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The Principle of Competition Embedded in the EU Public Procurement Directives

I. Introduction

Changing perspective and moving from the analysis of public procurement as an object for competition law (chapter four) towards the examination of the competition elements of public procurement rules, this chapter takes into consideration competition from a ‘pure’ public procurement perspective and examines where competition concerns fit in EU public procurement rules and how they affect (or should affect) the shaping of these rules. Hence, the present chapter will be concerned with the research sub-question: *what is the place for competition concerns in the EU public procurement regime and how do they affect its construction and interpretation?* The inquiry will build upon the already established general premise that public procurement rules have promotion of competition—or the opening up of public procurement markets to competition—as one of their main goals (above chapter three, §IV) and that, consequently, they should be designed around a pro-competitive paradigm and implemented in a pro-competitive fashion. This assumption or point of departure is becoming increasingly recognised and, indeed, it has been recently stressed that the ‘starting point for achieving best value for money in government procurement is a regulatory framework that is based on the principle of competition and that submits public spending to the adherence to competitive procurement methods.’¹ Hence, this is the main consideration that drives the following analysis.

In this regard, the first part of this chapter will focus on the identification of a competition principle as one of the fundamental or general principles of the EU public procurement regime. It will be submitted that EU public procurement directives have indeed always been based on the paradigm of an open and competitive procurement process, and that competition is one of their fundamental principles. This competition principle will be interpreted as requiring that public procurement rules be designed and applied in a pro-competitive way—so that they do not hinder, limit or distort competition—and that public procurement practices which prevent, restrict or distort competition be avoided (§II). The argument is now supported by the consolidation of this principle of competition in article 18(1) of Directive 2014/24. However, the drafting of this provision

¹ UNCTAD, Intergovernmental Group of Experts on Competition Law and Policy, *Competition Policy and Public Procurement* (2012), available at unctad.org/meetings/en/SessionalDocuments/ciclpd14_en.pdf.

does not completely fit the proposal that is advanced here and, in any case, creates important interpretative difficulties. Those difficulties derive prominently from the inclusion of an element of ‘intention’ of restriction of competition that will be closely scrutinised and followed by a proposal to objectify its application (§III). After this analysis of the principle of competition embedded in the EU procurement directives, the research will turn towards the implications that it generates for the shaping of the EU public procurement regime—particularly as regards the transposition and implementation of EU public procurement directives by Member States and the interpretation of public procurement rules and regulations (both domestic and European) in a more pro-competitive way (§IV). The final part of the chapter will analyse in further detail the general implications of the competition principle in the public procurement setting and, in particular, will distinguish it from the principle of equal treatment or non-discrimination (§V). Preliminary conclusions in the light of previous analyses close the chapter (§VI).

II. The Competition Principle Embedded in the pre-2014 EU Public Procurement Directives

A. The Recognition of the Existence of a Competition Principle Embedded in the pre-2014 EU Public Procurement Directives and their Interpreting Case Law

The promotion of effective competition in the public procurement field—or, put otherwise, the opening up of public procurement markets to competition, has been a constant goal across the four generations of EU public procurement directives² (above chapter three).³ The development of effective competition in the field of public contracts was expressly stated as an objective in the preambles to the previous generation of directives;⁴ and this

² The expression regarding the ‘fourth generation’ of procurement directives to refer to Dir 2004/17 and Dir 2004/18 is borrowed from C Bovis, *EU Public Procurement Law* (Cheltenham, Edgar Elgar, 2007) 49.

³ For a brief overview of the evolution of EU public procurement directives, see PA Trepte, *Public Procurement in the EU: A Practitioner’s Guide*, 2nd edn (Oxford, Oxford University Press, 2007) 28–38. For more extensive accounts, see S Arrowsmith, *The Law of Public and Utilities Procurement*, 2nd edn (London, Sweet & Maxwell, 2005) ch 3; id, *The Law of Public and Utilities Procurement. Regulation in the EU and the UK*, vol 1, 3rd edn (London, Sweet & Maxwell, 2014) ch three; and Bovis (n 2) 17–26.

⁴ See rec (14) in the preamble to Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts [1993] OJ L199/1 (with specific reference to the need ‘to ensure development of effective competition in the field of public contracts’); and rec (10) in the preamble to Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts [1993] OJ L199/54 (adopting the same exact wording). See also rec (20) in the preamble to Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts [1992] OJ L209/1 (which adopted a different wording and expressed, maybe in clearer terms, that the directive was needed ‘to eliminate practices that restrict competition in general and participation in contracts by other Member States’ nationals in particular’). Such general considerations had a direct translation into numerous pro-competitive rules included in those directives; see G Boncompagni, ‘Appalti pubblici e concorrenza’ in EA Raffaelli (ed), *Antitrust fra Diritto nazionale e Diritto comunitario* (Milano, Giuffrè, 1996) 189, 199–200. In my view, and as further developed in the text, the very broad terms of these recitals are a clear indication of the existence of a *general* competition objective in the public procurement directives, which should not be narrowed down or interpreted as only implying an ‘operational’ requirement of promotion of access to the public

led the ECJ to declare that procurement 'legislation contains fundamental rules of EU law in that it is intended to ensure the application of the principles of equal treatment of tenderers and of transparency *in order to open up undistorted competition in all the Member States*'⁵ and to repeatedly stress that the purpose of the public procurement directives 'is to *develop effective competition in the field of public contracts*'.⁶

Such an express objective was also contained in the preamble to the 2004 directives—see recital (9) in the preamble to Directive 2004/17 and recitals (2) and (36) in the preamble to Directive 2004/18.⁷ Moreover, the 2004 EU public procurement directives have numerous references to the preservation and promotion of undistorted competition as one of the basic goals and principles of this regulatory body.⁸ Even further, many of their provisions made express reference to the fact that contracting authorities must refrain from adopting certain procedures or applying certain rules if doing so would limit or distort competition. Indeed, this constraint in the design and implementation of public procurement rules was expressly stated by the 2004 EU public procurement directives, particularly in relation to new procedures and institutions, such as the competitive dialogue, electronic tendering, dynamic purchases, or framework agreements; as expressed by articles 29(7), 32(2), 33(7) and 54(8) of Directive 2004/18 and articles 14(4), 15(7) and 56(9) of Directive 2004/17—all of which expressly prohibited contracting authorities from resorting to these types of contracts and procedures if that could result in a limitation or distortion

procurement procedure. Along the same lines, see L Fiorentino, 'Public Procurement and Competition' in KV Thai et al (eds), *International Public Procurement Conference Proceedings* (2006) 847, 851; and id, 'The Italian Public Procurement Code' (2007) 16 *Public Procurement Law Review* 352, 365. Cf S Arrowsmith, 'National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict?' in id and A Davies (eds), *Public Procurement: Global Revolution* (1998) 3, 15; and Arrowsmith (n 3, 2005) 69, 129–31, 431–32 and 955. Similarly, see C Bovis, *EC Public Procurement: Case Law and Regulation* (Oxford, Oxford University Press, 2006) 43–44; and id (n 2) 7.

⁵ Case C-213/13 *Impresa Pizzarotti* [2014] pub electr EU:C:2014:2067 63 (emphasis added), with reference to its judgments in Case C-70/06 *Commission v Portugal* [2008] ECR I-1 40; Case C-213/07 *Mikhaniki* [2008] ECR I-9999 55; Case C-251/09 *Commission v Cyprus* [2011] ECR I-13 37–39; and Case C-336/12 *Manova* [2013] pub electr EU:C:2013:647 28.

⁶ Case C-138/08 *Hochtief and Linde-Kca-Dresden* [2009] ECR I-9889 47 (emphasis added), with references to Case C-27/98 *Fracasso and Leitschutz* [1999] ECR I-5697 26; Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233 34; Case C-470/99 *Universale-Bau* [2002] ECR I-11617 89; and Case C-247/02 *Sintesi* [2004] ECR I-9215 35.

⁷ Interestingly, in very clear terms the first proposal of rec (2) of Dir 2004/18 expressly required that its 'provisions should be based ... on the introduction of effective competition in public contracts'. Subsequent amendments led to the current wording—which establishes that its 'provisions ... [should] guarantee the opening-up of public procurement to competition', but the phrasing 'ensure development of effective competition in the field of public contracts' is present in rec (36); see JM Hebly and N Lorenzo van Roedij (eds), *European Public Procurement: Legislative History of the 'Classic' Directive: 2004/18/EC* (Alphen aan den Rijn, Kluwer Law International, 2007) 89–96. Similarly, rec (9) Dir 2004/17 made reference to the 'opening-up of public procurement to competition' as one of the principles that was inferable from the requirements of arts 20, 34 and 35 TFEU (ex arts 14, 28 and 39 TEC)—and that specific mention was put at the beginning of the recital as enacted, which makes clear that the directive is approved 'in order to guarantee the opening up to competition of public procurement contracts' in the 'excluded' sectors; see JM Hebly (ed), *European Public Procurement: Legislative History of the 'Utilities' Directive: 2004/17/EC* (Alphen aan den Rijn, Kluwer Law International, 2008) 157–69. It is submitted that the final wording of these recitals establishes a clear link to the case law regarding the competition objective and requirements in previous directives (below n 12), and essentially captures the *competition principle* that underlies the public procurement regime.

⁸ See: recs (2), (4), (8), (12), (13), (15), (29), (31), (36), (41) and (46) in the preamble to Dir 2004/18, as well as recs (9), (11), (15), (20), (21), (23), (32), (38), (40), (41), (42) and (55) in the preamble to Dir 2004/17.

of competition.⁹ Also, regarding the effect of public procurement on the development of competition between economic operators—and, arguably, with specific focus on the potential increase in the likelihood of collusion that certain procurement rules generate (specially regarding transparency, see above chapter two, §V.D)—it is worth stressing that article 35(4) *in fine* of Directive 2004/18 and article 49(2) *in fine* of Directive 2004/17 allowed for derogations on the rules of publicity and advertisement where the release of such information might prejudice fair competition between economic operators, public or private. Therefore, it is submitted that it is clear from all these provisions of the 2004 EU public procurement directives that they were already founded on the conceptual basis that contracting authorities must refrain from adopting certain procedures or applying certain rules if doing so limits or distorts competition. Along the same lines, it can be considered that the specific procedure for establishing whether a given activity is exposed to competition—and, consequently, can be excluded from the scope of Directive 2004/17 because ‘the activity is directly exposed to competition on markets to which access is not restricted’ (ex art 30(1) Dir 2004/17)—was a further indication of the clear link between public procurement rules and competition concerns.¹⁰

In view of this express recognition of the existence of a strong pro-competition rationale and orientation, no doubt should be cast on the existence of a *competition objective* embedded in the EU public procurement directives¹¹—which has clearly and consistently been declared as such by the case law of the EU judiciary.¹² Indeed, EU case law has repeatedly held that the directives are designed to eliminate practices that restrict competition in general and to open up the procurement market concerned to competition—ie, to ensure free access to public procurement, in particular for undertakings from other Member States. The reasons behind this pro-competitive approach to public procure-

⁹ See: Arrowsmith (n 3, 2005) 432, who considered that ‘competition might be developed as a general principle with the same status as transparency and equal treatment. The very broad conception of competition ... was [however] criticised ... the directives are merely concerned with removing restrictions on participation in competitions held in public markets. However, a general principle of competition could properly be developed to support this latter objective of removing restrictions on participation.’

¹⁰ In this regard, see Bovis (n 2) 296–98; and id, *EC Public Procurement: Case Law and Regulation* (2006) 284–86 and 602. Similarly, W Sauter and H Schepel, *State and Market in European Union Law. The Public and Private Spheres of the Internal Market before the EU Courts* (Cambridge, Cambridge University Press, 2009) 53–58. On this general exemption, see Trepte (n 2) 173–81.

¹¹ See: R Drago, ‘Marchés publics et concurrence’ in J-M Rainaud and R Cristini (eds), *Droit public de la concurrence* (Paris, Economica, 1987) 197, 199; A Mattera, *Le marché unique européen, ses règles, son fonctionnement* (Paris, LGD, 1990) (the Spanish translation by C Zapico Landrove, *El mercado único europeo. Sus reglas, su funcionamiento* (Madrid, Civitas, 1991) is used) 387; SE Hjelmborg et al, *Public Procurement Law—The EU Directive on Public Contracts* (Copenhagen, Djøf Forlag, 2006) 55; and V Salvatore, *Diritto comunitario degli appalti pubblici. Incidenza nell’ordinamento italiano delle direttive sulle procedure di aggiudicazione* (Milano, Giuffrè, 2003) 75.

¹² For recent references, see Case C-538/07 *Assitur* [2009] ECR I-4219 25; Case C-213/07 *Mikhaniki* [2008] ECR I-9999 39; Case C-454/06 *Pressetext Nachrichtenagentur* [2008] ECR I-4401 31; Case C-412/04 *Commission v Italy* [2008] ECR I-619 2; Case C-337/06 *Bayerischer Rundfunk and others* [2007] ECR I-11173 39; Case C-220/05 *Auroux* [2007] ECR I-385 52; Case C-340/04 *Carbotermo* [2006] ECR I-4137 58; Joined Cases C-21/03 and C-34/03 *Fabricom* [2005] ECR I-1559 26; Case C-26/03 *Stadt Halle* [2005] ECR I-1 44; Case C-247/02 *Sintesi* [2004] ECR I-9215 35. For previous references, see also Case C-214/00 *Commission v Spain* [2003] ECR I-4667 53; Case C-470/99 *Universale-Bau* [2002] ECR I-11617 89; Case C-411/00 *Swoboda* [2002] ECR I-10567 33; Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7213 81; Case C-92/00 *HI* [2002] ECR I-5553 44; Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233 34–5; Case C-399/98 *Ordine degli Architetti* [2001] ECR I-5409 75; Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745 62; and Case C-27/98 *Fracasso and Leitschutz* [1999] ECR I-5697 26. For further previous references, see Case C-243/89 *Storebaelt* [1993] ECR I-3353 33; and Case 31/87 *Beentjes* [1988] ECR 4635 21.

ment are that effective competition is expected firstly to remove barriers that prevent new players from entering the market, secondly to benefit contracting entities which will be able to choose from among more tenderers and, thus, will be more likely to obtain value for money, and, finally, to help maintain the integrity of procurement procedures as such.¹³ Consequently, it is submitted that EU public procurement rules and their interpreting case law have established with pristine clarity that this body of regulation has the promotion of effective competition as one of its fundamental goals.

In my opinion, the pursuit of this primary objective has generated or resulted in the emergence of a *competition principle* that underlies and guides (or, in my opinion, should guide)¹⁴ the rules and regulatory options adopted by the EU public procurement system in trying to achieve the objective of effective competition in public procurement markets (on the specific contours of this principle, see below §II.B).¹⁵ Such a principle has now been consolidated in article 18(1) of Directive 2014/24, which in my view constitutes a mere incremental step in the development of the EU system of procurement rules (for discussion, see below §III). To be sure, the distinction between the competition *goal* persistently and emphatically stressed by the EU directives and their interpreting case law, and the ensuing competition *principle* hereby identified might to some seem blurry, since they largely imply each other or, in other terms, *hold a biunivocal or interconnected relation*. The close link between the objective and the principle is acknowledged and, for the analytical purposes of this study, the principle of competition will be understood and referred to as the ‘translation’ or ‘materialisation’ of the competition goal clearly and undoubtedly pursued by the EU directives.¹⁶

References to the principle of competition have often been phrased using different terminology—such as *free competition*,¹⁷ *undistorted competition*,¹⁸ *effective competition*,¹⁹

¹³ Opinion of AG Poiares Maduro in Case C-250/07 *Commission v Greece* 11 and 17. Similarly, C Bovis, ‘Developing Public Procurement Regulation: Jurisprudence and Its Influence on Law Making’ (2006) 43 *Common Market Law Review* 461, 464; and S Simone and L Zanettini, ‘Appalti pubblici e concorrenza’ in L Fiorentino (ed) *Lo Stato compratore. L’acquisto di beni e servizi nelle pubbliche amministrazioni* (Bologna, Il Mulino, 2007) 119.

¹⁴ *Contra* S Arrowsmith, ‘The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies’ (2011–12) 14 *Cambridge Yearbook of European Legal Studies* 1–47, who considers that this position ‘[w]hile apparently supported by some statements in the jurisprudence these are based on misunderstanding and such a broad interpretation ... represents unwarranted judicial reorientation of the directives’ rules’. In my view, and despite the strong criticism adopted by Professor Arrowsmith, that is not the case. Not least, because art 18(1) Dir 2014/24 has now consolidated such a ‘properly developed’ principle of competition. For an expanded discussion, see below §III. See also P Kunzlik, ‘Neoliberalism and the European Public Procurement Regime’ (2012–13) 15 *Cambridge Yearbook of European Legal Studies* 283, esp 312–56, who claims to hold a third view on the principle of competition, but actually does not.

¹⁵ Similarly, it has been stressed that EU public procurement rules are based on the principles of a free market economy and, most notably, that the ‘opening of contracts to competition’ is the link between public procurement law and competition law; M Guibal, ‘Droit public des contrats et concurrence: le style européen’ (1993) 15 *Semaine Juridique* 161.

¹⁶ It is submitted that reaching a more precise or clear-cut distinction between the competition goal and the competition principle embedded in the EU directives is unnecessary for the purposes of the study.

¹⁷ Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233 76; and Joined Cases T-485/93, T-491/93, T-494/93 and T-61/98 *Dreyfus* [2000] ECR II-3659 65–67.

¹⁸ Case C-454/06 *Presstext Nachrichtenagentur* [2008] ECR I-4401 31 and 79; and Case C-480/06 *Commission v Germany* [2009] ECR I-4747 47.

¹⁹ Joined Cases C-147/06 and C-148/06 *SECAP* [2008] ECR I-3565 29; and Joined Cases C-21/03 and C-34/03 *Fabricom* [2005] ECR I-1559 26.

genuine competition,²⁰ *healthy* competition,²¹ *elimination of restrictions to* competition,²² or competition *tout court*²³—and cross-references to previous findings sometimes use different wordings to refer to the principle of competition,²⁴ which might generate a debate on the possible existence of different competition principles or concepts in EU law. However, it is submitted that this debate seems to be largely formal and potentially misleading, and it is argued that these terminological differences should not obscure the fact that these different mentions were clearly intended to stress that *the EU public procurement regime holds a direct and particularly close link with the principle of competition as a general principle of EU law*.²⁵ Hence, in my view, all such references directly refer to that general principle, regardless of their specific phrasing or wording.²⁶ Therefore, in what follows, reference will be made simply to the ‘competition principle’, without further ado.²⁷

It should also be acknowledged that the principle of competition had remained largely implicit both in public procurement regulations and in their interpreting case law, but it seemed to be receiving an increasing degree of attention in the enforcement of the EU

²⁰ Case C-399/98 *Ordine degli Architetti* [2001] ECR I-5409 52; and Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233 34.

²¹ Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233 57 (which, as indicated above n 17 and n 20, also makes reference to *free* and *healthy* competition, in another instance of terminological interchangeability; see below n 24).

²² Opinion of AG Poiares Maduro in Case C-250/07 *Commission v Greece* 11 and 17.

²³ Opinion of AG Stix-Hackl in Case C-247/02 *Sintesi* 32–33.

²⁴ See, eg: Opinion of AG Léger in joined cases C-21/03 and C-34/03 *Fabricom* 4, where the Advocate General refers to the ‘principle of *free* competition’ and quotes Case 103/88 *Costanzo* [1989] ECR 1839 18, whereas the literal rendering of the finding of the ECJ in that case referred to ‘the development of *effective* competition in the field of public contracts’. Some paragraphs later, AG Léger stresses that ‘the directives on public contracts ... aim to promote the development of *effective* competition’ (*Fabricom* Opinion, 22), and returns to the initial nomenclature shortly after, by underlining ‘that general principles, such as *free* competition, equal treatment and non-discrimination, are applicable to the award of public contracts’ (ibid 25). Eventually, AG Léger adopts a third terminology, referring to the fact that certain provisions of the EU directives on public procurement are designed ‘to prevent ... harm to *fair* competition’ (ibid 33; all emphases added). It is submitted that this should be taken into consideration, at least as anecdotal evidence of the fact that terminology might not have always been used very precisely in referring to the principle of competition—or has, simply, been used interchangeably as a matter of style—and that, at the same time, this is largely irrelevant from an analytical perspective, since all these terms refer to one and the same principle: *the principle of competition as a general principle of EU law*.

²⁵ As already mentioned, the existence of this general principle of competition in EU law has been expressly recognised by the EU judiciary, see Case 240/83 *Waste oils* [1985] ECR 531 9; Case 249/85 *Albako* [1987] ECR 2345 16; Case C-126/97 *Eco Swiss* [1999] I-3055 36–37; and Case C-453/99 *Courage and Crehan* [2001] ECR I-6297 20–21. See also T Tridimas, *The General Principles of EU Law*, 2nd edn (Oxford, Oxford University Press, 2006) 5; and O Odudu, *The Boundaries of EC Competition Law: The Scope of Article 81* (Oxford, Oxford University Press, 2006) 9.

²⁶ Terminological differences surrounding the principle of competition seem to mirror the same issues concerning the concept of competition or the objectives of competition law (see above chapter three). Nonetheless, in my view, they are largely irrelevant, since all these terms are clearly to be understood as referring to the general principle of competition contained in the TFEU; see Case C-95/04 P *British Airways* [2007] ECR I-2331 106 and 143.

²⁷ This terminology is not uncommon amongst public procurement scholars, who refer to the principle of competition, without further qualification. See, eg S Arrowsmith, ‘Framework Purchasing and Qualification Lists under the European Procurement Directives’ (part 1) (1999) 8 *Public Procurement Law Review* 115, 142–43 and 145; PA Trepte, *Regulating Procurement. Understanding the Ends and Means of Public Procurement Regulation* (Oxford, Oxford University Press, 2004) 131; Bovis (n 13) 461 and 466; GA Benacchio and M Cozzio, ‘Presentazione’ in id (eds), *Appalti pubblici e concorrenza: La difficile ricerca di un equilibrio* (Trento, Università degli studi di Trento, 2008) 2; or JM Gimeno Feliú, *El control de la contratación pública. Las normas comunitarias y su adaptación en España* (Madrid, Civitas, 1995) 46–57; and id, *La nueva contratación pública europea y su incidencia en la legislación española: La necesaria adopción de una nueva Ley de Contratos Públicos y propuestas de reforma* (Madrid, Civitas, 2006) 45–47.

public procurement regime throughout the last decade.²⁸ Even if, arguably, it has not yet been explicitly applied, nor fully enforced by the EU judicature—in part because some of the issues that directly concern the competition principle have been addressed by the EU judicature in the light of the more general principle of equal treatment or non-discrimination (see below §III and §IV.A)²⁹—such a competition principle has informed the public procurement case law and has contributed to establishing the proper boundaries for the development of public procurement activities by Member States' contracting authorities. As the ECJ observed, 'all the requirements imposed by Community [public procurement] law must ... be applied in such a manner as to ensure compliance with the principles of free competition and equal treatment of tenderers and the obligation of transparency.'³⁰ In short, I consider that the principle of competition has always formed a basic part of public procurement regulation in the EU and constituted one of its fundamentals. This point of view has been consistently shared by several opinions of Advocates General,³¹ as well as by an increasing body of scholarly commentary.³²

To be sure, the 2004 EU public procurement directives did not have EU competition rules as their legal basis—they were, instead, based on the fundamental freedoms and internal market provisions of the Treaty (arts 53(2), 62 and 114 TFEU (ex arts 47(2), 55 and 95 TEC)—and did not serve the purpose of implementing article 101 TFEU or any other competition provision of the TFEU.³³ However, EU public procurement rules are based on the same core principles as EU competition rules, promote the same type of economic competition and the same final goals, and have specific implications for competition policy.³⁴ It is fitting to recall here a statement by the ECJ to the effect 'that the

²⁸ See, eg, the fact that the principle of competition has been raised as a guiding interpretative element in recent cases before the ECJ, such as Case C-213/07 *Mikhaniki* [2008] ECR I-9999 24; or in Joined Cases C-147/06 and C-148/06 *SECAP* [2008] ECR I-3565 6 and 16. See also Case C-538/07 *Assitur* [2009] ECR I-4219; Case C-305/08 *CoNISMa* [2009] ECR I-12129; and Case C-159/11 *Ordine degli Ingegneri della Provincia di Lecce and Others* [2012] pub electr EU:C:2012:817; cf Case C-358/12 *Consorzio Stabile Libor Lavori Pubblici* [2014] pub electr EU:C:2014:2063, although it is submitted that the argument was faulty.

²⁹ This approach has been shared by the courts of Member States. For instance, the French Conseil Constitutionnel has refused to issue express opinions on the competition implications of public procurement processes and has limited the discussion to equality terms; see JF Brisson, *Les fondements juridiques du droit des marchés publics* (Paris, Imprimerie Nationale, 2004) 103–04. However, the French Conseil d'État has adopted a more competition-oriented approach and has recognised expressly that undistorted competition is an emergent principle clearly distinguished from the principle of non-discrimination (id, 190–92).

³⁰ Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233 76 (emphasis added).

³¹ See: Opinion of AG Stix-Hackl in Case C-247/02 *Sintesi* 32–33. Along the same lines, see Opinion of AG Poiares Maduro in Case C-250/07 *Commission v Greece* 11 and 17; Opinion of AG Stix-Hackl in Case C-532/03 *Commission v Ireland* 73; Opinion of AG Kokott in Case C-220/05 *Auroux* 43, 50, 63–64, 66 and 79; Opinion of AG Poiares Maduro in Joined Cases C-226/04 and C-228/04 *La Cascina and others* 26; and Opinion of AG Cosmas in Case C-107/98 *Teckal* 48 and 65.

³² Bovis (n 10) 461 and 466. See also J-P Colin and M Sinkondo, 'Principe de non-discrimination et protection de la concurrence en Droit international et en Droit communautaire' (1993) 364 *Révue du marché commun et de l'Union Européenne* 36, 55; Guibal, *Droit public des contrats et concurrence* (1993) 161; G Clamour, *Intérêt général et concurrence. Essai sur la pérennité du droit public en économie de marché* (Paris, Dalloz, 2006) 315–20 and 329–32; C Cabanes and B Neveu, *Droit de la concurrence dans les contrats publics. Pratiques anticoncurrentielles, abus de position dominante, controls et sanctions* (Paris, Le Moniteur, 2008) 69; M Garcés Sanagustin, 'Contratación en el sector público y competencia: Incidencia práctica de la entrada en vigor de la Ley 30/2007, de 30 de octubre, de Contratos del Sector Público' (2008) 3 *Revista de Derecho de la competencia y la distribución* 119, 120; Simone and Zanettini (n 13) 136; and Benacchio and Cozzio (n 27) 2.

³³ Case C-247/02 *Sintesi* [2004] ECR I-9215 28–30. Cf Simone and Zanettini (n 13) 128.

³⁴ See: Trepte (n 3) 40; RH Folsom, *Principles of European Union Law* (St Paul, Thomson-West, 2005) 285–86; and MM Razquin Lizarraga, *Contratos públicos y Derecho comunitario* (Elcano, Aranzadi, 1996) 36–38.

Community rules on public procurement were adopted in pursuance of the establishment of the internal market, in which freedom of movement is ensured and restrictions on competition are eliminated.³⁵ Even further, public procurement rules seek to ensure effective competition in procurement markets and are guided by a strong pro-competitive rationale (above chapter three). Therefore, it was submitted that the principle of competition had to be expressly recognised as one of the fundamental principles of EU public procurement law (as is now the case in art 18(1) Dir 2014/24, below §III). Admittedly, the EU judicature has had several opportunities to declare in more explicit terms the existence of the competition principle³⁶—but has only made direct and express reference to that principle *nominatim* in very limited occasions.³⁷ Nonetheless, it is submitted that the apparent reluctance of the ECJ to adopt a more emphatic or explicit approach to the existence of a competition principle embedded in the EU public procurement directives should not be granted substantial interpretative weight, for two reasons. First, there is no trace of denial or limitation of that principle in the EU case law—to the contrary, it is continually used as a strong argument by Advocates General in their opinions³⁸ and, in my view, the ECJ has not signalled in any significant way a departure or rejection of the general principle. Remarkably, the ECJ has not tackled such open declarations as those indicating that the EU procurement rules’ objective of coordinating the procedures for the award of public contracts in the Member States ‘is nothing more than an instrument for the achievement of a more important objective, namely, the *development of effective competition in the sector*, in the interests of establishing the fundamental freedoms in European integration.’³⁹ Second, when as hereby submitted, it is understood as the ‘translation’ or ‘specification’ of the competition objective consistently stressed by the ECJ case law, there seems to be limited need for a separate acknowledgement of the existence of the competition principle—as it is submitted that it logically follows or stems from the existence of the competition objective of public procurement directives, repeatedly emphasised in very clear terms.⁴⁰

In light of the above and as already pointed out, it seems clear that *the principle of undistorted or free competition has always formed a basic part of EU public procurement rules, that it constitutes one of its fundamentals, and that it offers a proper legal basis upon which to build the basic elements of a more pro-competitive public procurement system*. The boundaries of the competition principle, as developed prior to the approval of Directive 2014/24 will now be explored. A critical assessment of the consolidation of the principle in article 18(1) of Directive 2014/24 against that benchmark will follow (§III).

³⁵ Case C-538/07 *Assitur* [2009] ECR I-4219 25; Case C-412/04 *Commission v Italy* [2008] ECR I-619 2. See also Opinion of AG Trstenjak in Case C-271/08 *Commission v Germany* 94.

³⁶ Notably, in the Case C-247/02 *Sintesi* [2004] ECR I-9215, after having been presented with the very elaborate construction of the Opinion of AG Stix-Hackl in Case C-247/02 *Sintesi* (below §II.B).

³⁷ Remarkably, see Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233 76, where express reference is made to the *principle* of free competition. See also Case C-237/99 *Commission v France* [2001] ECR I-939 49; and Case T-258/06 *Germany v Commission* [2010] ECR II-2027 131.

³⁸ See the multiple references above n 31.

³⁹ Opinion of AG Ruiz-Jarabo Colomer in Case C-393/06 *Ing Aigner* 31 (emphasis added).

⁴⁰ *Contra* Arrowsmith (n 14) 32, who considers that ‘[i]t seems significant that while non-discrimination, transparency and equal treatment were written into the directives as general principles, [its] ‘competition’ provisions are confined to specific areas’.

B. Delimiting the Competition Principle Embedded in the pre-2014 EU Public Procurement Directives

According to its most elaborated construction so far—developed by Advocate General Stix-Hackl in her Opinion in the *Sintesi* case⁴¹—the competition principle embedded in the EU public procurement directives might seem to be multi-faceted and could potentially fulfil at least three protective purposes. First, it would be aimed at relations between undertakings themselves and would require that there exists parallel competition between them when they participate in the tendering for public contracts. Second, it would be concerned with the relationship between the contracting authorities and the tendering undertakings, in particular in order to avoid abuses of a dominant position—both by undertakings against the contracting authorities (ie, through the exercise of market or ‘selling’ power) and, reversely, by contracting authorities against public contractors (through the exercise of buying power). Third, the principle of competition would be designed to protect competition as an institution.⁴² Finally, as a complement to the previous functions or as an expression of the competition principle, EU public procurement directives set particular rules that operationalise the competition principle in different phases of the public procurement process—such as transparency rules, rules on technical specifications, provisions on the selection of undertakings and on the criteria for the award of contracts, information disclosure rules, etc.

Even if the approach followed by Advocate General Stix-Hackl is to be shared in general terms and the competition principle embedded in the EU public procurement directives is to be conceived of as an independent principle⁴³ and spelled out in broad terms, a closer examination seems to indicate that, of the three stated functions of the competition principle in the public procurement arena, only the latter is of distinguishing relevance. This is so because the other two stated functions of the competition principle are neither more nor less than the standard application of EU competition rules in the public procurement setting. On the one hand, article 101(1) TFEU requires parallel competition between undertakings not only when they respond to a call for tenders, but generally in any market situation. Moreover, the application of the general prohibition of collusive behaviour should not be any different here than in other markets—ie, the *de minimis* rule for agreements between competitors,⁴⁴ potential efficiency exemptions according to article

⁴¹ Opinion of AG Stix-Hackl in Case C-247/02 *Sintesi* 34–40.

⁴² This same concept of ‘competition as an institution’ has been referred to as the goal of art 102 TFEU; see Opinion of AG Kokott in Case C-95/04 P *British Airways* 125. See also Opinion of AG Ruiz-Jarabo Colomer in Joined Cases C-468/06 to C-478/06 *GlaxoSmithKline* 74 fn 49.

⁴³ Opinion of AG Léger in Case C-94/99 *ARGE* 95 fn 36.

⁴⁴ But see: Cabanes and Neveu (n 32) 32, who report that French domestic competition law—art L 464–6–1 of the Code du commerce—expressly excludes the applicability of the *de minimis* rule to agreements between undertakings when public contracts are affected. Arguably, this restriction of the *de minimis* regime—or, put differently, this expansion or toughening of the enforcement of the prohibition of art 101(1) TFEU in the field of public procurement could go against art 3(2) of Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 which requires that Member States completely align with EU competition law as regards collusive behavior. It is submitted that, in general terms, Member States cannot establish more demanding requirements for the enforcement of art 101(1) TFEU or their national equivalents in the field of public procurement and, consequently, all rules (including *de minimis*) need to be aligned with EU law. However, this is an issue that has been significantly blurred after the Case C-226/11 *Expedia* [2012] pub electr EU:C:2012:795. See also Communication from the

101(3) TFEU, block exemption regulations, and so forth are fully applicable to undertakings' developing activities in a public procurement context. On the other hand, and as long as the prohibitions of article 102 TFEU are applicable to tenderers or to contracting authorities,⁴⁵ the abuse of a dominant position will be proscribed and prosecuted exactly under the same circumstances in the public procurement arena as in any other type of market. Therefore, it is submitted that *only what has been termed 'protection of competition as an institution' constitutes the proper content for the competition principle embedded in EU public procurement law*—since currently there is no specific competition rule that develops that function with a general character (above chapter four, §V).

By 'protection of competition as an institution', it is submitted that direct reference is made to the general objective of the TFEU of guaranteeing a system ensuring that competition in the internal market is not distorted and, more generally, to the ensuing general principle of competition.⁴⁶ In my opinion, such a reference should currently be interpreted in relation to article 3(3) TEU, article 3(1)(b) TFEU and Protocol (27) TFEU⁴⁷—ie, EU public procurement directives should be conceived of and configured as a body of rules developed on the basis of the principle of undistorted competition in the internal market. Or, more clearly, it is submitted that *the competition principle embedded in the EU public procurement directives is no more and no less than a particularisation, or specific enunciation, of the more general principle of competition in EU law*. In this way, the relevance of the competition principle in the field of public procurement is stressed, since its inclusion amongst the basic principles of public procurement regulation seems to imply the existence of a stronger link of this body of regulation to this general principle of EU law than in the case of other regulatory bodies. It is submitted that placing the principle of competition at the basis of the EU public procurement rules reinforces its importance. The justification for this emphasis or reinforcement of the principle of competition in the sphere of public procurement can be found in the fact that EU public procurement rules were developed right from the beginning on the basis of the clear finding that they were necessary to create competition in a setting that initially suffered from an almost complete lack of it (above chapter three). Therefore, the clear competition objective guiding public procurement rules (above §II.A) and the ensuing obligation of contracting authorities to *protect* competition as an institution—if not to *develop* competition in the public procurement

Commission, Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union [2014] OJ C291/1, and Commission Staff Working Paper, Guidance on restrictions of competition 'by object' for the purpose of defining which agreements may benefit from the De Minimis Notice (SWD(2014) 198 final).

⁴⁵ AG Stix-Hackl correctly points out that this would be particularly the case of contracting authorities who must be classified as 'undertakings' for the purposes of competition law; see Opinion of AG Stix-Hackl in Case C-247/02 *Sintesi* 35. It is hereby recalled and stressed that this could be the case for all the other contracting authorities as well (see above chapter four).

⁴⁶ The reasoning would be analogous to that maintained by the EU judicature in relation to the principle of equal treatment, which 'has likewise explained that the principle of non-discrimination in public procurement is a specific enunciation of the eponymous general principle of Community law', Opinion of AG Sharpston in Case C-199/07 *Commission v Greece* 82. In that regard, see Case C-458/03 *Parking Brixen* [2005] ECR I-8585 48; and Case 810/79 *Überschär* [1980] ECR 2747 16. Along the same logical lines, it is hereby submitted that the principle of competition in public procurement is a specific enunciation of the eponymous general principle of EU law—see Case 240/83 *Waste oils* [1985] ECR 531 9, and other references quoted above n 25.

⁴⁷ See: Case C-95/04 P *British Airways* [2007] ECR I-2331 106 and 143. For discussion on the implications of the ratification of the Treaty of Lisbon, see above chapter four, §IV.D.

field—was synthesised in the principle of competition embedded in EU public procurement directives (and now consolidated in art 18(1) Dir 2014/24, below §III).

In furtherance to the above, it is worth emphasising that the competition principle embedded in EU public procurement directives has two dimensions. In its *positive dimension*, public procurement rules are guided by a fundamental competition principle in that they are designed to abolish protectionist purchasing practices by Member States that result in a segmentation of the internal market and, consequently, to foster transnational competition for public contracts, as well as increased domestic competition for the same contracts.⁴⁸ This has been the ‘classical’ or ‘narrow’ conception of the competition requirements and goals of EU public procurement rules—which has read the requirement to open public procurement up to competition as strictly requiring an increase in the number of bidders, mainly due to increased cross-border competition. This view is intrinsically related to non-discrimination requirements (particularly as regards discrimination on the grounds of nationality), and presents a strong link with the objective of market integration that has constantly informed the design and enforcement of EU public procurement directives (above chapter three, §IV.E). However, it is submitted that this positive approach to the competition principle does not comprise all its implications in the public procurement arena, since the principle requires promotion of undistorted competition in public procurement, not merely fostering bidders’ participation.

Possibly of a greater relevance—although so far less explored—is an envisageable *negative dimension* of the competition principle embedded in EU public procurement directives. From this perspective, competition requirements should be understood as determining that public procurement rules have to be designed and implemented in such a way that existing competition is not distorted.⁴⁹ In other words, it is submitted that public procurement rules cannot generate distortions in the dynamic competitive processes that would take place in the market in their absence. Or, even more clearly, public procurement rules must not distort competition between undertakings.⁵⁰ This fundamental competition principle embedded in the public procurement directives could be defined or phrased in these terms: *public procurement rules have to be interpreted and applied in a pro-competitive way, so that they do not hinder, limit, or distort competition. Contracting entities must refrain from implementing any procurement practices that prevent, restrict or distort competition.*

It is further submitted that this mandate must be considered a well-defined obligation to all Member States’ contracting authorities, and not a mere programmatic declaration of the EU public procurement directives. As has been rightly stressed, the evolution of the EU directives on public procurement has progressively reduced the area of discretion left to Member States,⁵¹ and consequently the general principles and mandates contained in the EU public procurement directives should suffice to constrain effectively Member

⁴⁸ This is the part of the competition requirement accepted both by Arrowsmith (n 14) and Kunzlik (n 14). However, both of them reject the second dimension of the principle as presented here.

⁴⁹ Again, as the ECJ has repeatedly declared, and AG Poiares Maduro stressed recently, the directives have the common aim of eliminating anti-competitive practices in public procurement; Opinion of AG Poiares Maduro in Case C-250/07 *Commission v Greece* 11 and 17, and other references above n 13.

⁵⁰ As already mentioned (above §II.A), this is clear, inter alia, from the fact that arts 29(7), 32(2), 33(7) and 54(8) Dir 2004/18/EC and arts 14(4), 15(7) and 56(9) Dir 2004/17/EC expressly prohibit contracting authorities from resorting to these types of contracts and procedures if that would result in a limitation or distortion of competition.

⁵¹ See: S Arrowsmith, ‘The Past and Future Evolution of EC Public Procurement Law: From Framework to Common Code?’ (2005–06) 35 *Public Contract Law Journal* 337, 338 and 352ff.

States' purchasing behaviour, or to substantiate a declaration of their breach of EU law if they behave otherwise. Hence, from this negative perspective, public procurement rules and practices need to be measured with the yardstick of the competition principle to ensure that they do not result in restrictions of competition or, in other terms, that they do not generate the effects that competition law seeks to prevent. In the end, as was clearly stated, 'the principle of competition is designed to protect competition as an institution.'⁵² This issue raises the need to clarify the relationship between 'general' EU competition law and the EU public procurement directives as a final step prior to the critical assessment of the formulation of the principle of competition in article 18(1) of Directive 2014/24.

C. The Link between the Competition Principle Embedded in the pre-2014 EU Public Procurement Directives and General EU Competition Law

It has already been mentioned that the principle of competition embedded in the EU public procurement directives makes direct reference to the basic TFEU objective of guaranteeing a system ensuring that competition in the internal market is not distorted and to the ensuing general principle of competition in EU law (above §II.B). Consequently, an apparent link between the competition considerations within the public procurement field and 'general' EU competition rules emerges—since both ultimately share the same goal and must be shaped in conformance with the same general principle. Hence, clarifying the nature of that relationship will prove helpful to gain a better understanding of the inter-relationships of public procurement and competition law, as well as a better understanding of the possibilities of pursuing parallel or simultaneous developments in both areas as regards the market behaviour of the public purchaser.

Apparently, this link could be configured as a relationship of speciality, by virtue of which public procurement could be conceptualised as *lex specialis* establishing the competition rules applicable in this sector of economic activity. However, it is submitted that this is not the proper understanding of the relationship that links public procurement and competition law together. First and foremost, the enforcement of public procurement law does not preclude the enforcement of competition law, it cannot alter the content or modify the prohibitions established by competition rules—which is one of the general traits present in bodies of rules tied together by a relationship of speciality (*lex specialis derogat legi generali*). Secondly, public procurement rules are generally open-ended and can potentially give rise to both competitive and anti-competitive results (see above chapter two and below chapter six). Consequently, they will often give rise to situations in which the protection of undistorted competition will require resorting to general competition rules and criteria. Finally, EU public procurement rules are not of a general character, but focus on a number of very specific phases of the tender and award process, as well as some limited aspects of the execution and termination of public contracts, which could be insufficient to rein in competition-distorting practices related to aspects not covered by the EU public procurement directives. Therefore, public procurement rules seem insufficient to become an *alternative* to competition rules and a different type of relationship

⁵² Opinion of AG Stix-Hackl in Case C-247/02 *Sintesi* 36.

seems more adequate to conceptualise properly the existing link between competition and public procurement.

In my opinion, competition and public procurement remain largely *complementary* and provide each other with useful interpretative criteria. Moreover, an adequate enforcement of each of these sets of economic regulation reinforces the effects of the other. On the one hand, a public procurement system properly based on the competition principle can complement current competition rules and tackle certain types of publicly-generated competition distortions that are not captured by current EU competition law (above chapter four). On the other hand, the criteria and tools of analysis usually applied in the enforcement of competition law can inform and guide the concrete application of the competition principle through more specific public procurement rules. Therefore, the competition principle embedded in public procurement directives should be understood as the necessary link for the approximation and consistent development of both sets of economic regulation, or as the gateway through which principles and criteria generally related to the protection of undistorted competition in ‘non-public’ markets (*rectius*, in relation with non-public buyers) can be brought to life in public procurement markets to discipline the purchasing behaviour of the public buyer (further details below, conclusions to part three).

III. The Principle of Competition Consolidated in Article 18(1) of Directive 2014/24: A Critical Assessment of the Interpretative Difficulties it Creates

As already mentioned, article 18(1) of Directive 2014/24 has now consolidated the *principle of competition* amongst the general ‘principles of procurement’ and clearly indicates that ‘[t]he design of the procurement shall not be made with the intention ... of artificially narrowing competition’ and that ‘competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators’. In my view, this is an incremental step in the pro-competitive approach to the regulation of EU public procurement and it follows to a large extent the proposal advanced in the first edition of this book.⁵³ It is true that the wording of this provision could have been clearer and that there are significant interpretative questions that need being addressed (which will be explored shortly), but it should be acknowledged that article 18(1) of Directive 2014/24 stresses the relevance of competition considerations in the public procurement setting across the board and provides an interpretative tool that is likely to further develop the pro-competitive orientation of the system of EU public procurement rules in the coming years. In my view, this is a truly welcome development, and not only because it clearly supports the ideas and approach developed in the first edition of this book and now further refined in this second edition.

⁵³ It should also dispel at least part of the criticism that such a proposal received, particularly from Arrowsmith (n 14) 32.

That being said, it is quite evident that article 18(1) of Directive 2014 creates two sources of interpretative difficulty. Firstly, it promotes the conflation of competition and corruption issues related to unequal treatment by setting an irrebuttable presumption of competition distortion where discrimination has taken place (§III.A). Secondly, article 18(1) of Directive 2014/24 provides a formulation of the principle of competition that includes a subjective element by requiring that there be an *intention* to artificially narrow competition (§III.B). An excessively formal interpretation of these new elements could run the risk of deactivating and neutralising the principle of competition. At the other extreme, an excessively lenient interpretation of the principle could result in an improper test of proportionality or reasonableness of the procurement decisions taken by the contracting authorities. And, in any case, a divergent interpretation of the principle and its requirements in different Member States could result in distortions of the level playing field for the enforcement of the EU public procurement directives.

Therefore, this section tackles both of these interpretative difficulties and aims to propose an interpretation that results in an *effective* tool for the shaping of a competition-oriented procurement system around the general principle of competition. It is important to stress that, in any case, the interpretation of the principle should comply with the general requirements derived from the (pre)existence of competition as a general principle of EU law⁵⁴ and the limits imposed by article 4(3) TEU on the adoption of any sorts of state activity that may diminish the *effet utile* of the competition rules in articles 101 to 109 TFEU (see chapter four).

A. The Problematic Conflation of Competition and Corruption Issues Related to Unequal Treatment

As briefly mentioned, the first interpretative difficulty derives from the fact that, by setting a presumption that competition is ‘artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators’, article 18(1) of Directive 2014/24 exacerbates the potential difficulties in disentangling competition and corruption and non-discrimination considerations. Before engaging in any other considerations, it is worth remembering that this presumption of distortion of competition did not exist in the original text of the 2011 proposal of the European Commission for a new procurement directive, which clearly separated competition and discrimination issues by clearly stating that

Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate way. *The design of the procurement shall not be made with the objective of excluding it from the scope of this Directive or of artificially narrowing competition.*⁵⁵

⁵⁴ See Case 240/83 *Waste oils* [1985] ECR 531 9; Case 249/85 *Albako* [1987] ECR 2345 16; Case C-126/97 *Eco Swiss* [1999] I-3055 36–37; and Case C-453/99 *Courage and Crehan* [2001] ECR I-6297 20–21. And further references in n 25 above.

⁵⁵ See European Commission, *Proposal for a Directive of the European Parliament and of the Council on public procurement* (COM(2011) 0896 final), art 15 (emphasis added), available at eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52011PC0896.

This formulation, which would have avoided all problems derived from the conflation of different issues related to the enforcement of the principle of equal treatment and the principle of competition (as advocated here, below §V), evolved during the negotiations of what ended up being Directive 2014/24 and, in a compromise text of July 2012, was drafted in a way that suppressed the principle of competition from the equivalent provision and, instead, included provisions more clearly oriented towards the fight of corruption and the prevention of discrimination:

Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner that *avoids or remedies conflicts of interest and prevents corrupt practices*. The design of the procurement shall not be made *with the intention of excluding it from the scope of this Directive or of unduly favouring or disadvantaging certain economic operators or certain works, supplies or services*.⁵⁶

Negotiations continued and, in the end, in the compromise text of July 2013 that fundamentally crystallised the text of what is now Directive 2014/24, the general principles had been redrafted in a way that reintroduced the principle of competition, minimised the references to corrupt practices and conflicts of interest, and created the ‘hybrid’ presumption of distortion of competition based on unequal treatment that now remains in article 18(1) of Directive 2014/24:

Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner. *The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement was made with the intention of unduly favouring or disadvantaging certain economic operators*.⁵⁷

Leaving aside the substitution of the element of ‘intention’ for the previous mention of the existence of an ‘objective’ to artificially narrow competition or unduly discriminate (below, §III.B), it is worth stressing that the presumption of competitive distortion based on ‘unduly favouring or disadvantaging certain economic operators’ seems to be a result of the deficient legislative technique that plagues EU legislation.⁵⁸

Not surprisingly, this presumption raises a potential problem of (logical) ‘capture’ for the interpreters of this rule, as they may be tempted to consider that in the absence of (undue!) favouritism or corruption, no restrictions on competition are contrary to the precept—that is, they can be inclined to decide not to apply the ‘residual’ or ‘general’ part of the prohibition and limit it exclusively to cases covered by the presumption. Additionally, while it is true that most cases of favouritism or corruption will result in a restriction of competition, this is not always necessarily the case. For example, in cases where the beneficiary of favouritism could be awarded the contract under competitive conditions, or in cases in which corrupt practices are added to previous restrictions of competition created by the bidders active in the market; it could be argued that there is no

⁵⁶ See the Council compromise text of 24 July 2012 (2011/0438 (COD)) art 15 (emphasis added), available at register.consilium.europa.eu/doc/srv?l=EN&f=ST%2012878%202012%20INIT.

⁵⁷ See the Council compromise text of 12 July 2013, art 15 (emphasis added), available at europarl.europa.eu/document/activities/cont/201309/20130913ATT71292/20130913ATT71292EN.pdf.

⁵⁸ For a critical reflection on this not so new problem, see H Xanthaki, ‘The Problem of Quality in EU Legislation: What on Earth Is Really Wrong?’ (2001) 38 *Common Market Law Review* 651–76.

(independent) restriction of competition and, therefore, that the presumption is unnecessary or unjustified.

In any case, it is worth stressing that some of the instances of favouritism included in the irrebuttable presumption would (also) be covered by the new rules relating to conflicts of interest envisaged in article 24 of Directive 2014/24 (which requires Member States to ‘ensure that contracting authorities take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures *so as to avoid any distortion of competition* and to ensure equal treatment of all economic operators’ emphasis added), and can even fit into one of the headings of mandatory exclusion of tenderers and candidates in article 57(1)(b) for corruption, as supplemented by the obligation to terminate the contract under article 73(b) of Directive 2014/24 (see chapter six). Therefore, the establishment of the presumption of anti-competitive intent in cases of favouritism or discrimination is, in my opinion, unnecessary and may be counterproductive.

Ultimately, it will be necessary for the bodies responsible for the implementation of these provisions to clearly distinguish instances of corruption from those of (simple) restriction of competition and, in the latter scenario, apply the first part of the principle of competition in an ‘objectified’ manner (as advocated below §III.B). The difficulties in disentangling competition concerns from other sort of breaches of the principle of non-discrimination are also further discussed below (§V), but suffice it to indicate here that the establishment of this presumption should not affect the interpretation of the more general principle of competition, as it simply specifies one of the potential situations in which competition can be distorted.

B. The Introduction of a Subjective Element of ‘Intention’ and the Need to ‘Objectify’ It

As also mentioned in passing, the second interpretative difficulty derives from the substitution of ‘objective’ elements with ‘intentional’ requirements in the drafting of the principle of competition during the legislative process leading up to the approval of Directive 2014/24. Remarkably, and with potentially larger implications for a limited interpretation and application of the principle of competition, article 18(1) of Directive 2014 has included an *apparently subjective element of intention in the generation of an artificial reduction of competition*.

Indeed, as already mentioned, article 18(1) of Directive 2014/24 provides a formulation of the principle of competition in which the subjective or intentional element of any restriction of competition is emphasised: ‘The design of the procurement shall not be made *with the intention of ... artificially narrowing competition*’ (emphasis added). This intentional element is common to different language versions of the Directive (‘*intención*’ in Spanish, ‘*intention*’ in French, ‘*intento*’ in Italian, ‘*intuito*’ in Portuguese or ‘*Absicht*’ in German), so cannot be justified as a deficiency in translation or an error in the wording of the provision. However, the recitals of the directive do not provide any clarification and, ultimately, this provision can open the door to complex problems of identification and attribution of intentional elements in the field of public procurement—or, more generally, in administrative (economic) law.

In my opinion, if it was to be carried out with the purpose of preserving the subjective or intentional element derived from a literal reading of the provision, this very complex task could require establishing the parameters by which a decision that often involves various individuals (and potentially several administrative bodies) is considered affected by an underpinning anti-competitive (or discriminatory) intention. In fact, this task is virtually impossible. Given that the traditional mechanisms of allocation of subjective factors in (administrative) disciplinary or criminal law are not easily (or at all) applicable to this sort of decision-making processes, this clearly requires an ‘objectifying’ reinterpretation of the intentional element in the provision. As has rightly been pointed out, not only in public procurement but more generally, ‘important decisions within the spheres of economic and social law are taken by governments, companies or other collective or non-natural decision-makers. To speak of the ‘intent’ of such bodies is to run the risk of anthropomorphism’; and, consequently, ‘it is more common to understand economic and social EU law in terms of effects.’⁵⁹ This is the point departure undertaken here.⁶⁰

In short, and bearing all these issues in mind, it is submitted that the only avenue to approach the interpretation and enforcement of article 18(1) of Directive 2014/24 in a *possibilistic and pragmatic manner* is to derive the element of intention to restrict or distort competition (ie, to artificially narrow it) from a *reasonable objective assessment of the concurring circumstances, so that intention is inferred or derived from the effects or consequences of the way in which the procurement procedure is designed and carried out by the contracting authority*. In the end, the context in which the distortions or restrictions of competition take place will be a determinant of their existence and little else identifiable can give meaning to the (implicit) intention of the contracting authority to artificially narrow down competition.

Generally, it is worth stressing that the reasons for the ‘objectification’ of the wording of article 18(1) of Directive 2014/24 are multiple and derived mainly from the need for coordination of this new rule with some of its ‘functional neighbours’. Remarkably, such coordination should take into account the objective character of the restrictions of competition derived from the TFEU and its interpretation by the ECJ. Indeed, the prohibitions in articles 101 and 102 TFEU apply in abstraction from any volitional element of the offending parties—that is, undertakings infringing competition law can be sanctioned without them having ‘an intention actually to violate’ the applicable rules,⁶¹ and the EU Courts have repeatedly upheld that

for an infringement of the competition rules to be regarded as having been committed intentionally, it is not necessary for an undertaking to have been aware that it was infringing those rules;

⁵⁹ G Davies, ‘Discrimination and beyond in European Economic and Social Law’ (2011) 18 *Maastricht Journal of European & Comparative Law* 7, 13–14.

⁶⁰ This discussion is somehow related to the issue of imputation of criminal liability to corporate entities or, more closely, the imputability of infringements of competition law. On the latter, see WPJ Wils, *The Optimal Enforcement of EC Antitrust Law. Essays in Law & Economics* (London, Kluwer Law International, 2002) 163–87; id, *Efficiency and Justice in European Antitrust Enforcement* (Oxford, Hart Publishing, 2008) 157; and P Whelan, *The Criminalization of European Cartel Enforcement* (Oxford, Oxford University Press, 2014) 86–9 and 108–13. On the imputation of criminal liability to corporate entities, see eg A Foerschler, ‘Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct’ (1990) 78(5) *California Law Review* 1287–311; and CMV Clarkson, ‘Kicking Corporate Bodies and Damning Their Souls’ (1996) 59(4) *Modern Law Review* 557–72.

⁶¹ Whelan (n 60) 86.

it is sufficient that it could not have been unaware that its conduct was aimed at restricting competition.⁶²

Hence, a competitive restriction in the market (almost) automatically results in a violation of those prohibitive norms, irrespective of the *actual* intention with which market players have conducted the practice restrictive of competition.⁶³ The only exception will come where there was clearly no negligence in the oversight of the competition-restricting effects of the given market activity.⁶⁴ In that regard, and trying to achieve consistent enforcement standards, it is submitted that the objectification of article 18(1) of Directive 2014/24 seems the most appropriate functional solution—but, it should be acknowledged, it can be seen as lying some distance away from a literal interpretation of the provision.

However, it is submitted that such an objectification of ‘intentional element’ in article 18(1) of Directive 2014/24 would not be a new or radical approach in the field of public procurement or, more generally, in the enforcement of EU economic law.⁶⁵ Indeed, there have been other sorts of prohibition in the public procurement setting that included an ‘intentional element’, such as the traditional prohibition of calculating the value of the contract in a way that made it remain below the value thresholds that trigger the application of the EU public procurement directives and, ultimately, allowed the contracting authority to avoid them. Indeed, under the applicable rules, it is made clear that ‘[t]he choice of the method used to calculate the estimated value of a procurement shall not be made *with the intention* of excluding it from the scope of this Directive’ (emphasis added) and, in particular, that a ‘procurement shall not be subdivided with the effect of preventing it from falling within the scope of this Directive, unless justified by objective reasons’ (see art 5(3) of Dir 2014/24 and, previously, art 9(7) Dir 2004/18).

In that regard, it is important to stress that the ECJ departed from the literal wording of the provision, which requires an intentional element in the same way as article 18(1) of Directive 2014/24, and clearly adopted an objective assessment based on the effects and consequences of the contracting authorities’ decisions concerning the estimation of the value of contracts that should have been tendered under the applicable EU rules. In a consistent line of case law, the ECJ stressed that the analysis needs to be based on objective elements that create *indicia* of the intentional artificial split of the contract, such as ‘the simultaneous issuance of invitations to tender ... similarities between contract notices, the initiation of contracts within a single geographical area and the existence of a single

⁶² Case T-143/89 *Ferriere Nord v Commission* [1995] ECR II-917 41. This has been repeatedly emphasised. Most recently, in Case T-11/06 *Romana Tabacchi v Commission* [2011] ECR II-6681 227.

⁶³ This is related to the issue of the prohibitions of restrictions of competition by object. For a recent discussion, see Commission Staff Working Paper, Guidance on restrictions of competition ‘by object’ for the purpose of defining which agreements may benefit from the De Minimis Notice (SWD(2014) 198 final). See also A Jones, ‘Left Behind by Modernisation? Restrictions by Object Under Article 101(1)’ (2010) 6(3) *European Competition Journal* 649–76; D Bailey, ‘Restrictions of Competition by Object under Article 101 TFEU’ (2012) 49(2) *Common Market Law Review* 559–99; and G Bushell and M Healy, ‘Expedia: The De Minimis Notice and “By Object” Restrictions’ (2013) 4(3) *Journal of European Competition Law & Practice* 224–26.

⁶⁴ Case C-26/75 *General Motors v Commission* [1975] ECR 1367.

⁶⁵ Indeed, in the area of indirect discrimination, the ECJ was quick to abandon the requirement of intent in order to find breaches of EU economic law. See Case 170/84 *Bilka v Weber von Hartz* [1986] ECR 1607 30, where the ECJ made it clear that the relevant test was whether ‘the undertaking is able to show that its pay practice may be explained by *objectively justified factors* unrelated to any discrimination’ (emphasis added). See D Schiek, ‘Indirect Discrimination’, in id, L Waddington and M Bell, *Non-Discrimination Law* (Oxford, Hart Publishing, 2007) 323, 356–57.

contracting authority' all of which 'provide additional evidence militating in favour of the view that, in actual fact, the separate works contracts relate to a single work,'⁶⁶ which led the GC to stress that

a finding that a contract has been split in breach of European Union procurement legislation *does not require proof of a subjective intention* to circumvent the application of the provisions contained therein. ... Where such a finding has been made, as in the present case, *it is irrelevant whether the infringement is the result of intention or negligence* on the part of the Member State responsible, or of technical difficulties encountered by it.⁶⁷

Indeed, the intentional element has been excluded where, on the basis of such analysis, there were *objective reasons* that justified the decision adopted by the contracting authority.⁶⁸ Moreover, the prohibition of artificially splitting the contract with the intention of circumventing the application of the EU procurement rules has been applied directly to determine the incompatibility of legal rules that objectively diminished the applicability of the relevant directives, without engaging in any sort of subjective assessment (which would have been impossible).⁶⁹ Therefore, it seems plain to conclude that in the assessment of an identical (apparent) subjective element of intention, the ECJ has 'objectified' the test applicable to determine the existence of an eventual infringement of the EU public procurement directives.

It is true that the ECJ has not gone as far as simply presuming the existence of the intention to avoid the applicability of the EU procurement directives in all cases. As aptly put by Advocate General Trstenjak:

Although the Court is decidedly strict in its examination of that prohibition, such intention to circumvent cannot be presumed without more. Each individual case in which a contract was split for the purposes of an award *must be examined according to its context and specificities and, in that regard, particular attention must be given to whether there are good reasons* pointing in favour of or, on the contrary, against the split in question.⁷⁰

Broadly speaking, in my opinion and in line with the test derived from the ECJ case law, the 'objectification' of the principle of competition consolidated in article 18(1) of Directive 2014/24 should indeed be carried out by establishing a *rebuttable presumption of restrictive intent* in cases where the tendering procedure has been designed in a manner that is in fact restrictive of competition. The disproval of this rebuttable presumption would require the contracting authority or entity to justify the existence of objective, legitimate and proportionate reasons for the adoption of the criteria restrictive of competition (ie, to provide a plausible justification on objective grounds for the imposition of restrictive conditions of

⁶⁶ As stressed very recently, see Case T-384/10 *Spain v Commission* [2013] pub electr EU:T:2013:277 65–68 (appeal pending, Case C-429/13 P), with references to Case C-16/98 *Commission v France* [2000] ECR I-8315; Joined Cases C-187/04 and C-188/04 *Commission v Italy* [2005] pub electr EU:C:2005:652; Case C-220/05 *Auroux and Others* [2007] ECR I-385; and Case C-574/10 *Commission v Germany* [2012] pub electr EU:C:2012:145.

⁶⁷ Case T-384/10 *Spain v Commission* [2013] pub electr EU:T:2013:277 95 (emphasis added); with reference to Case C-574/10 *Commission v Germany* [2012] pub electr EU:C:2012:145 49, and Case C-71/97 *Commission v Spain* [1998] ECR I-5991 15.

⁶⁸ Case C-411/00 *Swoboda* [2002] ECR I-10567 57–60.

⁶⁹ Case C-412/04 *Commission v Italy* [2008] ECR I-619 72–74.

⁷⁰ Opinion of AG Trstenjak in Case C-271/08 *Commission v Germany* 165 (emphasis added and references omitted). Cf Opinion of AG Jacobs in Case C-16/98 *Commission v France* 38, where the AG stressed that the intentional or subjective element cannot be eliminated, but suggested that the applicable test still lies on whether the decision under assessment can be 'justified on objective grounds'.

competition in tendering the contract, so as to exclude the plain and simple explanation that it was otherwise indeed intended to restrict competition therewith).⁷¹ In other words, if it could be justified that a ‘reasonable and disinterested contracting entity’ (meaning free from any intent to restrict competition) would have taken the same decision on the design of the tender in a form restrictive of competition, the presumption of restrictive intent would not be applicable and, ultimately, the tender would be compliant with article 18(1) of Directive 2014/24. Obviously, this test requires some further development and the ECJ will most likely have the opportunity to address these issues in the future.

C. Preliminary Conclusion: Towards an Objective Interpretation of the Principle of Competition as Consolidated in Article 18(1) of Directive 2014/24

By way of preliminary conclusion, in view of all the above, it is submitted that the consolidation of the principle of competition in article 18(1) of Directive 2014/24 should be welcomed, but its wording requires two major adjustments designed to ensure its functionality. Firstly, it is necessary to objectify the interpretation and application of the provision and, in my opinion, this should be done by establishing a rebuttable presumption of competition-restrictive intent based on a *reasonable objective assessment of the concurring circumstances*, so that intention is inferred or derived from the consequences and effects of the way in which the procurement procedure is designed and carried out by the contracting authority. In other words, the test should be limited to assessing whether the restriction of competition can be *justified on objective grounds and whether the restriction of competition is proportionate* to the alternative aim pursued by the contracting authority. Moreover, the irrebuttable presumption of restriction of competition in cases of favouritism or corruption should be interpreted as not being exhaustive and should not prevent the widespread application of the (not necessarily residual) general test of competitive restraint in the absence of (clear) discrimination (as further discussed below, §V).

Ultimately, it is hereby submitted that an objective interpretation of the principle of competition consolidated in article 18(1) of Directive 2014/24 is still compatible with the broadest formulation hereby advocated, according to which *public procurement rules have to be interpreted and applied in a pro-competitive way, so that they do not hinder, limit or distort competition. Contracting entities must refrain from implementing any procurement practices that prevent, restrict or distort competition* (above §II.B), provided that the requirements of the principle of competition are combined with those of the principle of proportionality (as further discussed below §V.B). In the end, that is the only way in which distortions of competition that are not susceptible of *justification on objective grounds* can be avoided.

⁷¹ Similarly, this was the interpretation presented by the Commission when the rule preventing the artificial split of contracts was first assessed; see European Commission, *Guide to the Community Rules on Public Works Contracts other than in the Water, Energy, Transport and Telecommunications Sectors (Directive 93/37/EEC)* (1993) 17, available at ec.europa.eu/internal_market/publicprocurement/docs/guidelines/works_en.pdf.

IV. Implications of the Competition Principle for the Shaping of Public Procurement Rules by Member States: The General Obligation to Develop a Pro-Competitive Public Procurement Framework

Once the competition principle embedded in the EU public procurement directives has been spelled out and configured as a specification of the more general principle of competition in EU law (above §II), and leaving aside for now the interpretative difficulties that the specific wording of article 18(1) of Directive 2014/24 creates (above §III), it will be useful to explore the consequences that it has in the shaping of public procurement rules and practices, both at the EU and Member State level. The main implication of the fundamental principle of competition embedded in the EU public procurement directives is that anti-competitive public procurement regulations and practices not only constitute a potential breach of EU competition law (see above chapter four), but are also in breach of the EU public procurement directives themselves. This implication of the pro-competitive mandates of the directives is of major relevance, as it will expand the enforcement possibilities and the remedies available to fight against competition-restrictive public procurement, particularly before the courts and the administrative bodies of the Member States entrusted with the review of bid protests and the appeals against the decisions made by their contracting authorities.

It is submitted that the following effects unroll from the recognition of the competition principle in the EU public procurement system: First, the competition principle becomes a rule of self-construction for the interpretation of the EU public procurement directives (§III.A). Second, the competition principle restricts the options potentially available to Member States in the transposition of EU public procurement directives (§III.B) and becomes one of the basic yardsticks and criteria for the interpretation and construction of Member States' domestic public procurement legislation (§III.C). Third, together with the principle of equality or non-discrimination and the ensuing transparency obligations, the competition principle is to be integrated in the core group of basic principles that extend their effects and impose obligations regarding public procurement not covered by the public procurement directives (§III.D). Finally, the competition principle becomes a residual criterion for construction or development of public procurement systems in cases currently not covered by either EU or domestic rules (§III.E).

This section focuses on each of these effects in turn, and places particular emphasis on the effects of the competition principle for the consistent interpretation and construction of Member States' public procurement legislation in conformity with this principle—as this effect can be of the greatest importance and can contribute the most to developing a more pro-competitive public procurement system. In this regard, it is submitted that, even if more general rules of interpretation could be applicable—such as teleological interpretation of public procurement rules in accordance with the general EU law principle of competition⁷²—the existence of the more specific competition principle embedded in the

⁷² In very broad terms, K Riesenhuber has held that 'all European legislative actions aim at the harmonisation of laws, the abolition of obstacles to competition and the realisation of the internal market. In addition, there are more specific objectives ... in the case of conflict among the different ways of interpretation, the teleological

EU public procurement directives and the obligation of Member States to guarantee the ensuing consistent interpretation of their domestic public procurement rules seem to provide *closer* or *more specific* legal tools for the development of a more competition-oriented public procurement system.⁷³ Hence, recourse to more general methods of interpretation and construction will only be had where the more specific principles and rules of legal construction adapted to the purchasing activities conducted under the public procurement directives do not apply (§III.D), as a matter of *residual* interpretation (§III.E).

A. The Competition Principle as a Rule of Self-Construction for EU Public Procurement Directives

Even if the practical effects of the competition principle on the interpretation of the EU public procurement directives *themselves* can be relatively small—as litigation in this field will largely be based on the interpretation and application of domestic public procurement legislation (which fails to transpose, transposes improperly, or simply violates the mandates of the directives); it should be stressed that the recognition of the competition principle embedded in the public procurement directives expands the possibilities of challenging anti-competitive or restrictive rules contained in the directives themselves (if any), inasmuch as the general principle of competition embedded therein is to be recognised as a *rule of self-construction*.

By this, the aim is to stress that a pro-competitive construction of the EU public procurement directives is not only a mandate of its teleological interpretation in the light of the general principle of competition in EU law but, more specifically, a requirement of systematic interpretation of these legal statutes⁷⁴—since the competition principle forms part of the EU public procurement directives themselves (ie, is a ‘built-in’ rather than an ‘external’ principle and criterion for their interpretation). Therefore, it is submitted that, should EU public procurement directives contain a competition restrictive or distortionary rule, it shall be repealed—or, in laxer terms, be (re)interpreted—according to the mandates of systematic interpretation of EU directives.

In this regard, it should be recalled that any public procurement rule contained in the EU directives on public procurement might be the object of both direct and indirect challenge procedures under articles 263 and 267 TFEU (ex arts 230 to 234 TEC)—although

approach prevails over the other methods’, quoted in C Hofmann, ‘Report on the Conference on European Methodology’ (2005) 1 *European Review of Contract Law* 384.

⁷³ A similar line of reasoning led the ECJ to determine that, where a matter is regulated in a harmonised manner at EU level, any national measure relating thereto must be assessed in the light of the provisions of that harmonising measure instead of the articles of the TFEU on which the harmonising measure is founded; see Case C-37/92 *Vanacker and Lesage* [1993] ECR I-4947 9; and Case C-324/99 *DaimlerChrysler* [2001] ECR I-9897 32. Indeed, as a matter of legal technique or methodology and in general terms, a criterion of *specificity* seems desirable in the selection of the construction rules and guiding principles as to how to undertake the task of interpretation of EU law. The basic assumption behind this option is that the *more closely related* the rules and the principles for their interpretation, the greater are the possibilities of identifying useful operative criteria and potential inconsistencies.

⁷⁴ The importance of systematic interpretation—as a complement or, sometimes, as an overriding consideration to grammatical or literal interpretation—has been recently stressed in the field of public procurement by the Opinion of AG Verica Trstenjak in Case C-324/07 *Coditel Brabant* 73. See also Opinion of AG Poiares Maduro in Case C-64/05 P *Sweden v Commission* 48.

it must be acknowledged that this possibility may be of particular relevance in relation to incidental challenges under article 267 TFEU;⁷⁵ and may be more specifically in those cases where (vertical) direct effect of provisions of the EU public procurement directives is sought against Member States' contracting authorities.⁷⁶

B. The Competition Principle and the Transposition of the EU Directives on Public Procurement by Member States

What is possibly even more relevant is that this basic principle on which the EU directives on public procurement are founded must inform the decisions that Member States make when adopting the national legislation and regulations that transpose the directives to their domestic legal order—and, as argued, this principle seems to impose a more binding obligation than the general teleological interpretation of all those rules in accordance with the general principle of competition in EU law. Therefore, where Member States have discretion to adopt one amongst several solutions for the transposition of the directives, they will be in breach of EU public procurement law if they do not opt for procompetitive solutions—or, more clearly, if they adopt solutions that restrict competition or limit access to procurement.

It is to be recalled here that, even if directives allow for a certain degree of flexibility in the design of specific legal solutions for their transposition, they are binding on Member States as regards the results to be achieved with their transposition (art 288 TFEU, ex art 249 TEC). Consequently, if one of the basic goals or expected results (and, hence, one of the fundamental principles of the EU directives on public procurement) is the promotion of pro-competitive public procurement rules and practices (as a specification or particularisation of the general principle of competition, above §II), all regulatory measures adopted by Member States that depart from this pro-competitive approach will run contrary to this basic objective and will be in breach of EU law due to the improper transposition of the EU directives on public procurement. In that case, the traditional remedies at EU level—ie, infringement proceedings against the Member State on the basis of articles 258 to 260 TFEU (ex arts 226 to 228 TEC) will be available and could be enforced by the Commission;⁷⁷ and, if the requirements established by the ECJ case law are met, this could result in the Member State being held liable for a breach of EU law.⁷⁸

In this regard, it is important to stress that, even when legislation properly transposes EU directives, the enforcement activities of the Commission can also capture ensuing administrative practices that infringe EU law, at least in circumstances where the practice

⁷⁵ Indeed, it has been rightly held that an individual may attack, by way of incidental challenge, the validity of an EU measure before a national court on the grounds of infringement of the general principles. In this respect, see *Tridimas* (n 25) 35–38. More generally, on the importance of art 267 TFEU (ex art 234 TEC) in the field of competition law, see BJ Rodger (ed), *Article 234 and Competition Law: An Analysis* (Alphen aan den Rijn, Kluwer Law International, 2008) 3–9.

⁷⁶ On the issue of the direct effect of the EU public procurement directives, see *Trepte* (n 3) 531–40.

⁷⁷ On the enforcement of EU public procurement directives by the Commission, see *Trepte* (n 3) 578–90.

⁷⁸ On the subsequent state liability for breach of EU Law, see *Tridimas* (n 25) 498–547, esp 509–12; and N Reich, *Understanding EU Law: Objectives, Principles, and Methods of Community Law*, 2nd edn (Antwerpen, Intersentia, 2005) 321–29.

in question is persistent and general⁷⁹—ie, systematic or general anti-competitive public procurement practices can be the object of an infringement procedure against a Member State even if the EU directives on public procurement are formally correctly transposed into the state's domestic legal order (subject to an analysis of the dimensions of scale, time and seriousness of the practice in question).⁸⁰ Therefore, the relevance of the competition principle is not limited to the *strict* transposition of the EU directives by Member States, but extends to the development of ensuing public procurement practices that could generate anti-competitive effects in the affected markets—which, it is submitted, has wider practical relevance and implications.

C. The Competition Principle and the Consistent Interpretation of Domestic Public Procurement Legislation

As has been briefly mentioned, the effects of the competition principle embedded in the EU public procurement directives can be expected to be most significant as regards the consistent interpretation and construction of Member States' domestic procurement legislation. It is submitted that this is so because the interpretation of domestic legislation according to the EU rules does not only take place shortly after the passing of those rules (as should be the case of their transposition or implementation, which is theoretically a one-shot event expected to take place shortly after the adoption of the directive and within a specified time limit) but extends for a long period of time (or, at least, throughout the validity period of the EU rules). Therefore, the interpretation and construction of domestic public procurement legislation in a manner consistent with the principle of competition embedded in the EU public procurement directives could become the *prime* enforcement mechanism for competition considerations in the public procurement field. In order properly to appraise the extent of these potential effects, the doctrine of consistent interpretation developed by the EU judiciary will be summarily reviewed and, then, specifically applied to public procurement rules.

i. Consistent Interpretation as a Rule of Construction of EU Law

The EU judiciary has clearly established a general obligation for Member States to interpret and to enforce national legislation (particularly if it is adopted in transposition of EU directives) according to the principles of the TFEU and other principles and basic

⁷⁹ See: Case C-494/01 *Commission v Ireland* [2005] ECR I-3331 27–28 and 129–33; Case C-278/03 *Commission v Italy* [2005] ECR I-3747 13; Case C-441/02 *Commission v Germany* [2006] ECR I-3449 47; Case C-342/05 *Commission v Finland* [2007] ECR I-4713 22; and Case C-489/06 *Commission v Greece* [2009] ECR I-1797 46. As regards the requirements applicable to the finding of the existence of an administrative practice in breach of EU law (ie, that the administrative practice must be, to some degree, of a consistent and general nature), see Case C-287/03 *Commission v Belgium* [2005] ECR I-3761 28; and Case C-156/04 *Commission v Greece* [2007] ECR I-4129 50. See also P Craig and G de Búrca, *EU Law: Texts, Cases and Materials*, 4th edn (Oxford, Oxford University Press, 2007) 447.

⁸⁰ For an analysis in the public procurement setting see Case C-489/06 *Commission v Greece* [2009] ECR I-1797 48–56; and Opinion of AG Mazák in Case C-489/06 *Commission v Greece* 37ff. See also P Wennerås, 'A New Dawn for Commission Enforcement under Articles 226 and 228 EC: General and Persistent (GAP) Infringements, Lump Sums and Penalty Payments' (2006) 43 *Common Market Law Review* 31, 47–50.

objectives of EU rules.⁸¹ According to this *principle of consistent interpretation* (harmonious interpretation, convergent construction or *interprétation conforme*) and as a ramification of the positive duties imposed by the TFEU Member States' courts and authorities⁸² are to interpret national law so as to ensure that the objectives of the directives are achieved and that national law is consistent with the relevant provisions of EU law—hence, giving it *indirect effect* through the interpretation and enforcement of domestic law.⁸³

In other words, in applying national law—and, in particular, the provisions of a law specifically passed in order to transpose and implement a given directive (regardless of whether it properly or improperly transposes it into domestic legislation), national courts and authorities are required, as far as possible, to interpret the national law (whether adopted before or after the directive) in the light of the wording and the purpose of the

⁸¹ The same obligation exists as regards public international law and its application by the domestic courts of the states that signed the different treaties; G Betlem and A Nollkaemper, 'Giving Effect to Public International Law and European Community Law before Domestic Courts. A Comparative Analysis of the Practice of Consistent Interpretation' (2003) 14 *European Journal of International Law* 569, 571.

⁸² On the extension of these duties not only to national courts, but also and notably to national authorities, see J Temple Lang, 'The Duty of National Courts under Community Constitutional Law' (1997) 22 *European Law Review* 3; id, 'The Duty of National Authorities under European Constitutional Law' (1998) 23 *European Law Review* 109, 114; Tridimas (n 25) 44–47; and JH Jans et al, *Europeanisation of Public Law* (Groningen, Europa Law Publishing, 2007) 111–12. The basis of these obligations was established in Case C-80/86 *Kolpinghuis* [1987] ECR 3969 12.

⁸³ This is the wording of the principle of consistent interpretation, as introduced in Case 14/83 *Von Colson and Kamman* [1984] ECR 1891 26; and Case 79/83 *Harz* [1984] ECR 1921 26. The principle was crystallised in Case C-106/89 *Marleasing* [1990] ECR I-4135 8 and 13; and Case C-334/92 *Wagner Miret* [1993] ECR I-6911 20. This approach has been consistently held by the ECJ; see Case C-76/97 *Tögel* [1998] ECR I-5357 25; Case C-62/00 *Marks and Spencer* [2002] ECR I-6325 24; and Case C-371/02 *Björnekulla* [2004] ECR I-5791 13. Specifically in the field of public procurement, see Case 103/88 *Costanzo* [1989] ECR 1839 28–33; and, more recently, Case C-357/06 *Frigerio Luigi* [2007] ECR I-12311 28–29; and Joined Cases C-147/06 and C-148/06 *SECAP* [2008] ECR I-3565 22. See also S Prechal, *Directives in European Community Law. A Study of Directives and Their Enforcement in National Courts* (Oxford, Clarendon, 1995) 200–45 and 2nd completely revised edn (Oxford, Clarendon, 2005) 180–215; D Anderson, 'Inadequate Implementation of EEC Directives: A Roadblock on the Way to 1992?' (1988) 11 *Boston College International and Comparative Law Review* 91, 101–03; C Hilson and T Downes, 'Making Sense of Rights in EC Law' (1999) 24 *European Law Review* 121, 127–29; J Maillo, 'Efecto directo limitado de las Directivas: alcance y significado. ¿En qué medida los particulares pueden sufrir los perjuicios de una Directiva?' (1999) 204 *Gaceta jurídica de la UE y de la competencia* 37; T Tridimas, 'Black, White and Shades of Grey: Horizontality of Directives Revisited' (2002) 21 *Yearbook of European Law* 327, 346–53; G Betlem, 'The Doctrine of Consistent Interpretation—Managing Legal Uncertainty' (2002) 22 *Oxford Journal of Legal Studies* 397; JC Moitinho de Almeida, 'L'effet direct des directives, l'interprétation conforme du Droit national et la jurisprudence de la Cour Suprême de Justice portugaise', in N Colneric et al (eds), *Une Communauté de Droit. Festschrift für Gil Carlos Rodriguez Iglesias* (Berlin, BWV Berliner Wissenschafts, 2003) 235, 235–42; A La Pergola, 'El juez constitucional italiano ante la primacía y el efecto directo del Derecho comunitario. Notas sobre unas jornadas de estudio' in N Colneric et al (eds), *Une Communauté de Droit. Festschrift für Gil Carlos Rodriguez Iglesias* (Berlin, BWV Berliner Wissenschafts, 2003) 251, 251–59; A Arnulf, *The European Union and its Court of Justice*, 2nd edn (Oxford, Oxford University Press, 2006) 209–25; Jans et al (n 82) 99–112; K Lenaerts and P van Nuffel, *Constitutional Law of the European Union*, 2nd edn (London, Thomson/Sweet & Maxwell, 2005) 119 and 775–76; TC Hartley, *The Foundations of European Community Law*, 6th edn (Oxford, Oxford University Press, 2007) 216–20; Craig and de Búrca (n 79) 287–303; Reich (n 78) 29–34. See also GC Rodríguez Iglesias and J-P Keppenne, 'L'incidence du Droit communautaire sur le Droit national' in M Waelbroeck and M Doni (eds), *Études de Droit Européen et International. Mélanges en Hommage à Michel Waelbroeck* (Bruxelles, Bruylant, 1999) 516, 520–27; K Lenaerts and T Corthaut, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law' (2006) 31 *European Law Review* 287, 292–97; and M Dougan, 'When Worlds Collide! Competing Visions of the Relationship between Direct Effect and Supremacy' (2007) 44 *Common Market Law Review* 931, 932–37 and 945–47. With a special focus on the application of this doctrine to EU public procurement directives, see DD Dingel, *Public Procurement—A Harmonization of the National Judicial Review of the Application of European Community Law* (The Hague, Kluwer, 1999) 123–31.

directive in order to achieve its intended results.⁸⁴ The principle of consistent interpretation also requires that settled domestic case law is reinterpreted in light of the directives, so that not only statutory legislation, but also judge-made law, is constructed in a convergent manner with EU law.⁸⁵

In principle, the EU case law has held that this obligation of courts and national authorities of the Member States is not absolute, and certain limits could be found (i) in the initially restrictive approach towards horizontal direct effect of directives, (ii) in the prohibition of *contra legem* interpretation of domestic laws, and (iii) in the necessary respect of certain time limits generally applicable to the transposition of directives. However, a closer analysis of these general restrictions on the duty of consistent interpretation shows that they have been construed in very narrow terms in the case law. As a result, it is submitted that none of these apparent limits actually restricts in a significant manner the duty of Member States to ensure consistent construction of domestic legislation with EU rules.

As just mentioned, a first apparent limit to consistent interpretation might be encountered in the lack of *horizontal direct effect* of the directives' provisions, and so consistent interpretation may be restricted if it could lead to the imposition on an individual of an obligation laid down by a directive which has not been transposed into domestic law,⁸⁶ at least if such a result is unacceptable in the light of the general principles of law (particularly, the principles of legal certainty and non-retroactivity).⁸⁷ Nonetheless, the interpretation

⁸⁴ For recent references, see Case C-160/01 *Mau* [2003] ECR I-4791 34; Joined Cases C-397/01 to C-403/01 *Pfeiffer and others* [2004] ECR I-8835 113–14; Case C-212/04 *Adeneler* [2006] ECR I-6057 108–11; and Joined Cases C-187/05 to 190/05 *Agorastoudis and others* [2006] ECR I-7775 43. See also R Alonso García, 'La interpretación del Derecho de los estados conforme al Derecho comunitario: Las exigencias y los límites de un nuevo criterio hermenéutico' (2008) 28 *Revista española de Derecho europeo* 385. There is room for doubt as to whether the ECJ could be preparing a movement towards substituting the principle of consistent interpretation with a recognition of full (horizontal) direct effect to directive provisions, after its decision in cases such as Case C-144/04 *Mangold* [2005] ECR I-9981; Case C-555/07 *Kücükdıveci* [2010] ECR I-365; and Case C-425/12 *Portgás* [2013] pub electr EU:C:2013:829. See Note, 'Editorial Comments—Horizontal Direct Effect—A Law of Diminishing Coherence?' (2006) 43 *Common Market Law Review* 1, 4–8. However, such a development seems unlikely; see K Sawyer, 'The Principle of *'interprétation conforme'*: How Far Can or Should National Courts Go when Interpreting National Legislation Consistently with European Community Law?' (2007) 28 *Statute Law Review* 165, 177–79.

⁸⁵ Case C-456/98 *Centrosteeel* [2000] ECR I-6007 17. See Betlem (n 83) 408–09.

⁸⁶ This is clearly the situation in cases involving criminal proceedings; see Case C-168/95 *Arcaro* [1996] ECR I-4705 42; and Joined Cases C-74/95 and C-129/95 *Criminal proceedings against X* [1996] ECR I-6609 24. The extension of this limit to civil and administrative proceedings remains obscure, but is envisageable; cf Opinion of AG Jacobs in joined cases C-206 and 207/88 *Zanetti* 24–26, and in Case C-456/98 *Centrosteeel* 35 (who adopted a restrictive interpretation of the limit in civil proceedings and argued for a broad obligation of consistent interpretation) and Opinion of AG Van Gerben in Case C-106/89 *Marleasing* 8 (who held that consistent interpretation could not result in the imposition of a civil sanction such as nullity, and favoured a limited approach to this obligation). Similarly, see Betlem (n 83) 410–11; but see Sawyer (n 84) 179.

⁸⁷ See: Case C-80/86 *Kolpinghuis* [1987] ECR 3969 13; Case 14/86 *Pretore de Salò* [1987] ECR 2545 20; and Joined Cases C-74/95 and C-129/95 *Criminal proceedings against X* [1996] ECR I-6609 25 and 31. See also Prechal, *Directives in EC Law*, 1st edn (1995) 222–29 and 2nd edn (2005) 203–08. See also Betlem and Nollkaemper (n 81) 580. Indeed, under certain circumstances, the narrowness of this restriction puts the doctrine of consistent interpretation (or indirect effect) in conflict with one of the main tenets of the doctrine of direct effect of directives—which excludes its horizontal application. On the issue of 'horizontal' direct effect of directive provisions see P Craig, 'Directives: Direct Effect, Indirect Effect and Construction of National Law' (1997) 22 *European Law Review* 519; and M Szpunar, *Direct Effect of Community Directives in National Courts—Some Remarks Concerning Recent Developments* (College of Europe Working Paper, 2003), available at www.natolin.edu.pl/pdf/zeszyty/Natolin_9—2003.pdf; and Craig and de Búrca (n 79) 282–87. In particular, on the issue of the admissibility of the 'horizontal' direct effect (or a disguised indirect horizontal effect) in so-called 'triangular relationships'—such as those generally present in the public procurement environment; see Case

conducted by the case law of the requirements that the imposition on individuals is (i) of obligations 'as such' and (ii) by the directive 'of itself' has followed a restrictive approach, with the result that this apparent restriction falls short of preventing the application of the doctrine of convergent construction in every case in which the legal position of an individual is negatively affected.⁸⁸ It follows that, in the end, consistent interpretation of national legislation with EU law can generate (indirect or ancillary) negative effects on the legal position of individuals, as long as the result is acceptable in light of the general principles of law—ie, unless it runs contrary to fundamental legal guarantees provided by these principles to individuals.

Another apparent limit could be found in that national courts and authorities are not obliged to make a *contra legem* interpretation of the relevant provisions of national legislation.⁸⁹ Nevertheless, this limit does not seem to constrict significantly the result of the convergent construction of domestic and EU law,⁹⁰ in so far as national courts and authorities are obliged to disapply the provisions of national law that frontally contradict EU law, by virtue of the principle of supremacy—and so the same final results are generally achieved.⁹¹

Finally, a *waiting period* is in principle also applicable to the duty of consistent interpretation—that is, the obligation of harmonious interpretation of national legislation arises only after the time-limit for the transposition of the directive has expired.⁹²

However, even before the expiry of the transposition period, an obligation exists for Member States to refrain from adopting any measures which might seriously compromise, after the period of transposition has expired, attainment of the objective pursued by that directive.⁹³ In the end, even if the time restrictions for the application of the principle

C-201/02 *Wells* [2004] ECR I-723 and the extension of its findings by Jans et al (n 82) 100. See also K Lackhoff and H Nyssens, 'Direct Effect of Directives in Triangular Situations' (1998) 23 *European Law Review* 397, 407 and 412; A Jiménez-Blanco Carrillo de Albornoz, 'De nuevo sobre el efecto de las Directivas' (2002) 205 *Noticias de la UE* 115; D Colgan, 'Triangular Situations: The Coup de Grâce for the Denial of Horizontal Direct Effect of Community Directives' (2002) 8 *European Public Law* 545; D Edward, 'Direct Effect: Myth, Mess or Mystery?' (2003) 7 *Diritto dell'Unione Europea* 215; Prechal (n 57, 2005) 261–70; and Tridimas (n 83) 333–46 and 353–54. Along the same lines, Arnulf (n 83) 204; R Gordon, *EC Law in Judicial Review* (Oxford, Oxford University Press, 2007) 20 and 156–57; and Reich (n 78) 22–23.

⁸⁸ See: Case C-177/88 *Dekker* [1990] ECR I-3941; and Case C-180/95 *Draehmpaehl* [1997] ECR I-2195, where the ECJ applied the doctrine of consistent interpretation even if the legal position of the individuals concerned was significantly altered. Along the same lines, see Case C-456/98 *Centrosteeel* [2000] ECR I-6007 19 and Joined Cases C-240/98 to C-244/98 *Océano* [2000] ECR I-4491 31–32. Indeed, this limitation of the principle of convergent construction should be interpreted restrictively and, especially, should not be triggered by a mere detrimental effect on an individual's legal position; see Tridimas (n 25) 348–9; and Craig and de Búrca (n 79) 292–96.

⁸⁹ Case C-105/03 *Pupino* [2005] ECR I-5285 47. See also Opinion of AG Elmer in Case C-168/95 *Arcaro* 40. However, the limits imposed by the prohibition to conduct *contra legem* interpretation remain unclear; see Tridimas (n 25) 30–31; and J Temple Lang, 'The Core of the Constitutional Law of the Community—Article 5 EC' in LW Gormley (ed), *Current and Future Perspectives on EC Competition Law. A Tribute to Professor MR Mok* (The Hague, Kluwer Law International, 1997) 41, 60–61.

⁹⁰ MR Tinç, 'L'interprétation "contra legem" devant les Cours européennes des Droits de l'homme et de la Justice' (2009) 3 *Révue du Droit de l'Union Européenne* 493, 504–05.

⁹¹ Lenaerts and van Nuffel (n 83) 775–78.

⁹² Case C-212/04 *Adeneler* [2006] ECR I-6057 113–16. Arguably, this judgment clarified this important point of the doctrine of consistent interpretation and put an end to a significant academic discussion on whether anticipatory effects could be derived from the passing of a directive before the time limit for its transposition had expired; see M Klamert, 'Judicial Implementation of Directives and Anticipatory Indirect Effect: Connecting the Dots' (2006) 43 *Common Market Law Review* 1251, 1254.

⁹³ Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411 45ff; Case C-157/02 *Rieser Internationale*

of convergent construction are theoretically clear, its practical implementation still raises significant doubts.⁹⁴

Therefore, as anticipated, given that the limits of the principle of consistent interpretation remain somewhat blurry and that the ECJ has adopted an expansive approach to the issue of the obligation of Member States to guarantee the effectiveness of directives, it is submitted that the limits of legal construction of Member States' law with conformity to EU directives should be interpreted restrictively in order to favour to the maximum extent the (indirect) effectiveness of EU law and the goals pursued by EU directives. This is all the more necessary in view of recent developments of the rules of construction developed by the ECJ that are superseding the traditional boundaries of the theory of direct effect and point towards a more general doctrine of 'legality review' of the legislative actions of Member States,⁹⁵ and towards the expansion of the boundaries of legal interpretation that conform to the TFEU and secondary rules (in what has been termed as *leveraged development*)⁹⁶—which seem to have overcome the notorious difficulties that the early developments of the direct effect doctrine generated (although they may pose some other interpretative problems of their own).⁹⁷ The limit seems to lie where consistent interpretation requires national courts and authorities to overcome 'merely' interpretative functions (broadly defined) and to assume legislative functions.⁹⁸ Nonetheless, drawing the dividing line will usually be a difficult task and, as already mentioned, the clear prevalence of a *pro communitate* interpretative principle must be identified in the relevant case law.

To sum up, it is submitted that Member States are under an almost absolute obligation to guarantee that domestic legislation is interpreted and applied in a manner that is consistent with EU law and, in particular in the case of directives, to ensure that their goals and intended effects are attained through national legislation—regardless of whether that legislation was adopted for the sake of transposing those directives, and regardless of the proper or improper transposition of those directives.

ii. Consistent Interpretation of the EU Public Procurement Directives with the Competition Principle

It follows from the discussion above that, in general terms, *the interpretation and enforcement of Member States' public procurement rules by national courts and authorities must*

Transporte [2004] ECR I-1477 67; and Case C-212/04 *Adeneler* [2006] ECR I-6057 123. See also L Sevón, 'Inter-Environnement Wallonie—What Are the Effects of Directives and from When?' in N Colneric et al (eds), *Une Communauté de Droit. Festschrift für Gil Carlos Rodriguez Iglesias* (Berlin, BWV Berliner Wissenschafts, 2003) 245.

⁹⁴ See: Klamert (n 92) 1273–75; and T von Danwitz, 'Effets juridiques des directives selon la jurisprudence récente de la Cour de Justice. Effet anticipé, antérieur à l'expiration du délai de transposition, interprétation conforme aux directives, primauté et application "combinée" avec les principes généraux du droit' (2007) 4 *Revue trimestrielle de Droit européen* 575.

⁹⁵ See: S Prechal, 'Does Direct Effect Still Matter?' (2000) 37 *Common Market Law Review* 1047, 1051. Cf C Hilson, 'Legality Review of Member State Discretion under Directives' in T Tridimas and P Nebbia (eds), *European Union Law for the Twenty-First Century: Rethinking the New Legal Order* (Oxford, Hart Publishing, 2004) 223.

⁹⁶ See: S Treumer and E Werlauff, 'The Leverage Principle: Secondary Community Law as a Lever for the Development of Primary Community Law' (2003) 28 *European Law Review* 124.

⁹⁷ See: D Curtin, 'The Province of Government: Delimiting the Direct Effect of Directives in the Common Law Context' (1990) 15 *European Law Review* 195, 220–23.

⁹⁸ As suggested by Alonso García (n 84) 401, the limit to a *contra legem* interpretation is to be found where the courts are forced to develop legislative functions.

be consistent with the fundamental principle of competition of the EU public procurement directives.⁹⁹ It is submitted that this obligation has potentially far-reaching consequences on the national systems for the review of public procurement rules and practices since, in order to be aligned or consistent with EU law, they must provide room for their revision on competition grounds. Put otherwise, Member States must ensure that practices and decisions ensuing from domestic public procurement legislation do not result in breaches of the principle of competition. Otherwise, they would be jeopardising the attainment of the competition goal pursued by the public procurement directives (above §II) and, hence, would be in breach of EU rules.

As an immediate consequence, the adoption of anti-competitive public procurement practices will not only result in a breach of EU law, but will also contravene Member States' domestic legislation on public procurement as properly or consistently interpreted—inasmuch as the latter cannot provide legal coverage to anti-competitive procurement practices that would trump one of the fundamental principles of the EU directives, since that interpretation of national law would be inconsistent with their competition goal and principle.¹⁰⁰ Consequently, in addition to the remedies for breach of EU law already mentioned, the remedies established in national law against breaches of the tendering and award procedures shall be available to fight anti-competitive public procurement practices¹⁰¹—and, if need be, guidance on the appropriate interpretation of the general competition principle and its implications for a given domestic public procurement rule may be sought from the ECJ through preliminary questions, following article 267 TFEU (ex art 234 TEC).

D. Extension of the Competition Principle to Procurement Conducted Outside the Blueprint of the EU Directives: Competition as a General Principle

In furtherance of the general obligation of consistent interpretation—and seemingly as a specification in the field of public procurement of the general obligation of teleological interpretation according to the general principles of EU law—compliance with

⁹⁹ Arguably, as already mentioned, the same results should be attainable by establishing the obligation of Member States' courts and administrative bodies to interpret public procurement rules in a pro-competitive manner as a result of their teleological interpretation in the light of the general principle of competition (above §III). Nonetheless, the fact that the competition principle is embedded in and fundamental to EU public procurement rules seems to provide a more solid legal basis to impose pro-competitive interpretative and enforcement duties on Member States' courts and administrative bodies.

¹⁰⁰ In general, on the function of general principles in the EU legal order and, particularly, as regards their threefold function as aids to interpretation, as grounds for review, and as rules of law a breach of which may give rise to tortious liability, see *Tridimas* (n 25) 29–35. On the judicial review of Member States' actions through the use of general principles—although largely conceived of as fundamental rights (which limits in some respects the applicability of the reasoning pursued), see X Groussot, *General Principles of Community Law* (Groningen, Europa Law Publishing, 2006) 271–301. More specifically, on the role of general principles in the interpretation of EU public procurement directives, see Hjelmborg et al (n 11) 41–54; and Gimeno Feliú (n 27, 2006) 45–63.

¹⁰¹ Remedies at the EU and national level are indeed complementary and not alternative, as clearly stated in Case C-508/03 *Commission v United Kingdom* [2006] ECR I-3969 71, where it was unequivocally held that the existence of remedies available through the national courts cannot prejudice the bringing of an action under art 258 TFEU (ex art 226 TEC), since the two procedures have different objectives and effects. See also Craig and de Búrca (n 79) 433–34.

the principle of competition is reinforced by the obligation of Member States to conduct all public procurement activities in compliance with the basic principles of the TFEU. According to EU case law,¹⁰² public procurement below the thresholds of the EU directives or outside their scope of application has to be conducted according to the basic principles of the TFEU and, most importantly, must respect the mandates of the principles of non-discrimination and transparency.¹⁰³

A system of undistorted competition, as laid down in the TFEU, can be guaranteed only if equality of opportunity between the various economic operators is secured.¹⁰⁴ Therefore, all public procurement conducted by the Member States needs to be in accordance with

¹⁰² See: Case C-59/00 *Vestergaard* [2001] ECR I-9505 21–24; Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745 60–62; Case C-231/03 *Coname* [2005] ECR I-7287 16–19; Case C-458/03 *Parking Brixen* [2005] ECR I-8585 46–49; Case C-507/03 *Commission v Ireland* [2007] ECR I-9777 30–31; Case C-412/04 *Commission v Italy* [2008] ECR I-619 66 and 94; Joined Cases C-147/06 and C-148/06 *SECAP* [2008] ECR I-3565 20; and Case C-324/07 *Coditel Brabant* [2008] ECR I-8457 25. For a review of the relevant case law, A Brown, ‘Seeing Through Transparency: The Requirement to Advertise Public Contracts and Concessions Under the EC Treaty’ (2007) 16 *Public Procurement Law Review* 1, 1–16; and S Treumer, ‘Recent Trends in the Case Law from the European Court of Justice’ in R Nielsen and S Treumer (eds), *New EU Public Procurement Directives* (Copenhagen, Djøf Forlag, 2005) 17, 24–27.

¹⁰³ See: Commission interpretative Communication on the community law applicable to contract awards not or not fully subject to the provisions of the public procurement directives [2006] OJ C179/2. The Communication has been challenged by Germany before the EGC, which rejected the complaint in Case T-258/06 *Germany v Commission* [2010] ECR II-2027. For discussion, see A Brown, ‘Case T-258/06: The German Challenge to the Commission’s Interpretative Communication on Contracts not Subject to the Procurement Directives’ (2007) 16 *Public Procurement Law Review* NA84. See also P Cassia, ‘Contrats publics et principe communautaire d’égalité de traitement’ (2002) 38 *Revue trimestrielle de Droit européen* 413, 424–25; J-Y Chérot, *Droit public économique*, 2nd edn (Paris, Economica, 2007) 721–34; UB Neergaard, ‘The Concept of Concession in EU Public Procurement Law versus EU Competition Law and National Law’ in R Nielsen and S Treumer (eds), *New EU Public Procurement Directives* (Copenhagen, Djøf Forlag, 2005) 149, 150; and HM Stergiou, ‘The Increasing Influence of Primary EU Law and EU Public Procurement Law: Must a Concession to Provide Services of General Economic Interest be Tendered?’ in JW van de Gronden (ed), *The EU and WTO Law on Services: Limits to the Realisation of General Interest Policies within the Services Markets?*, European Monograph Series (Alphen aan den Rijn, Kluwer Law International, 2009) 159, 168–72. This situation is strongly criticised by P Braun, ‘A Matter of Principle(s)—The Treatment of Contracts Falling Outside the Scope of the European Public Procurement Directives’ (2000) 9 *Public Procurement Law Review* 39. *Contra*, see M Krüger, ‘The Principles of Equal Treatment and Transparency and the Commission Interpretative Communication on Concessions’ (2003) 12 *Public Procurement Law Review* 181, 184 and 193–98. In moderate but still critical terms, see Brown (n 102) 16–21; and T Kotsonis, ‘The Extent of the Transparency Obligation Imposed on a Contracting Authority Awarding a Contract Whose Value Falls below the Relevant Value Threshold: Case C-195/04, *Commission v Finland*, Opinion of Advocate General Sharpston, January 18, 2007’ (2007) 16 *Public Procurement Law Review* NA71; and id, ‘The Extent of the Transparency Obligation Imposed on a Contracting Authority Awarding a Contract Whose Value Falls below the Relevant Value Threshold: Case C-195/04, *Commission v Finland*, April 26, 2007’ (2007) 16 *Public Procurement Law Review* NA119. See also S Cacace, ‘Gli affidamenti dei servizi pubblici nel rispetto dei principi comunitari’ in GA Benacchio and D de Pretis (eds), *Appalti pubblici e servizi di interesse generale* (Trento, Università degli studi di Trento, 2005) 217, 227–38; M Lipari, ‘I principi di trasparenza e di pubblicità’ in GA Benacchio and D de Pretis (eds), *Appalti pubblici e servizi di interesse generale* (Trento, Università degli studi di Trento, 2005) 255, 256–58 and 262–65; C Maugüé, ‘La portée de l’obligation de transparence dans les contrats publics’ in P Devolvé (ed), *Mouvement du Droit public: du Droit administratif au Droit constitutionnel, du Droit français aux autres Droits. Mélanges en l’honneur de Franck Moderne* (Paris, LGDJ, 2004) 609, 618–24; and Hjelmberg et al (n 11) 59–63. Also critical of this strand of case law, see Trepte (n 3) 16–27. Interestingly, this controversial string of case law has been considered a case of leveraged development of EU public procurement law; see Treumer and Werlauff (n 96) 125–27. For a general study, see C Risvig Hansen, *Contracts Not Covered or Not Fully Covered by the Public Sector Directive* (Copenhagen, Djøf Forlag, 2012).

¹⁰⁴ Case C-202/88 *France v Commission* [1991] ECR I-1223 51; Case C-18/88 *GB-Inmo* [1991] ECR I-5941 25; Case C-462/99 *Connect Austria* [2003] ECR I-5197 83; Case T-250/05 *Evropaiki Dynamiki (OPOCE)* [2007] ECR II-85 46; and Case T-406/06 *Evropaiki Dynamiki (CITL)* [2008] ECR II-247 84. Recently, see Case C-553/12 P *Commission v DEI* [2014] *pub electr* EU:C:2014:2083.

the requirements imposed by the TFEU and, particularly, has to respect the four freedoms and its other basic goals. In other terms, all public procurement, including that which falls below the thresholds, or otherwise lies outside the scope of the EU directives, has to contribute to—or, at least, not impede—the development of the internal market. This does not mean that it should be conducted according to the procedural rules established by the EU public procurement directives.¹⁰⁵ Rather, it has to comply with the substantive mandates of the EU public procurement system and be organised in a transparent and non-discriminatory manner.¹⁰⁶

By the same token, and given that the competition principle is not only one of the basic principles and objectives of the TFEU itself,¹⁰⁷ but is also fundamental to EU public procurement law (above §II.A), the conduct of public procurement below the thresholds or otherwise outside the scope of the EU directives should be subjected to similar pro-competitive requirements.¹⁰⁸ In essence, all public procurement conducted by Member States' contracting authorities and procurement officials should be pro-competitive—at least in the sense of the negative dimension of the competition principle: *public procurement conducted by Member States should not distort competition in the markets where the public buyer sources goods and services*. Again, this does not mean that public procurement conducted by the Member States outside the scope of the directives has to be necessarily subject to the rules and procedures thereby envisaged. However, national public procurement legislation should be drafted in such a way that it ensures that public procurement activities are not a source of competitive distortion in the markets where the public buyer is active. In this respect, the basic principles and interpretative guidelines provided by the case law of the ECJ in relation to the provisions of the EU directives should inform and guide the interpretation of the domestic public procurement laws and regulations of the Member States to the furthest possible extent. Even if some domestic public procurement procedures might be substantially simpler or more limited in scope than those envisioned in the EU directives, they should all be designed and conducted in a non-discriminatory, transparent and pro-competitive manner. It is probably implied in the argument that simpler procurement procedures should be subject to lighter requirements, in order not to burden unnecessarily the contracting body and not to raise the administrative costs of the public procurement activities—ie, a trade-off between competition and efficiency requirements needs to be reached (see above chapter three, §IV).

However, it is submitted that, as regards the behaviour of the contracting authorities—and, more specifically, as regards compliance with the principles of equality, transparency and competition, no *de minimis* exception should be construed in the field of public procurement.¹⁰⁹ No matter how small (in terms of economic value) or simplified a public

¹⁰⁵ The effort to expand the logic and basic rules of the EU directives to the tendering of contracts that fall outside their scope has been criticised. See EP Hordijk and M Meulenbelt, 'A Bridge Too Far: Why the European Commission's Attempts to Construct an Obligation to Tender outside the Scope of the Public Procurement Directives should be Dismissed' (2005) 14 *Public Procurement Law Review* 123, 127–30.

¹⁰⁶ See: Arrowsmith (3rd, n 3) 252–63.

¹⁰⁷ See above n 42. As already mentioned, it is my view that the amendments to the TEC introduced by the Treaty of Lisbon do not alter this conclusion and, consequently, promotion of undistorted competition has to be considered a basic principle and an objective of the TEU and the TFEU (above chapter four, §IV.D).

¹⁰⁸ As seems suggested in Joined Cases C-147/06 and C-148/06 *SECAP* [2008] ECR I-3565 28–29.

¹⁰⁹ Along the same lines, the ECJ has declared that the *de minimis* rule does not apply to the provisions on free movement; see Joined Cases 177 and 178/82 *Van de Haar* [1984] ECR 1797 13. See also K Mortelmans, 'Towards Convergence in the Application of the Rules on Free Movement and on Competition?' (2001) 38 *Common*

procurement activity is, it is always susceptible to be fully accommodated to the non-discriminatory, transparent and pro-competitive mandates imposed by the fundamental principles of EU law in this field, at least from a negative perspective. That is, ‘minor’ public procurement activities conducted by Member States can be exempted from the ‘positive’ obligations to promote transparency (through formal advertisement in official journals, for instance) and to guarantee a minimum level of competition—*ad ex* through the fixing of a minimum number of tenderers to be invited to participate. However, *it seems to be impermissible to allow Member States to conduct discriminatory, opaque or competition-distorting public procurement, even when these activities lie outside the scope of the EU directives*. Consequently, the conduct of all public procurement activities (i) must guarantee the equal treatment of all participating undertakings, as well as setting up the necessary checks to avoid the exclusion of potentially interested offerors; (ii) needs to be transparent, to guarantee prompt access to the information, and to guarantee that relevant public notices are issued, if need be; and (iii) must avoid generating restrictions and distortions of competition in the markets where the public buyer is active (for a more detailed analysis, see below chapter six).¹¹⁰

E. Residual Application of the Principle of Competition

Finally, for the sake of the consistency of the rules regulating the internal market, it is submitted that, if and when EU directives and national legislation do not provide for specific rules to regulate a given procurement situation or to inform a particular procurement decision (ie, in the case of a completely *unregulated* or unforeseen new public procurement situation derived from the evolution of public procurement practices), the contracting authority will still be bound by the pro-competitive requirements of the EU public procurement system and will have to opt for the solution that best suits the mandates of the competition principle (*in dubio pro concurrentia*).¹¹¹

In other terms, any legislative or regulatory lacunae that might be encountered by contracting authorities and public procurement officials should be constructed, to the maximum possible extent, in a pro-competitive way, even if those situations fall outside the scope of the doctrine of consistent interpretation (above §III.C). It should be noted that, as a logical limit to the doctrine of consistent interpretation, it does not provide support for the construction or creation of consistent rules *ex novo*. Put otherwise, when there is no national rule to be interpreted—ie, in the case of an effective regulatory gap

Market Law Review 613, 633. Given that EU public procurement directives have free movement provisions of the TFEU as their express legal basis (above §II.A), it is submitted that the same exclusion of the *de minimis* rule has to be adopted. The situation is different as regards the application of the *de minimis* rule excluding application of art 101(1) TFEU to the behaviour of the tenderers (see above n 44). Cf Risvig Hansen (n 103) 149–53.

¹¹⁰ When the distortions of competition derive from the pursuit of a conflicting regulatory or policy goal, the criteria developed above chapter four, §VII should be applicable and the restrictions should be appraised under the proposed strict proportionality test—which is different from a *de minimis* exemption (that, as already indicated, should be rejected) in that the *de minimis* exemption would provide a blanket justification and exclude any analysis, whereas the proportionality test will only justify the restrictive public procurement rules or practices when their net social effects are positive.

¹¹¹ In similar terms, see CM Von Quitzow, *State Measures Distorting Free Competition in the EC. A Study of the Need for a New Community Policy towards Anti-Competitive State Measures in the EMU Perspective* (The Hague, Kluwer, 2002) 232.

or lacuna—the doctrine of convergent construction proves inadequate to generate new solutions, unless a broad view towards the consistent interpretation of the ensemble of domestic regulations (including its regulatory gaps) is adopted—which seems to require going a step too far in terms of legal technique. Similarly, the more general doctrine of teleological interpretation according to the general principles of EU law might also prove limited. Nonetheless, it is submitted that recourse to those techniques will be unnecessary, as the development of new regulatory solutions will still need to be compatible (or consistent, in law terms) with the principle of competition, as a general principle of EU law with particular relevance in the public procurement field. Since a new rule that generated competition distortions or restrictions in the public procurement field would—once adopted or developed—be contrary to the principle of competition and, hence, would need to be repealed or amended to ensure consistency with the principle of competition, *contracting authorities and Member States are obliged to anticipate the pro-competitive requirements to the phase of design of the new rules or administrative practices* required to bridge the concerned regulatory gap. Rather obviously, the development of such pro-competitive solutions will still also have to pay due regard to the other objectives of the public procurement system (namely, efficiency and transparency; see above chapter three) and the other applicable public procurement principles (that is, non-discrimination and respect for the fundamental freedoms regulated in the TFEU), but competition should be regarded as a key consideration in their design—which warrants giving the principle of competition the mentioned *residual* role.

V. The Principle of Equal Treatment and the Principle of Competition Distinguished

A. A First Approximation: The Close Links between the Principles of Equal Treatment and Competition

As already mentioned, the competition principle presents close links with the principle of equal treatment and could even be considered a specific manifestation of the latter.¹¹² Some of the procurement rules and decisions that infringe pro-competitive requirements have discriminatory features and, consequently, they also infringe the mandates of the principle of equal treatment. As Advocate General Tesouro put it:

Community legislation chiefly concerns economic situations and activities. If, in this field, different rules are laid down for similar situations, the result is not merely inequality before the law,

¹¹² See: A Laguerre, *Concurrence dans les marchés publics* (Paris, Berger-Levrault, 1989) 23–27; Colin and Sinkondo (n 32) 37 and 48–55; JR Dromi, *La licitación pública* (Buenos Aires, Editorial Astrea, 1975) 134–39; JM Fernández Astudillo, *Los procedimientos de adjudicación de los contratos públicos de obras, de suministros y de servicios en la Unión Europea. La nueva Directiva reguladora de los contratos públicos* (Barcelona, Bosch, 2005) 21; and JA Moreno Molina, *Los principios generales de la contratación de las administraciones públicas* (Albacete, Bomarzo, 2006) 37–42.

but also, and inevitably, distortions of competition which are absolutely irreconcilable with the fundamental philosophy of the common market.¹¹³

It is submitted that this is the main reason why the principle of competition has not yet been explicitly formulated in full, nor fully enforced by the EU judicature (above §II.A); as some of the issues that directly concern the competition principle have been addressed by the ECJ in light of the more general principle of equal treatment.¹¹⁴ To be sure, the conduct of non-discriminatory public procurement contributes to the protection of undistorted competition by interested tenderers¹¹⁵—as a system ensuring undistorted competition cannot be guaranteed if undertakings are the object of discriminatory practices.¹¹⁶ Consequently, given these close links between both principles, there is a tendency to assimilate them and to consider that equal treatment requirements are by themselves enough to guarantee that competition is not distorted in public procurement processes. However, these principles do not impose exactly the same requirements,¹¹⁷ so identifying the additional requirements that the competition principle brings to the analysis will be particularly relevant for our purposes.

B. A Closer Look: The Principles Impose Different Requirements, and Competition Concerns should Modulate the Application of the Principle of Equality

The principle of equality requires that similar situations are not treated differently unless differentiation is objectively justified;¹¹⁸ consequently, it prohibits treating either similar

¹¹³ See: Opinion of AG Tesouro in Case C-63/89 *Assurances du Crédit* (at 1829); see D Caruso, *Limits of the Classic Method: Positive Action in the European Union after the New Equality Directives* (NYU School of Law, Jean Monnet Working Papers No 10, 2002) 48 fn 183, available at www.jeanmonnetprogram.org/papers/02/021001.pdf. The same idea had been advanced, in more general terms, by D Linotte, 'Principes d'égalité, de liberté, de commerce et de l'industrie et Droit de la concurrence' in J-M Rainaud and R Cristini (eds), *Droit public de la concurrence* (Paris, Economica, 1987) 9, 17–20. See also T Tridimas, 'The Application of the Principle of Equality to Community Measures' in A Dashwood and S O'Leary (eds), *The Principle of Equal Treatment in EC Law* (London, Sweet & Maxwell, 1997) 214, 217–18.

¹¹⁴ Indeed, often the ECJ refers to both principles simultaneously; see, for instance, Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233 76. Consequently, the distinction between them might appear blurry and their delimitation might be difficult to appraise in certain instances.

¹¹⁵ Opinion of AG Ruiz-Jarabo Colomer in Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* 24–25. See also Colin and Sinkondo (n 32) 49; D Linotte and R Romi, *Services publics et Droit public économique*, 4th edn (Paris, Litec, 2001) 116; L Richer, *Droit des contrats administratifs*, 5th edn (Paris, LGDJ, 2006) 369; Cassia, *Contrats publics et principe communautaire d'égalité* (2002) 420–21; and Hjelmberg et al (n 11) 24–26 and 42–46.

¹¹⁶ Case C-202/88 *France v Commission* [1991] ECR I-1223 52. Similarly, D Linotte and A Mestre, *Services publics et Droit public économique* (Paris, Litec, 1982) 119–20. Even further, the competition requirements of the first EU public procurement directives (Directive 71/305/CEE) served as the logical basis for the reading of a general principle of equal treatment of tenderers by the ECJ—which was not expressly mentioned in their text; see Case C-243/89 *Storebaelt* [1993] ECR I-3353 33 and 39; and Cassia (n 103) 430.

¹¹⁷ Along the same lines, see Opinion of AG Léger in Case C-94/99 *ARGE* 95 fn 36.

¹¹⁸ See: Joined Cases 117/76 and 16/77 *Ruckdeschel* [1977] ECR 1753 7; Case 810/79 *Überschär* [1980] ECR 2747 16; Case 106/83 *Sermide* [1984] ECR 4209 28. In general, on the principle of equality in EU law, see J Schwarze, *European Administrative Law* (Brussels, OPOCE, 1992) 545–74 and revised 1st edn (London, Sweet & Maxwell, 2006) 561–625; G de Búrca, 'The Role of Equality in European Community Law' in A Dashwood and S O'Leary (eds), *The Principle of Equal Treatment in EC Law* (London, Sweet & Maxwell, 1997) 13; Tridimas (n 25) 59–135; Lenaerts and van Nuffel (n 83) 123–38; Jans et al (n 82) 125–42; Gordon, *EC Law in Judicial Review*

situations differently, or different situations identically.¹¹⁹ For its part, the competition principle requires that the treatment afforded to undertakings does not distort the dynamics either of the procurement process or, more generally, of the markets where the public buyer is active (above §II).

Consequently, at least in principle, undertakings could be given a clearly anti-competitive treatment in the public procurement arena (or elsewhere) and this would still not result in a discriminatory situation, inasmuch as all the undertakings that were in a similar situation were treated in an equally anti-competitive manner. Obviously, then, in extreme situations the requirements of the principle of equality are insufficient to guarantee respect of the competition principle. It follows that the competition principle has additional requirements that should be integrated and made compatible with the principle of non-discrimination. It is submitted that this means that the competition principle could be understood as a 'regulating device' for the application of the principle of equality—similarly as the proportionality principle does,¹²⁰ but with a *purposive orientation*.¹²¹ This has now been broadly endorsed by the ECJ, when it has stressed that 'the principle of non-discrimination ... in the field of public procurement, pursues ... objectives including ... the opening up of undistorted competition in all the Member States.'¹²² That is, equality of treatment or non-discrimination is aimed at ensuring competitive results. Or, reversely, the competitive effects of a situation should be integrated in the analysis from an equality perspective in this field.

It is submitted that the analysis should be as follows. In order to apply the principle of equality to two given undertakings properly, their situations need to be analysed under

(2007) 201–25; Hartley, *Foundations of EC Law* (2007) 152–54; Groussot, *General Principles of Community Law* (2006) 160–89; and G Barrett, 'Re-Examining the Concept and Principle of Equality in EC Law' (2003) 22 *Yearbook of European Law* 117, 121ff. On the requirements imposed by the principle of non-discrimination or equal treatment (and its corollary principle of transparency) in the field of public procurement, see Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233 37; Case C-315/01 *GAT* [2003] ECR I-6351 73; and Case C-496/99 *P Succhi di Frutta* [2004] ECR I-3801 108–11. See also Cassia (n 103) 421–49; S Treumer, 'Technical Dialogue Prior to Submission of Tenders and the Principle of Equal Treatment to Tenderers' (1999) 8 *Public Procurement Law Review* 147; Krügener, *The Principles of Equal Treatment and Transparency* (2003) 186–92; and Arrowsmith (n 3, 2014) 264–79.

¹¹⁹ Case 13/63 *Italy v Commission* [1963] ECR 165; see also Case 8/82 *Wagner v Balm* [1983] ECR 371 18. See also A-L Durviaux, *Les marchés publics dans la jurisprudence de la Cour de Justice des Communautés Européennes (1995 à 2000)* (Bruxelles, Kluwer, 2001) 5–7.

¹²⁰ In general, it should be noted that the principle of proportionality in EU law has particular connotations as regards the division of powers between the EU institutions and Member States, as well as between the former and the EU judiciary. However, as used here, the principle of proportionality is not intended to refer to that particular conception of the principle of proportionality in EU law, but to discuss it in more general terms of basic legal analysis. See Moreno Molina (n 112) 66–67.

¹²¹ By reference to 'purposive orientation' it is intended to imply that the application of the non-discrimination principle has to be complemented with the values of competition, and to aim towards developing or maximising pro-competitive solutions. That is, that recourse to and application of the principle of non-discrimination should be complemented or *instrumentalised* to attain more competition-oriented results. In this regard, it can be understood as a different approach from a classical 'teleological interpretation', in that teleological interpretation is strictly aimed at clarifying the meaning of a given provision in the light of the function or goal that was intended in its passing (and hence, teleological interpretation of the principle of non-discrimination is restricted to the requirements of 'formal equality'), while a purposive orientation would go further and be aimed at *operationalising* that provision in order to achieve that goal (ie, would orient the results of the analysis towards pro-competitive goals). Similarly, with specific reference to the purposive interpretation of the EU public procurement directive, see Hjelmberg et al (n 11) 54–56.

¹²² Case C-19/13 *Fastweb* [2014] pub electr EU:C:2014:2194 65. See also Case C-91/08 *Wall* [2010] ECR I-2815 48, and Case C-336/12 *Manova* [2013] pub electr EU:C:2013:647 28.

the prism of the proportionality principle, in two respects. First, proportionality requires that separate treatment is granted only when the circumstances of both undertakings are sufficiently different—thereby, granting common treatment to undertakings in relatively different situations when granting them different treatment would be disproportionate; ie, when the differences that exist between them are small enough to render different treatment discriminatory. Therefore, proportionality informs the *comparability* prong of the equality of treatment test. Second, proportionality requires that the differences in treatment are adequate to the objective differences in the situations of both undertakings—thereby, proportionality requires adjusting the differences in treatment to the objective differences in their departing situations, providing more equal treatment for smaller differences, and more differentiated treatment for larger differences.¹²³

Rather obviously, differences in treatment need to meet the three cumulative requirements imposed by the principle of proportionality in a wide sense: ie, suitability, necessity and proportionality *stricto sensu*. Therefore, proportionality modulates or regulates the application of the principle of equal treatment.¹²⁴ That will be particularly possible when non-binary situations are confronted, which allow for an escalation of the treatment offered to undertakings and for a more progressive application of the principle of equal treatment—as binary situations restrict the applicability of the requirements of strict proportionality by limiting the alternatives of the contracting authority through an ‘all-or-nothing’ approach. Hence, the proper application of the proportionality requirements can be facilitated by the introduction of more flexible or gradual criteria.

In a similar way, the competition principle imposes certain restrictions and conditions to the application of the principle of non-discrimination, but it goes further than the principle of proportionality in that it orients the results of the analysis towards a specific result—ie, it pursues the protection and promotion of market competition.¹²⁵ This means that, whenever it is non-discriminatory and proportionate to grant different treatment to (competing) undertakings in the public procurement setting (as a result of the first prong of the proportionality analysis, or comparability test), the difference in the treatment afforded has to be such that it guarantees that competition is not unnecessarily restricted (second prong of the analysis, which adds a *purposive* element to the test of proportionality *stricto sensu*). In clearer terms, the differences in treatment afforded to undertakings should be such that—while respecting the mandates of formal equality/inequality—they generate lesser distortions as regards competition.

This essentially means that, when designing the rules governing a given public procurement process, the public buyer must guarantee that differences in the treatment afforded to undertakings in different situations are not only proportional, but also yield procompetitive results. In most situations, this will mean that the principle of competition will be better served if the procurement system is not made binary—eg, if meeting a given

¹²³ Case C-29/95 *Pastors* [1997] ECR I-285 19–26. Along the same lines, see Jans et al (n 82) 130–31.

¹²⁴ The juncture and dual function of equality and proportionality has been stressed by Tridimas (n 25) 7, 72–74, 136–39 and 175–77. Similarly, see Groussot (n 100) 20–23.

¹²⁵ Interestingly, the ‘plus’ that the principle of competition adds to the principle of non-discrimination in the public procurement setting was stressed (implicitly): ‘The principles of transparency and non-discrimination may make the exercise of strategic buyer power more difficult, but they do not appear to protect other buyers who might be adversely affected by the exercise of public sector buyer power’; see OFT, *Assessing the Impact of Public Sector Procurement on Competition* (2004) 58, available at www.of.gov.uk/shared_of/reports/comp_policy/of742c.pdf.

requirement or condition does not result in admission or exclusion of the tenderer or his offer, but mainly affects the evaluation of the offer. Consequently, in general terms, it would be desirable that the system allowed for an escalation of the different criteria in play and, as far as possible, allowed room for variations and introduced a certain degree of flexibility in the process—so that ‘all-or-nothing’ situations were reduced to a minimum. In this way, and subject to equality of treatment requirements, the application of the proportionality and competition principles should offer better results than a strict and rigid ‘formally egalitarian’ public procurement environment.

In my opinion, these ‘extra’ requirements that the principle of competition imposes will generally imply that the consequences attached to the observed differences between tenderers and their offers should not result in an unnecessary elimination or restriction of competition. This general objective can be achieved by minimising the number of criteria that would prevent participation from potentially interested tenderers (such as technical, financial or professional requirements), or the admissibility of certain products or services (through open-ended and performance-based technical specifications, through minimum mandatory requirements, or otherwise); as well as by shaping the main characteristics of the tendered contract (in terms of duration, volume, number of lots, associated financial guarantees, etc) in such a way that the maximum number of potential contractors can participate and compete for it. Moreover, the competition principle will impose a special duty on the contracting authority to avoid procurement decisions that could negatively affect competition in the market after the contract is awarded or as a result of the award of the contract. These general criteria will be explored in detail (below chapter six).

Reversely, the application of the competition principle will be limited by the enforcement of the principle of non-discrimination imposed by the directives as, in certain cases, implementing the (theoretically) most pro-competitive alternative would be conditional upon a degree of relaxation of the requirements of non-discrimination among tenderers—or, at least, upon some procedural flexibility—that a strict application of the principle of equal treatment might prevent. Similarly, the principle of proportionality will also set bounds that pro-competitive procurement rules should not overstep. This is to say that pro-competitive public procurement practices are not to be carried to their extreme consequences if they result in discrimination amongst tenderers or in disproportionate requirements. In the end, the EU public procurement system seeks to encourage competition only provided that it takes place in compliance with the principle of equal treatment,¹²⁶ and proportionality is an all-embracing general principle of EU law.¹²⁷

These additional requirements should help set a limit on certain public procurement practices that could go further than required in trying to foster competition for public contracts. In the end, public procurement rules need to generate a pro-competitive procurement environment and avoid all distortions to competition. However, public procurement should not become a tool of economic intervention or economic planning, or an additional competition law remedy *stricto sensu*. Therefore, those procurement practices

¹²⁶ Opinion of AG Poiares Maduro in Joined Cases C-226/04 and C-228/04 *La Cascina and others* 26. See also *Cassia* (n 103) 420.

¹²⁷ Case 181/84 *Man (Sugar) v IBAP* [1985] ECR 2889; Case 222/84 *Johnston* [1986] ECR 1651; Case 352/85 *Van Adverteerders* [1988] ECR 2085; Case 5/88 *Wachauf* [1989] ECR 2609; Case 353/89 *Commission v Netherlands* [1991] ECR I-4069; Case C-320/91 *Corbeau* [1993] ECR I-2533; Case C-2/92 *Bostock* [1994] ECR I-955; Case C-22/94 *Irish Farmers* [1997] ECR I-1809; and Case C-27/95 *Woodspring* [1997] ECR I-1847.

that exceed the proportional requirements of the promotion of undistorted competition should be declared to run contrary to the requirements of the equality and proportionality principles and, consequently, should be stopped.

C. Emphasis on the Distinction of both Principles in the Area of Internal Market

It follows from the discussion above that analysing all potentially competition-distorting public procurement rules and practices from a strict equality of treatment perspective may fall short of guaranteeing the pro-competitive system envisioned in the EU directives;¹²⁸ particularly since certain practices can restrict competition while not necessarily resulting in clearly disproportionate or discriminatory results. Indeed, as has been properly stressed, in order to be of assistance, ‘formal equality’ (ie, equality as consistency) needs to be informed by other values.¹²⁹ Given that ‘formal equality’ is the conception that seems to inspire the principle of equality in the case law of the EU judiciary in the public procurement arena, it seems necessary that the application of the principle of equal treatment is informed by the values underlying the principle of competition if it is to yield meaningful results. Therefore, identifying the ‘extra’ requirements that the principle of competition imposes seems to be particularly necessary if one takes into consideration that the interpretation of the principle of equal treatment in the public procurement arena is substantially conditioned by the case law of the EU judiciary on the four fundamental freedoms and, more specifically, on the free movement of goods¹³⁰—which, it is submitted, significantly reduces its effectiveness in tackling distortions to the functioning of the internal market.

Briefly, it is important to recall that article 34 TFEU (ex art 28 TEC) prohibits quantitative restrictions on imports and all measures having equivalent effect applicable between Member States.¹³¹ However, according to article 36 TFEU (ex art 30 TEC), such quotas and measures of equivalent effect can be justified on the grounds of *public interest*, such as public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Nonetheless, such prohibitions or restrictions should not constitute a means of arbitrary

¹²⁸ In similar terms, see D Triantafyllou, ‘Les règles de concurrence et l’activité étatique y compris les marchés publics’ (1996) 32 *Revue trimestrielle de Droit européen* 57, 74–75.

¹²⁹ See: Barrett (n 118) 123.

¹³⁰ The situation might be different as regards the other freedoms (free movement of services, persons and capital), see de Búrca (n 118) 21–23. See also the various essays in M Andenas and W-H Roth (eds), *Services and Free Movement in EU Law* (Oxford, Oxford University Press, 2002). However, it has been argued that the same reasoning developed as regards arts 34 and 36 TFEU (ex arts 28 and 30 TEC) applies under arts 49 and 52, and 56 and 63 TFEU (ex arts 43 and 46, and 49 and 55 TEC); see F Neumayr, ‘Value for Money v Equal Treatment: The Relationship between the Seemingly Overriding National Rationale for Regulating Public Procurement and the Fundamental EC Principle of Equal Treatment’ (2002) 11 *Public Procurement Law Review* 215, 225–28 and 232. Also E Szyszczak, *The Regulation of the State in Competitive Markets in the EU* (Oxford, Hart Publishing, 2007) 65–69. Moreover, *Keck* does not apply in relation to fundamental freedoms other than free movement of goods; see W-H Roth, ‘The European Court of Justice’s Case Law on Freedom to Provide Services: Is *Keck* Relevant?’ in M Andenas and W-H Roth (eds), *Services and Free Movement in EU Law* (Oxford, Oxford University Press, 2002) 1, 6–7; and Sauter and Schepel (n 10) 35–37. Therefore, the position that unification in the basic treatment of all fundamental freedoms makes its joint analysis possible is adopted.

¹³¹ Art 35 TFEU (ex art 29 TEC) establishes a twin prohibition for exports between Member States.

discrimination or a disguised restriction on trade between Member States.¹³² Therefore, the general system established by articles 34 and 36 TFEU can be interpreted as setting a general, broad and objective prohibition on the establishment of barriers to the functioning of the internal market that can only in a very limited set of circumstances be overcome for overriding reasons of public interest, and only as long as they do not result in discrimination or are used as a cover for effective restrictions of trade between Member States.

However, in clear contrast with the previous approach to articles 34 and 36 TFEU—which arguably impose a very strict prohibition of restrictions on trade between Member States and strongly rely on a functional criterion of *effects on the functioning of the internal market*—and according to the relevant case law (generally known as the *Keck* doctrine),

the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States ... so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.¹³³

According to the *Keck* doctrine,¹³⁴ then, quotas and measures of equivalent effect can be justified on the grounds of mandatory (regulatory) requirements not included in article 36 TFEU, as long as they are *indistinctly applicable* to all undertakings and products—which, however, cannot be invoked to justify commercially or economically motivated measures, and must show a clear (alternative) regulatory goal. Therefore, in the field of free movement of goods, the *Keck* jurisprudence has come to restrict significantly the criterion of the effects of the measures on the functioning of the internal market (ie, on trade between Member States) through the establishment of a *rule of reason* that balances internal market considerations and competing regulatory goals of Member States, and has limited the scope of the analysis to non-discrimination issues—and, largely, to the analysis of potential discrimination on the basis of nationality or origin (art 18 TFEU, ex art 12 TEC).¹³⁵ Consequently, the analysis of the ECJ—based on that so-called *rule of reason*—requires adequacy and proportionality of the restriction vis-à-vis the goal of promoting

¹³² In general, Case 45/87 *Dundalk* [1988] ECR 4929; Case C-21/88 *Du Pont de Nemours Italiana* [1990] ECR I-889; and Case C-359/93 *UNIX* [1995] ECR I-157. See PV van Themmat and LW Gormley, 'Prohibiting Restriction of Free Trade within the Community: Articles 30–36 of the EEC Treaty' (1981) 3 *Northwestern Journal of International Law and Business* 611; LW Gormley, *Prohibiting Restrictions on Trade within the EEC. The Theory and Application of Articles 30–36 of the EEC Treaty* (The Hague, TMC Asser, 1985); and P Oliver and M Jarvis, *Free Movement of Goods in the European Community under Articles 28 to 30 of the EC Treaty* (London, Thomson/Sweet & Maxwell, 2003) 164–69.

¹³³ Joined Cases C-267/91 and 268/91 *Keck and Mithouard* [1993] ECR I-6097 16. For discussion, see PJG Kapteyn et al (eds), *The Law of the European Union and the European Communities: Kapteyn-VerLoren Van Themaat*, 4th rev edn (The Hague, Kluwer Law International, 2009) 626–32, 636 and 750–52; and Sauter and Schepel (n 10) 31–37. See also A Tryfonidou, 'Was *Keck* a Half-baked Solution After All?—Comment to the Judgment of the Court of 14 September 2006, in Joined cases C-158 and 159/04 *Vassilopoulos*' (2007) 34 *Legal Issues of Economic Integration* 167, 171–82. See also P Pecho, 'Good-Bye *Keck*? A Comment on the Remarkable Judgment in *Commission v Italy*, C-110/05' (2009) 36 *Legal Issues of Economic Integration* 257; and D Doukas, 'Untying the Market Access Knot: Advertising Restrictions and the Free Movement of Goods and Services' (2007) 9 *Cambridge Yearbook of European Legal Studies* 177–215.

¹³⁴ See: JJ Ezquerro Ubero, *La jurisprudencia 'Cassis-Keck' y la libre circulación de mercancías. Estudio de derecho internacional privado y derecho comunitario* (Madrid, Marcial Pons, 2006). In relation specifically to public procurement, see Arrowsmith (n 3, 2014) 256–62; and Trepte (n 3) 6–9.

¹³⁵ For reasoning along these lines, see Krüger (n 103) 197–201.

trade between Member States, but does not take into account other aspects, such as its impact on competition.¹³⁶ Hence, according to the relevant case law, there might seem to be room in EU law for significant restrictions of free trade (and competition) if certain legitimate (regulatory) objectives justify them and they are designed proportionally to those objectives—which, generally, will conflict with competition requirements.¹³⁷ This is true even under the emerging ‘market access test’ to free movement of goods based on ‘user/consumer interests,’¹³⁸ applicability of which to the procurement setting seems difficult in any case.

In this regard, it could be argued that it is possible to derive from the *Keck* jurisprudence (by analogy) the conclusion that, when public procurement regulations affect all potential tenderers or contractors in the same way, there is no need for specific justification of the restrictions imposed by public procurement regulations other than their adequacy to the procurement process—since there is no ‘formal discrimination’ among tenderers—and, consequently, they could be treated as permissible indistinctly applicable (restrictive) measures.¹³⁹ Or that whatever restrictions to access the market the procurement rules impose, they could be saved on the basis of some sort of ‘public interest’.

However, it is submitted that the analysis cannot be restricted to such ‘formal equality’ considerations and that its reconciliation with the competition principle embedded in the EU public procurement directives should yield different results. In this regard, it is submitted that restrictions to competition in the public procurement setting, or deviations from the EU public procurement rules, will hardly ever pass the *Keck* test or a modified market access test—either because the measures would place domestic bidders and those from other Member States in a different position (ie, they would not actually be indistinctly applicable), or because they would fall short of meeting the requirements of the *rule of reason* as properly constructed in view of the *purposive pro-competitive orientation* of the directives. Taking into account the special weight that should be assigned to

¹³⁶ In similar terms, it was stressed that a pure ‘discrimination standard’—which corresponds to the principle of undistorted competition—‘is not a sufficient standard to guarantee access to the market’ and that, therefore, it was appropriate to combine ‘the discrimination test with the “prohibition of restrictions” test’; see Roth (n 130) 14. In this regard, it is submitted that a pro-competitive oriented interpretation of the basic requirements embedded in public procurement rules can attain the same objective of ensuring (to a larger degree) that there is no restriction to market access (although not simply or only that).

¹³⁷ The analyses and arguments put forward above chapter four, §VII are of relevance here, as regards the conduct of that balancing of goals and effects in the application of the rule of reason.

¹³⁸ As developed in Case C-110/05 *Commission v Italy (Trailers for mopeds)* [2009] ECR I-519; Case C-142/05 *Åklagaren v Mickelsson and Roos* [2009] ECR I-4273; and Case C-108/09 *Ker-Optika* [2010] ECR I-12213. For discussion, see C Barnard, *The Substantive Law of the EU. The Four Freedoms*, 4th edn (Oxford, Oxford University Press, 2013) 102–08 and 140–47; Pecho (n 133) 257–72; and P Oliver, ‘Of Trailers and Jet Skis: Is the Case Law on Article 34 TFEU Hurling in a New Direction?’ (2011) 33(5) *Fordham International Law Journal* art 4. Recently, this approach has been stressed in Case C-639/11 *Commission v Poland* [2014] pub electr EU:C:2014:173; and Case C-61/12 *Commission v Lithuania* [2014] pub electr EU:C:2014:172.

¹³⁹ However, it should be noted that the *Keck* jurisprudence focuses on the regulation of ‘selling arrangements’ by the state. Consequently, doubts could be cast on the applicability of the case law to ‘buying arrangements’ such as public procurement (loosely defined). Nonetheless, it is submitted that the behavior that the *Keck* jurisprudence controls (ie, non-discriminatory state action through regulation) is—for my analytical purposes—substantially comparable to procurement activities (ie, non-discriminatory state action through procurement regulation or practice) and, therefore, deserves some further consideration—particularly in view of the conceptual difficulties surrounding the notions of ‘selling arrangements’ and ‘rules relating to the characteristics of products’; see Opinion of AG Poiares Maduro in Joined Cases C-158/04 and C-159/04 *Vassilopoulos* 31, who stressed that in some cases ‘it is impossible to include a measure within one or other of these categories because the variety of rules which may be called into question does not fit easily into such a restricted framework’.

the competition objective in the public procurement field (above §II), a very stringent and demanding proportionality test should be applicable to formally non-discriminatory public procurement rules and practices that generate negative impacts on competition. In this regard, for a competition-restrictive rule or practice to be objectively justified under the principles of equal treatment and competition in the field of public procurement, it should successfully meet the substantive criteria for restrictions on ‘core’ EU economic objectives to be acceptable (above chapter four, §VII.C)—or, put otherwise, meet a very restrictive proportionality test that balanced its alternative regulatory (non-economic) objectives and the distortions or restrictions of competition that it generates. It is further submitted that, in general terms, most restrictive public procurement rules and practices that generate competition distortions are likely to lack sufficient justification to pass legal muster under the competition principle and the ensuing rule of reason or proportionality test, since they will probably pursue objectives of lower or secondary relevance and, hence, will be insufficient to trump competition.

VI. Conclusions to this Chapter

The analyses conducted in the previous sections have shown that the market behaviour of the public buyer and its impact on competition are not unregulated, since *public procurement rules establish a framework for evaluating the behaviour of the government as a buyer from a competition perspective*. Given that EU public procurement directives have a clear competition goal and are based on an embedded competition principle, competition concerns are not alien to public procurement. The principle of competition has always been fundamental to the regulation of public procurement in the EU and constitutes one of its basic tenets. In this regard, according to this principle of competition, EU public procurement rules have to be interpreted and applied in a pro-competitive way, so that they do not hinder, limit, or distort competition, and that contracting entities must refrain from implementing any procurement practices that prevent, restrict or distort competition. This general principle of competition should serve the function of being the fundamental link between competition law and public procurement law.

This function of the principle of competition is now recognised in article 18(1) of Directive 2014/24, which consolidates it amongst the general principles governing the EU system. However, its drafting requires significant interpretative efforts in order to overcome the inclusion of an apparently subjective element and a presumption that conflates competition and corruption considerations. However, as argued above, an ‘objectification’ of the principle is not only necessary but also possible and the ECJ is likely to continue using the principle as an important tool in the shaping of EU public procurement rules under Directive 2014/24 (which will be analysed in detail in chapter six).

The legal implications of the abovementioned competition principle are manifold and particularly condition the way in which EU public procurement directives should be interpreted or *self-constructed*, and the real alternatives that Member States have for their transposition—which has to ensure the existence of a pro-competitive public procurement system and should not jeopardise the achievement of the basic competition objective.

What is possibly still more relevant is the fact that the existence of the competition principle deeply conditions the way in which domestic public procurement legislation has to be interpreted. According to the doctrine of consistent interpretation developed by the ECJ, Member States are under an almost absolute obligation to guarantee that domestic legislation is interpreted and applied in a manner that is consistent with EU law, and to ensure that the EU goals and intended effects of directives are attained through national legislation. More specifically, then, the interpretation and enforcement of Member States' public procurement rules by national courts and authorities must be consistent with the fundamental principle of competition embedded in the EU public procurement directives, and so Member States must ensure that practices and decisions ensuing from domestic public procurement legislation do not result in restrictions of market competition. Hence, *domestic anti-competitive procurement rules and practice run contrary to EU public procurement law*—that is, anti-competitive public procurement is specifically proscribed by EU public procurement law. Moreover, given that the principles that derive from the TFEU must be respected by the Member States in the conduct of procurement activities not covered by the directives, the pro-competitive requirements imposed by EU public procurement law are automatically extended to all public procurement rules and practice of the Member States, including procurement activities not or not fully covered by the EU directives. Finally, for the sake of completeness, a residual role for the principle of competition has also been envisaged in cases of new or totally unregulated public procurement practices.

Lastly, the legal implications derived from the competition principle have been delineated by exploring its content and, particularly, by distinguishing it from the close principle of equality or non-discrimination. Even if they are closely related these principles do not impose exactly the same requirements and compliance with formal equality requirements must be complemented by a pro-competitive purposive interpretation of public procurement rules. In turn, the principles of equality and proportionality will serve to check and counter-balance the more pro-competitive approach advocated here, since compliance with these fundamental principles must always be ensured. Finally it is necessary to stress the need to differentiate both principles and to include competition considerations in the area of public procurement—as a part of internal market regulation, where the interpretation of the principle of equality seems to be deeply entrenched with 'formal equality' considerations.

The general conclusion that can be extracted from this chapter is that public procurement rules are based on the paradigm of a pro-competitive system and, as one of their primary functions, pursue a competition goal—which materialises in a competition principle that constitutes the legal basis for the development of a more competition-oriented set of public procurement rules (or, at least, for a more competition-oriented interpretation and construction of current procurement rules, both at the EU and Member States level). It can also be concluded that the objective of developing a more competition-oriented set of public procurement rules should be attainable by recourse to well-known and consolidated rules of legal interpretation and construction, which only seem to require increased awareness of competition issues in the enforcement of public procurement legislation and practices, and in the revision of public procurement decisions.

It must be admitted that the exploitation of the potential pro-competitive instruments discussed in this chapter is dependent on the proper development of more specific rules

and criteria that can guide the appraisal of the several public procurement regulations and purchasing practices that can potentially distort competition in the market. An effort in that direction will be undertaken (below chapter six). Nonetheless, *the fundamental guiding criterion lies in the competition principle itself and making it fully effective is already possible*—particularly through the construction of public procurement legislation according to the doctrine of consistent interpretation and, where this legal technique is inappropriate, by recourse to a more general obligation of purposive interpretation of EU law in the light of its general principle of competition.

Conclusions to Part III: Sketching a Legal Framework to Discipline the Market Behaviour of the Public Buyer and to Guarantee Undistorted Competition in Public Procurement

As stated in chapter one, the main aim of this part of the study was to analyse EU competition and public procurement rules and to appraise to what extent they can be considered the building blocks of a framework properly designed to discipline the market behaviour of the public purchaser and to guarantee undistorted competition in the public procurement setting. To this end, the inquiry began by looking at public procurement from a competition perspective, focusing on how competition law addresses publicly-generated restrictions of competition in the public procurement arena. The intuition behind that approach was that competition law—understood as a (complete) system of rules oriented to the protection of undistorted competition in the market as a means to promote economic efficiency and social welfare (chapter three)—should be prepared to tackle distortions generated by the purchasing behaviour of the public buyer. The research agenda then moved on to adopt the opposite perspective and looked at competition concerns from a public procurement standpoint. The intuition in this instance was that—competition being a basic goal of public procurement rules (chapter three), the latter should give some room to the discipline of the purchasing behaviour of the public buyer. It is submitted that both perspectives have provided complementary insights into the relationship between competition and public procurement that should at least be useful to gain a better understanding of each of these branches of EU economic law, as well as of their interaction. It is further submitted that the results of the investigation conducted so far show that, indeed, competition and public procurement rules constitute the building blocks of a framework designed to discipline the market behaviour of the public purchaser and to guarantee undistorted competition in the public procurement setting. However, the current importance and effectiveness of each of these two blocks diverges—and, probably, in a way that might seem unexpected.

The analysis from a strict *competition law perspective* has shown that the rules of competition law are relatively unprepared to provide instruments to tackle anticompetitive effects derived from public intervention in procurement markets in most situations or with a sufficient degree of generality. To be sure, existing EU competition rules can remedy

those distortions of competition under specific (and relatively extreme) circumstances but, as the law currently stands, it falls short of providing an effective instrument to address publicly-generated distortions of competition in the public procurement setting *as such*. In my opinion, the logic and criteria that inspire general competition law enforcement are clearly adequate to conduct such an important task. However, a restrictive and too formal approach towards the interpretation and delimitation of the competition institutions that could undertake that mission most easily (especially the concept of *undertaking* for the purposes of direct application of ‘core’ competition prohibitions, and the state action doctrine that regulates their indirect application) prevents them from effectively constraining the market activities of the public buyer and from ensuring undistorted competition in the market under most common circumstances. From a normative standpoint and *de lege ferenda*, the research has also advanced possible developments that could contribute to overcoming those perceived limitations of current EU competition law and effectively to extending its institutions and remedies to cover competition-distorting public procurement with the desired degree of generality—ie, to discipline purchasing behaviour *as such*. Therefore, this first overview of the framework for the discipline of the market behaviour of the public buyer from a competition perspective has resulted in the partial conclusion that the main substantive elements or criteria are there, but that there are also formal restrictions that still require further advances and (materially-oriented) revisions if competition law is to contribute effectively to develop a more competition-oriented public procurement system.

For its part, the analysis from a *public procurement perspective* has shed a different and complementary light on the issue. In this part of the inquiry, public procurement law has emerged as a set of regulations particularly well suited to incorporate competition logic and criteria to the procurement field through the competition principle that is embedded in EU public procurement directives and has finally been consolidated in article 18(1) of Directive 2014/24. This principle is a specification or particularisation of the general principle of competition in EU law and one of the fundamentals of the EU public procurement system. In my opinion, it should significantly condition the interpretation, construction, transposition and enforcement of EU and domestic procurement legislation. By requiring that public procurement rules are interpreted and applied in a pro-competitive way, so that they do not hinder, limit, or distort competition, and that contracting entities refrain from any procurement practices that prevent, restrict or distort competition, the principle of competition embedded in the directives opens a gateway for the transfer of competition law criteria to the public procurement setting—and crucially establishes a strong link between both sets of economic regulation. Therefore, this second look at the framework for the discipline of the market behaviour of the public buyer from the public procurement perspective has shown that the shortcomings identified in the competition area can be supplemented through ‘pure’ procurement rules and institutions, as the competition principle embedded in the EU directives establishes the required link between them and offers a sufficient legal basis for the development of a more competition-oriented set of public procurement rules.

The competition principle is, indeed, the key element or the touchstone of the framework for the discipline of the market behaviour of the public buyer under EU law, and it constitutes the gateway through which competition standards should be enforced in the public procurement setting. To be sure, the development and enforcement of this principle

is still in its infancy and requires a substantial amount of interpretative effort before it can be considered as a fully-effective tool to prevent public distortions of competition in the market. This interpretative effort has not been facilitated by the specific wording of the principle of competition in article 18(1) of Directive 2014/24 but, rather, the contrary. However, there are no insurmountable difficulties in adopting an objective interpretation of its requirements. In this respect, it is submitted that the development of the competition principle *within* the field of public procurement law must take into account and build upon the more general theories and doctrines of competition law—that is, that competition law criteria and principles should be transferred to public procurement law through the competition principle embedded in EU public procurement directives. In a certain way, the competition principle offers the *formal legal basis* for the introduction and full enforcement of competition considerations in the public procurement setting, but the *substance or content* of that principle (ie, its requirements and implications) need to be determined according to the general principles and criteria of EU competition law. In this sense, the complementariness of both sets of EU economic law is clearly apparent and offers the proper legal and conceptual basis for the development of a more procompetitive public procurement system.

From a *broader or systemic perspective*, it should be acknowledged that the general framework for the discipline of the market behaviour of the public buyer just sketched is still not complete (and may be far from being complete), and that further developments in each of its building blocks would yield better results. As regards competition law, overcoming the restrictions imposed by the current formal approximations to the direct and indirect application of EU competition rules to the public buyer—through the revision of the concept of undertaking, or the development of a set of competition rules applicable to the public sector with more teeth (in this instance, through the development of the ‘market participant exception’ to the state action doctrine)—would allow for its increased relevance and effectiveness in tackling publicly-generated distortions of competition in public procurement markets. As regards public procurement law, the development and further elaboration of the competition principle and its effective enforcement on Member States’ legislatures and contracting authorities would significantly increase the chances of attaining the goals of the public procurement system and, more specifically, its competition goal (and the ensuing value for money).

It could be argued that pursuing both strings of development simultaneously or in parallel could seem unnecessary or counterproductive, since full development of either of the two blocks would render developments in the other largely unnecessary and, hence, irrelevant. At first glance, a public procurement system fully controlled by the competition principle might make the proposed developments of competition law unnecessary (as they relate to public procurement, but not as regards other types of state economic intervention). For its part, the adoption of the proposed developments in competition law could reduce the need to explore and expand the virtuality and effectiveness of the competition principle embedded in public procurement regulations, since competition law mechanisms would suffice to ensure that competition remained undistorted in public procurement markets. However, it is submitted that none of the proposed changes should be automatically envisaged as easily or completely attainable (due to their major political, social and economic implications) and, consequently, partial developments in both areas seem adequate to contribute to completing the general framework for the appraisal of

market activities of the public buyer and to rein in publicly-generated restrictions of competition in the public procurement setting. Indeed, the coordinated and incremental development of both blocks of the framework for the discipline of the market behaviour of the public buyer seems a more desirable strategy—and one capable of offering better results in the long run.

From a *practical perspective*, however, the line of development that seems easier to pursue and that can provide effective results more quickly lies with ‘pure’ public procurement considerations. Developing the competition principle and ensuring that it effectively shapes all public procurement rules and practices does not require an (express) amendment of current legal doctrines and case law, is better suited to yield incremental results and, arguably, should raise less opposition or resistance—as it has fewer implications for the general distribution of competences between the EU and Member States than the revision and further development of the competition rules applicable to public authorities—and it affects their sovereignty only marginally and within an area already substantially harmonised, such as public procurement.

Therefore, the remainder of the study (part four) will be dedicated to the critical appraisal of the public procurement rules incorporated in Directive 2014/24 (as well as their contrast with the previous rules under the 2004 EU public procurement Directives) in the light of the competition principle embedded in EU public procurement directives—and the competition law principles and doctrines that it brings or carries forward to the procurement arena—with the main purpose of contributing to those incremental changes towards the development of a more competition-oriented public procurement system (chapter six). Also, further developments or additional rules that, in my view, could complement and strengthen the competition principle within public procurement regulations will be explored and proposed (chapter seven). It should be stressed that this approach does not imply an abandonment of the analyses and views held in the competition part of the current inquiry (chapter four), and that it should rather be viewed as a practical and functional approach to legal research (above chapter one) with the objective of providing readily-available solutions for the achievement of more pro-competitive results in public procurement.