertakings in a dominant position are entitled to demonstrate the economic benefits of their abuses*’.

<sup>210</sup> Support for this position could be found in Jdgmt. ECJ of 25 October 1977, in case 26/76 – *Metro I* [ECR 1977, 1875] ¶ 21; Jdgmt. ECJ of 3 December 1987, in case 136/86 – *BNIC v Aubert* [ECR 1987, 4789] ¶ 21; and Jdgmt. CFI of 11 July 1996, in joined cases T-528/93, T-542/93, T-543/93 and T-546/93 – *Metropole Télévision SA* [ECR 1996, II-649] ¶ 118. Arguably, this possibility is implicit in the *Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty* [OJ C 101, 27.04.2004, 97–118; at ¶ 42]; see Van de Gronden, *The Internal Market, the State and Private Initiative*, *supra* note 168, 134.

would arguably not exist when the assessment had to be conducted under article 82 ECT, inasmuch as it lacks an ‘exemption’ or ‘justification’ clause.<sup>211</sup>

To be sure, the applicability of article 81(3) ECT to this type of cases is not automatic. It is submitted that the four conditions required for its application might not be easily satisfied when non-economic criteria are taken into consideration as, in general terms, activities in the public interest contribute to economic progress and benefit consumers only in an indirect manner—since they are generally aimed at contributing to social development and benefitting taxpayers or citizens. Therefore, it is doubtful that most activities pursuing social or other public interest goals could be exempted from the prohibition of article 81(1) ECT on the basis of article 81(3) ECT, particularly relying on non-economic considerations.<sup>212</sup> Exemption or justification for comparable reasons under article 82 ECT seems even harder to obtain.<sup>213</sup>

It is submitted that these difficulties to exempt the conduct analysed in *FENIN* and *Selex* most probably influenced the approach of the Community judicature—particularly bearing in mind that most of the cases in which the public buyer develops that type of social activities involve a monopsonistic situation in the public procurement market (or, at least, that is the paradigm that informs policy and judicial decisions) and, consequently, it must be appraised under the ‘tougher’ standards of article 82 ECT.

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For discussion on the application of article 81(3) ECT in relation to ‘extra-competition’ policies of the Community, see ROSITA B. BOUTERSE, *COMPETITION AND INTEGRATION – WHAT GOALS COUNT?* 22–55 & 113–131 (1994); CHRISTOPHER TOWNLEY, *ARTICLE 81 EC AND PUBLIC POLICY* (2009); Kamiel Mortelmans, *Towards Convergence in the Application of the Rules on Free Movement and on Competition?*, 38 CML REV. 613, 641–642 (2001); and Giorgio Monti, *Article 81 EC and Public Policy*, 39 CML REV. 1057, 1087–1089 (2002). In general, on the possibility to take into account non-competition considerations within article 81(3) ECT, see also CRAIG & DE BÚRCA, *EU LAW*, *supra* note 56, 981–982; and, with a more cautious approach, WHISH, *COMPETITION LAW*, *supra* note 72, 153–155. See also Brenda Sufrin, *The Evolution of Article 81(3) of the EC Treaty*, 51 ANTITRUST BULL. 915, 952–967 (2006). Contrary to taking into consideration of non-efficiency or non-economic goals in article 81(3) ECT, see ODUDU, *BOUNDARIES OF EC COMPETITION LAW*, *supra* note 95, 159–174; Phedon Nicolaides, *The Balancing Myth: The Economics of Article 81(1) & (3)*, 32 LEG. ISS. ECON. INTEGRATION 123, 135 (2005); and Constanze Semmelmann, *The Future Role of the Non-Competition Goals in the Interpretation of Article 81 EC*, 1 GLOBAL ANTITRUST REV. 15, 46 (2008).

<sup>211</sup> However, a trend can be identified in trying to develop it. In general, see Paul-John Loewenthal, *The Defence of “Objective Justification” in the Application of Article 82 EC*, 28 WORLD COMP. 455, 462 (2005); Albertina Albors-Llorens, *The Role of Objective Justification and Efficiencies in the Application of Article 82 EC*, 44 CML REV. 1727 (2007); Rousseva, *Objective Justification and Article 82 EC*, *supra* note 209, 381–382; and Thomas Eilmansberger, *How to Distinguish Good from Bad Competition under Article 82 EC: In Search of Clearer and More Coherent Standards for Anti-Competitive Abuses*, 42 CML REV. 129, 136 (2005). See also *Communication From The Commission—Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*. C(2009) 864 final, ¶¶ 28–31.

<sup>212</sup> See Schweitzer, *Competition Law and Public Policy*, *supra* note 153, 5–14; Wulf–Henning Roth, *Strategic Competition Policy: A Comment on EU Competition Policy*, in *THE EVOLUTION OF EUROPEAN COMPETITION LAW. WHOSE REGULATION, WHICH COMPETITION?* 38, 52 (Hanns Ullrich ed., 2006); and Assimakis P. Komninos, *Non-Competition Concerns: Resolution of Conflicts in the Integrated Article 81 EC* (University of Oxford, Centre for Competition Law and Policy, WP (L) 08/05, 2005) available at <http://www.competition-law.ox.ac.uk/lawvle/users/ezrachia/CCLP%20L%2008-05.pdf>.

<sup>213</sup> See Rousseva, *Objective Justification and Article 82 EC*, *supra* note 209, 384–385 & 389–391.

Indeed, this lack of flexibility within ‘core’ EC competition rules to allow a States’ economic activity to be justified or exempted from the application of the competition prohibitions [with the only exception of article 86(2) ECT] has been considered one of the reasons why the Community judicature has been relatively hesitant to use EC competition law provisions against member States.<sup>214</sup> In parallel reasoning, it is submitted that the inability to justify or exempt the economic conduct of undertakings closely linked to the member States or developing social functions—particularly those that hold a dominant position, has chilled the full application of competition rules by the Community judicature; in this case, leading it to adopt a questionable concept of undertaking in *FENIN* and *Selex*. In this sense, it is submitted that—in order to attain the (implicit) objective of not subjecting procuring authorities developing social or other public interest activities to the competitive requirements applicable to profit maximizing undertakings—the only option left to the CFI and the ECJ to shield them from competition prohibitions was to exclude the economic character of procurement activities ‘as such’ and, consequently, not to consider the public buyer an undertaking for the purposes of EC competition law. It is further submitted that this outcome is not only technically flawed (and generates major ‘unwanted’ consequences due to its far-reaching implications), but is also excessive to attain the objective of insulating certain social or other activities in the public interest from competition law analysis.

Firstly, the position of the Community judicature is technically flawed and barely motivated.<sup>215</sup> The bold statements that ‘*it would be incorrect, when determining whether or not a given activity is economic, to dissociate the activity of purchasing goods from the subsequent use to which they are put*’,<sup>216</sup> or that ‘*there is no need to dissociate the activity of purchasing goods from the subsequent use to which they are put in order to determine the nature of that purchasing activity*’,<sup>217</sup> reflect pure value considerations that are not supported by any (sound) economic rationale or other plausible justification. It is submitted that the CFI and the ECJ could have taken the opposite approach for exactly symmetrical reasons—*i.e.* that there is a need to dissociate the purchasing and the subsequent activities for analytical purposes, or that it would be incorrect to determine the nature of the purchasing activity according to the subsequent use to which the goods or services sourced are put. If so, their approach would be equally unconvincing and insufficiently motivated. However, there are stronger economic justifications to support the later approach than the position adopted by the CFI and the ECJ—since economic theory has shown that purchasing activities can generate negative competition effects and, consequently, merit independent appraisal (*supra* §2).

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<sup>214</sup> See Szyszczak, *State Intervention and the Internal Market*, *supra* note 204, 220 & 236–238; also *id.*, REGULATION OF THE STATE IN COMPETITIVE MARKETS, *supra* note 56, 38–41, 55–56 & 82–86.

<sup>215</sup> See KORAH, EC COMPETITION LAW, *supra* note 75, 49 & 228.

<sup>216</sup> Jdgmt. CFI of 4 March 2003, in case T-319/99 – *FENIN v Commission* [ECR 2003, II-357] ¶ 36; and Jdgmt. CFI of 12 December 2006, in case T-155/04 – *Selex v Commission* [ECR 2006, II-4797] ¶ 65.

<sup>217</sup> Jdgmt. ECJ of 11 July 2006, in case C-205/03 P – *FENIN v Commission* [ECR 2006, I-6295] ¶ 26; and Jdgmt. ECJ of 26 March 2009, in case C-113/07 P – *Selex v Commission* [ECR 2009, nyr] ¶¶ 102 & 114.

Secondly, the position of the Community judicature is excessive to attain the relatively limited objective of insulating certain social or other activities in the public interest from competition law analysis. Conducting a unitary analysis of all the activities developed by public bodies (both economic and non-economic) exceeds the purpose of not subjecting them to the same competitive requirements applicable to profit-maximizing undertakings. If this objective is to be properly understood, it is the social or other type of activities in the public interest that merit insulation from competition mandates, but not the rest of the activities conducted by those same bodies. In this respect, a separate analysis of the different types of activities would make more significant contributions to achieve the policy goal of shielding certain activities from antitrust scrutiny. If the core social or other activities in the public interest were analysed under the State action doctrine, it would be possible to balance their restrictive aspects and their (net) contribution to the public interest and, consequently, to eventually insulate them from competition prohibitions when merited. At the same time, subjecting non-core (social) activities—and, particularly, public procurement—to general competition requirements would generate superior results.

Somehow, the current position comes to consider procurement merely as an *ancillary* activity of these public bodies and, hence, restrictions in the procurement activity are deemed somewhat *instrumental* to attain the main public interest goals.<sup>218</sup> However, it is submitted that this approach gives way to an excessive competition-distorting potential in the conduct of public procurement activities that is not necessary to achieve the goal of granting a different competition treatment to social activities, or to pursue the public interest.<sup>219</sup> It can be argued that subjecting public buyers to competition requirements does not jeopardize the effective achievement of social or other public interest goals. Hence, the holistic approach followed by the CFI and the ECJ is not proportional to the purpose of subjecting social and other public interest activities to ‘softened’ competition law requirements. On the contrary, it is submitted that splitting the analysis to differentiate core social activities (to be analysed under the State action doctrine) and self-standing public procurement activities (to be analysed under general competition law requirements) would generate better results and would allow for a more efficient and coherent competition law enforcement.

Moreover, the potential contradiction of considering a given public body or institution an ‘undertaking’ for the purposes of EC competition law when it conducts procurement activities (*i.e.* its demand behaviour) and not to consider it an undertaking when it develops social or other activities in the public interest (*i.e.* its activities as an offeror) is just apparent and should not generate significant practical difficulties, inasmuch as both

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<sup>218</sup> This ‘*accessoriness approach*’ under which purchasing activity is assessed in dependence on an activity on the supply side has been specifically criticized; see BundesKartellamt, *Buyer Power in Competition Law – Status and Perspectives*, *supra* note 15, 14–15.

<sup>219</sup> Winterstein, *Social Security and Competition Law*, *supra* note 46, 331–332.

types of activities are easily discernible and allow for selective enforcement of competition rules, depending on the character of the underlying activity.<sup>220</sup>

*c) Sketch Proposal for the Review of the Current Case-Law*

As a preliminary conclusion, and in view of all the previous arguments, it is to be stressed that in our opinion, treating purchasing activities *as such* as ‘economic activities’ for the purposes of EC competition law would not only be meaningful from an economic perspective, but would also improve the technical quality of the legal analysis conducted by the Community case-law in those instances in which the public buyer develops non-economic subsequent activities. The current holistic approach adopted in the case-law gives way to excessive protection of public competition-distorting behaviour for substantially no good reason (since it is neither necessary, nor justified by the apparent desire to grant separate competition treatment to social and other activities in the public interest), as it completely excludes the applicability of EC competition law and unnecessarily places clearly commercial activities out of reach of competition rules. Therefore, competition enforcement would benefit from a more economic approach towards this issue.

Implementation of this approach—which, acknowledgedly is not easily or necessarily foreseeable (given that it refers to a relatively settled string of case-law) would require the addition of a *caveat* to the current *FENIN-Selex* approach, to acknowledge that it would be incorrect, when determining whether or not a given activity is economic, to dissociate the activity of purchasing goods from the subsequent use to which they are put,<sup>221</sup> or that there is no need to dissociate the activity of purchasing goods from the

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<sup>220</sup> Indeed, as it was held in Jdgmt. CFI of 12 December 2006, in case T-155/04 – *Selex v Commission* [ECR 2006, II-4797] ¶ 54, ‘the various activities of an entity must be considered individually and the treatment of some of them as powers of a public authority does not mean that it must be concluded that the other activities are not economic’. This approach had already been set by the Jdgmt. CFI of 12 December 2000, in case T-128/98 – *Aéroports de Paris* [ECR 2000, II-3929] ¶¶ 108–109; confirmed on appeal by Jdgmt. ECJ of 24 October 2002, in case C-82/01 P – *Aéroports de Paris* [ECR 2002, I-9297] ¶¶ 68–83. Along the same lines, see Op. AG Jacobs of 17 May 2001, in case C-475/99 – *Ambulanz Glöckner* ¶72; and Op. AG Jacobs of 22 May 2003, in joined cases C-264/01, C-306/01, C-354/01 and C-355/01 – *AOK Bundesverband and others*, ¶ 45, who expressly held that ‘the notion of undertaking is a relative concept in the sense that a given entity might be regarded as an undertaking for one part of its activities while the rest fall outside the competition rules’ (emphasis added). The ECJ stated that ‘perhaps’ this is the case, see Jdgmt. ECJ of 16 March 2004, in joined cases C-264/01, C-306/01, C-354/01 and C-355/01 – *AOK Bundesverband and others* [ECR 2004, I-2493] ¶ 58. See ARROWSMITH, LAW OF PUBLIC AND UTILITIES PROCUREMENT, *supra* note 57, 65 fn 60; and WHISH, COMPETITION LAW, *supra* note 72, 83.

Similarly, in the area of social security, see Op. AG Fennelly of 6 February 1997, in case C-70/95 – *Sodemare v Regione Lombardia*, ¶¶ 29–30, who concluded that whereas the provision of solidarity-based social security does not *as such* constitute an economic activity (sic), the behaviour of such bodies with persons *other* than the insured can nonetheless be economic in character. See also Winterstein, *Social Security and Competition Law*, *supra* note 46, 331; Louri, *The Notion of Undertaking and Purchasing Activity*, *supra* note 163, 88; and Montana & Jellis, *The Concept of Undertaking in EC Competition Law*, *supra* note 171, 112–113. Indeed, such an approach seemed to be favoured (not to say imposed) by the Jdgmt. ECJ of 16 June 1987, in case 118/85 – *Commission v Italy* [ECR 1987, 2599] ¶ 7.

<sup>221</sup> Jdgmt. CFI of 4 March 2003, in case T-319/99 – *FENIN v Commission* [ECR 2003, II-357] ¶ 36; and Jdgmt. CFI of 12 December 2006, in case T-155/04 – *Selex v Commission* [ECR 2006, II-4797] ¶ 65.



subsequent use to which they are put in order to determine the nature of that purchasing activity,<sup>222</sup> *unless the purchasing activity is by itself capable of reducing or distorting competition in the market, or to generate the effects which competition rules seek to prevent.* In case this caveat (or a similar one) was introduced in the Community case-law as suggested—it is submitted that the conduct of a more balanced and economically-oriented analysis would be possible and the *competition rules would gain substantial effectiveness in tackling publicly-generated distortions of market dynamics, particularly in the case of public procurement.*

d) What Scope for a More Stringent Approach by Member States?

Regardless of the previous considerations and proposals *de lege ferenda*, a parallel issue to be considered is whether and to what extent *de lege lata* member States can apply a more stringent approach when enforcing their domestic competition laws—or, put otherwise, whether they have to soften their previous criteria and national practices regarding the subjection of public procurement activities *as such* to competition law (in case they had them, as we have seen that the UK, Germany, France, the Netherlands and Spain did). In this regard, it could be argued that, given the supremacy of EC law and the binding character of ECJ case-law as regards its interpretation, the *FENIN-Selex* approach is to take precedence over rulings of member States' courts—however better suited to (economic) reality they are.<sup>223</sup> Nonetheless, it is submitted that this conclusion is not automatic or unavoidable.<sup>224</sup>

According to established Community case-law,<sup>225</sup> and to article 3(2) of Regulation 1/2003 on the implementation of the rules on competition laid down in articles 81 and 82 ECT,<sup>226</sup> member States must completely align with EC competition law as regards collusive behaviour, but can adopt and apply on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.<sup>227</sup> Arguably, the expansion of the concept of undertaking at domestic level would result in a subsequent expansion of the competition rules equivalent to articles 81 and 82 ECT and, while the first is forbidden, the latter is tolerated by EC law. In this regard, and taking

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<sup>222</sup> Jdgmt. ECJ of 11 July 2006, in case C-205/03 P – *FENIN v Commission* [ECR 2006, I-6295] ¶ 26; and Jdgmt. ECJ of 26 March 2009, in case C-113/07 P – *Selex v Commission* [ECR 2009, nyr] ¶¶ 102 & 114.

<sup>223</sup> This position seems to have been adopted by the OFT (Policy Note—*The Competition Act 1998 and Public Bodies*, available at [http://oft.gov.uk/shared\\_oft/business\\_leaflets/ca98\\_mini\\_guides/oft443.pdf](http://oft.gov.uk/shared_oft/business_leaflets/ca98_mini_guides/oft443.pdf)), and to have been endorsed by German commentators; see BundesKartellamt, *Buyer Power in Competition Law – Status and Perspectives*, *supra* note 15, 14–15.

<sup>224</sup> See Jennifer Skilbeck, *Just When is a Public Body an 'Undertaking'? FENIN and BetterCare Compared*, 12 PUB. PROC. L. REV. NA75, NA76 (2003); Rodger, *State Entities as Undertakings*, *supra* note 171, 15; ARROWSMITH, LAW OF PUBLIC AND UTILITIES PROCUREMENT, *supra* note 57, 66–67; and EZRACHI, EC COMPETITION LAW LEADING CASES, *supra* note 75, 8–10.

<sup>225</sup> Jdgmt. ECJ of 13 February 1969, in case 14/68 – *Walt Wilhelm* [ECR 1969, 1]; and Jdgmt. ECJ of 10 July 1980, in joined cases 253/78 and 1 to 3/79 – *Guerlain* [ECR 1980, 2327]. See WAELBROECK & FRIGNANI, DROIT COMMUNAUTAIRE DE LA CONCURRENCE, *supra* note 118, 148–157.

<sup>226</sup> [OJ L 1, 04.01.2003, 1-25].

<sup>227</sup> See JONES & SUFRIN, EC COMPETITION LAW, *supra* note 97, 1282–1283.

into consideration that publicly-generated restrictions to competition in the public procurement setting will be *primarily of a unilateral nature*, there seems to be no impediment under EC law for member States' competition authorities and judicial bodies to maintain their previous criteria and to continue enforcing domestic competition rules on public buyers conducting public procurement activities *as such* (at least as regards unilateral conduct developed by public buyers).

## ***5.2. Developing a 'Market-Participant Exception' to the State Action Doctrine***

After having covered the first of the two lines of revision or development of current EC competition rules hereby proposed to achieve better results, this section turns towards the second line of proposals, *i.e.* is dedicated to the revision and further development of the State action doctrine, with a particular focus on its impact on public procurement legislation, regulation and administrative practices.

### ***a) Setting the Proper Bounds of the State Action Doctrine: Bringing Sovereignty to the Centre of the Doctrine, and Developing a 'Market Participant Exception'***

#### ***i) General Approach: 'Sovereignty' and 'Legitimacy' as Ruling Criteria***

As has been previously analysed, under EC State action doctrine the *sovereign* nature and the ensuing *legitimacy* of the public action at stake is a key factor in determining its subjection to competition law requirements. In general terms, the main criterion to determine whether an act of the State is subject or exempt from EC competition rules depends on whether or not it is the result of the exercise of its *ius imperium*,<sup>228</sup> which is not always easy to determine.<sup>229</sup> Although the exercise of the sovereign faculties of the State is limited by the joint application of competition rules and articles 3(1)(g), 4 and 10(2) ECT in those limited cases where it detracts from the effectiveness of the competition rules addressed at private undertakings, in other situations the increased legitimacy of public activity (or its democratic element) has been considered a relevant factor to exempt public action from competition scrutiny.<sup>230</sup>

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<sup>228</sup> Along the same lines, Mortelmans, *Towards Convergence in Free Movement and Competition*, *supra* note 210, 623; and Szyszczak, *State Intervention and the Internal Market*, *supra* note 204, 225–226. See also Winterstein, *Social Security and Competition Law*, *supra* note 46, 326–327; and Gyselen, *Commentary to Cases C-67/96, Joined Cases C-115-117/97, and C-219/97*, *supra* note 204, 440. In general terms, on the implications of the exercise of *imperium* in competition law, see CHARBIT, *DROIT DE LA CONCURRENCE ET SECTEUR PUBLIC*, *supra* note 94, 1–218 *passim*; Bazex, *Le Droit Public de la Concurrence*, *supra* note 200, 787–788; Nicinski, *Droit Administratif de la Concurrence*, *supra* note 174, 757; and Marcos, *El Tratamiento de las Restricciones Públicas a la Competencia*, *supra* note 175, 6; *id.*, *Conductas Exentas por Ley*, *supra* note 175, 246–248. Compare with Van de Gronden, *The Internal Market, the State and Private Initiative*, *supra* note 168, 130.

<sup>229</sup> See SZYSZCZAK, *REGULATION OF THE STATE IN COMPETITIVE MARKETS*, *supra* note 56, 256.

<sup>230</sup> See Neergaard, *State Action and European Competition Rules*, *supra* note 134, 396; and, in further detail, BAQUERO, *BETWEEN COMPETITION AND FREE MOVEMENT*, *supra* note 145, 52–56; and *ib.*, *State Action Doctrine*, *supra* note 116, 585. Along the same lines, the sovereign immunity in the exercise of public powers in matters of *vital national interest* is stressed as a limit on member States' obligations under articles 3(1)(g) and 10(2) ECT; see VAN BAEL & BELLIS, *COMPETITION LAW*, *supra* note 91, 988;

Those acts of the State that are formally covered by an appearance of legitimacy will generally be shielded from competition analysis on the basis that it is for member States to strike the proper balance between competition and other policy goals. In general terms, such an approach is unobjectionable from a constitutional perspective. However, in our view, legitimacy is not a constant in all public interventions and, consequently, this general premise needs to be further developed and specifically adapted to different situations. While the passing of legislation by national parliaments and the approval of regulations of general applicability by the governments of the member States can safely be considered State actions imbued with a significant degree of legitimacy—or, lacking such legitimacy, subject to intense political review and public accountability; other activities of a more limited scope and conducted at lower levels of government are in a largely different situation. Administrative practice and decisions made by civil servants or other government employees *per se* show a different (lower) level of legitimacy and are further isolated from public oversight—and, hence, may require special regulatory devices in order to ensure their appropriateness.<sup>231</sup>

Therefore, it is submitted that *the umbrella of sovereign powers or the ius imperium of the State should not be automatically and artificially extended to all types of public activity*. While legislative and regulatory activity might justify a wider antitrust exemption under the State action doctrine, other (lower) administrative decisions and practices should not be automatically shielded from competition scrutiny. Particularly in those cases where the government acts as any other agent in the market—that is, when the government carries on commercial activities or exercises its *ius commercium*, be it as an offeror (as has already been recognised by extending competition rules to public undertakings) or as a buyer; there are no good reasons to isolate it from the scrutiny of competition rules.

Even if the final conclusions in that case were contrary to the contentions put forward so far, it is interesting to note the general reasoning behind the Opinion of Advocate General Poiares Maduro in *FENIN*, where a strong case for the subjection of non-sovereign State activities to competition rules is clearly made:

*“there is no justification, when the State is acting as an economic operator, for relieving its actions of all control. On the contrary, it must observe the same rules [imposed on economic operators acting on a market] in such cases. It is therefore essential to establish a clear criterion for determining the point at which competition law becomes applicable [...] the need for consistency means that if a State [...] conducts itself in practice as an economic operator, Articles 81 EC to 86 EC may apply to it”* (emphasis added).<sup>232</sup>

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and ODUDU, BOUNDARIES OF EC COMPETITION LAW, *supra* note 95, 46–47. *Contra*, see Castillo de la Torre, *Reglamentaciones Públicas Anticompetitivas*, *supra* note 128, 1382.

<sup>231</sup> Along the same lines, see TREPTE, REGULATING PROCUREMENT, *supra* note 51, 13. See also DIDIER LINOTTE & RAPHAËL ROMI, *SERVICES PUBLICS ET DROIT PUBLIC ECONOMIQUE* 16 (4th edn. 2001).

<sup>232</sup> Op. AG Poiares Maduro of 10 November 2005, in case C-205/03 P –*FENIN v Commission*, ¶ 26.

In this sense, it is submitted that public procurement *legislation* or (administrative) rules and public procurement *practice*—as the paramount expressions of the public buyer market activities, should be distinguished in analysing public procurement from a competition law perspective;<sup>233</sup> since they should not be automatically considered instances of exercise of sovereignty or public powers (at least in the case of public procurement practices or administrative decisions) and present different levels of legitimacy.<sup>234</sup> Therefore, a differentiated treatment based on these observed divergences between public procurement legislation, or public procurement rules *stricto sensu*, and public procurement (administrative) practices will be attempted in what follows.

***ii) Anti-Competitive Public Procurement Legislation and Regulation as Instances of Exercise of Public Powers or Sovereign Activities***

The design of the rules and the approval of public procurement legislation and regulations are an expression of the legislative and administrative regulatory powers of the State. Therefore, they are activities developed by institutions with a large democratic support (*i.e.* by the corresponding parliament and/or the government) that instil a high degree of legitimacy to the process—unless an abnormal functioning of these institutions or a clear regulatory capture situation arises. In short, they are sovereign activities that result from the exercise of *ius imperium*. At this level, competition scrutiny might be more restricted and, in principle, fall mostly within the scope of the State action exemption as it currently stands. However, a further distinction seems to be required within this general legislative and regulatory level.

The approval of competition-restricting public procurement rules and legislation can be the result of an explicit and wilfully accepted trade-off between competition requirements and the other goals of the public procurement system, such as the pursuance of ‘secondary’ policies in public procurement. In these cases, the balancing between competition and other considerations properly lies within the sphere of political

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<sup>233</sup> From an economic perspective, the difference between legislation, regulation and administrative practice is substantially irrelevant, since they are all equally susceptible or prone to generate distortions or restrictions in the competitive dynamics of the markets concerned (see *supra* §2). Therefore, a strong economic justification can be found for the common treatment of anticompetitive public procurement legislation and practices. Nonetheless, from a legal perspective, the degree of sovereignty or the democratic legitimacy of these different *sources* of potential distortions of competition is relevant and, thus, must be respected. Consequently, it is our view that the adoption of purely economic criteria shall be filtered through this type of legal considerations in the analyses performed in this paper.

<sup>234</sup> The different legitimacy of these two levels of action in the public procurement area justifies such separate study and treatment. Our proposal is conceptually in line with the ‘*tiered approach*’ to State action proposed by John T. Delacourt & Todd J. Zywicki, *The FTC and State Action: Evolving Views on the Proper Role of Government*, 72 ANTITRUST L. J. 1075, 1089–1090 (2004-2005), who proposed a new framework for the analysis of State action in the US that departs from the ‘*one-size-fits-all paradigm*’ and is based on two key factors: the nature of the anticompetitive conduct, and the nature of the entity engaging in the conduct. On the importance of taking the legitimacy of decisions into account, see BAQUERO, BETWEEN COMPETITION AND FREE MOVEMENT, *supra* note 145, 156–157—an opinion later relaxed by Baquero, for considering the approach too complex and intrusive, in *ib.*, *State Action Doctrine*, *supra* note 116, 589–590.

decision and of sovereign activity.<sup>235</sup> Hence, they should only in exceptional circumstances be subject to competition scrutiny, and therefore may not necessarily be trumped by competition considerations. Nonetheless, in our view, the trade-off between competing economic and non-economic goals has to be properly weighed and remain within the bounds of a strict proportionality analysis.

However, the adoption of anti-competitive public procurement rules and legislation may also take place in the absence of any good justification and without an express or specific legislative intention, as a result of defects in the legislative process or regulatory capture. Also, the pursuit of alternative policy goals may result in disproportionate restrictions of competition. In these instances, when there is not an expressly assumed sacrifice of competition in the pursuit of alternative or conflicting policy goals, or when competition restrictions are excessive and disproportionate, it is submitted that the mere fact that the restrictive procurement rules are adopted by way of legislation or regulation should not impede its scrutiny on competition policy grounds.<sup>236</sup> In the end, it is submitted that the legitimacy of these legislative and regulatory decisions not only needs to be formal, but also substantive (and proportional), for them to be exempted from competition scrutiny as proper sovereign acts of exercise of *ius imperium*. In this regard, there seems to be room for the adoption of more substantive-oriented criteria for the revision of competition-restricting public procurement legislation on competition grounds.<sup>237</sup>

### ***iii) Anti-Competitive Public Procurement Decisions and Practices as Instances of Exercise of Economic Powers or Non-Sovereign Activities by the State***

In those instances in which public procurement legislation does not generate competitive distortions *per se*—but leaves room for the exercise of some discretion by

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<sup>235</sup> Along the same lines, it has been proposed that the State action exemption should cover measures taken in pursuit of a legitimate and clearly defined public interest objective and actively supervised by the State; see Op. AG Jacobs of 23 March 2000, in joined cases C-180/98 to C-184/98 –*Pavlov and Others*, ¶ 163. Similarly, but adding a third proportionality requirement for the anticompetitive State regulation, see Op. AG Léger of 10 July 2001, in case C-35/99 –*Arduino*, ¶¶ 88–91; and Thunström *et al*, *State Liability from Anti-Competitive State Measures*, *supra* note 143, 525. Along the same lines, Op. AG Poiares Maduro of 1 February 2006, in joined cases C-94/04 and C-202/04 –*Cipolla*, ¶¶ 31–36. Also, Judit Szoboszlai, *Delegation of State Regulatory Powers to Private Parties—Towards an Active Supervisory Test*, 29 WORLD COMP. 73 (2006).

<sup>236</sup> In similar terms, it has been proposed that not all anti-competitive regulations should be struck down by virtue of articles 3(1)(g), 10(2) and 81 ECT, but that those regulations that aim at achieving genuine economic policy goals or other legitimate objectives should be fully exempted; see Gyselen, *State Action and Effectiveness of Competition Provisions*, *supra* note 117, 56–58. His arguments are further developed in *ib.*, *Anti-Competitive State Measures under the EC Treaty*, *supra* note 160. Similarly, Bacon, *State Regulation of the Market and EC Competition Rules*, *supra* note 127, 288; and Gagliardi, *US and EU Antitrust versus State Regulation*, *supra* note 121, 372–373. See also BAQUERO, BETWEEN COMPETITION AND FREE MOVEMENT, *supra* note 145, 160–161. As mentioned, however, Baquero changed his position later; *id.*, *State Action Doctrine*, *supra* note 116, 589–590. Also VON QUITZOW, STATE MEASURES DISTORTING FREE COMPETITION, *supra* note 97, 15–16 & 262.

<sup>237</sup> The issue of the substantive test applicable to restrictive legislation is further explored in our dissertation. However, since it is a matter that goes beyond subjecting public procurement to competition law, and due to space limitations, it is left out of this paper.

the public buyer, there should be enlarged room for competition scrutiny of the practices and decisions of contracting authorities.<sup>238</sup> It should be stressed that the implementation and application of public procurement rules in specific public tenders by the public bodies or agencies entrusted with purchasing functions are developed at a lower level of government (or, in other terms, at a lower level of the executive branch of the State) and present reduced legitimacy if compared to the passing of legislation or general regulations. Indeed, the conduct of public procurement—*i.e.* the administrative practice ensuing from public procurement regulations, cannot itself be considered an exercise of the *ius imperium* of the State (even if a very broad concept of ‘public power’ is adopted), but constitutes an exercise of *ius commercium* or *ius gestionis*.<sup>239</sup>

In general terms, purchasing authorities are subject to the fundamental obligation of furthering the public interest—and, hence, should promote competition (as public procurement regulations widely recognise that it runs in the best public interest in most situations). However, contracting authorities usually hold relatively large amounts of discretion as regards specific purchasing decisions (particularly in relation with the design of the procurement process, requirements of the goods or services to be sourced, etc.) and, at the same time, are more vulnerable to capture by private interest groups.

It is submitted that, given the open-ended nature of most public procurement rules and the ensuing need for the exercise of administrative discretion, purchasing authorities can easily generate restrictions of competition in the markets where they are buying through all types of public procurement practices. If and when they adopt competition-distorting procurement practices not imposed by public procurement rules and legislation—*i.e.* when the restrictions or distortions of competition stem directly from the exercise of the administrative discretion involved in the adoption of a given public procurement practice or decision, it is hard to envisage any relevant legitimacy issue that should shield purchasing authorities from the application of competition rules.<sup>240</sup> Similarly, when the public buyer adopts certain contract compliance policies—thereby imposing on the government contractor obligations that go further than those imposed by general

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<sup>238</sup> On the contrary, if the restriction is imposed by public procurement legislation or regulation, the relevant analysis should be that performed as regards anti-competitive legislation *as such*—and, probably, would restrict the possibilities for competition scrutiny, if compared to the scrutiny of equivalently distortive administrative practices that lack legal or regulatory coverage. Acknowledgedly, this is one of the areas where the treatment of legally imposed restrictions of competition by member States’ domestic competition law can have a major impact (see *supra* note 132).

<sup>239</sup> For a clear characterisation of public procurement as an activity of *jure gestionis*, see Triantafyllou, *Les Règles de Concurrence et l’Activité Étatique y Compris les Marchés Publics*, *supra* note 124, 69–70. See also LUCIANO PAREJO ALFONSO, EFICACIA Y ADMINISTRACIÓN—TRES ESTUDIOS 81–82 (1995).

<sup>240</sup> In more moderate terms, see BAQUERO, BETWEEN COMPETITION AND FREE MOVEMENT, *supra* note 145, 160–161. However, it is to be recalled and stressed that Baquero changed his position in *ib.*, *State Action Doctrine*, *supra* note 116, 589–590, and currently proposes a more formal procedural test based on the financial disinterestedness of the body adopting the anti-competitive behaviour; in line with the proposals of other authors as Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667 (1990-1991) and *id.* *Making Sense of Antitrust Petitioning Immunity*, 80 CAL. L. REV. 1177 (1992); and Schepel, *Delegation of Regulatory Powers*, *supra* note 141, 45–51. See also NEERGAARD, COMPETITION & COMPETENCES, *supra* note 118, 275–291.

legislation and regulation, it is developing (*quasi*-)legislative or nearly-regulatory functions at a lower-than-ought level of government.<sup>241</sup> If contract compliance results in competition-distorting situations, in our view, this administrative practice of the public buyer should not be (automatically) covered by the State action exemption, as the degree of legitimacy or sovereignty involved is arguably too low to trigger protection.<sup>242</sup> In the end, these practices seem to be taking place in too low a level of public intervention—and, hence, under weak legitimacy conditions and substantially shielded from the checks and balances usually associated to legislative and regulatory activities, so as to merit exemption from competition laws. Put otherwise, they seem to fall below the *bottom boundary* of the State action doctrine.

*b) Excluding Activities with Weak Sovereignty and Legitimacy Implications from the Scope of the State Action Doctrine: the ‘Market Participant Exception’*

To sum up, it is submitted that it is hard to envisage a good reason to exempt the conduct of the public sector from competition scrutiny in those cases i) where the protection derived from the legitimacy of the public competition-distorting action is feeble because the adoption of anti-competitive public procurement rules and legislation does not respond to a real political option and is not the result of a proportional trade-off between different policies, between competing goals of the procurement systems (or even between primary and secondary policies pursued through public procurement rules), or ii) where competition-distorting buying practices and contract compliance policies are adopted as a result of ‘mere’ administrative discretion.

Therefore, it is our view that these activities should not be covered by the State action antitrust exemption—as they do not seem to comply with the sovereignty and legitimacy criteria that justify the existence of the State action doctrine of competition law immunity. Moreover, while being imbued with a lower legitimacy level, public procurement practices and decisions—as opposed to public procurement legislation and regulation *stricto sensu*, seem to present a higher risk of generating anti-competitive effects (as they are more specific and usually complement the general criteria contained in the laws and regulations; which, precisely because of that generality, will tend to be

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<sup>241</sup> The fact that the government uses contracts as a method of controlling behaviour as an alternative to enacting regulations was stressed by Sue Arrowsmith, *Government Contracts and Public Law*, 10 LEGAL STUD. 231, 233–234 (1990); see also Friedl Weiss, *The Law of Public Procurement in the EFTA and the EEC: The Legal Framework and its Implementation*, 7 YEL 59 (1987); and Jan A. Winter, *Public Procurement in the EEC*, 28 CML REV. 741, 742 (1991). On contract compliance and its constitutional implications, as regards the ‘legitimacy’ of its use, see SUE ARROWSMITH *et al*, REGULATING PUBLIC PROCUREMENT: NATIONAL AND INTERNATIONAL PERSPECTIVES 287–296 (2000); ARROWSMITH, LAW OF PUBLIC AND UTILITIES PROCUREMENT, *supra* note 57, 1248; and PHILLIP J. COOPER, GOVERNING BY CONTRACT. CHALLENGES AND OPPORTUNITIES FOR PUBLIC MANAGERS (2003). For a general account of these practices, see P. E. Morris, *Legal Regulation of Contract Compliance: An Anglo-American Comparison*, 19 ANGLO-AM. L. REV. 87 (1990).

<sup>242</sup> On this possibility to expand competition law to public procurement activities, see Triantafyllou, *Les Règles de Concurrence et l’Activité Étatique y Compris les Marchés Publics*, *supra* note 124, 70–74.

less restrictive). Consistently, they should be subjected to more intense competition scrutiny.

Whereas the first part of the development of the current State action doctrine in relation to the adoption of anti-competitive legislation and regulations merits further analysis, it is submitted that developing a ‘*market participant exception*’ would suffice to effectively subject public procurement (administrative) practices to competition law scrutiny. That is, ‘*piercing the sovereign veil*’ in the public procurement arena to subject to competition scrutiny all instances of market intervention related to non-regulatory public procurement activities (*i.e.* subjecting the strictly commercial part of public procurement, and the ensuing administrative discretion to competition oversight) could contribute to foster competition in this important field of economic activity. The implementation would be rather simple (in formal terms), since it would exclusively require disregarding the fact that a public authority or other entity is conducting a given market activity (*i.e.* excluding it from the shield of the State action doctrine), and indirectly analysing it under the general prohibitions of ‘core’ competition rules (*i.e.* articles 81 and 82 ECT) by means of articles 3(1)(g), 4 and 10(2) ECT—that is, overstepping the formal *Van Eycke* test and extending the corresponding substantive analysis of the unilateral competition distorting behaviour of the public buyer. As already mentioned, it is submitted that this development—together with the revision of the concept of ‘economic activity’ would allow the system of EC competition law to go full-circle in constraining anti-competitive public procurement behaviour; one way or the other, the activities of the public buyer would be subjected to EC competition rules.

## **6. GENERAL CONCLUSIONS**

This paper has analysed how and to what extent EC competition law addresses publicly-generated competitive distortions in the public procurement field. As a point of departure, and in order to show the relevance of the proper treatment of public procurement from a competition perspective, the economics underlying the market activity of the public buyer (and its effects on competitive dynamics) have been explored. Building on the insight that public procurement can generate the kind of effects which competition rules seek to prevent, the paper has moved on to consider to what extent current EC competition rules are actually able to prevent them.

The analysis has shown how current institutions and mechanisms are significantly limited and generally insufficient to prevent anti-competitive public procurement rules and practices under most common market circumstances—mainly because of an exceedingly formal approach by the Community case-law to both the direct and the indirect application of the ‘core’ competition rules of articles 81 and 82 ECT. In view of these results, it has been submitted that a revision of two main strings of that case-law could contribute to bring EC competition law full-circle in tackling publicly-generated restrictions to competition in the public procurement setting.



More specifically it has been suggested that the adoption of a more economic or anti-formalistic (or functional) approach to the concept of undertaking can contribute to bring the bulk of public procurement activities *qua* economic activities *per se* directly under the scope of ‘core’ competition prohibitions. That development would bridge the jurisprudentially-created gap between the competition rules applicable to private and to public purchasing activities—and, indirectly, between the rules applicable to public and private entities developing economic activities, loosely understood. It has further been argued that refining the State action doctrine on the basis of a more acute distinction between sovereign and economic or commercial activities of public authorities—*i.e.* ‘*piercing the sovereign veil*’, can further improve the results attainable by competition law in preventing and fighting publicly-generated distortions of competition in public procurement. Particularly, the development of a ‘*market participant exception*’ that excludes from the shield of the State action doctrine all instances of market intervention related to non-regulatory public procurement activities has been advanced—so that public procurement activities could then be analysed according to the ‘core’ competition rules *indirectly*, by expedient recourse to articles 3(1)(g), 4 and 10(2) ECT.

It is submitted that these proposed developments of current EC competition rules are particularly well-suited to address publicly-generated competitive distortions in the public procurement field and, in our view and *de lege ferenda*, should become the prime regulatory response under EC competition law to ensure the development of a more competition-oriented public procurement system. These developments should be pursued in a coordinated manner and, to the furthest possible extent, simultaneously—since each of them would, probably, be insufficient by itself to address *all* publicly-generated restrictions of competition in the public procurement setting.