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**Doctoral Thesis**

## Award of Public Contracts as a Means to Conferring State Aid: A Legal Analysis of the Interface Between Public Procurement Law and State Aid Law

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AWARD OF PUBLIC CONTRACTS AS A MEANS TO CONFERRING STATE AID: A LEGAL ANALYSIS OF THE INTERFACE BETWEEN PUBLIC PROCUREMENT LAW AND STATE AID LAW

PhD Series 10-2018

Cecilie Fanø Petersen

# AWARD OF PUBLIC CONTRACTS AS A MEANS TO CONFERRING STATE AID

A LEGAL ANALYSIS OF THE INTERFACE BETWEEN PUBLIC PROCUREMENT LAW AND  
STATE AID LAW

Doctoral School of Business and Management

PhD Series 10-2018

**CBS** COPENHAGEN BUSINESS SCHOOL  
HANDELSHØJSKOLEN

Award of public contracts as a means to conferring State aid: A legal analysis of  
the interface between public procurement law and State aid law

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Doctoral School of Business and Management (BM)

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## Preface:

This Thesis has been written from June 2014 to December 2017 during my employment as Ph.D Fellow at Copenhagen Business School, Law Department. During my employment, I managed to complete two writing stays at European University Institute (EUI) in Florence, which both contributed to my studies in a very positive way.

I would like to thank my colleagues at the Law Department, including Head of Department, Professor Peter Arnt Nielsen who has been very supportive and encouraging, and especially my supervisors. During my employment I have had the pleasure of being supervised by three different supervisors who all, in their own way, helped me through the many phases of the life as a Ph.D student. Many thanks to Professor Christina Tvarnø for all the comments - especially on my methodology chapter. I would also like to thank Professor Ruth Nielsen for guiding me through the last phase of writing. I have benefitted from your many competences and experience as a Ph.D supervisor. Last, but not least, I would like to thank Professor Grith Ølykke who unfortunately was not able to supervise me through the last phase. Thank you for all the advises, academic discussions and for pushing me further. I have enjoyed our travels and talks.

This Thesis is dedicated to the two most important persons in my life: My husband, Lasse Fanøe Petersen, and my son Bernhard Fanøe Petersen, who have been very supportive - thank you for all the patience and for keeping me smile.

Copenhagen, December 2017

Cecilie Fanøe Petersen

## Abstract

The Thesis investigates the interface between State aid law and public procurement law with an emphasis on analysing when the award of public contracts by contracting authorities constitutes State aid within the meaning of Article 107(1) TFEU. Article 107(1) TFEU prohibits any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, in so far as it affects trade between Member States. Award of public contracts is governed by procedural rules laid down in the public procurement Directives which lay out specific rules and procedures for the award of public contracts. Furthermore, public contracts can – under specific circumstances – be awarded directly without the conduct of a tender procedure. These situations are referred to as legal direct award of contract. A contract can be legally awarded without the conduct of a tender procedure, e.g. when the value of the contract is below the thresholds set out in the Directives. Finally, situations might occur where the award of a contract directly to an economic operator falls under the scope of the procurement Directives and thus should have happened through a tender procedure. Such situations are referred to as illegal direct award of contracts. This Thesis analyses the extent to which State aid rules apply in the abovementioned situations.

**Chapter 1** introduces the scope and perspectives of this Thesis and accounts for the methodological approach taken. The analyses in the Thesis are legal dogmatic in the sense that the research question asked leads to an answer that seeks to find out what law *is*, rather than asking what the law *should be* (a normative approach). The Thesis thereby aims at concluding when the award of public contracts constitutes State aid within the meaning of Article 107(1) TFEU.

**Chapter 2** seeks to analyse the aims and objectives of public procurement rules and State aid rules, respectively. The understanding of the objectives behind the two sets of rules is important in order to answer the research question. It is found that public procurement rules and State aid rules share the common objective of supporting the Internal Market by increasing and protecting competition. The two sets of rules support this goal in different ways, but it is concluded that the different means are not mutually exclusive.

**Chapters 3 and 4** analyse the personal scope of the procurement rules and State aid rules. This is done in order to conclude whether contracting authorities fall under the scope of the State aid rules. It is found in chapter 3 that the concept of ‘contracting authority’ under the procurement rules coincides with the concept of ‘State’ under the State aid rules. Furthermore, it is concluded in chapter 4 that the concept of ‘economic operator’ under the procurement rules coincides with the concept of ‘undertaking’ under the State aid rules. Thereby, it is concluded that contracting authorities are capable of transferring State aid to economic operators when they award public contracts.

**Chapter 5** looks at the interface between the two sets of rules with regard to assessing whether public contracts are able to satisfy the cumulative criteria set out in Article 107(1) TFEU with regard to measures which ‘distort or threaten to distort competition’, measures which ‘favour certain undertakings or the production of certain goods’ and measures which ‘affect trade between Member States’. With regard to measures which distort or threaten to distort competition, it is argued that the obligation for the contracting authority to ensure that competition is not distorted is embedded in the public procurement Directives by way of an obligation for the contracting authority to ensure that competition is not artificially narrowed when public contracts are awarded. Then, the chapter analyses measures which favour certain undertakings or the production of certain goods (the concept of selectivity). It is unsettled in the case law from the CJEU how the concept of selectivity applies to procurement measures. It is argued that the requirement of selectivity cannot be determined *a priori*, and thus whether the award of public contracts are selective must be determined on a case-by-case basis. In relation to the three award situations, it is argued that the principles of equal treatment and non-discrimination, as embedded in the procurement rules, resemble the concept of selectivity under State aid law. It is found that no selectivity occurs in relation to legal direct award of contracts in so far as the general principles of the Treaty are adhered to. However, the same conclusion does not apply for illegal direct award of contracts, especially in situations where the general principles of the Treaty are not adhered to.

**Chapter 6** accounts for the concept of ‘advantage’ under State aid law. It is argued that when assessing whether an advantage has been conferred to the recipient, it is relevant to conclude whether the measure in question represents normal market conditions, and thus whether market price has been paid. Then, the presumptions for the requirement of market price are deduced. It

is found that when State intervention is not given according to market conditions, market price is not paid, and hence an advantage is conferred within Article 107(1) TFEU. Finally, it is argued that in cases where the State purchases goods and services, there will be aid only if the price paid exceeds the market price.

**Chapter 7** contains an analysis of the concept of ‘advantage’ in relation to the award of public contracts and discusses how and when an advantage occurs when public contracts are awarded. It is emphasised that the CJ has not yet taken the opportunity to conclude whether the award of a public contract constitutes State aid within the framework of Article 107(1) TFEU. For this reason, the analysis is based on judgments from the GC as well as decisions from the Commission. It is concluded that the benchmark for obtaining market price when public contracts are awarded is not unambiguous. Hence, it is necessary to take the concrete circumstances of the case into consideration when it is decided whether the award confers an advantage on the winning tenderer. Accordingly, the benchmark for assessment of whether State aid is granted when public contracts are awarded relies on a number of factors which are indicative for whether market price has been obtained.

**Chapter 8** introduces and explains the Market Economy Investor Principle (MEIP), which is the benchmark applied under State aid law for assessment of whether a transaction from the State involves an advantage for the recipient. It is concluded that the MEIP is not applicable to contracting authorities when they purchase goods or services. Based on this conclusion, it is discussed which other benchmark, if not the MEIP, is used when assessing whether the contracting authorities confer an advantage on the recipient when they purchase goods or services. It is found that the Market Economy Purchaser Principle (MEPP) is the benchmark used by the CJ to conclude whether an advantage has been conferred to the recipient, and it is discussed what the MEPP contains.

**Chapter 9** is the conclusions of the Thesis. The contributions of this Thesis are numerous: They all contribute to conclude that contracting authorities are capable of transferring State aid when public contracts are awarded and that the benchmark for assessment of whether State aid is granted when public contracts are awarded relies on a number of factors which are indicative for whether market price has been obtained. Finally, it is concluded that the benchmark used by the CJ to conclude whether an advantage has been conferred by contracting authorities to economic operators is the Market Economy Purchaser Principle (MEPP).



## Resumé:

Afhandlingen undersøger grænsefladen mellem statsstøtteren og udbudsretten med henblik på at analysere, hvornår tildeling af offentlige kontrakter tildelt af ordregivende myndigheder udgør statsstøtte i henhold til artikel 107, stk. 1, TEUF. Artikel 107, stk. 1, TEUF forbyder enhver støtte ydet af en medlemsstat eller gennem statsmidler i enhver form, som fordrejer eller truer med at fordreje konkurrencen ved at begunstige visse virksomheder eller visse produktioner, for så vidt som den påvirker samhandelen mellem medlemsstaterne. Tildeling af offentlige kontrakter er underlagt procedureregler i udbudsdirektiverne, hvori der er fastsat særlige regler og procedurer for indgåelse af offentlige kontrakter. Desuden kan offentlige kontrakter under særlige omstændigheder tildeles direkte uden udbudsprocedure. Disse situationer refereres der til i afhandlingen som lovlig direkte tildeling af kontrakt. Tildelingen kan være lovlig uden udførelse af en udbudsprocedure, f.eks. fordi kontraktens værdi ligger under de grænser, der er fastsat i direktiverne. Endelig kan der opstå situationer, hvor tildeling af en kontrakt direkte til den økonomiske aktør falder ind under udbudsdirektivernes anvendelsesområde og derfor skulle have været gennem en udbudsprocedure. Sådanne situationer betegnes i afhandlingen som ulovlig direkte tildeling af kontrakter. Denne afhandling analyserer, i hvilket omfang statsstøtteregler finder anvendelse i ovennævnte situationer.

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## 1. Introduction and Methodology

### 1.1 Introduction

In recent years, it has been debated whether a procurement procedure can be used as a tool to eliminate or reduce the presence of State aid.<sup>1</sup> The answer to this question is essential for public authorities who risk breaching the State aid rules when they award public contracts, but it is also crucial for economic operators who risk having to pay back illegal State aid.<sup>2</sup>

Article 107(1) TFEU prohibits any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, in so far as it affects trade between Member States. Accordingly, the rules on State aid are concerned with eliminating or preventing possible distortive effects of aid granted by the Member States, since such effects are perceived as harmful for the Internal Market.

Award of public contracts is governed by procedural rules laid down in the public procurement Directives which lay out specific rules and procedures for the award of public contracts. The

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<sup>1</sup> The contributions on this topic include, but are not limited to: P. Nicolaides and S. Schoenmaekers, 'The Concept of 'Advantage' in State aid and Public Procurement and the Application of Public Procurement Rules to Minimise Advantage in the New GBER', (2015), 14 (1), *EStAL*, 143-156; A.S. Graells, 'Public procurement and state aid: reopening the debate?' (2012) 6, *P.P.L.R.*, 205-212; P. Nicolaides and I.E. Rusu, 'Competitive Selection of Undertakings and State Aid: Why and When Does It Not Eliminate Advantage?', (2012), 7, (1), *E.P.P.P.L.*, 5-29; G.S. Ølykke, 'The Legal Basis Which Will (Probably) Never Be Used: Enforcement of State Aid Law in a Public Procurement Context' 2011(3), *EStAL*, 457-462; G.S. Ølykke 'How does the Court of Justice of the European Union pursue competition concerns in a public procurement context?' *P.P.L.R.*, 2011 (6), 179-192; N. Tosics and N. Gaál, 'Public procurement and State aid control – the issue of economic advantage' 2007(3), *Competition Policy Newsletter*, 15-18; A. Doern, 'The interaction between EC rules on public procurement and State aid', 2004(3) *P.P.L.R.*, 97-129; J. Hillger, 'The award of a public contract as state aid within the meaning of Article 87(1) EC', (2003), 3, *P.P.L.R.*, 109-130; P.A. Baistrocchi, 'Can the award of a public contract be deemed to constitute state aid?' (2003) 24(10), *E.C.L.R.*, 510-517; M. Stempowski and M. Dischendorfer, 'The interplay between the E.C Rules on public procurement and state aid', (2002) 3, *P.P.L.R.*, 47-52; A. Bartosch, 'The Relationship between Public Procurement and State Aid Surveillance – The Toughest Standard Applies?' 2002, 39, *Common Market Law Review*, 551-576; G.S. Ølykke, 'Commission Notice on the notion of state aid as referred to in article 107(1) TFEU – is the conduct of a public procurement procedure sufficient to eliminate the risk of granting of state aid?', (2016), 5, *P.P.L.R.*, 197-212; G.S. Ølykke, 'The Notice on the Notion of State Aid and Public Procurement Law' (2016), 15, (4), *EStAL*, 508-526; P.E. Hasselgård, 'The Use of Tender Procedures to Exclude State Aid: The Situation under the EU 2014 Public Procurement Directives' (2017), 12, (1), *EPPPL*, 16-28.

<sup>2</sup> In this respect the Commission has the power to order recovery of the unlawful aid, cf. Article 108 TFEU. See also Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No. 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 140.

aim of setting up procedural rules for the award of public contracts is to ensure that public procurement is opened up to competition, to the benefit of undertakings across the EU. As emphasised in the preamble in the public procurement Directive:<sup>3</sup>

***“The award of public contracts by or on behalf of Member States’ authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that those principles are given practical effect and public procurement is opened up to competition.”***<sup>4</sup>

The rules on public procurement and State aid have arguably been seen as completely independent areas of law<sup>5</sup> and this means that contracting authorities might not be aware of the risk of granting State aid through the award of public contracts. However, in recent years, a growing interaction between the two sets of rules can be detected in case law as well as in the Commission’s State aid practice.

The link between public procurement law and State aid law became relevant with the landmark *Altmark*<sup>6</sup> judgment delivered on 24 July 2003 where the CJ used a public procurement procedure as a possible tool to eliminate State aid relating to the delivery of public service obligations (PSOs).<sup>7</sup>

The *Altmark* judgment concerned the balance between Member States’ rights to provide public services against protecting the Internal Market from potential distortive effects caused by

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<sup>3</sup> Directive 2014/24/EU of The European Parliament and of The Council of 26 February 2014 on public procurement (henceforth “the public procurement Directive”), repealing Directive 2004/18/EC, recital 1.

<sup>4</sup> Emphasis added.

<sup>5</sup> A. Bartosch, ‘The Relationship between Public Procurement and State Aid Surveillance – The Toughest Standard Applies?’ 2002, 39, *Common Market Law Review*, 551-576, 551.

<sup>6</sup> *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht*, C-280/00, EU:C:2003:415.

<sup>7</sup> The CJEU has connected the concept of Services of General Economic Interest (SGEI) to the concept of PSO, e.g. in *Enirisorse SpA v Ministero delle Finanze*, Joined cases C-34/01 to C-38/01, EU:C:2003:640, para 33 and *European Commission v Deutsche Post AG*, C-399/08 P, EU:C:2010:481, para 41. See also G.S. Ølykke and P. Møllgaard, ‘What is a Service of General Economic Interest?’ (2016) 41(1) *European Journal of Law and Economics* 205-241, 210.



subsidies granted to specific undertakings. In the case, the CJ was asked whether the financial compensation for the delivery of a PSO granted by a Member State to an undertaking constituted State aid.<sup>8</sup> In its reply, the CJ formulated a number of criteria which must be met when determining whether the compensation for delivery of a PSO amounts to State aid.<sup>9</sup> If the criteria set out are not fulfilled, the compensation is considered State aid. According to the CJ, the criteria which must be fulfilled in order for compensation for the delivery of PSOs not to amount to State aid are: i) the PSO must be clearly defined; ii) the calculation of the compensation must be laid down in advance in an objective and transparent manner, and iii) no overcompensation may occur.<sup>10</sup> In the fourth criterion, the CJEU stated that if the choice of the provider of the PSO is not made pursuant to a public procurement procedure, the public authority is obliged to make a benchmarking exercise to make sure that no State aid is granted.<sup>11</sup> This means that when a public contract for PSOs is awarded subsequent to a public procurement procedure, the compensation (payment) does not constitute State aid.

Thus, *Altmark* established a link between public procurement law and State aid law in the area of PSOs.<sup>12</sup> However, the *Altmark*, judgment only concerns compensation for PSOs, and therefore, does not concern the rather important question, whether the direct award of public contracts for other contract subjects constitutes State aid. This question is of great importance to the contracting authorities.

So far, the CJ has not taken the opportunity to conclude whether (or to what extent) a tender procedure is capable of eliminating (or reducing) the presence of State aid. However, this does not mean that the question of whether the contracting authority falls under the scope of Article

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<sup>8</sup> *Altmark*, C-280/00, para 31.

<sup>9</sup> *Ibid.*, 89–93.

<sup>10</sup> *Ibid.*, para 93.

<sup>11</sup> *Ibid.*

<sup>12</sup> Among the academic contributions that discuss the *Altmark* rulings are: E. Szyszczak, 'Altmark assessed' in E. Szyszczak (ed.), *Research Handbook on European State Aid Law* (Edward Elgar 2011), 293–326; J.-M. Thouvenin, 'The Altmark case and its consequences' in M. Krajewski, U. Neergaard and J. van de Gronden (eds.), *The Changing Legal Framework for Services of General Interest in Europe - Between Competition and Solidarity* (TMC Asser Press 2009), 103–115; A. Bartosch, 'Clarification or Confusion? How to Reconcile the ECJ's Rulings in Altmark and Chronopost' (2003) 2(3), *European State Aid Law Quarterly*, 375–386; A. Sinnave, 'State Financing of Public Services: The Court's Dilemma in the Altmark Case', *European State Aid Law Quarterly* (2003), 351–363; C. Rizza, 'The Financial Assistance Granted by Member States to Undertakings Entrusted With the Operation of a Service of General Economic Interest: The Implications of the Forthcoming Altmark Judgment for Future State Aid Control Policy' *The Columbia Journal of European Law* (2003), 429–446; N. Travers, 'Public Service Obligations and State Aid: Is all really clear after Altmark?', *European State Aid Law Quarterly* (2003) 387–392

<sup>13</sup> Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (2016/C 262/01), OJ C 262, 19.7.2016, p. 1–50, point 89.

107(1) TFEU is unsolved in case law. However, what has not been concluded in case law is to which extent the procedural rules of the public procurement Directives work as a safeguard against granting State aid.

### **1.1.1 A competitive, transparent, non-discriminatory and unconditional tender procedure as a means of avoiding State aid?**

Central to the discussion of whether the conduct of a tender procedure is capable of eliminating State aid is the way in which the public contract has been awarded. In this respect, the conduct of a competitive, transparent, non-discriminatory and unconditional tender procedure has been mentioned by the Commission as one possible way to avoid the risk of granting State aid:<sup>13</sup>

*“If the sale and purchase of assets, goods and services (or other comparable transactions) are carried out following a competitive, transparent, non-discriminatory and unconditional tender procedure in line with the principles of the TFEU on public procurement, it can be presumed that those transactions are in line with market conditions, provided that the appropriate criteria for selecting the buyer or seller [...] have been used [...].”<sup>14</sup>*

It has to be noted however, that the choice of procedure is not sufficient to rule out State aid:<sup>15</sup>

*“Using and complying with the procedures provided for in the Public Procurement Directives can be considered sufficient to meet the requirements above provided that all the conditions for the use of the respective procedure are fulfilled. This does not apply in specific circumstances that make it impossible to establish a market price, such as the use of the negotiated procedure without publication of a contract notice. If only one bid is submitted, the procedure would not normally be sufficient to ensure a market price, unless either (i) there are particularly strong safeguards in the design of the procedure ensuring genuine and effective competition and it is not apparent that only one operator is realistically able to submit a credible bid or (ii) the public authorities verify through additional means that the outcome corresponds to the market price.”<sup>16</sup>*

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<sup>13</sup> Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (2016/C 262/01), OJ C 262, 19.7.2016, p. 1–50, point 89.

<sup>14</sup> Emphasis added.

<sup>15</sup> Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262, point 93.

<sup>16</sup> Emphasis added.

Accordingly, the conduct of a tender procedure is used as a *presumption* against State aid. As stressed by the Commission, if the chosen procedure for the award is not suitable to establish market price, State aid cannot be ruled out.

Arguably, the procedure itself cannot be used to rule out the presence of State aid when public contracts are awarded, and this means that contracting authorities have to be aware of the State aid rules when they award public contracts.

### **1.1.2 Interaction between public procurement law and State aid law**

The public procurement rules consist of Directives which lay down procedural rules for the award of public contracts by contracting authorities above a certain threshold. The rules on public procurement are set out in four Directives, namely the public procurement Directive; the utilities Directive<sup>17</sup>; the concession Directive<sup>18</sup>; and the defence Directive<sup>19</sup>. The procedural rules in the procurement Directives concern situations where the contracting authority act as purchaser, and one of the main aims of the procurement rules is to ensure equal access to public contracts for economic operators across Member States.<sup>20</sup>

Furthermore, public contracts can – under specific circumstances – be awarded directly without the conduct of a tender procedure. These situations are referred to as legal direct award of contract. A contract can be legally awarded without the conduct of a tender procedure, e.g. when the value of the contract is below the thresholds set out in the Directives. Finally, situations might occur where the award of a contract directly to an economic operator falls under the scope of the procurement Directives and thus should have happened through a tender procedure. Such situations are referred to as illegal direct award of contracts.

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<sup>17</sup> Directive 2014/25/EU of The European Parliament and of The Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors (henceforth “the utilities Directive”), repealing Directive 2004/17/EC.

<sup>18</sup> Directive 2014/23/EU of The European Parliament and of The Council of 26 February 2014 on the award of concession contracts (henceforth “the concession Directive”).

<sup>19</sup> Directive 2009/81/EC of The European Parliament and of The Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security (henceforth “the defence Directive”). The defence Directive will not be analysed further.

<sup>20</sup> This follows e.g. from *Commission of the European Communities v Kingdom of Denmark (Sorebælt)*, C-243/89, EU:C:1993:257. The objectives of the procurement rules are analysed further in Chapter 2, section 2.1.

The rules on State aid are laid down in Articles 107-109 TFEU as well as in secondary legislation consisting of decisions, regulations, guidelines, notices and frameworks, and concern the States' use of public funding to private or semi-private undertakings. The point of departure is a total prohibition against State aid to undertakings, which is laid down in Article 107(1) TFEU and supported by several exemptions in Articles 107(2) TFEU et seq. The State aid rules aim at preventing aid which favours certain undertakings by conferring an advantage which in turn can result in distortions to the Internal Market. The State aid rules are arguably concerned with preventing existing competition from being distorted, where the procurement rules aim at increasing the level of competition by ensuring equal access to public contracts.<sup>21</sup>

This Thesis will address the situations explained above by analysing to which extent the procedural safeguards<sup>22</sup> of the procurement Directive reduce or even eliminate the presence of State aid.

## 1.2 Problem statement

As mentioned above, so far, the CJ has not directly dealt with any cases concerning whether State aid occurs when public contracts are awarded. There could be numerous explanations for this. Perhaps the CJ has refrained from ruling directly on this matter due to political reasons<sup>23</sup>, e.g. because the subject is controversial for the Member States. Another explanation could be that there has not yet been an opportunity for the CJ to deliver a judgment which concludes whether the award of public contracts constitutes State aid within the meaning of Article 107(1) TFEU.

However, arguably, unsuccessful tenderers are starting to realise that there might be reasons to argue that an award of a public contract results in State aid. An example of this situation can be found in the case of *SNCM*<sup>24</sup> which was a case before the GC. In this case, one of the unsuccessful tenderers (Corsica Ferries) lodged a complaint before the Commission concerning unlawful State aid incompatible with the Internal Market to the winning tenderer (SNCM and

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<sup>21</sup> The objectives of the State aid rules are analysed further in Chapter 2, section 2.2.

<sup>22</sup> Procedural safeguards in this connection are understood as the rules concerning the different tender procedures/requirements of transparency and equal treatment etc.

<sup>23</sup> It is outside the scope of this Thesis to analyse the political aspect of the judgments from the CJEU.

<sup>24</sup> *Société nationale maritime Corse Méditerranée (SNCM) v European Commission. (SNCM)*, T-454/13, EU:T:2017:134.

CMN) as a result of the awarded contract.<sup>25</sup> This case serves to show that unsuccessful tenderers use the State aid rules as the choice of rule to prevent the award of contract to the winning tenderer. Thus, if the argument above is correct, State aid rules could be argued to represent an opportunity for the tenderers to prevent the winning tenderer from receiving the contract.

Arguably, the choice of rules depends largely on two factors which will be discussed separately. Firstly, the choice of rules can depend on the result wished for. Secondly, the choice of rules could be seen as a strategic choice by the parties. The following will discuss these situations in turn.

First of all, it should be stressed that the fact that a case has been decided under one set of rules does not mean that the same case cannot be decided under another set of rules at a later stage. This means that in situations where a case has been decided under the procurement rules there is nothing to prevent the Commission from taking up the case under the State aid rules at a later point.

Regarding the first argument that the choice of rules depends on the result wished for, it should be stressed that if a case is decided under the State aid rules, there is no possibility to have the contract deemed void. Consequently, if a case is decided under the State aid rules, the unsuccessful tenderer will not have the possibility to get the procurement process annulled, and the winning tenderer will thus enjoy the immediate benefit of getting the contract.

Secondly, the choice of rules is a strategic choice by the parties. Arguably, if the contracting authority wishes to get out of a contract, they can use the State aid rules to ‘threaten’ the winning tenderer with the possibility that the contract entails State aid.

On the basis of the above, the thesis will answer the overall research question:

*“When does the award of public contracts constitute State aid within Article 107(1) TFEU?”*

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<sup>25</sup> *Ibid.*, para 37. The *SNCM* case will be further analysed in chapter 7 of this Thesis.

### **1.2.1 Analytical framework**

In order to answer the main research question, I set up an analytical framework to be applied in the analyses. Consequently, I assess the overall research question in relation to three different award situations, namely i) award by public tender ii) award by concession and iii) direct award. These three situations represent the analytical framework of this Thesis.

The first situation refers to award of contracts which fall inside the scope of the public procurement Directive. The second award situation refers to award under the concession Directive. The third situation refers to two different award situations which are legal direct award and illegal direct award. Regarding the first situation, this could be award of contracts below the threshold as set out in the procurement Directive<sup>26</sup>. The latter situation entails illegal direct award to an undertaking, i.e. where the procurement rules apply, but are not adhered to.

It is important to analyse the three situations separately as the rules on State aid might apply differently depending on whether the award falls within the procurement regime or not.

However, it is not appropriate to apply the analytical framework in all situations, i.e. analyse all three award situations in all situations. For this reason, the different award situations are analysed uniformly in some situations. Thus, I apply the analytical framework in the Thesis, with respect to analysing the different award situations separately, where it is appropriate for the analysis.

## **1.3 Purpose of the study**

The purpose of this study is to provide a legal dogmatic (*de lege lata*) analysis of the interface between State aid law and public procurement law with an emphasis on analysing when the award of public contracts awarded by contracting authorities constitutes State aid within the meaning of Article 107(1) TFEU.

The analyses in the study are theoretical in the sense that they are focused on discussing how existing legal sources apply in general. However, I wish to address a broad audience, and I consider the conclusions of this Thesis useful for academics as well as contracting authorities, economic operators (tenderers) and others with an interest in this subject.

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<sup>26</sup> See e.g. Directive 2014/24/EU, Article 4.

## 1.4 Law and method

This section will introduce and explain how the main research question introduced above is answered. The research question asked in this Thesis is dogmatic in the sense that the aim of the Thesis is to find out what valid law is,<sup>27</sup> and essentially the answers will be *de lege lata* (an account for the current status of law through an examination of the jurisprudence from The General Court as well as the CJEU in their application of the public procurement rules and State aid rules).

### 1.4.1 Legal philosophy

The legal research in this Thesis is methodologically founded on legal positivism. The main argument behind the choice of legal positivism as foundation for the Thesis is that legal positivism has been the prevailing legal philosophy in Europe since the 19<sup>th</sup> century and is used today by most EU legal scholars.<sup>28</sup>

Legal positivism sees law as an observable phenomenon of legislation, custom, adjudication by Courts and other legal institutions.<sup>29</sup> One of the core tenets of legal positivism is that law is created by humans and obtains validity through the formal legal status of a rule.<sup>30,31</sup> Modern legal positivism has been highly influenced by *Hans Kelsen* who developed the pure theory of law (*Reine Rechtslehre*)<sup>32</sup>. The pure theory of law builds on legal positivism but distinguishes itself by being free of ‘foreign elements’ such as morality or matters of facts.<sup>33</sup> *Kelsen* sees a legal system as a hierarchy of legal norms from which the highest-ranking norm, (*Grundnorm*),

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<sup>27</sup> In the sense of H. Kelsen, *‘Introduction to the Problems of Legal Theory, A Translation of the First Edition of the Reine Rechtslehre or pure Theory of Law’*. (Oxford 1992), 35-36.

<sup>28</sup> R. Nielsen, ‘New European Legal Realism – New Problems, New Solutions?’ in U. Neergaard and R. Nielsen (eds.) *‘European Legal Method – towards a New European Legal Realism?’* (DJØF Publishing 2013), 81.

<sup>29</sup> R. Cryer, T. Herbey and B. Sokhi-Bulley, *‘Research Methodologies in EU and International law’* (Hart publishing 2011), 38.

<sup>30</sup> *Ibid.*, 37.

<sup>31</sup> In this regard, legal positivism stands in contrast to natural law, and should be seen as a reaction and critique against naturalism. Natural law is the oldest legal philosophy with a history stretching back over 2000 years. Natural law theorists see law as a necessary subject to moral constraint whereby natural law theorists concern themselves with how law should be. One of the hallmarks of natural law is that law obtains its authority, and at least some of its content, from permanent principles (whether by virtue of God or not) that are inherent in nature and/or reason. See further R. Cryer, T. Herbey and B. Sokhi-Bulley, *‘Research Methodologies in EU and International law’* (Hart publishing 2011), 35.

<sup>32</sup> H. Kelsen, *‘Introduction to the Problems of Legal Theory, A Translation of the First Edition of the Reine Rechtslehre or pure Theory of Law’*. (Oxford 1992).

<sup>33</sup> B.L. Paulson and S.L. Paulson, *‘Introduction to the Problems of Legal theory’* (Oxford University Press 2002), xx-xxi.

springs. Thus, the validity of a norm depends on whether or not it can be transferred back to (has been adopted in accordance with) the highest-ranking norm from which all other norms derive their validity. This means that each norm itself derives validity from a hierarchically superior norm until eventually an originating ultimate norm or *Grundnorm* can be posited. Accordingly, the *Grundnorm* is a norm whose validity is not created from any other (higher-ranking) norm.<sup>34</sup> This phenomenon has been referred to as a ‘Chain of Creation’.<sup>35</sup>

Legal positivism is a useful methodological approach to systematising legal norms, which is exactly what this Thesis seeks to accomplish by asking the overall research question of when the award of public contracts constitutes State aid within the meaning of Article 107(1) TFEU. The choice to apply legal positivism in the Thesis has implications for my research question. Legal positivism sees the law *as it is* and not how it *should be*,<sup>36</sup> and this implicitly entails that the research question I ask cannot be normative.

#### 1.4.2 Method

This Thesis has as its field of enquiry EU law in the broad sense, and more specifically the rules on State aid as set out in Articles 107-109 TFEU, and the rules on public procurement as set out in the public procurement Directive; the utilities Directive; the concession Directive and the defence Directive.

State aid law and public procurement law represent two separate legal disciplines, which have historically been interpreted separately, and with their own sets of EU regulated sanctions.<sup>37</sup> As the public procurement rules are highly technical and specialised, the development has arguably been isolated from the other areas of EU law.<sup>38</sup>

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<sup>34</sup> C. Tvarnø and R. Nielsen, *‘Retsskilder og Retsteorier’*, (DJØF Publishing 2017), 346.

<sup>35</sup> C. Tvarnø and R. Nielsen find that this expression is used in the translation of the German version, while Kelsen himself use the expression *Erzeugungszusammenhang* in the German (original) version, see C. Tvarnø and R. Nielsen, *‘Retsskilder og Retsteorier’*, (DJØF Publishing 2017), 346.

<sup>36</sup> E.g. in the sense of A. Ross, *‘On Law and Justice’* (1974(1958)), 46-47.

<sup>37</sup> In this respect the sanctions for breaching the procurement rules are very different from the sanctions relating to breach of State aid rules. It is outside the scope of this Thesis to analyse this question further, although the subject is of great interest to the author. For the purpose of this chapter compare e.g. Directive 2007/66/EC of 11 December 2007 with regard to improving the effectiveness of review procedures concerning the award of public OJ L 335 and Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 140.

<sup>38</sup> On the same note, see A. Bartosch, *‘The Relationship between Public Procurement and State Aid Surveillance – The Toughest Standard Applies?’* 2002, 39, *Common Market Law Review*, 551-576, 551.



A similar development has taken place within State aid law. Further, State aid law and public procurement law have from the outset two different legal bases which mean that the rules on State aid are part of the Treaty rules on competition, where the public procurement rules are founded on the free movement rules in the Treaty.<sup>39</sup>

### **1.4.3 Legal dogmatic method**

The legal dogmatic (doctrinal) method will be applied in this Thesis, whereby relevant sources of law will be identified and balanced against each other in accordance with the doctrine of the sources of the law and finally interpreted.<sup>40</sup> As the Thesis has EU law as its field of enquiry in a broad sense as described above, the legal dogmatic method will therefore be applied with regard to EU law.

This section will now account for the method used to interpret the relevant sources of law (section 1.5) as well as the doctrine of the sources of law (section 1.4.3.2). The relevant sources of law will be identified according to the chosen philosophy of law, as described above in section 1.4.1. The sources of law will be described in section 1.5.1.

#### **1.4.3.1 Interpretation of EU sources of law**

Four methods of interpretation<sup>41</sup> can be used to interpret sources of law, namely the wording of the law (grammatical interpretation), the context of the law (systematic interpretation), the object and purpose of the law (teleological interpretation) and the legislative history of the law and the intentions of the legislator (historical interpretation).

In a legal analysis, the four methods will often influence each other, and it will therefore not always be possible to adhere to one specific method of interpretation, nor is it always possible to detect which method of interpretation is used.

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<sup>39</sup> This is further analysed in chapter 2 of this Thesis.

<sup>40</sup> R. Nielsen, 'New European Legal Realism – New Problems, New Solutions?' in U. Neergaard and R. Nielsen (eds) *European Legal Method – towards a New European Legal Realism?* (DJØF Publishing 2013), 77.

<sup>41</sup> J. Komárek, 'Legal Reasoning in EU Law' in A. Arnulf and D. Chalmers (eds.) *The Oxford Handbook of European Union Law* (Oxford University Press 2015), 28-51, 45.

An example of the usage of several methods of interpretation is the judgment in *Italy v Commission*<sup>42</sup> where the CJEU applied both grammatical and teleological interpretation to conclude that the Commission was right in applying guidelines on aid to employment in a decision:<sup>43</sup>

*“in the light of that case-law, the Commission's assessment [...] is not contrary to **the letter or spirit** of Article 87(3)(a) EC [now 107(3) TFEU] and thus does not err in law.”*<sup>44</sup>

In *Teleaustria*<sup>45</sup> the CJEU used historical interpretation to consider whether the direct award of a contract fell within the scope of the procurement rules. The CJEU emphasised that:<sup>46</sup>

*“Since Telekom Austria, the Member States which have submitted observations and the Commission dispute that interpretation, **it is necessary to assess its merits in the light of the history of the relevant directives**, in particular in the field of public service contracts.”*<sup>47</sup>

Grammatical interpretation seek to derive the meaning of a norm from its literal expression in the legal text. The multilingual aspect of the EU sometimes makes grammatical interpretation difficult, as legal sources can be interpreted differently depending on which linguistic version is used. In cases of such conflicts between various language versions, systemic and teleological arguments will prevail.<sup>48</sup> Systematic interpretation puts the interpreted legal provisions into a wider context and seeks to establish an interpretation which coheres with the rest of the legal system<sup>49</sup>. This includes interpretation by analogy.

In *CILFIT*,<sup>50</sup> the CJEU emphasised that the context in which the legal source is placed is important:<sup>51</sup>

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<sup>42</sup> *Italian Republic v Commission of the European Communities*, C-310/99, EU:C:2002:143.

<sup>43</sup> *Ibid.*, para 78.

<sup>44</sup> Emphasis added.

<sup>45</sup> *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG*, joined party: *Herold Business Data AG*, C-324/98, EU:C:2000:669.

<sup>46</sup> *Ibid.*, para 45.

<sup>47</sup> Emphasis added.

<sup>48</sup> J. Komárek, ‘Legal Reasoning in EU Law’ in A. Arnulf and D. Chalmers (eds.) *The Oxford Handbook of European Union Law* (Oxford University Press 2015), 28-51, 45.

<sup>49</sup> *Ibid.*, 46.

<sup>50</sup> *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, Case 283/81, EU:C:1982:335.

<sup>51</sup> *Ibid.*, para 20.

*“[...] every provision of community law **must be placed in its context** and interpreted in the light of the provisions of community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.”<sup>52</sup>*

Teleological interpretation refers to the purpose of the legal norm, its function in the overall legal scheme and the consequences of the selected interpretation.<sup>53</sup> The purpose of a legal act can be detected from the act itself, in the preparatory work or recitals to the act, or in EU case law. The method of interpretation applied by the CJEU is teleological interpretation, but other legal arguments are used as well.<sup>54</sup> Teleological interpretation is understood as a systemic understanding of the EU legal order, and more specifically, the case law from the CJEU. Maduro states that:<sup>55</sup>

*“Teleological interpretation in EU law does not, therefore, refer exclusively to a purpose driven interpretation of the relevant legal rules. It refers to a particular systemic understanding of the EU legal order that permeates the interpretation of all its rules.”*

The *effet utile* is a specific aspect of teleological interpretation and is used by the CJEU as a method of interpretation.<sup>56</sup> The *effet utile* requires a provision of EU law to be interpreted so as to support the general aim of EU law.<sup>57</sup> Finally, historical interpretation refers to situations where the intention of the legislator is examined, e.g by taking preparatory works for a legal text into consideration. Historical interpretation is closely related to systematic and teleological interpretation.<sup>58</sup>

#### **1.4.3.2 The EU doctrine of the sources of law**

The doctrine of the sources of law concerns how a legal source should be placed in the legal hierarchy, and accordingly how it can be used to answer the question *what is valid law?* The EU

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<sup>52</sup> Emphasis added.

<sup>53</sup> J. Komárek, ‘Legal Reasoning in EU Law’ in A. Arnall and D. Chalmers (eds.) ‘*The Oxford Handbook of European Union Law*’ (Oxford University Press 2015), 28-51,46.

<sup>54</sup> M.P. Maduro, ‘Interpreting European Law: Judicial Adjudication in A Context of Constitutional Pluralism’ (2007) 1(2), *European Journal of Legal Studies*, 137-152, 139-140.

<sup>55</sup> *Ibid.*,140.

<sup>56</sup> H. Rasmussen ‘*The European Court of Justice*’ (GadJura 1998), 31.

<sup>57</sup> This is referred to by Rasmussen as the *telos* in rules of [Union] law, H. Rasmussen ‘*The European Court of Justice*’ (GadJura 1998), 31.

<sup>58</sup> J. Komárek, ‘Legal Reasoning in EU Law’ in A. Arnall and D. Chalmers (eds.) ‘*The Oxford Handbook of European Union Law*’ (Oxford University Press 2015), 28-51,46.

doctrine of sources of law means that lower-ranking sources of law, such as secondary sources of law, must respect the higher-ranking sources of law, such as the Treaties.<sup>59</sup> In the EU, the hierarchy of norms implies that there is a vertical order of legal acts, and norms lower in the hierarchy are thus subject to legal acts of a higher status.<sup>60</sup> From an EU perspective, the doctrine of sources of law has to deal with and acknowledge the national sources of law in the Member States. Mainly two principles influence the relationship between EU law and the national laws of the Member States, namely the doctrine of supremacy and the doctrine of direct effect. Firstly, the doctrine of supremacy means that primary and secondary EU law takes precedence over national laws of the Member States.<sup>61</sup> Secondly, the doctrine of direct effect entails that EU Treaty provisions can have direct effect in the Member States, and further, that they can be relied on by individuals.<sup>62</sup> The principles of supremacy and direct effect play a vital role in the relationship between EU and the Member States and has allowed for uniformity of EU law.

## **1.5 Sources of law**

This section introduces the legal sources mainly used in this Thesis. The legal sources relied on are EU sources of law. As described above, the legal philosophy applied in the Thesis is legal positivism, and valid law is thus identified as sources of law adopted by recognised law-making bodies. In this respect, the term ‘source of law’ is used in a broad sense which implies that every legal norm which creates a legal obligation or right is considered a source of law for the purpose of this Thesis.<sup>63</sup>

### **1.5.1 EU Sources of law**

The legal sources used and interpreted in this Thesis include in particular EU judicial and legal practice. The overall research question seeks to understand the current and future case law of the

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<sup>59</sup> See further, P. Craig and G. de Búrca, ‘*EU Law – Text, Cases and Materials*’ (Oxford University Press 2015) 6<sup>th</sup> edn., 105 ff.

<sup>60</sup> *Ibid.*, 105.

<sup>61</sup> The doctrine of supremacy was established in *Flaminio Costa v E.N.E.L.*, 6/64, EU:C:1964:66.

<sup>62</sup> The principle of direct effect was first mentioned in *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, 26/62, EU:C:1963:1. The CJEU held that: ‘it follows from the foregoing considerations that, according to the spirit, the general scheme and the wording of the treaty, article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect’.

<sup>63</sup> H. Kelsen, ‘*Introduction to the Problems of Legal Theory, A Translation of the First Edition of the Reine Rechtslehre or pure Theory of Law*’. (Oxford 1992), 67.

CJEU, and this is done through EU primary sources of law (the TEU and TFEU) and EU secondary sources of law listed in article 288 TFEU (Regulations, Directives and Decisions). Furthermore, case law from the CJEU, general principles of EU law, EU soft law and preparatory works will be highly relied on as interpretative aids. Finally, academic literature will be included where necessary.

These sources will be elaborated below, but first a brief history of the EU as well as the law-making process in the EU will be explained.

#### **1.5.1.1 The history and law-making process of the EU**

The idea of a European Union leads far back, and as early as in 1925 the French Prime Minister, *Herriot*, spoke publicly about the wish to establish a United European Union.<sup>64</sup> Not until the 1950s, however, in the aftermath of World War II, did this idea (partly) come to live. The European Coal and Steel Community (ECSC) was thus established with the aim to prevent further war in Europe (namely between France and Germany). In 1951, the Treaty of Paris<sup>65</sup> was signed between Belgium, France, West Germany, Italy, the Netherlands and Luxembourg with the intention of creating a Common Market for coal and steel. Today (2017), the EU consists of 28 Member States which have conferred power to the EU to various degrees depending on which area of law is at stake.<sup>66</sup>

There are seven principal institutions listed in Article 13 TEU which carry out the tasks of the Union, namely the European Parliament, the European Council, the Council, the Commission, the CJEU, the European Central Bank and the Court of Auditors.<sup>67</sup> The Council, the Commission and the Parliament adopt and enact EU legislation. When the EU wishes to exercise the competences conferred upon it by the Treaties, the principles set out in Article 5 TEU are relevant. Hence, the principle of conferral, the principle of proportionality and the principle of subsidiarity should be respected when the EU legislator acts. The principle of conferral means that the EU only has the powers conferred on it by the Treaties. Further, the

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<sup>64</sup> D. Dinan, *Europe Recast – A History of European Union* (Palgrave Macmillan 2014) 2<sup>nd</sup> ed., 3

<sup>65</sup> Treaty Establishing the European Coal and Steel Community, 18 April 1951.

<sup>66</sup> The EU only has attributed competence conferred by the Treaties. See further, P. Craig and G. de Búrca, *EU Law – Text, Cases and Materials* (Oxford University Press 2015) 6<sup>th</sup> edn., 73.

<sup>67</sup> The European Council, the European Central Bank and the Court of Auditors will not be discussed or explained further. For a thorough explanation of the competences and functions of the principal institutions in the EU, see P. Craig and G. de Búrca, *EU Law – Text, Cases and Materials* (Oxford University Press 2015) 6<sup>th</sup> edn., 30-71.

principle of proportionality means that the exercise of EU competence may not exceed what is necessary to achieve the objectives of the Treaties. Finally, the principle of subsidiarity implies that in situations where the EU and the Member States have shared competences, the EU may only intervene if it is capable of acting more effectively than the Member States.

### 1.5.1.2 Competences

The Union shares competences with the Member States in the area of Internal Market, cf. Article 4 TFEU, and therefore they share competences on the rules on public procurement. Shared competences imply that the EU and the Member States act jointly in a specific area. Firstly, shared competence gives the Member States a right to legislate and adopt legally binding acts. Furthermore, it obliges the Member States to exercise their competence to the extent that the Union has not exercised its competence. Article 2(2) TFEU states that:

*“When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.”*<sup>68</sup>

On the contrary, the EU has exclusive competence over the competition rules, including the rules on State aid.<sup>69</sup> According to Article 3(1)(b) TFEU, the establishment of the competition rules necessary for the functioning of the Internal Market fall within the area of exclusive competence. Exclusive competence means that the Member States do not have competence to legislate, unless specifically empowered by the Union to do so. Article 2(1) states that:

*“When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.”*<sup>70</sup>

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<sup>68</sup> Emphasis added.

<sup>69</sup> In *Kingdom of Spain and Italian Republic v Council of the European Union*, joined cases C-274/11 and C-295/11, EU:C:2013:240, the CJEU stated the following in para 24: “The scope of, and arrangements for, exercising the Union’s competences in the area of ‘competition rules necessary for the functioning of the internal market’ are determined in Part Three, Title VII, Chapter 1 of the FEU Treaty, in particular in Articles 101 TFEU to 109 TFEU[...].”

<sup>70</sup> Emphasis added.

As outlined above, different competences exist for the procurement rules and the State aid rules when it comes to adopting legislation and legally binding acts. Hence, the Member States do not enjoy any autonomous legislative competence over the State aid rules, and they cannot adopt any legally binding acts, whereas the opposite applies for the public procurement rules. This situation could be problematic in situations where a Member State wishes to adopt legislation or establish enhanced cooperation in order to address issues that arise out of situations where both the State aid rules and the procurement rules play a role. In such situations it would not necessarily be possible for the Member State to establish enhanced cooperation as this is not possible when there is exclusive competence. An issue of this sort arose in *Spain and Italy v Council*<sup>71</sup>. In this case, a number of Member States wished to establish enhanced cooperation with the aim of creating unitary patent protection. The CJEU had to consider whether enhanced cooperation for creating unitary patent protection ultimately falls within the area of shared or exclusive competence.

Furthermore, the different competences could also be problematic in the sense that the fact that State aid rules and procurement rules are not coordinated implies that the two areas of law develop as separate lines of legislation.

The above is relevant to the research question asked in this Thesis e.g. in relation to the Member States' possibilities of establishing enhanced cooperation. Hence, actions taken by the Member States in the area of public procurement rules are not necessarily coordinated with the Commission's policy on the State aid area.

#### **1.5.1.3 Primary sources of law**

The main legal sources in the EU legal system are the Treaties, i.e. the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), which form the cornerstone of EU regulation and provide the framework for the Member States' cooperation with each other. As mentioned above, the main legal sources to be relied on in this Thesis are Articles 107-109 TFEU. Furthermore, the means and objectives of the Internal Market are deduced from the Treaty, e.g. in Article 3 TEU.

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<sup>71</sup> *Kingdom of Spain and Italian Republic v Council of the European Union*, Joined cases C-274/11 and C-295/11.

In *France v High Authority*,<sup>72</sup> the CJEU established teleological interpretation of the Treaty provisions by stating that the fundamental provisions of the Treaty (in this case Articles 2-5 ECSC) are directly applicable, which means that other articles must be interpreted in accordance with these principles. In this Thesis, the statement put forward in *France v High Authority* applies in so far as the State aid rules should be interpreted in the light of the fundamental principles of the Treaty.

#### **1.5.1.4 Secondary sources of law**

As required by the principle of legality, every legislative act should have legal basis.

In this Thesis, I rely mainly on two types of secondary sources of law, namely Directives and Decisions from the Commission. Directives are secondary sources of EU law which means that they must respect (and not conflict with) provisions and principles set out in higher-ranking sources of law, e.g. the Treaties. In this Thesis, Directives are highly relied on as legal source as the public procurement rules are laid down in Directives.<sup>73</sup>

A Decision from the Commission is binding on those to whom the Decision is addressed, cf. Article 288 TFEU:

*“To exercise the Union’s competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.*

*A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.*

*A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.*

*A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.*

*Recommendations and opinions shall have no binding force.”*

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<sup>72</sup> *French Republic v High Authority of the European Coal and Steel Community*, case 1/54, EU:C:1954:7.

<sup>73</sup> See further on the objectives and purpose of the procurement Directives in chapter 2 of this Thesis.



In this Thesis, Decisions from the Commission play an important role in relation to the rules on State aid,<sup>74</sup> and therefore they are highly relied on as a legal source.

#### **1.5.1.5. Case law**

The case law from the CJEU is included in the Thesis. It can be discussed whether case law from the CJEU should be regarded as a source of EU law as such, as there is no system of binding precedent for the CJEU's judgments (no *stare decisis*). There could, however, be modifications to this view that I find should be taken into account.<sup>75</sup> First of all, the judgments from the CJEU have wide effects and are often and usually followed by the CJEU itself as well as by the national courts of the Member States. Further, the CJ has, in landmark cases, created general principles through case law, which it has followed consistently over a long period of time. One example of such a case is *Costa/Enel* where the CJEU established the primacy of Union law over domestic law. In this case, an Italian court had asked the Court of Justice whether the Italian law on nationalisation of the production and distribution of electrical energy was compatible with certain rules in the EEC Treaty. The Court thus introduced the doctrine of the primacy of Union law, basing it on the specific nature of the EU legal order, which is to be uniformly applied in all the Member States.

Finally, in a more recent case, the CJEU seemed to establish the legal basis of a concrete case by interpreting earlier case law. In *Belgacom*, the CJEU deduced a legal consequence directly from previous case law by interpreting two paragraphs of an earlier judgment in combined reading.<sup>76</sup> On the basis of the *Belgacom* case, it could be argued that we see a tendency from the CJEU to use case law as precedent to a greater extent than before, and this could arguably mean that case law can be used as a source of law.

On the basis of the above, I intend to use case law with some weight in the analysis.

#### ***Composition of the CJEU***

The Court of Justice of the European Union (CJEU) is the judicial institution of the European Union. The CJEU is divided into two courts: the Court of Justice (CJ), which deals with requests

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<sup>74</sup> See further on the role of the Commission in relation to the rules on State aid in chapter 2 of this Thesis.

<sup>75</sup> In general, on the role of the CJEU, see J. Basedow, 'The Judge's Role in European Integration – The Court of Justice and Its Critics' in H.-W. Micklitz and B. De Witte (eds.) *The European Court of Justice and the Autonomy of the Member States* (Intersentia publishing 2012), 65-79.

<sup>76</sup> *Belgacom NV v Interkommunale voor Teledistributie van het Gewest Antwerpen (INTEGAN) and Others*, C-221/12, EU:C:2013:736, para 38.

for preliminary rulings from national courts, certain actions for annulment and appeals,, and the General Court (GC) (former Court of First Instance), which deals with rules on actions for annulment brought by individuals, companies and, in some cases, EU governments. In practice, this means that the General Court deals mainly with competition law, including State aid law. In this Thesis I use the term CJEU or ‘Court of Justice of the European Union’ when referring to the Union Courts<sup>77</sup> or I use the specific terms or acronyms, Court of Justice (CJ) or General Court (GC), where necessary. The CJEU’s jurisdiction is specified in the Treaties, where Article 19(1) TEU states that:

*“The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.”*

For the purpose of this Thesis, judgments from the GC and the CJ are used as legal sources.

#### **1.5.1.6 General principles of law**

General principles of law are used by the CJEU to interpret legal acts. They are ranged below the constituent Treaties and are used when interpreting particular Treaty Articles.<sup>78</sup> The General principles are thus important interpretative tools for the CJEU and provide for considerable power over the interpretation of Treaty Articles.<sup>79</sup>

In this respect, general principles of law such as proportionality,<sup>80</sup> legal certainty and legitimate expectations are important for the interpretation of EU law.

For the purpose of this Thesis, general principles such as transparency and equal treatment play a vital role in the interpretation of the procurement Directives.<sup>81</sup>

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<sup>77</sup> By Union Courts is meant the Court of Justice, the General Court or the specialised courts such as the European Union Civil Service Tribunal. For a review of the Court of Justice of the European Union, see P. Craig and G. de Búrca, ‘EU Law – Text, Cases and Materials’ (Oxford University Press 2015) 6<sup>th</sup> edn., 57-70.

<sup>78</sup> P. Craig and G. de Búrca, ‘EU Law – Text, Cases and Materials’ (Oxford University Press 2015) 6<sup>th</sup> edn., 111. See also, T. Tridimas ‘The General Principles of EU Law’ (Oxford University Press 2006) 2<sup>nd</sup> edn.

<sup>79</sup> P. Craig and G. de Búrca, ‘EU Law – Text, Cases and Materials’ (Oxford University Press 2015) 6<sup>th</sup> edn., 112.

<sup>80</sup> Proportionality is a well-established general principle of EU law. A version of the principle can be found in Article 5(4) TEU, which provides that a Union action shall not go beyond what is necessary to achieve the objectives pursued. See also P. Craig and G. de Búrca, ‘EU Law – Text, Cases and Materials’ (Oxford University Press 2015) 6<sup>th</sup> edn., 551 ff.

#### **1.5.1.7 Soft law instruments**

Soft law may be defined as “*rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects*”.<sup>82</sup> Soft law instruments include for example recommendations, notices, communications, codes and guidelines.

Soft law is not binding on the Member States, cf. Article. 288 TEUF, but the legal positioning of soft law instruments is debated in the literature. Some authors argue that soft law is not law at all, and that the only rules that can have legal effect are hard law,<sup>83</sup> while others argue that the positioning of soft law instruments in the EU system of sources of law depends on a further analysis of the legal system in question.<sup>84</sup> The degree to which legal effects are attributed to soft law instruments affects legal doctrine. In this Thesis, soft law instruments from the Commission, such as communications and notices, are used to help answer the main research question. Thus, soft law instruments from the Commission are given some weight, although they are used as an interpretative aid. However, arguably, the Commission enjoys a rather significant role in the field of State aid, and therefore the Commission’s soft law instruments in this area of law are given quite some weight. In this respect, soft law instruments from the Commission are to a certain degree seen as ‘hybrid’ legal sources in so far as soft law from the Commission in the State aid area, in some cases, can be a stepping-stone to hard law.<sup>85</sup> However, the soft law instruments issued by the Commission are subject to judicial review from the CJEU and accordingly used in this Thesis as an interpretative aid with some weight.

#### **1.5.1.8 Preparatory works**

Preparatory works are included in the analysis in situations where it is found necessary in order to understand the meaning or wording of EU legislation. Preparatory acts are not binding under

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<sup>81</sup> The general principles of the Treaty are analysed in relation to the public procurement Directives in chapter 2 of this Thesis, see section 2.1.2.1.

<sup>82</sup> L. Senden, ‘*Soft law in European Community law*’ (Hart Publishing 2004), 112.

<sup>83</sup> J. Klabbers, ‘Informal instruments before the European Court of Justice’, (1994) 31 (5), *C.M.L.R.* 997-1023, 997.

<sup>84</sup> L. Senden, ‘Changes in the Relative Importance of Sources of Law – The Case of EU Soft Law’ in U. Neergaard and R. Nielsen (eds.) ‘*European Legal Method – in a Multi-Level EU Legal Order*’ (DJØF Publishing 2012), 225-260, 226.

<sup>85</sup> The term ‘stepping-stone to hard law’ is borrowed from M. Cini ‘The soft law approach: Commission rule-making in the EU’s state aid regime’, ‘*Journal of European Public Policy*’ (2001) 8(2), 192-207.

EU law, cf. Article 288 TFEU, and therefore it can be discussed how much weight can be put on them.

However, for the purpose of this Thesis, preparatory acts play different roles according to which area of law is discussed. Arguably, preparatory acts should not be taken into consideration when analysing the Treaties since the preparatory acts are generally not available.<sup>86</sup> For this reason, since the State aid rules are founded on Treaty provisions, preparatory acts are not taken into account when analysing the State aid rules.

For the purpose of the public procurement rules, preparatory acts can be argued to play a more prominent role. During the adoption of the 2014 procurement Directives,<sup>87</sup> a negotiation phase was carried out,<sup>88</sup> and this arguably leads to a more transparent phase for the observers. In this Thesis, preparatory works are used as an interpretative aid in order to understand the intention behind the procurement directives.

#### **1.5.1.9 Academic literature**

I use academic literature in the Thesis to discuss and criticise the analyses and the argumentations set out. The main research question of the Thesis has been discussed rather intensely in academic literature in spite of (or perhaps because of) the fact that so far, the CJ has not taken the opportunity to rule directly on the question of when the award of public contracts constitutes State aid within Article 107(1) TFEU. For this reason, academic literature is included as an interpretative aid – and as counter arguments to the conclusions and discussions set out.

### **1.6 Methods of interpretation in cases of conflicts of norms**

The research question asked in this Thesis concerning when the award of public contracts constitutes State aid within Article 107(1) TFEU could possibly entail a situation where the application of two sets of rules will lead to incompatible legal outcomes, or where the award is

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<sup>86</sup> See e.g. R. Plender, 'The Interpretation of Community Acts by Reference to the Intentions of the Authors' 1982, *Yearbook of European Law*, 63 or J. Bengoetxea, *The Legal Reasoning of the European Court of Justice Towards a European Jurisprudence* (Clarendon Press 1993).

<sup>87</sup> The 2014 procurement Directives are Directive 2014/24/EU, Directive 2014/25/EU and Directive 2014/23/EU.

<sup>88</sup> For an analysis of the EU legislative process, see e.g. D. Allerkamp, 'The EU legislative process. An introduction from a political science perspective' in G.S. Ølykke and A. Sanches-Graells (eds.), *Reformation or Deformation of the EU Public Procurement Rules*, (Edward Elgar Publishing 2016), 28-56.

legal under one set of rules, but in breach of the other. Prior to the determination of whether there is a conflict, however, there must be an interpretation of each situation in order to determine its content and thus to determine whether conflict of norms exists.

The *de lege lata* part of the Thesis examines when State aid is present when the contracting authority awards public contracts. In this respect, so far, the CJ has not taken the opportunity to decide whether the conduct of a tender procedure eliminates the presence of State aid. However, as indicated, the mere fact that a tender procedure has been conducted does not always eliminate the risk of granting aid. Accordingly, in such a situation, a conflict between norms exists, and it is thus necessary to apply methods of interpretation to solve this conflict to establish which set of rules applies.

Contradiction between two sets of rules can occur in two instances.<sup>89</sup> Firstly, situations can occur where two sets of rules conflict with each other and thereby make the application of both sets of rules impossible. Secondly, partial<sup>90</sup> conflict can occur when one rule set of rules is special compared to the other and thereby leads to different/incompatible outcomes. Situations which lead to incompatible outcomes are solved by three principles of interpretation, namely *Lex superior*, *Lex specialis* and *Lex posterior*.<sup>91</sup>

Firstly, according to the *Lex superior* principle, a higher-ranking rule takes precedence over a lower-ranking one. This means that in situations of conflict between two rules, one has a higher status and thus applies. Secondly, the principle of *Lex specialis* entails that specific rules take precedence over general rules. The principle requires the more specific rule to be applied over and above the more general rule. Finally, a *Lex posterior* rule is characterised by giving priority to the most recent law. It can be argued that the later law represents the most recent will of the law-maker and should therefore apply.

In cases of conflict between the three mentioned principles of interpretation, it is necessary to establish priority between them. In this respect it is necessary to establish how the principles of interpretation relate to the rules on State aid and the rules of public procurement, respectively.

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<sup>89</sup> C. Tvarnø and R. Nielsen, '*Retskilder og Retsteorier*', (DJØF Publishing 2017), 234 ff.

<sup>90</sup> C. Tvarnø and R. Nielsen refers to these situations as 'total-partiel modsigelse' or 'regelkrydsning' which can be translated into 'total-partial contradiction' or 'rule crossing', C. Tvarnø and R. Nielsen, '*Retskilder og Retsteorier*', (DJØF Publishing 2017), 238.

<sup>91</sup> C. Tvarnø and R. Nielsen, '*Retskilder og Retsteorier*', (DJØF Publishing 2017), 235.

Firstly, it should be discussed whether State aid law can be considered superior compared to procurement law. As stated above, the *Lex superior* principle entails that higher-ranking rules take precedence over lower-ranking ones. In this regard, it could be argued that since the procurement Directives are based on Treaty provisions, they have the same legal base as the rules on State aid. Further, State aid rules and procurement rules share the same main objectives, i.e. both sets of rules seek to strengthen the Internal Market.<sup>92</sup> According to this argument, State aid rules and procurement rules should be considered laws at the same level of legal hierarchy, and the principle of *Lex superior* would therefore not be applicable as a conflict-solving method of interpretation. However, the rules on State aid are directly based on the Treaty, whereas procurement rules are laid down in Directives, albeit based on Treaty provisions. This means that compared to the procurement rules, State aid rules could be seen as superior.

The second method of interpretation used to solve conflicts between norms is *Lex specialis*. As noted above, there is a presumption that the specific rule is applied over and above the more general rule. The rules on State aid are generally aimed at preventing the State from making harmful interventions in the market by granting incompatible aid to undertakings. This means that the rules on State aid have a wide scope in so far as they generally address the behaviour of the State. The public procurement rules specifically address the behaviour of the contracting authority when they award public contracts and aim to ensure that undertakings get access to public contracts across Member States. Accordingly, procurement rules should be considered special rules compared to the rules on State aid in the specific situation where contracting authorities award public contracts. *Lex specialis* points to a narrow interpretation of a norm in the sense that it should be understood as specifically as possible, and this argument could mean that *Lex specialis* is therefore not applicable as method of interpretation if cases of conflict between the State aid rules and the procurement rules. However, in cases where only part of the norms are in contradiction, it could be argued that *Lex specialis* could be applied as method of interpretation.

Finally, the *Lex posterior* principle implies that priority should be given to the later law. If the *Lex posterior* principle is taken literally, this would imply that the public procurement Directives would take precedence over the State aid rules, since the procurement Directives were adopted later than the State aid rules. However, as emphasised above, both the

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<sup>92</sup> See chapter 2 of this Thesis.

procurement rules and the State aid rules are based on Treaty rules, and this could imply that the *Lex posterior* principle is not suitable as method of interpretation.

Conclusively, it could be argued that where a conflict of norms exists, the applicable method of interpretation is the *Lex superior* principle. However, it has been argued that in situations where only part of the norms are in contradiction, *Lex specialis* could be applied as method of interpretation.

## **1.7 Delimitations**

This Thesis sets out to determine when the award of public contracts constitutes State aid within Article 107(1) TFEU.

The research question seeks to analyse whether purchases made by contracting authorities fall within the scope of the State aid rules. Thus, this Thesis does not analyse other situations of competitive selection, such as the award of licences.<sup>93</sup>

The thesis does not analyse the research question in relation to Article 107(2) and (3) TFEU. In this connection, it is important to distinguish between existence and compatibility: The fact that aid exists does not mean that it cannot be compatible. In this respect, Articles 107-109 TFEU are introduced in chapter 2 in order to ensure completeness. However, Articles 107(2) and (3) and Articles 108-109 TFEU will not be subject to further analysis. This means that one major limitation to the conclusions of this Thesis is the discussion of whether the transfer of alleged aid satisfies one of the possible exemptions laid down in Articles 107(2) or (3) TFEU. This means that the conclusions of this Thesis could be different if one of the possible exemptions in Articles 107(2) or (3) TFEU applies.

Furthermore, I do not discuss how the alleged existence of aid is or should be treated by the Member States, including the contracting authorities. In this respect, it would be relevant to discuss whether a specific framework should be put in place to provide a quick possibility for the contracting authorities to ensure that they do not risk granting State aid when they award public contracts. Arguably, the process of ensuring that aid is not granted or that possible aid is

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<sup>93</sup> See to this effect, *Eventech Ltd v The Parking Adjudicator*, C-518/13, EU:C:2015:9 concerning the use of bus lanes in London by black taxis but not mini cabs and *Bouygues SA and Bouygues Télécom SA v Commission of the European Communities*, T-475/04, EU:T:2007:196 concerning the award of licences to telecoms operators.

deemed compatible is very time consuming for the contracting authority in need of a specific good or service.

I only discuss the research question in relation to EU law. Possible solutions at national level are therefore not included.

As indicated in the introduction, a link between procurement law and State aid law was established in the *Altmark* case. *Altmark* considered the possible State aid concerning compensation for PSOs. It is not an aim of this Thesis to further discuss or develop this field of research. Rather, the *Altmark* case is used as an example to stress the fact that so far, the CJ has not ruled on the link between public procurement law and State aid law when the award of public contracts is made for purchases that do not relate to PSOs. Consequently, this Thesis will not analyse whether State aid occurs when undertakings are chosen to perform public service obligations.

I do not include the defence or utilities Directives in the study. Defence and utilities procurement purchases are considered rather distinct from the purchases made under the public procurement Directive and the concession Directive. Accordingly, State aid issues arising from defence and utilities procurement differ from the problems identified in this Thesis. For this reason, I have chosen to leave out defence and utilities procurement from the analysis.

This Thesis does not include an analysis of the State aid issues relating to the in-house provision in Article 12 of the public procurement Directive. Article 12 is a codification of the in-house case law from the CJEU, which in some ways deviates from prior case law by being more permissive.<sup>94</sup> In this respect, it could have been analysed whether the in-house provision in Article 12 gives rise to State aid. This discussion would have been relevant in chapter 7 of this Thesis and would have built on the conclusions in this chapter.<sup>95</sup>

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<sup>94</sup> See in this respect G.S. Ølykke and C.F. Andersen, '*A state aid perspective on certain elements of Article 12 of the new Public Sector Directive on in-house provision*', 2015, 1, *P.P.L.R.*, 1-15.

<sup>95</sup> Instead, the in-house provision is shortly discussed in chapter 2, section 2.3.3.



## **1.8 Structure**

The Thesis is divided into three parts which both seek to answer the research question *when does the award of public contracts constitute State aid within Article 107(1) TFEU*.

Part I – The first part comprises chapters 2-5. This part seeks to investigate whether the conditions for the classification of State aid for the purpose of Article 107(1) TFEU are fulfilled. In chapter 2, the objectives of State aid law and procurement law are examined with respect to whether the two areas of law coincide in respect to aims and objectives and personal scope of the rules. It is discussed to what extent the two areas of law share common objectives and where conflicts of law might arise. Chapters 3-4 analyse the personal scope for the two sets of rules and seek to conclude whether the personal scope for the procurement rules coincide with the personal scope for the State aid rules.

Part II – chapters 6-7 analyse to what extent the award of public contracts constitute State aid. Chapter 6 accounts for the concept of ‘advantage’ within Article 107(1) TFEU and seeks to derive the decisive benchmark for assessment of advantage in a procurement perspective. Chapter 7 analyses when the specific award of public contracts constitutes State aid.

Part III comprises chapter 8. This chapter introduces and explains the Market Economy Investor Principle (MEIP), which is the benchmark applied under State aid law for assessment of whether a transaction from the State involves an advantage for the recipient. This chapter further present and discuss the Market Economy Purchaser Principle (MEPP) which is the benchmark used to consider whether an advantage is conferred when public contracts are awarded.

Finally, chapter 9 presents the final conclusions of this Thesis.

## PART I

### Foundations

In this part of the Thesis I lay the basic foundations for the rest of the analyses. Thus, this part of the Thesis will analyse whether contracting authorities fulfil the cumulative criteria set out in Article 107(1) TFEU with an emphasis on discussing whether contracting authorities are, in theory, capable of transferring State aid when they award public contracts. I also analyse, whether the aims of objectives underlying the two sets of rules coincide.

## CHAPTER 2

### **2. Objectives and scope of application for the public procurement rules and State aid rules**

This chapter analyses the scope and objectives for the procurement rules and State aid rules, respectively. The analysis seeks to shed light on the two areas of law in order to find out whether differences exist with regard to what aims and objectives the areas of law seek to ensure.

In section 2.1 the aims and objectives of the procurement rules are analysed. This section seeks to establish what aims can be detected from the procurement directives as well as the case law from the CJEU. Subsequently, section 2.2 analyses the aims and objectives for the State aid rules. Section 2.2 resembles section 2.1 in structure, although the content is different. In section 2.3 the common objectives of the two sets of rules are detected in order to establish a common reference between the two sets of rules with respect to what common goals the two sets of rules seek to achieve.

#### **2.1 Public procurement law and the objectives it pursues**

When contracting authorities carry out public purchases of goods, works and services above a certain threshold, EU public procurement rules apply. EU law sets out a minimum of harmonised rules that organise the way public authorities purchase goods, works, and services. This section focuses on what the procurement rules seek to achieve – and how.

The rules on public procurement are based on Article 53(1) TFEU; Article 62 TFEU and Article 114 TFEU, and also the free movement rules of the Treaty, in particular the provisions which guarantee free movement of goods (Article 34 TFEU), freedom of establishment (Article 49 TFEU) as well as the freedom to provide services (Article 56 TFEU). Moreover, as will be

accounted for below, the principles derived from the general principles of the Treaty,<sup>96</sup> such as equal treatment, non-discrimination, mutual recognition, proportionality, and transparency play an essential role.

The EU directives on public procurement rules consist of three directives, which lay down the procedures for public purchases above a certain threshold. Firstly, the public procurement Directive regulates the acquisition by means of public contracts of works, supplies, or services from economic operators.<sup>97</sup> Secondly, the utilities Directive regulates procurement in the water, energy, transport, and postal services sectors, and finally, the concession Directive regulates the award of concession contracts.

The first procurement directives were adopted during the 1970's: The first directive for public works contracts<sup>98</sup> was adopted in 1971. Six years later, a directive on supplies contracts<sup>99</sup> was adopted. The evolution of EU procurement policy can best be described as an iterative process, meaning that public procurement policy has developed step by step, perhaps in order to get the Member States to accept coordinated regulation on public procurement in their public sectors.<sup>100</sup> One example of this is the fact that the first co-ordination directives did not regulate state-owned industries or the utilities sectors, i.e. the water, transport, energy, and telecommunications sector<sup>101</sup>, which consequently meant that in the beginning, public procurement rules had limited impact.<sup>102</sup>

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<sup>96</sup> It has been discussed in the literature how the CJEU has applied public procurement rules as a lever to shape fundamental principles of the Treaty, see S. Treumer and E. Werlauff, 'The leverage principle: secondary Community law as a lever for the development of primary Community law', (2003) 28 (1), *E.L. Rev.*, 124-133. It is outside the scope of this Thesis to go further into this discussion.

<sup>97</sup> Directive 2014/24/EU, Article 2.

<sup>98</sup> Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts OJ L 185.

<sup>99</sup> Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts OJ L 13.

<sup>100</sup> See also R. Caranta 'The Borders of EU Public Procurement Law' in D. Dragos and R. Caranta (eds), *Outside the EU Procurement Directives – Inside the Treaty?*, European Procurement Law Series vol. 4, (DJØF Publishing 2012), 25ff.

<sup>101</sup> See S. Arrowsmith *The Law of Public and Utilities Procurement: Regulation in the EU and UK*, 3rd edn. (Sweet and Maxwell 2014), 182.

<sup>102</sup> See Communication from the Commission to the Council, *Public Supply Contracts, Conclusions and Perspectives*, COM(84)717 Final, 11.

However, in 1985, the Commission published a White Paper on completing the internal market<sup>103</sup> and this changed the life of the public procurement regulation. In the communication, the Commission mentioned public procurement as one of the key areas in order to complete the Internal Market<sup>104</sup> and several initiatives were taken in order to improve the existing directives.<sup>105</sup> In the years to follow, two new directives on public works<sup>106</sup> and public supplies<sup>107</sup> were adopted, but these were later amended to consolidate the existing rules into two texts.<sup>108</sup> In 2004, a consolidated directive<sup>109</sup> on works, supplies and services was adopted as well as a directive on utilities contracts<sup>110</sup>. Furthermore, in 2007, a remedies directive<sup>111</sup> was adopted, amending the two existing remedies directives.<sup>112</sup> A few years later, in 2010, the Commission announced that it would start working on ‘simplifying and updating’ the existing procurement regime,<sup>113</sup> and in early 2011, a consultation process<sup>114</sup> was started, which led to the proposals for

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<sup>103</sup> White Paper from the Commission to the Council on Completing the Internal Market, COM(85)310 Final.

<sup>104</sup> *Ibid.*, 23.

<sup>105</sup> See S. Arrowsmith *The Law of Public and Utilities Procurement: Regulation in the EU and UK*, 3rd edn. (Sweet and Maxwell 2014), 183ff for a review of the procurement measures made, following the Commission’s white paper.

<sup>106</sup> Directive 89/440/EEC of 18 July 1989 concerning coordination of procedures for the award of public works contracts, OJ L 210.

<sup>107</sup> Directive 88/295/EEC of 22 March 1988 relating to the coordination of procedures on the award of public supply contracts, OJ L 127.

<sup>108</sup> Hence, Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts OJ L 199 and Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts OJ L 199, were adopted.

<sup>109</sup> Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134.

<sup>110</sup> Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ L 134.

<sup>111</sup> Directive 2007/66/EC, OJ L 335.

<sup>112</sup> Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ L 76, for the utilities sector and Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, OJ L 395, for the public sector.

<sup>113</sup> Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *Towards a Single Market Act For a highly competitive social market economy 50 proposals for improving our work, business and exchanges with one another*, COM(2010) 608, proposal 17.

<sup>114</sup> Green Paper on the modernisation of EU public procurement policy: Towards a more efficient European Procurement Market, COM (2011)15 final.

three new directives.<sup>115</sup> Following a legislative process with some modifications to the initial proposals,<sup>116</sup> the three current procurement Directives were adopted.

### 2.1.1 Classification of a public contract

The procurement directives are applicable to the award of public contracts between economic operators and contracting authorities.<sup>117</sup> Paragraphs (1) (5) and (6) of Article 2, in the procurement Directive defines public contracts in the following way:

*“(5) ‘public contracts’ means contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services;*

*(6) ‘public works contracts’ means public contracts having as their object one of the following:*

*(a) the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex II;*

*(b) the execution, or both the design and execution, of a work;*

*(c) the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work;*

*7) ‘a work’ means the outcome of building or civil engineering works taken as a whole which is sufficient in itself to fulfil an economic or technical function;*

*(8) ‘public supply contracts’ means public contracts having as their object the purchase, lease, rental or hire-purchase, with or without an option to buy, of products. A public supply contract may include, as an incidental matter, siting and installation operations;*

*(9) ‘public service contracts’ means public contracts having as their object the provision of services other than those referred to in point 6;”*

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<sup>115</sup> Proposal for a Directive on public procurement, COM(2011) 896 final; *Proposal for a Directive on procurement by entities in the water, energy, transport and postal services sector*, COM(2011) 895 final; and *Proposal for a Directive on the award of concession contracts*, COM(2011) 897 final.

<sup>116</sup> On the process of the legal reform of the 2014 procurement directives, see G. Ølykke and A. Sanches-Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules*, (Edward Elgar Publishing 2016) and R. Caranta, ‘The Changes to the Public Contract Directives and the Story They Tell About How EU Law Works’ (2015) 52(2), *Common Market Law Review*, 391-460. See also, M. Trybus, R. Caranta and G. Edestam (eds) ‘*EU Public Contract Law – Public Procurement and Beyond*’ (Bruylant 2014).

<sup>117</sup> The concept of ‘contracting authority’ is analysed in chapter 3 of this Thesis. The concept of ‘economic operator’ is analysed in chapter 4 of this Thesis.

According to Article 2, (1) (5- 9) in the procurement Directive, public contracts cover a wide range of work, supply and service contracts. Article 2 (1) (5) defines public contracts in general. The decisive characteristics for the definition of a public contract thus consist of formal requirements for:

- pecuniary interests <sup>118</sup>;
- contracts concluded in writing
- contracts entered into between economic operators <sup>119</sup> and contracting authorities <sup>120</sup>
- the object of works, the supply of products or the provision of services

In this regard, the most controversial requirements are probably the definition of economic operators and contracting authorities, which will be analysed in chapters 3 and 4 of this Thesis.

Regarding the subject of the contract, namely the object of works, the supply of products or the provision of services, Article 2, (1) (6-9) defines such contracts as the execution and/or design of a work, cf. Article 2, (1) (6) (a-c). In this connection, ‘a work’ is defined as ‘the outcome of building or civil engineering works, taken as a whole, which is sufficient in itself to fulfil an economic or technical function’, cf. Article 2, (1) (7). Furthermore, public supply contracts relate to the purchase, lease, rental or hire-purchase of products - with or without an option to buy, cf. Article 2, (1) (8). Examples of public supply contracts could be siting and installation operations. Finally, Article 2, (1) (9) defines public service contracts as services, except for those referred to in Article 2, (1) (6).

The definition of a concession contract is set out in 5 (1) (a-b) in the concession Directive. Accordingly, a concession contract is defined in the following way.

*“(1) ‘concessions’ means works or services concessions, as defined in points (a) and (b)*

*(a) ‘works concession’ means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the execution of works to one or more economic operators the consideration for which consists either solely in the right to exploit the works that are the subject of the contract or in that right together with payment;*

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<sup>118</sup> This concept will be analysed further in chapter 6, section 6.2.2 of this Thesis.

<sup>119</sup> See chapter 4 of this Thesis.

<sup>120</sup> See chapter 3 of this Thesis.

*(b) ‘services concession’ means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the provision and the management of services other than the execution of works referred to in point (a) to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment.*

*The award of a works or services concession shall involve the transfer to the concessionaire of an operating risk in exploiting those works or services encompassing demand or supply risk or both. The concessionaire shall be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession. The part of the risk transferred to the concessionaire shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible;”*

Article 5 (1) (a) defines ‘works concession’ in a similar way as the public contract is defined, cf. Article 2, (1) (5) of the public procurement Directive. However, a works concession differs from the definition of a public works contract by way of payment, which can consist either solely in the right to exploit the works that are the subject of the contract or in that right together with payment. Article 5 (1) (b) defines ‘services concession’ as the provision and the management of services other than those referred to regarding the execution of works.

The decisive characteristics for the definition of a concession contract are the payment for the contract and the transfer of an operating risk in exploiting the work or service.

### **2.1.2 Public procurement rules as a way of supporting an Internal Market**

The achievement of an Internal Market is a central aim for the Union. As expressed in Article 3 (3) TEU:

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



*It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.*

*It shall promote economic, social and territorial cohesion, and solidarity among Member States.*

*It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.”*

The provisions concerning the Internal Market have two main objectives which probably serve as the only reasons for invoking the Internal Market rules; namely support of the four freedoms and elimination of appreciable distortions of competition between economic operators.<sup>121,122</sup>

Overall, two approaches can be used to attain an Internal Market.<sup>123</sup> Firstly, a negative and deregulatory approach prohibits the member states from adopting national legislation that causes barriers to market access. An example of regulation that uses this approach is the rules on free movement. Secondly, a positive integration approach harmonises national regulation in order to overcome barriers to integration, which could be achieved through the adoption of directives. The public procurement directives are examples of positive integration through coordinated legislation, but negative deregulatory measures can be detected as well, e.g. in recital 1 in the preamble of the public procurement Directive, in which it is stated that the award of public contracts has to comply with the rules on free movement, of goods, freedom of establishment as well as with the freedom to provide services.

The aim of supporting an Internal Market has been emphasised by the CJEU in several cases.<sup>124</sup> In this regard the CJEU has held that the aim of the procurement rules is to open up the Internal

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<sup>121</sup> *Germany v European Parliament and Council of the European Union*, C-376/98, EU:C:2000:544, para. 95 read in conjunction with paras. 81-89. On the same note, see S. Arrowsmith ‘The purpose of the EU Procurement Directives: Ends, Means and the implications for National Regulatory Space for Commercial and Horizontal Procurement Policies’, in C. Barnard, M. Gehring and I. Solanke (eds.), *Cambridge Yearbook of European Legal Studies* (Hart Publishing 2011-2012) vol. 14, 1-48, 37-38.

<sup>122</sup> The concept of economic operator is analysed in chapter 4.

<sup>123</sup> See P. Craig and G. De Burca, *EU Law, Texts, Cases and Materials*, 6th edn, (Oxford University Press 2015), 608.

<sup>124</sup> See e.g. *Impresa Lombardini SpA - Impresa Generale di Costruzioni v ANAS - Ente nazionale per le strade and Società Italiana per Condotte d'Acqua SpA* (C-285/99) and *Impresa Ing. Mantovani SpA v ANAS - Ente nazionale per le strade and Ditta Paolo Bregoli* (C-286/99), Joined cases C-285/99 and C-286/99, EU:C:2001:640; *Commission of the European Communities v Kingdom of Spain*, C-283/00, EU:C:2003:544; *Kauppatalo Hansel Oy v Imatran kaupunk*, C-244/02, EU:C:2003:560; *Stadt Halle and RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna*, C-26/03, EU:C:2005:5; *Carbotermo SpA and Consorzio Alisei v Comune di Busto Arsizio and AGESP SpA*, C-340/04, EU:C:2006:308; *Michaniki AE v Ethniko Symvoulío Radiotileorasis and Ypourgos Epikrateias*, C-213/07, EU:C:2008:731.

Market for public contracts<sup>125</sup> by ‘promoting the widest possible expression of interests among contractors in the Member States’.<sup>126</sup>

In *Stadt Halle*<sup>127</sup>, the CJEU stated that the purpose of the public procurement rules is the free movement of services (which was the ambit of the specific case) and the opening to undistorted competition in all the Member States.<sup>128</sup> The CJEU further elaborates on this point by stating that the purpose of the procurement rules involves an obligation on all contracting authorities to *apply the relevant Union rules*, where the conditions for such application are satisfied. This elaboration could imply that where the award of the contract is made pursuant to a tender procedure under the procurement directives, the scope for application of other relevant EU rules is broad.

In *Strong Segurança*<sup>129</sup>, the CJEU stated that the general principle of ‘effective competition’ is an essential objective of the procurement rules which, nevertheless, cannot lead to an interpretation that is contrary to the clear terms of the rules.<sup>130</sup> The term ‘effective competition’ is used by the CJEU, arguably to ensure competition by observing general principles of the Treaty, such as the principle of equal treatment.<sup>131</sup>

#### 2.1.2.1 *The general principles of the Treaty*

The general principles of the treaty are, arguably, of importance when public contracts are awarded.

The important role of the general principles to procurement law is expressed in the public procurement Directive. Cf. Article 18(1) of the public procurement Directive:

*“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*

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<sup>125</sup> *Impresa Lombardini*, Joined cases C-285/99 and C-286/99, para 34;

<sup>126</sup> *Michaniki*, C-213/07, para para 39 and the cases cited therein.

<sup>127</sup> *Stadt Halle*, C-26/03.

<sup>128</sup> *Ibid.*, para 58.

<sup>129</sup> *Strong Segurança SA v Município de Sintra and Securitas-Serviços e Tecnologia de Segurança*, C-95/10, EU:C:2011:161.

<sup>130</sup> *Strong Segurança*, C-95/10, para. 37.

<sup>131</sup> See *Concordia Bus Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne*, C-513/99, EU:C:2002:495, para. 81 and *Fabricom SA v État belge*, joined Cases C-21/03 and C-34/03, EU:C:2005:127, para. 26.

*design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.*<sup>132</sup>

Accordingly, contracting authorities have an express obligation, by way of Article 18(1), to ensure that economic operators are treated in an equal and non-discriminatory manner and, furthermore, that the contracting authority acts in a transparent and proportionate manner when they award public contracts.

Additionally, the preamble to the public procurement Directive mentions the general principles. Recital 1 of the preamble reads as follows:

*“the award of public contracts by or on behalf of Member States’ authorities **has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU)**, and in particular the free movement of goods, freedom of establishment and the freedom to provide services, **as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency.** However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that those principles are given practical effect and public procurement is opened up to competition.”*

Consequently, the procurement directives provide that contracting authorities should in particular<sup>133</sup> comply with the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency when they award public contracts.

#### *The principle of equal treatment*

The principle of equal treatment is of great importance in public procurement law.<sup>134</sup> Besides the mentioning in Article 18 of the procurement Directive as well as in the preamble as described above, the directives do not contain an express definition of the principle of equal treatment. In this respect, the material content of the obligation to ensure equal treatment, when public contracts are awarded, is derived through the case law of the CJEU.

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<sup>132</sup> Emphasis added.

<sup>133</sup> Paragraph 1 entails an obligation to comply with principles *such as*.

<sup>134</sup> M. Steinicke mentions the principle of equal treatment as the most important and the most often relied upon principle in public procurement law, see M. Steinicke, ‘Public Procurement’, in P. W. Jessen, B. G. Mortensen, M. Steinicke and K. E. Sørensen (eds) *Regulating Competition in the EU* (Kluwer Law International 2016), 585.

In *Überschär*<sup>135</sup> the CJEU formulated an obligation for the contracting authority to treat similar situations equally. The CJEU concluded that:<sup>136</sup>

*“according to the established case-law of the court the general principle of equality , of which the prohibition on discrimination on grounds of nationality is merely a specific enunciation , is one of the fundamental principles of community law . **This principle requires that similar situations shall not be treated differently unless differentiation is objectively justified.**”*<sup>137</sup>

The obligation to treat similar situations in an equal manner has later been clarified by the CJEU in *Fabricom*<sup>138</sup> to further entail that different situations cannot be treated equally. The CJEU held that:<sup>139</sup>

*[...] it must be borne in mind that the duty to observe the principle of equal treatment lies at the very heart of the public procurement directives, which are intended in particular to promote the development of effective competition in the fields to which they apply and which lay down criteria for the award of contracts which are intended to ensure such competition [...]*”

*Furthermore, it is settled case-law that the principle of equal treatment requires that comparable situations must not be treated differently and **that different situations must not be treated in the same way unless such treatment is objectively justified [...]**”*

Based on the above, the principle of equal treatment in a public procurement context thus entails an obligation for the contracting authority to ensure that comparable situations are not treated differently and that different situations are not treated in the same way unless such treatment is objectively justified.

In a State aid perspective, it could be argued that the obligation to ensure equal treatment relates to the prohibition in Article 107(1) TFEU to favour certain undertakings or conferring an advantage to the recipient undertaking.<sup>140</sup> As held above, Article 18 (1) of the procurement Directive entails a prohibition of artificially narrowing the design of the procurement with the intention of unduly favouring or disadvantaging certain economic operators.

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<sup>135</sup> *Peter Überschär v Bundesversicherungsanstalt für Angestellte*, Case 810/79, EU:C:1980:228.

<sup>136</sup> *Ibid.*, para 16.

<sup>137</sup> Emphasis added.

<sup>138</sup> *Fabricom*, Joined cases C-21/03 and C-34/03.

<sup>139</sup> *Ibid.*, paras 26-27.

<sup>140</sup> The concept of selectivity embedded in the prohibition to favour certain undertakings is further analysed in chapter 5. The notion of advantage is analysed in chapters 6 and 7.

In this respect, the principle of equal treatment, as expressed in Article 18(1) of the procurement Directive, obliges contracting authorities to design an appropriate tender procedure, which eliminates the risk of favouring certain undertakings or granting an advantage to the recipient undertaking.<sup>141</sup>

Arguably, there are many possibilities to confer an advantage to an economic operator in a procurement context.<sup>142</sup> It is, however, outside the scope of this chapter to discuss in detail how different award situations under procurement law might confer an advantage to economic operators. This analysis will therefore be conducted in chapter 7 instead. For the purpose of this chapter, it suffices to conclude that the principle of equal treatment is connected to the concept of selectivity and advantage under Article 107(1) TFEU by way of the formulation in Article 18(1) in the procurement Directive.

*The principle of equal treatment in relation to the direct award of contracts*

In relation to the analytical framework of this Thesis<sup>143</sup>, it has to be discussed how the principle of equal treatment relates to 1) situations in which the award is made pursuant to a tender procedure under the procurement Directive; 2) situations in which the award is made under the concession Directive and 3) situations in which the award is made directly (legally or illegally). As analysed above, the principle of equal treatment is embedded in Article 18(1) of the procurement Directive. A similar Article can be found in Article 3 of the concession Directive. For this reason, the following will account for how the principle of equal treatment applies to legal and illegal direct award of contracts.

Arguably, the principle of equal treatment applies to situations in which the contracting authority awards public contracts without the conduct of a tender procedure. In *Storebælt*<sup>144</sup> which is a case that dates back to before the mentioning of equal treatment in the procurement directives, the CJEU held that:<sup>145</sup>

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<sup>141</sup> See Nicolaides and Rusu for a discussion of procurement procedures that eliminate advantage: P. Nicolaides and I. E. Rusu, 'Competitive Selection of Undertakings and State aid: Why and When Does It Not Eliminate Advantage?', (2012), 7, (1), *E.P.P.P.L.*, 5-29, 12.

<sup>142</sup> See Nicolaides and Schoenmaekers for an analysis of different situations under procurement law that might lead to the conferral of advantage, P. Nicolaides and S. Schoenmaekers, 'The Concept of 'Advantage' in State aid and Public Procurement and the Application of Public Procurement Rules to Minimise Advantage in the New GBER', (2015), 14 (1), *EStAL*, 143-156, 145 ff.

<sup>143</sup> See chapter 1, section 1.2.1.

<sup>144</sup> *Commission of the European Communities v Kingdom of Denmark (Storebælt)*, C-243/89.

<sup>145</sup> *Ibid.*, paras 32-33.

*“Since the Commission claims in its pleadings, which were re-worded in its reply, that Storebaelt acted in breach of the principle that all tenderers should be treated alike, the Danish Government's argument that that principle is not mentioned in the directive and therefore constitutes a new legal basis for the complaint of breach of State obligations must be considered first.*

*On this issue, it need only be observed that, **although the directive makes no express mention of the principle of equal treatment of tenderers, the duty to observe that principle lies at the very heart of the directive** whose purpose is, according to the ninth recital in its preamble, to ensure in particular the development of effective competition in the field of public contracts and which, in Title IV, lays down criteria for selection and for award of the contracts, by means of which such competition is to be ensured.”<sup>146</sup>*

Accordingly, the principle of equal treatment applies to contracts awarded outside the scope of the procurement directives and, therefore, also to contracts awarded directly (whether legal or illegal)

Furthermore, since the principle of equal treatment can be derived from the Treaty, and therefore is a principle derived from primary law, it can be argued that the principle of equal treatment applies to situations where primary law applies. In this respect, it can be assumed that the principle of equal treatment applies to the legal, direct award of contracts where a cross-border interest exists.<sup>147</sup>

#### *The principle of transparency*

The principle of transparency is an important principle in relation to the procurement rules.

Article 18(1) of the procurement Directive, as cited above, refers directly to the principle of transparency by stating that contracting authorities shall act in a transparent manner when they award public contracts.<sup>148</sup>

In addition to its treatment in Article 18(1), the transparency principle is cited numerous times in the procurement Directive., e.g. in Article 43 (1)<sup>149</sup> regarding specific labels required for the

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<sup>146</sup> Emphasis added.

<sup>147</sup> On the same note see, G. S. Ølykke and R. Nielsen, ‘EU’s Udbudsregler – I dansk kontekst’, (Jurist- og Økonomforbundets Forlag 2015), 100.

<sup>148</sup> See section 2.1.2 above.

<sup>149</sup> Article 43 (1) (c) read as follows: “1. Where contracting authorities intend to purchase works, supplies or services with specific environmental, social or other characteristics they may, in the technical specifications, the award criteria or the contract performance conditions, require a specific label as means of proof that the works, services or supplies

purchase of works or services with specifically environmental, social or other characteristics; Article 56 (1) (3)<sup>150</sup> on general principles regarding choice of participants and the award of contracts; and Article 58<sup>151</sup> regarding selection criteria. Arguably, there is an obligation for contracting authorities, by way of the procurement Directive, to act in a transparent manner<sup>152</sup> in all phases of the tender procedure.

As stated above, Article 3 in the concession Directive resembles Article 18(1) in the public procurement Directive. Thus it can be concluded that the principle of transparency applies in a similar fashion as described above, to award of contracts under the concession Directive.

#### *The principle of transparency in relation to direct award of contracts*

The transparency principle is of importance to contracts awarded outside the directives. The CJEU has, on several occasions, held that the transparency principle applies to contracts below threshold or otherwise outside the scope of the directive.<sup>153</sup>

The first judgment regarding the influence of the principle of transparency to procurement law is considered to be the *Unitron Scandinavia*<sup>154</sup> case.<sup>155</sup>

In this case, the CJEU was asked to conclude whether a private undertaking (Danske Slagterier) could be considered a contracting authority within the meaning of the procurement directives.

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correspond to the required characteristics, provided that all of the following conditions are fulfilled: (c) **the labels are established in an open and transparent procedure** in which all relevant stakeholders, including government bodies, consumers, social partners, manufacturers, distributors and non-governmental organisations, may participate;”

<sup>150</sup> Article 56 (1) (3) read as follows: “3. Where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous or where specific documents are missing, contracting authorities may, unless otherwise provided by the national law implementing this Directive, request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, **provided that such requests are made in full compliance with the principles of equal treatment and transparency.**”

<sup>151</sup> Article 58 (1) (3), third indent read as follows: “The ratio, for instance, between assets and liabilities may be taken into consideration where the contracting authority specifies the methods and criteria for such consideration in the procurement documents. **Such methods and criteria shall be transparent, objective and non-discriminatory.**”

<sup>152</sup> On the same note, see M. Steinicke, ‘Public Procurement’, in P. W. Jessen, B. G. Mortensen, M. Steinicke and K. E. Sørensen (eds) *Regulating Competition in the EU* (Kluwer Law International 2016), 593.

<sup>153</sup> E.g. in *Unitron Scandinavia A/S and 3-S A/S, Danske Svineproducenter Serviceselskab v Ministeriet for Fødevarer*, C-275/98, EU:C:1999:567; *Telaustria*, C-324/98; *Consorzio Aziende Metano v Comune di Cingia de’ Botti*, (Coname), C-231/03, EU:C:2005:487 and *Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG*, C-458/03, EU:C:2005:605. See also see M Steinicke, ‘Public Procurement’, in P. W. Jessen, B. G. Mortensen, M. Steinicke and K. E. Sørensen (eds) *Regulating Competition in the EU* (Kluwer Law International 2016), 593.

<sup>154</sup> *Unitron Scandinavia*, C-275/98.

<sup>155</sup> See also R Caranta ‘The Borders of EU Public Procurement Law’ in D. Dragos and R. Caranta (eds), *Outside the EU Procurement Directives – Inside the Treaty?*, European Procurement Law Series vol. 4, (DJØF Publishing 2012), 25-60, 34.

The CJEU held that Danske Slagterier was not a contracting authority<sup>156</sup> and consequently, the procurement directives did not apply.<sup>157</sup>

Regarding the principle of transparency, the CJEU held that<sup>158</sup>

*[...]where a contracting authority grants to a body which is not a contracting authority special or exclusive rights to engage in a public service activity, the only requirement is that the measure whereby that right is granted must stipulate that, in relation to the public supply contracts which it awards to third parties in the context of that activity, **the body in question must comply with the principle of non-discrimination on grounds of nationality.***

*It should be noted, however, that **the principle of non-discrimination on grounds of nationality cannot be interpreted restrictively. It implies, in particular, an obligation of transparency** in order to enable the contracting authority to satisfy itself that it has been complied with.*<sup>159</sup>

Accordingly, the principle of transparency applies when contracts are awarded outside the scope of the procurement directives. Furthermore, the above shows that the principle of non-discrimination implies an obligation of transparency. Thus, the case of *Unitron* establishes a link between the principle of non-discrimination and the principle of transparency.

#### *Other principles*

As held above, a link between the principles of non-discrimination and transparency was established in *Unitron*.

In *Teleaustria*<sup>160</sup> the CJEU further elaborated on this link. This case concerned the question whether a service concession fell inside the scope of the procurement directives. The CJEU held that the fact that service concessions did not (at the time) fall within the scope of the procurement directives did not rule out the relevance of primary EU law. According to the CJEU<sup>161</sup>

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<sup>156</sup> *Unitron Scandinavia*, C-275/98, para 26.

<sup>157</sup> *Ibid.*, para 27.

<sup>158</sup> *Ibid.*, paras 29 and 31.

<sup>159</sup> Emphasis added.

<sup>160</sup> *Telaustria*, C-324/98.

<sup>161</sup> *Ibid.*, para 60.



*“[...] it should be borne in mind that, notwithstanding the fact that, as Community law stands at present, such contracts are excluded from the scope of Directive 93/38 [now 2014/25], **the contracting entities concluding them are, none the less, bound to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular.**”<sup>162</sup>*

In a State aid perspective, it could be argued that the obligation in Article 18(1) in the procurement Directive to ensure transparency and non-discrimination supports the prohibition in Article 107(1) TFEU of favouring or disadvantaging certain economic operators. In this respect, it could be argued that the principles of equal treatment, transparency and non-discrimination work coincident to ensure that public contracts are awarded in a non-selective and non-advantageous way.

According to the above, the rules on public procurement is an essential instrument of the Internal Market and public procurement rules are thus used as a means to an end of achieving an Internal Market. In order to obtain this overall objective, public authorities are obliged to comply with the principles of the Treaty, and in particular the free movement of goods, freedom of establishment, and the freedom to provide services, as well as the principles deriving therefrom, as described above.

### **2.1.3 Complementary objectives of the procurement rules**

Besides the goal of achieving an Internal Market, it should be discussed whether the procurement rules have other (complementary) goals. In the light of the research question asked in this Thesis, the objectives of the procurement rules become relevant when discussing whether the rules on public procurement and the rules on State aid share common objectives<sup>163</sup>, which in turn helps answering the research question, when the award of public contracts constitutes State aid within Article 107(1) TFEU. Therefore, the following section will account for whether complementary objectives, to the achievement of an Internal Market, can be detected in the case law from the CJEU. Furthermore, some discussions from academic literature will be highlighted.

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<sup>162</sup> Emphasis added.

<sup>163</sup> This will be discussed below in section 2.3.

It has been acknowledged by the CJEU that contracting authorities can be guided by considerations that are not necessarily economic when they award public contracts:

*“Consequently, the aim of the Directive is to avoid both the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities and the possibility **that a body financed or controlled by the State, regional or local authorities or other bodies governed by public law may choose to be guided by considerations other than economic ones**[...]”*<sup>164</sup>

Yet, as emphasised by the CJEU, the procurement rules seek to ensure that contracting authorities act in an equal manner (*avoid the risk of preference*) by ensuring that the contracting authorities adopt economic considerations when they award public contracts.

However, examples can be found of objectives that are not purely economic when public contracts are awarded.<sup>165</sup>

The CJEU has considered the use of environmental and social criteria in several cases.<sup>166</sup>

In *Beentjes*<sup>167</sup> the CJEU was asked to conclude whether certain criteria in relation to the selection of qualified tenderers were permitted under directive 71/305/EEC (the public works Directive). In replying to this question, the CJEU revealed two important aspects in relation to this Thesis. Firstly, the CJEU held that the contracting authorities have a certain degree of freedom to decide the award criteria:<sup>168</sup>

*“[...] the suitability of contractors is to be checked by the authorities awarding contracts in accordance with the criteria of economic and financial standing and of technical knowledge or ability referred to in Articles 25 to 28. **The purpose of these articles is not to delimit the power of the Member States to fix the level of financial and economic standing and technical knowledge required in order to take part in procedures for the award of public works contracts***

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<sup>164</sup> Emphasis added.

<sup>165</sup> Graells lists several so-called socio-political aims achieved through public procurement, see A. S. Graells, ‘Public Procurement and the EU Competition Rules’ (2<sup>nd</sup> edn. Hart publishing 2015) 102. See further, P. S. Jakobsen, S. T. Poulsen and S. E. Kalsmose-Hjelmberg, ‘EU Udbudsretten’ (Jurist- og Økonomforbundets Forlag 2016), 39ff.

<sup>166</sup> See e.g., *Gebroeders Beentjes BV v State of the Netherlands*, Case 31/87, EU:C:1988:422; *Commission of the European Communities v French Republic*, C-225/98, EU:C:2000:494; *Concordia Bus*, Case C-513/99; *EVN AG and Wienstrom GmbH v Republik Österreich*, C-448/01, EU:C:2003:651; *European Commission v Kingdom of the Netherlands (Max Havelaar)*, C-368/10, EU:C:2012:284.

<sup>167</sup> *Beentjes*, Case 31/87.

<sup>168</sup> *Ibid.*, para 17.

*but to determine the references or evidence which may be furnished in order to establish the contractor's financial and economic standing and technical knowledge or ability.*

*Nevertheless, it is clear from these provisions that the authorities awarding contracts can check the suitability of the contractors only on the basis of criteria relating to their economic and financial standing and their technical knowledge and ability”.*<sup>169</sup>

Then, the CJEU held that<sup>170</sup>

*“As regards the exclusion of a tenderer on the ground that it is not in a position to employ long-term unemployed persons, it should be noted in the first place that such a condition has no relation to the checking of contractors' suitability on the basis of their economic and financial standing and their technical knowledge and ability or to the criteria for the award of contracts referred to in Article 29 of the directive.*

*[...] in order to be compatible with the directive such a condition **must comply with all the relevant provisions of Community law, in particular the prohibitions flowing from the principles laid down in the Treaty in regard to the right of establishment and the freedom to provide services.***

*The obligation to employ long-term unemployed persons could inter alia infringe the prohibition of discrimination on grounds of nationality laid down in the second paragraph of Article 7 of the Treaty if it became apparent that such a condition could be satisfied only by tenderers from the State concerned or indeed that tenderers from other Member States would have difficulty in complying with it. It is for the national court to determine, in the light of all the circumstances of the case, whether the imposition of such a condition is directly or indirectly discriminatory.”*<sup>171</sup>

The citations above serve to show that the contracting authorities possess a certain degree of freedom to decide the selection and award criteria. However, the criteria used for the selection and award of tenderers should be conducted in accordance with the general principles of the Treaty.

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<sup>169</sup> Emphasis added. Footnote omitted.

<sup>170</sup> *Beentjes*, Case 31/87, paras 28-31.

<sup>171</sup> Emphasis added.

The second important aspect, in relation to the question asked in this Thesis, relates to the following paragraphs, in which the CJEU arguably established a link between the procurement rules and the State aid rules:<sup>172</sup>

*“Although the second alternative leaves it open to the authorities awarding contracts to choose the criteria on which they propose to base their award of the contract, **their choice is limited to criteria aimed at identifying the offer which is economically the most advantageous. Indeed, it is only by way of exception that Article 29 ( 4 ) [now Article 69] provides that an award may be based on criteria of a different nature within the framework of rules whose aim is to give preference to certain tenderers by way of aid, on condition that the rules invoked are in conformity with the Treaty, in particular Articles 92 [now 107] et seq .**”*

*Furthermore, the directive does not lay down a uniform and exhaustive body of Community rules; within the framework of the common rules which it contains, **the Member States remain free to maintain or adopt substantive and procedural rules in regard to public works contracts on condition that they comply with all the relevant provisions of Community law**, in particular the prohibitions flowing from the principles laid down in the Treaty in regard to the right of establishment and the freedom to provide services [...].”<sup>173</sup>*

Accordingly, the CJEU narrows the alleged degree of freedom of the scope for applying award criteria, which are not directly related to the contract, by emphasising that the choice is limited to criteria aimed at identifying the offer, which is economically the most advantageous (this was the specific ambit of the case). Furthermore, the CJEU emphasises that such criteria should be seen as exceptions.

Then, the CJEU emphasises that an award based on different criteria than the ones listed in the directive should be in conformity with Article 107 TFEU. Arguably, *Beentjes* establishes a link between the procurement rules and State aid rules by requiring that award criteria used by exception, should conform with the State aid rules. This conclusion is an important contribution in answering the research question asked in this Thesis, because the established link between the

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<sup>172</sup> *Beentjes*, Case 31/87, paras 19-20.

<sup>173</sup> Emphasis added.

procurement rules and State aid rules indicates that there is a possibility of granting State aid when public contracts are awarded under the procurement Directive.<sup>174</sup>

#### 2.1.3.1 Discussions in academic literature

The scope of objectives for the procurement rules has been widely debated in academic literature.<sup>175</sup>

As formulated by Trepte:<sup>176</sup>

*“Public procurement regulation in Europe suffers from uncertainty over what is and what should be. What appears constant is not and even if the objectives of the directives can be reduced to a few key principles, as they were at the outset, this is not how they are used and interpreted by the regulator, the courts or in practice. **There is confusion over the purposes of the directives and what they can be used to achieve.** Indeed, if they could be used to achieve all of the goals claimed for them, they would be very fluid instruments indeed. [...] The European judiciary has often been required to interpret the directives to make sense of them in practice. It has on several occasions, for example, been driven to state that the duty to observe the principle of equal treatment lies at the very heart of the public procurement directives even if this has only recently been recognised in the directives themselves.[...] **The regulator has also continued to regulate and the way in which it has done so sometimes appears far removed from the original goals of the directives. This is true even where, as is also the case, it has changed tack, sometimes reluctantly, to pursue varying goals of the moment. The directives are arguably now used explicitly to further political goals which are not covered by the stated objectives and have little to do with the procurement function.**”<sup>177</sup>*

The core of the debate seems to be whether the objectives of the procurement rules can be deduced to merely supporting an Internal Market by observing the fundamental freedoms in the

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<sup>174</sup> This question will be analysed in depth in chapter 7 of the Thesis.

<sup>175</sup> See in particular P. Kunzlik, ‘Neoliberalism and the European Public Procurement Regime’, in C. Barnard, M. Gehring and I. Solanke (eds.), *Cambridge Yearbook of European Legal Studies*, (Hart Publishing 2012-2013) vol. 15, 283-356, 312-356; A. S. Graells, ‘Public Procurement and the EU Competition Rules’ (2<sup>nd</sup> edn. Hart publishing 2015) 101ff; S. Arrowsmith ‘The purpose of the EU Procurement Directives: Ends, Means and the implications for National Regulatory Space for Commercial and Horizontal Procurement Policies’, in C. Barnard, M. Gehring and I. Solanke (eds.), *Cambridge Yearbook of European Legal Studies* (Hart Publishing 2011-2012) vol. 14, 1-48. P. Trepte, ‘Regulating Procurement – Understanding the End and Means of Public Procurement Regulation’ (Oxford University Press 2004).

<sup>176</sup> See foreword to the Second Edition by P. Trepte to A. S. Graells, ‘Public Procurement and the EU Competition Rules’ (2<sup>nd</sup> edn. Hart publishing 2015).

<sup>177</sup> Emphasis added.

Treaty (by way of the four freedoms) and the general principles flowing therefrom. Or, whether complementary objectives can be detected as well.<sup>178</sup>

In the light of the research question asked in this Thesis, it is relevant to discuss whether procurement rules and State aid rules share common objectives. In this respect, it can be argued that if contracting authorities seek to achieve policy goals when they award public contracts, and if such policy goals are not supported by the aims of the procurement rules, this could possibly lead to the risk that contracting authorities might grant disguised State aid to the winning tenderer. From a State aid perspective, policy-based exceptions are neither exceptional nor controversial. In fact, as will be elaborated below, rules allow the Commission and the Council a wide discretion and extensive power to admit aids to the Member States in derogation of the prohibition in 107(1) TFEU.<sup>179</sup>

As will be elaborated below, policy-based exemptions to the prohibition in Article 107(1) TFEU of granting aid are both possible and possibly allowed by way of Article 107(2) and (3). However, since the derogations in Article 107 (2) and (3) are outside the scope of this Thesis, it is sufficient to conclude that the scope of common objectives between the two sets of rules is important in order to answer the main research question. In this regard, the aims and objectives of the procurement rules are important factors in this analysis.

#### **2.1.4 Preliminary findings**

To sum up, the rules on public procurement are based on the rules on free movement in the Treaty, which have the support of the four freedoms and elimination of appreciable distortions of competition between economic operators as their core objectives. These objectives have been affirmed in the case law of the CJEU in a number of cases. The core objective for achieving an Internal Market is supported in a public procurement context by supporting the four freedoms, by way of and securing transparency and preventing protectionist purchasing, and thereby

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<sup>178</sup> Some authors seem to argue that complementary goals (to achieving an Internal Market) can be detected from the procurement rules: Graells lists several so-called socio-political aims achieved through public procurement, see A S Graells, *'Public Procurement and the EU Competition Rules'* (2<sup>nd</sup> edn. Hart publishing 2015) 102. See further, P S Jakobsen, S T Poulsen and S E Kalsmose-Hjelmborg, *'EU Udbudsretten'* (Jurist- og Økonomforbundets Forlag 2016), 39ff. On the contrary: ; S Arrowsmith 'The purpose of the EU Procurement Directives: Ends, Means and the implications for National Regulatory Space for Commercial and Horizontal Procurement Policies', in C Barnard, M Gehring and I Solanke (eds.), *Cambridge Yearbook of European Legal Studies* (Hart Publishing 2011-2012) vol. 14, 1-48.

<sup>179</sup> See section 2.2 immediate below.

removing discrimination and barriers that prevents entry into the public procurement market. The public procurement rules thus support the core objectives of the Internal Market rules in two ways. Firstly, the procurement directives seek to support the four freedoms by preventing protectionist purchasing.<sup>180</sup> Secondly, the procurement directives seek to ensure equal treatment between economic operators by removing discrimination<sup>181</sup> and barriers that prevent entry into the public procurement market. Furthermore, the procurement directives seek to implement competitive procedures in order to secure transparency.<sup>182</sup>

In addition to the aim of supporting an Internal Market, it has been discussed whether the procurement rules have complementary objectives. In this respect, the importance of this discussion has been emphasised as detecting a common aim of the procurement rules. The State Aid rules are equally important for the research question, as the achievement of policy goals through the award of public contracts could lead to disguised State aid.

## **2.2 State aid rules and the objectives it pursues**

The actual wording of Article 107 TFEU has remained almost unchanged since its introduction in 1951, when the first prohibition of subsidies was seen. Thus, the Treaty of Paris introduced a complete ban of subsidies in the coal and steel industries, the reason behind being that such subsidies would be incompatible with the Common (coal and steel) Market.<sup>183</sup> Later, with the Treaty of Rome, the complete ban was changed to resemble the formulation of the prohibition on the granting of State aid as we know it from Article 107 TEUF. Hence, Article 92 EEC contained a prohibition on granting any aid, but at the same time Article 92 (2) listed situations where aid is compatible with the Common Market. This structure is continued in Article 107 TFEU with a prohibition in Article 107(1) followed by several (policy-based) exemptions in Articles 107(2) and 107(3).

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<sup>180</sup> See G.S. Ølykke 'How does the Court of Justice of the European Union pursue competition concerns in a public procurement context?' PPLR, 2011, 6, 179-192, 180.

<sup>181</sup> See S. Arrowsmith *The Law of Public and Utilities Procurement: Regulation in the EU and UK*, 3rd edn. (Sweet and Maxwell 2014), 182, who states that the general Treaty rules on free movement entail an obligation not to discriminate in public procurement.

<sup>182</sup> See S. Arrowsmith 'The purpose of the EU Procurement Directives: Ends, Means and the implications for National Regulatory Space for Commercial and Horizontal Procurement Policies', in C. Barnard, M. Gehring and I. Solanke (eds.), *Cambridge Yearbook of European Legal Studies* (Hart Publishing 2011-2012) vol. 14, 1-48, 26.

<sup>183</sup> Treaty Establishing the European Coal and Steel Community, Art. 4(C), 18 April 1951, 261 UNTS 140.

The legal basis concerning the State aid rules is found in the Treaty in Chapter 1 of Title VII on the Rules on Competition. The provisions on State aid are directed at public authorities (Member States) and have an overall objective of prohibiting measures which distort competition.

Article 107 (1) read as follows;

*“Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the Internal Market.”*

Furthermore, several situations, that are compatible with the Internal Market, are listed in Article 107(2):

*“(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;*

*(b) aid to make good the damage caused by natural disasters or exceptional occurrences;*

*(c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.”*

Finally, Article 107(3) lists several situations that might be compatible with the Internal Market:

*(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;*

*(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;*

*(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;*

*(d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;*



*(e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.*

In a public procurement context, the situations listed in article 107(3) will mainly be relevant in connection with the contracting entity's use of complementary considerations.<sup>184</sup>

As held above, Article 107 TFEU is structured as a complete prohibition against aid in Article 107 (1) TFEU followed by several exemptions in Article 107 (2) and (3) TFEU that is, or might be, compatible with the Internal Market from an assessment by the Commission. This means that from the outset, aid granted by Member States is incompatible with the Internal Market; cf. Article 107(1), unless the conditions for exception in Article 107(2) or 107(3) are met.

Article 108 TFEU covers procedural rules, according to which, the Commission is given specific competence to decide on the compatibility of State aid within the Internal Market.

Article 108 TFEU reads as follows:

*“1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the internal market.*

*2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission. If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 258 and 259, refer the matter to the Court of Justice of the European Union direct.*

*On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the internal market, in derogation from the provisions of Article 107 or from the regulations provided for in Article 109, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the*

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<sup>184</sup> In this regard, see S. Arrowsmith ‘*The Law of Public and Utilities Procurement: Regulation in the EU and UK*’, 3<sup>rd</sup> edn. (Sweet and Maxwell 2014), 304.

*Council shall have the effect of suspending that procedure until the Council has made its attitude known. If, however, the Council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the case.*

*3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.*

*4. The Commission may adopt regulations relating to the categories of State aid that the Council has, pursuant to Article 109, determined may be exempted from the procedure provided for by paragraph 3 of this Article.”*

Article 108 TFEU consists of four indents. Firstly, pursuant to Article 108(1) TFEU, the Commission has an obligation to keep under constant review all systems of aid existing in the Member States. Secondly, Article 108(2) TFEU states that the Commission may decide that a State should either alter or abolish a State aid that is incompatible with the Internal Market.<sup>185</sup> This also means that the Commission has the power to order recovery of an aid granted in breach of the Treaty.<sup>186</sup> Thirdly, Article 108(3) TFEU states that the Commission must be informed of any plans to grant or alter aid. This gives the Commission power to initiate the procedure provided for in paragraph 2 of Article 107 TFEU. Finally, Article 108(4) TFEU gives the Commission power to adopt regulations relating to the categories of State aid. Article 108 TFEU confers a rather significant role to the Commission in regards to the systems of aid existing in the Member States.<sup>187</sup>

In order to increase legal certainty and transparency, the Council Regulation 2015/1589 of 13 July 2015 has been adopted.<sup>188</sup> Regulation 2015/1589 lays down detailed rules for the

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<sup>185</sup> This was already laid down in 1973 by the CJEU in *Commission v Germany (Kohlengesetz)*, 70/72, EU:C:1973:87, para. 20. See further T. Ottervanger and P. Adriaanse, ‘Recovery on Unlawful Aid’ in L. Hancher, T. Ottervanger and P.J. Slot (eds), *EU State Aids* (Sweet & Maxwell 2012) 1007.

<sup>186</sup> *Commission v Germany (Kohlengesetz)*, 70/72, para 13.

<sup>187</sup> This power has been acknowledged by the Court in its case-law. See e.g. *Steinike & Weinlig v Federal Republic of Germany*, 78/76, EU:C:1977:52, para. 8.

<sup>188</sup> Council Regulation 2015/1589 of 13 July 2015 OJ L 248/9.

application of Article 108 TFEU and is a codification of the principles and case law that have been established over time.<sup>189,190</sup>

Moreover, Article 109 TFEU empowers the Council to impose legislation in derogation from the prohibition in Article 107(1) TFEU. Article 109 TFEU provides that:

*“The Council, on a proposal from the Commission and after consulting the European Parliament, may make any appropriate regulations for the application of Articles 107 and 108 and may in particular determine the conditions in which Article 108(3) shall apply and the categories of aid exempted from this procedure.”*

In Article 109, TFEU gives the Council authority to adopt appropriate regulations for the application of Articles 107 and 108 TFEU. Also, it empowers the Council to determine in which conditions Article 108(3) TFEU applies and on the categories of aid exempted from notification. This also implies a right for the Council to specify other categories of aid which may be exempted from the prohibition in Article 107(1) TFEU.

In conclusion to the above, the State aid rules contain, as a point of departure, a prohibition of Aid granted by Member States. However, when inspecting Articles 107-109 TFEU more closely, these Articles reveal that the prohibition set out in Article 107(1) is neither absolute nor unconditional. Thus, in Article 107(2) and 107(3) TFEU as well as in Articles 108 and 109, TFEU gives the Commission and the Council a wide discretion and extensive power to admit aids to the Member States in derogation of the prohibition in 107(1) TFEU, something which has been acknowledged by the Courts.<sup>191</sup>

### 2.2.1 Classification of a measure as *aid*

The application of the State aid rules require that a measure can actually be classified as *aid*. In connection with the research question asked in this Thesis, the definition of aid is of vital importance, as it is decisive when assessing whether the award of public contracts can constitute

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<sup>189</sup> Ibid, recital 3 of the preamble.

<sup>190</sup> For an overview of the procedure laid down in Council Regulation 2015/1589, see P. W. Jessen, ‘State aid’, in P. W. Jessen, B. G. Mortensen, M. Steinicke and K. E. Sørensen (eds) *Regulating Competition in the EU* (Kluwer Law International 2016), 329 ff.

<sup>191</sup> See e.g. *Steinike & Weinlig v Federal Republic of Germany*, Case 78/76, para 8.

aid within the meaning of Article 107(1) TFEU. For this reason, the following section will discuss the definition of aid in general.<sup>192</sup>

The Treaty does not provide a definition of the concept of aid and so, the definition of aid has been developed through case law.<sup>193</sup>

The definition of aid was laid down in the case of *Steenkolenmijnen*<sup>194</sup> in which the CJEU gave the following definition of the terms subsidy and aid:<sup>195</sup>

*“A subsidy is normally defined as a payment in cash or in kind made in support of an undertaking other than the payment by the purchaser or consumer for the goods or services which it produces. **An aid is a very similar concept, which, however, places emphasis on its purpose and seems especially devised for a particular objective which cannot normally be achieved without outside help. The concept of aid is nevertheless wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without, therefore, being subsidies in the strict meaning of the word, are similar in character and have the same effect.**”*<sup>196</sup>

Accordingly, the definition of aid laid down in *Steenkolenmijnen* is broad in scope, as it covers subsidies in the form of direct payments in cash or in kind in support of an undertaking, as well as aid granted for a particular<sup>197</sup> purpose, which cannot normally be achieved without outside help.

In spite of the fact that the Treaty does not directly define aid, the CJEU has, through its case law, clarified and defined the different constituent elements of the concept of aid. The definition of aid is not exhaustive, but the CJEU has expressed the view that the definition of aid should be

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<sup>192</sup> The assessment of whether aid has been granted is not analysed in this section. Rather, chapters 6 and 7 analyse, in depth, when public contracts constitute State aid under Article 107(1) TFEU.

<sup>193</sup> See e.g. *Fondul Proprietatea SA v Complexul Energetic Oltenia SA*, C-150/16, EU:C:2017:388, para 15; *Congregación de Escuelas Pías Provincia Betania v Ayuntamiento de Getafe*, C-74/16, EU:C:2017:496; *OTP Bank Nyrt v Magyar Állam and Magyar Államkincstár*, C-672/13, EU:C:2015:185, para 40; *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SpA, Fondazione Cassa di Risparmio di San Miniato and Cassa di Risparmio di San Miniato SpA*, (Cassa di Risparmio), C-222/04, EU:C:2006:8, para 131.

<sup>194</sup> *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority of the European Coal and Steel Community*, case 30-59, (*Steenkolenmijnen*), EU:C:1961:2. The case of *Steenkolenmijnen* is also known for initiating the teleological interpretation of the Treaty provisions, see further chapter 1, section 1.4.3.1.

<sup>195</sup> *Steenkolenmijnen*, case 30-59, 19.

<sup>196</sup> Emphasis added.

<sup>197</sup> The term *particular purpose* probably refers to the concept of selectivity. The concept of selectivity is analysed in chapter 5 of this Thesis.

interpreted sufficiently wide in order to ‘prevent trade between Member States from being affected by advantages granted by public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or certain products’.<sup>198</sup> As a consequence, a certain measure must be analysed based on its effects rather than on its aim or causes.<sup>199</sup>

In his opinion in *Belgium V Commission*<sup>200</sup> AG Lenz elaborated on the expediency of a broad definition of aid:<sup>201</sup>

*“[...]To provide a definition in the Treaties would probably be neither feasible nor useful, since concrete definitions would be liable to restrict the scope of the term. However, a broad interpretation is necessary in order that Article 92 [now 107] of the EEC [now TFEU] Treaty may make a meaningful contribution towards ensuring that competition in the common market is not distorted, in accordance with the objective set out in Article 3 (f) of the EEC Treaty [now Article 3 TEU...].*

*It can be inferred from those decisions that **any type of support granted by a Member State or through State resources other than for commercial purposes constitutes aid within the meaning of Article 92 (1) [now 107(1)] of the EEC [TFEU] Treaty.** At least, support constitutes aid where the recipient undertaking obtains an advantage which it would not normally have obtained, for example, where capital is made available in circumstances which do not correspond to the normal conditions of the capital market.*”<sup>202</sup>

Conclusively, the definition of aid is broad in scope, which could probably be explained by an aim to cover all forms of direct payments in support of an undertaking, as well as aid granted for a particular purpose, which cannot normally be achieved without outside help.

### **2.2.2. State aid rules as a way of supporting an Internal Market**

The connection between the State aid rules and the Internal Market can be detected directly from the wording of Article 107(1) TFEU:

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<sup>198</sup> *Banco Exterior de España SA v Ayuntamiento de Valencia*, C-387/92, EU:C:1994:100, para 12.

<sup>199</sup> See e.g. *Italy v Commission*, C-173/73, EU:C:1974:71, para. 13; *Belgium v Commission*, (*Gasunie*), C-56/93, EU:C:1996:64, para. 79; *France v Commission*, (*Kimberly Clark*), C-241/94, EU:C:1996:353, para. 20; *Belgium v Commission*, C-75/97, EU:C:1999:311, para. 25 and *Spain v Commission*, C-409/00, EU:C:2003:92, para. 46.

<sup>200</sup> *Kingdom of Belgium v Commission of the European Communities (Meura)*, Case 234/84, EU:C:1986:302.

<sup>201</sup> Opinion of Mr. Advocate General Lenz delivered on 16 April 1986 in *Kingdom of Belgium v Commission of the European Communities (Meura)*, Case 234/84, EU:C:1986:151.

<sup>202</sup> Emphasis added.

*“[...] any aid granted by a Member State or through State resources [...] shall, in so far as it affects trade between Member States, **be incompatible with the Internal Market.**”<sup>203</sup>*

Furthermore, Article 107(2) and (3) TFEU mention the Internal Market. Article 107(2) TFEU states:

*“The following shall be compatible with the **internal market**[...]”<sup>204</sup>*

Article 107(3) TFEU states:

*“The following may be considered to be compatible with the **internal market**[...]”<sup>205</sup>*

Accordingly, the benchmark for assessment of compatibility with the State aid rules is (the preservation of) the Internal Market.

Furthermore, the CJEU has held that the aim of Article 107(1) TFEU is to prohibit benefits granted by public authorities, which distort or threatens to distort competition:<sup>206</sup>

*“The aim of article 92 [now 107] is to prevent **trade between member states from being affected** by benefits granted by the public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or the production of certain goods .”<sup>207</sup>*

The above supports the aim of preserving an Internal Market by prohibiting Member States to act in a way that can distort trade between the Member States, and thereby distort competition in the Internal Market.

### 2.2.3 Complementary objectives of the State aid rules

Despite the fact that the wording of Articles 107 and 108 TFEU has changed very little since the introduction of State aid rules, the interpretation of the rules has arguably evolved over time in order to adapt to a legal policy context.<sup>208</sup>

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<sup>203</sup> Emphasis added.

<sup>204</sup> Emphasis added.

<sup>205</sup> Emphasis added.

<sup>206</sup> *Italian Republic v Commission of the European Communities*, case 173-73, EU:C:1974:71, para 13.

<sup>207</sup> Emphasis added.

<sup>208</sup> On the same note see, J. J. Piernas López, *'The Concept of State Aid Under EU Law'* (Oxford University Press 2015).

Today, State aid policy is still used to contribute to the goals of the Internal Market<sup>209</sup>, but the context is different from when the State aid rules were introduced in the Treaty of Paris as a means to avoid disturbances with the Common (coal and steel) Market.

In the Europe 2020 Strategy, State aid policy was mentioned as a means to contribute to the Europe 2020 Strategy by ‘prompting and supporting initiatives for more innovative, efficient and greener technologies, while facilitating access to public support for investment, risk capital and funding for research and development’.<sup>210</sup> Also, in its 2015 Report on Competition Policy, the Commission mentions EU State aid rules as a means to “*steer public resources towards mobilising new investment, ensuring that public funding incentivises private investments which would not have been made otherwise*”.<sup>211</sup>

#### 2.2.3.1 Discussions in academic literature

Furthermore, it has been pointed out in the academic literature that the legal concept of ‘aid’, that can be identified in the case law from the Court, has changed over time<sup>212</sup> to be more competition oriented<sup>213</sup>, which means that, today, State aid rules is arguably used as a means to prevent distortion of competition *between competitors*, as opposed to a means to prevent distortion *between states*.

Also, it is submitted that the economic crisis, which has afflicted the European economy since 2007, has (temporarily) had an impact on the Commission’s State aid policy.<sup>214</sup> Hence, the Europe 2020 Strategy,<sup>215</sup> which sets the goals for Europe towards 2020, focuses on the

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<sup>209</sup> See *Italy v Commission*, C-173/73, para. 26; *Banco Exterior*, C-387/92, para 12 where the CJEU pointed out that the aim of the State aid rules is to prevent trade between Member States from being affected by advantages granted by public authorities.

<sup>210</sup> Communication from the Commission, *Europe 2020, A strategy for smart, sustainable and inclusive growth*, COM(2010) 2020 final, 19.

<sup>211</sup> Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Report on Competition Policy 2015, COM(2016) 393 Final, 3.

<sup>212</sup> See e.g., J. J. Piernas López, ‘*The Concept of State Aid Under EU Law*’ (2015), 11, who divides the evolution of State aid in three periods and states that during the third period (mid 1980s- mid 1990s) the Commission sought to tighten the State aid control i.e. by focusing on applying the State aid rules on intra-jurisdictional competition (aid given to companies in competition with other companies in a given Member State) rather than inter-jurisdictional competition (aid given to companies that compete with companies in other Member States).

<sup>213</sup> J. J. Piernas López ‘*The Concept of State Aid Under EU Law*’ (2015), 12.

<sup>214</sup> See D. Zimmer and M. Blaschczok, ‘The role of competition in European state aid control during the financial markets crisis’ (2011) 32(1), *E.C.L.R.*, 9-16.

<sup>215</sup> Commission Communication, COM(2010) 2020 final.

challenges that the economic crisis has brought with it, and recognises the need for a strategy to come out (stronger) from the crisis.<sup>216</sup>

It is uncontroversial that the economic crisis has had a severe impact on the economies of the Member States, and in a State aid context this means that some sectors, such as the financial sector, has been supported in a temporary, and exceptional, framework for State aid.<sup>217</sup> During the financial crisis, the Commission modified the legal requirements to banks and other financial institutions by setting up a temporary legal framework, under which the Commission approved State aid to banks in the Member States.<sup>218,219</sup>

When compared, State aid policy under the Treaty is probably more lenient, especially in some sectors as explained above. Perhaps it even accepts a higher degree of economic nationalism than what was the case, when the first prohibition of subsidies in the Common (coal and steel) Market was formulated in 1951. The financial crisis is a great example of the dynamic nature of the State aid policy.

Seen in the light of the above, State aid policy could be used, not only to support the Internal Market, but also in a wider societal context and with a built-in handle that can either be used to increase or decrease the Member States' use of economic nationalism. However, the Commission has stressed that the exceptional framework for State aid, which was seen during the financial crisis, cannot be permanent.<sup>220</sup> This message is a clear signal to the Member States that the Commission intends to promote a more stringent use of State aid rules in the future.

The above supports the argument that State aid rules have secondary goals that support the overarching goal of strengthening the Internal Market. However, it is not clear that the alleged complementary objectives are ingrained in the case law from the CJEU. In this connection it has to be assumed that possible complementary objectives have to comply with the aim of supporting an Internal Market.

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<sup>216</sup> *Ibid.*, p. 3.

<sup>217</sup> *Ibid.*, p. 22.

<sup>218</sup> See Communication from the Commission, *application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis*, COM(2011) 8744 final, 1 December 2011.

<sup>219</sup> For a critique of this approach from the Commission, see D. Zimmer and M. Blaschczok, 'The role of competition in European state aid control during the financial markets crisis' (2011) 32(1), *E.C.L.R.*, 9-16.

<sup>220</sup> Commission Communication, COM(2010) 2020 final, p. 22.



### 2.2.3.2 State aid rules as a derogation from Competition law?

Since their introduction, State aid rules have been placed in the chapter on Rules on Competition, and have thus formally been part of the rules on competition. This position could imply that the rules on State aid in Articles 107-109 TFEU share common objectives with the rest of the competition rules, by way of ensuring economic welfare, and strengthening the Internal Market.<sup>221</sup> However, as will be discussed below, the objectives of the State aid rules derogate from the objectives of the competition rules in certain aspects.

Competition policy is an economic, regulatory policy<sup>222</sup> which e.g. means that efficiency considerations prevail under this policy. Nevertheless, as accounted for above, social considerations are taken into account as well as economic progress and the welfare of European citizens has been pointed out as the very intention of the EU competition policy.<sup>223</sup> Furthermore, the competition rules have to be interpreted in the light of the Treaty's objectives<sup>224</sup> and especially Articles 2 and 3 TEU, which set out the Union's values and the aims of achieving these. Hence, Article 3(3) TEU states that the Union must establish an Internal Market with a highly competitive social market economy.<sup>225</sup>

Historically, the State aid rules had the creation of the Internal Market as their main objective.<sup>226</sup> Thus, State aid control has been defined as an instrument of competition policy that plays a fundamental role in defending and strengthening the Internal Market:<sup>227</sup>

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<sup>221</sup> The list of contributions on the purpose of competition rules is long. To mention a few: M. Motta, '*Competition Policy, Theory and Practice*' (Cambridge University Press 2009), 17ff; J. Goyders and A. Albors-Llorens, '*Goyders EC Competition Law*' (Oxford University Press 2009) p. 10ff; D. Geradin, A. Layne-Farrar and N. Petit '*EU Competition Law and Economics*', (Oxford University Press 2012), 19ff;

<sup>222</sup> See S. Hix and B. Høyland, '*The Political System of the European Union*' (Palgrave Macmillan 2011), 189.

<sup>223</sup> M. Motta, '*Competition Policy, Theory and Practice*' (Cambridge University Press 2009), 15.

<sup>224</sup> *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities*, Case 6-72, EU:C:1973:22. See also F. Snyder, 'Ideologies of Competition in European Community Law' (1989) 52, *The Modern Law Review*, 149-78, reprinted in F. Snyder (ed), *European Community Law Volume II*, (Dartmouth 1993), 84.

<sup>225</sup> Motta points out that Article 3 TEU refers to competition as a way to achieve the objectives stated in Article 2 TEU., see M. Motta, '*Competition Policy, Theory and Practice*' (Cambridge University Press 2009), 15 footnote 45.

<sup>226</sup> See the so-called Spaak Report which identifies State aid control as a key policy for the creation of the Common Market: Intergovernmental Committee on European Integration, *The Brussels Report on the general Common Market (the Spaak Report)*, 1956, Title II, Chapter 2. See further A. Biondi and E. Righini, 'An Evolutionary Theory of State Aid Control' in D. Chalmers and A. Arnall (eds), *Oxford Handbook of European Union Law* (Oxford University Press 2015) 670.

<sup>227</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *EU State Aid Modernisation (SAM)*, COM(2012) 209 final, 2.

*“[...]An effective internal market requires the deployment of two instruments: first, regulation to create one integrated market without national borders and, second, **competition policy including State aid control** to ensure that the functioning of that internal market is not distorted by anticompetitive behaviour of companies or by Member States favouring some actors to the detriment of others. [...]Thus, as one of the instruments of competition policy, State aid control plays a fundamental role in defending and strengthening the single market.”<sup>228</sup>*

The statement from the Commission implies that, overall, State aid rules share common objectives with the rest of the competition rules, insofar as both set of rules aim at achieving an Internal Market. However, the question is whether the rules on State aid should simply be regarded as an instrument of competition policy, or if the rules on State aid hold separate and more specific aims, which distinguishes them from the competition rules in Articles 101-106 TFEU.

In the literature, State aid rules have been described as an independent pillar of competition policy<sup>229</sup> and it has been stated that non-economic considerations prevail in State aid policy.<sup>230</sup> On the other hand, it has been argued that ‘State aid is basically a technical subject and has nothing to do with a desire to ensure fairness’<sup>231</sup> This line of literature suggests that the State aid rules hold separate objectives from the competition rules.

In conclusion, the State aid policy allows for the use of national policy considerations in addition to the identified objectives of ensuring economic welfare and achieving an Internal Market - although in general, the Commission favours a stringent use of State aid rules.

#### **2.2.4 Preliminary findings**

The State aid rules consist of a general prohibition in Article 107(1) TFEU against aid granted by Member States or through State resources, in any form whatsoever, which distorts or threatens to distort competition, by favouring certain undertakings or the production of certain goods, insofar as it affects trade between Member States. The general prohibition in Article 107(1) TFEU is supported by several exceptions laid down in Articles 107(2) and (3) TFEU.

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<sup>228</sup> Emphasis added.

<sup>229</sup> See e.g. A. Oldale and H. Piffaut, ‘Introduction to State aid law and policy’ in K. Bacon (ed), *European Community Law of State Aid* (Oxford University Press 2009) 4.

<sup>230</sup> P. Lowe states that State aid can be justified on the basis of non-economic grounds such as reducing social disparities: P. Lowe ‘The Design of Competition Policy for the 21<sup>st</sup> Century – the Experience of the European Commission and DG Competition’, *Competition Policy Newsletter*, (2008) 3(1),6.

<sup>231</sup> See introduction by A. S. Maria, in A. S. Maria (ed), *Competition and State Aid An Analysis of the EU Practice*, (Kluwer Law International 2015) 8.

Furthermore, Articles 108-109 TFEU provide for specific competences conferred on the Commission and the Council to decide on the compatibility of State aid with the Internal Market and to adopt appropriate regulations for the application of Articles 107 and 108 TFEU.

Furthermore, the definition of aid has been accounted for. It has been argued that no definition can be detected from Treaty and consequently, the definition of aid has been developed through the case law from the CJEU. It has been held that a broad definition of aid is applied, which, arguably, could be explained by a wish to cover all forms of direct payments in support of an undertaking, as well as aid granted for a particular purpose, which cannot normally be achieved without outside help.

The rules on State aid support the achievement of an Internal Market by way of expressing reference to the preservation of the Internal Market in Article 107(1-3).

Besides the aim of supporting an Internal Market, it has been discussed whether complementary objectives exist as well. However, it is not clear that the alleged complementary objectives are ingrained in the case law from the CJEU, but it has to be assumed that possible complementary objectives have to comply with the aim of supporting an Internal Market.

### **2.3 Common objectives of State aid rules and public procurement rules? Detecting disparities between the respective aims of the rules**

This section will discuss whether disparities exist between the objectives of procurement rules and State aid rules. The main reason for this discussion is to analyse whether the two sets of rules possess contradictory or even mutually exclusive objectives, as well as highlighting the coincident goals of the rules.

The most important difference between State aid rules and public procurement rules is the legal basis. State aid rules have their legal basis directly in the Treaty, where Articles 107-109 TFEU belong to the competition rules. The public procurement directives do not have direct Treaty basis, instead they are founded on the free movement rules in the Treaty. Thus, the rules on procurement have Treaty basis by way of the rules of free movement in the Treaty.

The procurement rules and State aid rules have a common denominator insofar as both sets of rules seek to achieve the strengthening of the Internal Market. This goal is achieved in different ways by the rules.<sup>232</sup> Firstly, as stated above, the procurement rules support the achievement of an Internal Market by prohibiting protectionist purchasing as well as by seeking to ensure equal treatment between economic operators by removing discrimination.<sup>233</sup> Secondly, as expressed in Article 107(1) TFEU, the State aid rules aim to protect the Internal Market from being affected from distortions of competition.

In this respect, it could be argued that the rules on State aid and public procurement, respectively, possess a common denominator in the sense that both sets of rules regulate the distortive powers of the State: In a public procurement context, this means that the public procurement rules aim to ensure that the public authority does not discriminate or act in a way that favours certain undertakings, but rather that the public market is open to all interested parties. In this respect, the logic behind the procurement directives is that they aim to create fair competition in order for all interested parties to have access to the public procurement markets. In a State aid perspective, the State aid rules seek to ensure that no advantage is given to certain undertakings, in order to avoid that those undertakings enjoy a favourable position, which they can use when they act on the market. In other words, it could be argued that procurement rules are designed to prevent distortion *for* the market (the public contract), while the State aid rules should prevent distortion *on* the market.

Accordingly, and as held above in section 2.1, both sets of rules seek to minimise the degree of which Member States favour national undertakings. Furthermore, they aim to make sure that no undue economic advantage<sup>234</sup> is conferred on economic operators.

### **2.3.1 A common aim of ensuring ‘competition’ under the procurement rules and State aid rules**

One common denominator between the procurement rules and State aid rules is the concept of competition. In the following, the concept of competition under the State aid rules and

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<sup>232</sup> On the same note, see G. S. Ølykke, ‘Commission Notice on the notion of state aid as referred to in article 107(1) TFEU – is the conduct of a public procurement procedure sufficient to eliminate the risk of granting of state aid?’, (2016), 5, *P.P.L.R.*, 197-212.

<sup>233</sup> See Chapter 2, section 2.1.

<sup>234</sup> The concept of advantage is analysed in chapter 6 of this Thesis.

procurement rules, respectively, will be detected. . It will also be discussed whether the concept of competition under the State aid rules and procurement rules coincide under the two sets of rules. This is done in order to assess whether the phenomenon, that is subject for protection, namely the concept of ‘competition’ coincides under the two sets of rules, or put in other words, how the State aid rules and the procurement rules aim to achieve this phenomenon.

It seems clear that preserving or enhancing competition is a key element of both State aid rules and procurement rules. Article 107(1) TFEU mentions, as one of the constituent elements for the assessment of aid, a prohibition against *distorting competition*. According to Article 107(1) TFEU:

*Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to **distort competition** by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the Internal Market.*<sup>235</sup>

Similarly, the procurement Directive emphasises, as one of the ‘principles of procurement’, a prohibition against artificially *narrowing competition*. According to Article 18(1) of the procurement Directive:

*“contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner. **The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.***”<sup>236</sup>

In this connection, competition is considered to be artificially narrowed, when it ‘favours or disadvantages’ certain economic operators, which is a formulation that resembles the one in article 107(1) TFEU.

In connection to the above, the question of how the concept of competition is expressed under State aid law and procurement law, respectively, arises. This is an interesting question for two reasons. Firstly, a clarification of the concept of competition, in relation to both areas of law,

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<sup>235</sup> Emphasis added.

<sup>236</sup> Emphasis added.

can help determine more precisely how the contracting authority should or could act in order to live up to the obligations that arises from the concept. I submit that the concept of competition creates different obligations for the contracting authority under the State aid rules and procurement rules, respectively. However, it is also submitted that the various obligations that arises under the concept are not mutually exclusive. This could, secondly, help to answer the main research question asked in this Thesis, when the award of public contracts constitutes State aid within Article 107(1) TFEU.

### **2.3.1.1 The concept of competition under the procurement rules**

As held above, ‘competition’ is mentioned in Article 18(1) of the public procurement directive with the aim of prohibiting that competition is not artificially narrowed.

Furthermore, the aim of competition is mentioned several times in the preamble to the public procurement Directive. Recital 1 mentions the opening up to competition:

*“[...] However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that those principles are given practical effect **and public procurement is opened up to competition.**”<sup>237</sup>*

In *CoNISMa*<sup>238</sup>, the CJEU had to conclude whether national legislation which excluded a consortium of an inter-university group from participating in a tender procedure, on the grounds that the inter-university group constituted a public body and thus did not fall under the definition of economic operator.<sup>239</sup> The CJEU ultimately held that such an exclusion was in breach of the procurement directives and held in this connection:<sup>240</sup>

*“The Court has thus held that **one of the primary objectives of Community rules on public procurement is to attain the widest possible opening-up to competition [...]**and that it is the concern of Community law to ensure the widest possible participation by tenderers in a call for tenders [...] It should be added that the widest possible opening-up to competition is contemplated not only from the point of view of the Community interest in the free movement of goods and services but also the interest of the contracting authority concerned itself, **which will***

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<sup>237</sup> Emphasis added.

<sup>238</sup> *Consorzio Nazionale Interuniversitario per le Scienze del Mare v Regione Marche*, (CoNISMa,) C-305/08, EU:C:2009:807. See further, *Bayerischer Rundfunk and Others v GEWA - Gesellschaft für Gebäudereinigung und Wartung mbH*, C-337/06, EU:C:2007:786, para 39 and *Assitur Srl v Camera di Commercio, Industria, Artigianato e Agricoltura di Milano*, C-538/07, EU:C:2009:317, para 26.

<sup>239</sup> The concept of economic operator is further analysed in chapter 4 of this Thesis.

<sup>240</sup> *CoNISMa*, C-305/08, 37.

*thus have greater choice as to the most advantageous tender which is most suitable for the needs of the public authority in question [...] “<sup>241</sup>*

Thus, the widest possible opening up to competition entails a wider possibility for the contracting authority to choose the tenderer who is most suitable for the needs of the public authority.

As held above, the principle of effective competition has been mentioned by the CJEU as an essential objective of the competition rules.

In this connection the CJEU held in *Strong Segurança*<sup>242</sup>:

*“With regard to the Commission’s contention that the general principle of ‘effective competition’ specific to Directive 2004/18 could lead to such an obligation, it must be noted that, **whereas effective competition constitutes the essential objective of that directive, that objective, as important as it is, cannot lead to an interpretation that is contrary to the clear terms of the directive**, which do not mention Article 47(2) thereof as being among the provisions which the contracting authorities are obliged to apply when awarding contracts concerning the services referred to in Annex II B to that directive.”*

This statement from the CJEU implies that the obligations to ensure effective competition have limits. Accordingly, in spite of the fact that effective competition is an essential objective of the procurement rules, this cannot lead to an interpretation contrary to the clear terms of the rules.

The CJEU has emphasised that the aim of public procurement rules is to create an Internal Market for public contracts. In *Technische Universität Hamburg*<sup>243</sup> the CJEU held that:<sup>244</sup>

*“In accordance with the case-law of the Court, **the principal objective of the EU rules in the field of public procurement is the opening-up to undistorted competition in all the Member States with regard to the execution of works, the supply of products or the provision of services; that entails an obligation***

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<sup>241</sup> Emphasis added.

<sup>242</sup> *Strong Segurança*, C-95/10, para. 37.

<sup>243</sup> *Technische Universität Hamburg-Harburg and Hochschul-Informations-System GmbH v Datenlotsen Informationssysteme GmbH*, (Datenlotsen), C-15/13, EU:C:2014:303.

<sup>244</sup> *Ibid.*, para 22.

on all contracting authorities to apply the relevant rules of EU law where the conditions for such application are satisfied [...]”<sup>245</sup>

In this respect, it can be argued that the aim of competition under procurement law should be seen as referring to the objective of increasing the number of (potential) tenderers.<sup>246</sup>

It can be discussed whether the concept of effective competition should merely be seen as a way to support the achievement of an Internal Market or whether effective competition can be seen as an individual aim in itself. Trepte seems to argue that the concept of effective competition is merely a confirmation of the obligations to ensure the general principles of the Treaty.<sup>247</sup>

*“The key mechanism of both directives is thus to impose Community[Union]-wide advertising of public contracts that will (1) **provide effective competition by ensuring equality of opportunity** (by notifying tenderers in all member states of contracts to be let throughout the Community) and equal access to those contracts (by fixing objective criteria for participation and prohibiting the use of discriminatory technical specifications) and (2) **guarantee a degree of transparency enabling supervision**”*<sup>248</sup>

In this respect, effective competition should merely be seen as a means of securing the aims of the directives by ensuring equal opportunities for the tenderers when public contracts are awarded and as a way to increase the potential number of tenderers.

### **2.3.1.2 The concept of competition under the State aid rules**

The concept of competition is not clearly defined under the State aid rules. For the most part, competition is not mentioned as an independent concept, but merely as a prerequisite for the constituent element of the distortive effects of a measure.<sup>249</sup> Since competition is the benchmark for the distortive measures prohibited by article 107(1) TFEU, it must, however, be held that competition is a vital and important element of the State aid rules.

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<sup>245</sup> Emphasis added.

<sup>246</sup> On the same note see, G. S. Ølykke, ‘*Abnormally Low Tenders – With an Emphasis on Public Tenderers*’ (DJØF Publishing Copenhagen 2010), 60.

<sup>247</sup> P. Trepte, ‘*Regulating Procurement – Understanding the Ends and Means of Public Procurement Regulation*’ (Oxford University Press 2004), 352. Contrary: see G. S. Ølykke, ‘*Abnormally Low Tenders – With an Emphasis on Public Tenderers*’ (DJØF Publishing Copenhagen 2010), 64.

<sup>248</sup> Footnotes omitted.

<sup>249</sup> Hancher even points out that the impact of a State measure on *competition* and *trade* has usually been dealt with together, see L. Hancher, ‘The general framework’ in L. Hancher, T. Ottervanger and P.J. Slot (eds), *EU State Aids* (Sweet & Maxwell 2012) 103.



The goal of ensuring undistorted competition has been stated repeatedly by the CJEU.<sup>250</sup> None of the cited cases mention what the concept of competition entails, but they do, however, reveal that the aim of ensuring undistorted competition relates closely to the preservation of the Internal Market. This corresponds to the overall objective of the State aid rules as discussed above.

Under the State aid rules, the State's obligation to ensure competition relates to ensuring that the measures adopted do not release an undertaking from costs which it would normally have had to bear.<sup>251</sup> In other words, ensuring that competition is not distorted is an obligation that somehow relates to the competitive environment between undertakings. This aim can be detected from the case law:

In *Phillip Morris*<sup>252</sup>, the CJEU was asked to assess the alleged aid to a cigarette manufacturer. The applicant (Phillip Morris) contested the Commission's decision by stating that the Commission had not assessed the criteria for possible restriction of competition. Phillip Morris asked the CJEU to do so by ultimately assessing whether the measure had affected the relation between competitors by i) determining the relevant market in ways of taking account of the product, the territory and the period of time in question and ii) consider the patterns of the market.<sup>253</sup> The CJEU did not reply in detail to this request but merely stated that the aid in question had the possibility of reducing the costs of the undertaking and thereby giving the undertaking in question (Phillip Morris) a competitive advantage over their competitors.<sup>254</sup>

Even though the CJEU did not uphold the applicant's argument, this case shows that, when assessing whether competition has been distorted, the effects on the relevant market has to be considered.

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<sup>250</sup> *Matra SA v Commission of the European Communities*, C-225/91, EU:C:1993:239, para 42; *Ireland and Others v European Commission*, T-50/06 RENV, T-56/06 RENV, T-60/06 RENV, T-62/06 RENV and T-69/06 RENV, EU:T:2012:134, para 72; *Compagnie nationale Air France v Commission of the European Communities (Air France)*, T-358/94, EU:T:1996:194, para 56; *Cityflyer Express Ltd v Commission of the European Communities*, T-16/96, EU:T:1998:78, para 50; *Mitteldeutsche Erdöl-Raffinerie GmbH v Commission of the European Communities*, T-9/98, EU:T:2001:271, para 113; *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission of the European Communities*, T-228/99 and T-233/99, EU:T:2003:57, para 99; *Commission of the European Communities v Hellenic Republic (Commission V Greece)*, C-369/07, EU:C:2009:428, para 119.

<sup>251</sup> This obligation is further analysed in chapter 5, section 5.2 of this Thesis.

<sup>252</sup> *Philip Morris Holland BV v Commission of the European Communities*, Case 730/79, EU:C:1980:209.

<sup>253</sup> *Ibid.*, para 9.

<sup>254</sup> *Ibid.*, para 11.

In *Germany v Commission*<sup>255</sup> the CJEU commented on the conditions of competition by stating that aid, which is intended to release an undertaking from costs which it would normally have had to bear, distorts the conditions of competition:<sup>256</sup>

*“In principle, operating aid [...] is intended to release an undertaking from costs which it would normally have had to bear in its day-to-day management or normal activities, **distorts the conditions of competition** [...]”*<sup>257</sup>

Thus, the conditions for competition can be related to the costs of the undertaking.

As formulated by Cecco, constraining competition is vital to the aims of State aid rules:<sup>258</sup>

*“The desire to constrain locational competition is precisely the rationale for the existence of State aid law and policy”*

Accordingly, the concept of competition under State aid rules relates, in essence, to the aim of ensuring that competition between competitors in the Internal Market is not distorted.

### 2.3.2 Preliminary findings

The concept of competition appears as central objectives of both procurement rules and State aid rules. However, the concept creates different obligations under the two sets of rules. In this respect, the concept of competition under procurement rules implies an obligation for the contracting authority to ensure equal access to the competition of the contract for the tenderers. Thusly, the concept of competition in relation to procurement rules aims at increasing the number of (potential) tenderers. Accordingly, the concept of competition in relation to procurement rules aims at creating more competition for the public contracts.

The concept of competition under State aid law refers to protecting existing competition in the Internal Market. Accordingly, the concept of competition under State aid rules seeks to ensure that competition between competitors in the Internal Market is not distorted. In this respect, the concept of competition under State aid law implies an obligation for the State to ensure that already existing competition is not distorted. Accordingly, the concept of competition in relation to State aid rules aims to preserve or protect existing competition.

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<sup>255</sup> *Federal Republic of Germany v Commission of the European Communities*, C-156/98, EU:C:2000:467.

<sup>256</sup> *Ibid.*, para 30.

<sup>257</sup> Emphasis added.

<sup>258</sup> F. de Cecco, ‘*State aid and the European Economic Constitution*’ (Hart publishing 2013), 41.

### 2.3.3 Mutually exclusive objectives of procurement rules and State aid rules?

Above, I have argued that competition appears as a central concept of both procurement rules and State aid rules. Accordingly, it is submitted that ‘competition’ is a concept of both State aid law and procurement law. However, the concept has different implications under the two sets of rules. Firstly, it could be argued that procurement rules seek to create competition between economic operators for the public contract by ensuring equal access to the contract. Secondly, the State aid rules arguably seek to ensure that competition, which already exists on the market, is protected by prohibiting that no advantage is conferred on the undertaking. However, these aims are not mutually exclusive or contradictory. This means that ensuring the objectives under State aid law does not imply that the aims and objectives under procurement law are compromised. An example of a situation, where the two objectives mentioned above clearly coincide, can be found in recital 32 of the preamble to the procurement Directive:

*“The exemption should not extend to situations where there is direct participation by a private economic operator in the capital of the controlled legal person since, in such circumstances, **the award of a public contract without a competitive procedure would provide the private economic operator with a capital participation in the controlled legal person an undue advantage over its competitors.** However, in view of the particular characteristics of public bodies with compulsory membership, such as organisations responsible for the management or exercise of certain public services, this should not apply in cases where the participation of specific private economic operators in the capital of the controlled legal person is made compulsory by a national legislative provision in conformity with the Treaties, provided that such participation is non-controlling and non-blocking and does not confer a decisive influence on the decisions of the controlled legal person. It should further be clarified that the decisive element is only the direct private participation in the controlled legal person. Therefore, where there is private capital participation in the controlling contracting authority or in the controlling contracting authorities, this does not preclude the award of public contracts to the controlled legal person, without applying the procedures provided for by this Directive **as such participations do not adversely affect competition between private economic operators.**”<sup>259</sup>*

Recital 32 concerns the in-house exception provided for in Article 12 of the procurement Directive. According to Article 12, it is entirely up to the contracting authorities whether they wish to buy the desired work or service from the market or whether they choose to make the

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<sup>259</sup> Emphasis added.

good or service themselves.<sup>260</sup> In this respect, recital 32 lists situations in which private capital participation results in the conferral of an undue advantage on the private undertaking. Recital 32 resembles the aim of not conferring an advantage to the economic operator and thereby distorting competition on the market. Thus, this recital can be used as an example of a situation where procurement rules and State aid rules share common objectives.

## **2.4 Conclusions**

Above, I have argued that the procurement rules and the State aid rules both seek to support the Internal Market. However, the two sets of rules accomplish this aim in different ways. Firstly, the procurement rules support an Internal Market by preventing protectionist purchasing and ensuring equal treatment between economic operators by removing discrimination and barriers that prevent entry into the public procurement market and further seek to implement competitive procedures in order to secure transparency. Secondly, the State aid rules support an Internal Market by way of prohibiting the transfer of advantages to the recipient undertaking and thus avoiding distortion of competition between competitors in the Internal Market.

It has been established that complementary objectives can be detected in both the procurement rules and the State aid rules. However, such complementary objectives cannot compromise the achievement of an Internal Market.

Furthermore, common goals of the two sets of rules have been detected. Aside from the achievement of an Internal Market, as mentioned above, it has been argued that both the procurement rules and the State aid rules seek to ensure competition. In this respect, it has been argued that the concept of competition in relation to procurement rules aims at increasing the number of (potential) tenderers. Accordingly, the concept of competition in relation to procurement rules aims at creating more competition for the public contracts. Under State aid law, the concept of competition relates to the protection of existing competition in the Internal Market. In this respect, the concept of competition under State aid law implies an obligation for

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<sup>260</sup> It is outside the scope of this Thesis to analyse the in-house provision in detail. For an analysis of State aid issues arising in connection to Article 12 of the public procurement Directive, see G. S. Ølykke and C. F. Andersen, 'A state aid perspective on certain elements of Article 12 of the new Public Sector Directive on in-house provision', 2015, 1, *P.P.L.R.*, 1-15.

the State to ensure that already existing competition is not distorted. Thus, the concept of competition in relation to State aid rules aims at preserving or protecting existing competition.

However, in spite of the fact that the two sets of rules seek to support competition in different ways, it has been argued that these aims of increasing or preserving competition are not mutually exclusive.

## CHAPTER 3

### **3. Defining the concept of State versus contracting authority: When are contracting authorities regarded as State under the State aid rules?**

This chapter investigates what triggers the applicability of procurement rules and State aid rules. The personal scope, *ratione personae*, for the public procurement rules and the State aid rules, respectively, will be accounted for in order to conclude whether contracting authorities fall under the scope of the State, and thereby whether contracting authorities are capable, within the meaning of the State, of granting aid. Firstly, section 3.1 examines the concept of *contracting authority* under the public procurement Directives and then compares it, in section 3.2, to the concept of *State* under the State aid rules to see if these two concepts coincide.

#### **3.1. The concept of ‘contracting authority’ under the procurement rules**

The definition of the concept of contracting authority is crucial in order to define which entities are covered by the public procurement directives.<sup>261</sup> Article 1 of the public procurement Directive states that the directive establishes procedural rules for procurement by contracting authorities, and thus, the personal scope of the directive is ‘contracting authorities’:

*“1. This Directive establishes rules on the procedures for procurement by contracting authorities with respect to public contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 4.”<sup>262</sup>*

Article 2(1) defines in subsections 1-4 what is meant by ‘contracting authorities’, ‘central government authorities and ‘sub-central contracting authorities’, and ‘bodies governed by public law’, respectively:

*“2(1). For the purposes of this Directive, the following definitions apply:*

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<sup>261</sup> Bovis mentions that a clear definition of the term *contracting authorities* is one of the most important elements of the public procurement legal framework, C. Bovis, *EU Public Procurement Law*, Second Edition, (Edward Elgar Publishing 2012), 286.

<sup>262</sup> Emphasis added.

- (1) *‘contracting authorities’ means the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law;*
- (2) *‘central government authorities’ means the contracting authorities listed in Annex I and, in so far as corrections or amendments have been made at national level, their successor entities;*
- (3) *‘sub-central contracting authorities’ means all contracting authorities which are not central government authorities;*
- (4) *‘bodies governed by public law’ means bodies that have all of the following characteristics:*
  - (a) they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;*
  - (b) they have legal personality; and*
  - (c) they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law; or are subject to management supervision by those authorities or bodies; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law;”*

What is meant by ‘contracting authorities’, ‘central government authorities’, ‘sub-central contracting authorities’, and ‘bodies governed by public law’ is analysed in detail in the following.

### **3.1.1 Contracting authorities: Article 2(1) (1)**

As stated in Article 2 (1) (1), contracting authorities cover the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities, or one or more such bodies governed by public law<sup>263</sup>. When defining which entities are contracting authorities, it must be taken into account whether the entity is at risk of giving preferential treatment to national industry when they purchase.<sup>264</sup>

<sup>263</sup> The concept of bodies governed by public law will be analysed below.

<sup>264</sup> This objective was stated by the CJEU in *Mannesmann Anlagenbau Austria AG and Others v Strohal Rotationsdruck GesmbH*, C-44/96, EU:C:1998:4, para 33. See further, S. Arrowsmith *The Law of Public and Utilities Procurement: Regulation in the EU and UK*, 3rd edn. (Sweet and Maxwell 2014), 340.

The concept of contracting authority is a concept of EU law, which means that it is independent of how broad this concept is defined in the Member States, including for example how the different Member States have arranged their public sectors and public administrations.<sup>265</sup> The Court has held that the concept of ‘contracting authority’ must be interpreted in ‘functional’ terms<sup>266</sup>, which arguably necessitates a flexible approach that develops over time. Furthermore, it has been stated by the CJEU that the actions of a contracting authority are imputable to the State<sup>267</sup>, which presupposes a close connection between the State and contracting authorities.<sup>268</sup>

As indicated by Article 2 (1) (1), the concept of contracting authority covers the State, regional or local authorities, bodies governed by public law or associations.

The concept of State is not further explained in the Directive, but it has been held by the CJEU that the concept of State entails legislative, executive, and judicial power.<sup>269</sup>

Regional or local authorities refer to the central and regional level of the government, which has the responsibility for local matters.<sup>270</sup> The concept of regional and local authority is further explained in Article 2 (2) of the Directive as follows:

“2. For the purpose of this Article ‘regional authorities’ includes authorities listed non-exhaustively in NUTS 1 and 2, as referred to in Regulation (EC) No 1059/2003 of the European Parliament and of the Council [FN deleted], while ‘local authorities’ includes all authorities of the administrative units falling under NUTS 3 and smaller administrative units, as referred to in Regulation (EC) No 1059/2003.”

As stated in Article 2(2), regional and local authorities are listed in Regulation 1059/2003 on the establishment of a common classification of territorial units for statistics (NUTS)<sup>271</sup> level 1 and

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<sup>265</sup> The CJEU has stated this on many occasions, see e.g. *Commission of the European Communities v Kingdom of Belgium*, C-323/96, EU:C:1998:411, para. 41 and *Commission of the European Communities v Kingdom of Spain*, C-214/00, EU:C:2003:276, para. 55.

<sup>266</sup> *Gemeente Arnhem and Gemeente Rheden v BFI Holding BV*, C-360/96, EU:C:1998:525, para 62. Later confirmed in *Commission of the European Communities v Ireland*, C-353/96, EU:C:1998:611, para 36 and *Commission of the European Communities v French Republic*, C-237/99, EU:C:2001:70, para 43.

<sup>267</sup> *Commission of the European Communities v Ireland*, C-353/96, para 23.

<sup>268</sup> The concept of imputability recurs under State aid law. In this respect, section 3.2.2 below will discuss whether a procurement measure can be imputed to the State.

<sup>269</sup> *Commission of the European Communities v Kingdom of Belgium*, C-323/96, para. 27.

<sup>270</sup> For a review of the concepts of State and regional or local authorities, see S. Arrowsmith *The Law of Public and Utilities Procurement: Regulation in the EU and UK*, 3rd edn. (Sweet and Maxwell 2014), 342ff.

<sup>271</sup> Regulation No 1059/2003 of the European Parliament and of the Council of 26 May 2003 on the establishment of a common classification of territorial units for statistics (NUTS) OJ L 154.



2 as regards regional authorities, and NUTS level 3 as regards local authorities, The list is non-exhaustive and can therefore be modified continually.

### **3.1.2 Central government authorities and sub-central contracting authorities: Articles 2(1) (2) and 2(1) (3)**

Central government authorities are listed in Annex I of the Directive, cf. Article 2(1) (2) and ‘sub-central contracting authorities’ mean all contracting authorities, which are not central government authorities.

### **3.1.3 Bodies governed by public law: Article 2(1) (4)**

Article 2(1) (4) states the characteristics of a ‘body governed by public law’;

*(1) ‘bodies governed by public law’ means bodies that have all of the following characteristics:*

- (a) they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;*
- (b) they have legal personality; and*
- (c) they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law; or are subject to management supervision by those authorities or bodies; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law;*

Article 2(1) (4) implies that the concept of ‘bodies governed by public law’ is not a simple one. First of all, the EU legislator has found it necessary to elaborate on the scope of the concept of ‘body governed by public law’ by spelling out three cumulative<sup>272</sup> criteria that have to be met in order to fulfill the concept of ‘body governed by public law’. This implicitly shows that the Court has found it necessary to elaborate on the constituent elements of the concept, possibly because the directive does not provide for an exhaustive interpretation, or because national courts have been in doubt as to how to interpret the concept. Furthermore, it has been noted in recital 10 of the preamble to the public procurement Directive that the concept of ‘bodies governed by public law’ has been examined repeatedly by the CJEU:

*“(10) The notion of ‘contracting authorities’ and in particular that of ‘bodies governed by public law’ have been examined repeatedly in the case-law of the Court of Justice of the*

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<sup>272</sup> *Mannesmann Anlagenbau Austria and Others*, C-44/96, para. 21.

**European Union.** To clarify that the scope of this Directive *ratione personae* should remain unaltered, it is appropriate to maintain the definitions on which the Court based itself and to incorporate a certain number of clarifications given by that case-law as a key to the understanding of the definitions themselves, without the intention of altering the understanding of the concepts as elaborated by the case-law. For that purpose, it should be clarified that a body which operates in normal market conditions, aims to make a profit, and bears the losses resulting from the exercise of its activity should not be considered as being a ‘body governed by public law’ since the needs in the general interest, that it has been set up to meet or been given the task of meeting, can be deemed to have an industrial or commercial character.<sup>273</sup>

Similarly, the condition relating to the origin of the funding of the body considered, has also been examined in the case-law, which has clarified *inter alia* that being financed for ‘the most part’ means for more than half, and that such financing may include payments from users which are imposed, calculated and collected in accordance with rules of public law.”

This indicates that the concept is not clear in scope and therefore needs to be interpreted by the CJEU repeatedly.

It has been held by the CJEU that the concept of ‘bodies governed by public law’ should be interpreted in a broad sense<sup>274</sup>, although, as will be elaborated on below, quite extensive guidance, as to how to interpret the constituent elements of the concept, exists.

As the formulation implies, the three conditions mentioned in Article 2(1) (4) are cumulative: ‘‘bodies governed by public law’ means bodies that have *all* of the following characteristics’.<sup>275</sup>

The three subsections of Article 2(1) (4) will be accounted for in the following in order to deduce the criteria for the definition of ‘bodies governed by public law’.

(a) *Meeting needs in the general interest, not having an industrial or commercial character: the first subsection*

The first subsection of Article 2(1) (4) relates to the concept of a ‘body governed by public law’ and more specifically, the question of whether a body governed by public law acts in the public

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<sup>273</sup> Emphasis added.

<sup>274</sup> *Adolf Truley GmbH V Bestattung Wien GmbH*, C-373/00, EU:C:2003:110, para 43.

<sup>275</sup> This is also stated in the case-law from the CJEU; see *Mannesmann Anlagenbau Austria AG and Others v Strohal Rotationsdruck GesmbH*, C-44/96, para 21.

interest (as opposed to creating profit). The State may act either by exercising public powers or by carrying activities of an industrial or commercial nature by offering goods and services on the market. In situations, where the latter activity is present, the entity in question is no longer considered ‘public’ and competition rules apply instead.<sup>276</sup>

The crucial assessment for the definition of ‘body governed by public law’ is whether the body in question has operated in normal market conditions<sup>277</sup>, which is aimed at making a profit, and has faced the risk of bearing the (potential) losses from the activity.<sup>278</sup> Or, put in other words, if the needs in the general interest have been met.

Bovis finds that the acid test for needs in the general interest not having an industrial or commercial character is whether the State or contracting authority chose themselves to meet the needs in the general interest, or at least have decisive influence over their provision:<sup>279</sup>

*“The acid test for needs in the general interest not having an industrial or commercial character is that the state or other contracting authorities choose themselves to meet these needs or to have a decisive influence over their provision.”*

The CJEU has held that the concept of meeting the needs in the general interest is a concept of EU-law, which should be interpreted in light of the purpose of the procurement rules.<sup>280</sup> This means that it is not dependent on how it is defined in the Member States. The CJEU states, directly in relation to the above, that the purpose of the procurement rules *“is to eliminate barriers to the freedom to provide services and goods and therefore to protect the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State”*<sup>281</sup> by combatting both *“the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities and the possibility that a body financed or controlled by the State,*

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<sup>276</sup> The question of whether a public authority acts in the capacity as public authority or in the capacity of economic operator, when it awards public contracts, is analysed further in chapter 8 of this Thesis.

<sup>277</sup> The concept of normal market conditions will be analysed further in chapter 6 of this Thesis.

<sup>278</sup> *Arkkitehtuuritoimisto Riitta Korhonen Oy and Others V Varkauden Taitotalo Oy*, C-18/01, EU:C:2003:300, para 51.

<sup>279</sup> Bovis, *EU Public Procurement Law*, Second Edition, (Edward Elgar Publishing 2012), 294.

<sup>280</sup> *Adolf Truley GmbH V Bestattung Wien GmbH*, C-373/00, para 40.

<sup>281</sup> *Ibid.*, para 41.

*regional or local authorities or other bodies governed by public law may choose to be guided by considerations other than economic ones”.*<sup>282</sup>

This statement from the CJEU could be interpreted to imply that when contracting authorities buy goods and services, they should only be guided by economic considerations (as opposed to social or other).

However, the CJEU acknowledged in *Fernwärme Wien*<sup>283</sup> that a body governed by public law can sometimes be guided by considerations other than economic ones, when they meet needs in the general interest. The CJEU stated that the concept of a body governed by public law should be interpreted in functional terms<sup>284</sup>, which means that in a *specific situation* other considerations than economic ones can prevail when a body governed by public law acts.

However, it must be noted that the procurement law regime is set up to avoid that a contracting authority, including a body governed by public law, chooses to be guided by considerations other than economic ones,<sup>285</sup>. However, this point of departure can be deviated from, if, as in the specific case, the relevant economic environment leads to the outcome that the ‘body governed by public law’ is not capable of meeting the needs of the general interest by only being guided by economic considerations.<sup>286</sup>

In *Agora*,<sup>287</sup> the Court was asked whether a national body was to be classified as a body governed by public law.<sup>288</sup> The Court first repeated the wording of Article 2(1) (4) by noting that a body governed by public law means a body established for the specific purpose of a) meeting needs in the general interest, b) not having an industrial or commercial character, c) having a legal personality, and d) being closely dependent on the State, regional or local authorities or other bodies governed by public law.<sup>289</sup> The Court emphasized that the activities conducted by the entity in question (organisation of fairs, exhibitions, and other similar activities) did not only benefit the individual interest of the entities (manufacturers and traders)

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<sup>282</sup> *Ibid.*, para 42.

<sup>283</sup> *Ing. Aigner, Wasser-Wärme-Umwelt, GmbH V Fernwärme Wien GmbH*, C-393/06, EU:C:2008:213.

<sup>284</sup> *Fernwärme Wien GmbH*, C-393/06, para. 37.

<sup>285</sup> *Ibid.*

<sup>286</sup> *Ibid.*, para. 45.

<sup>287</sup> *Agorà Srl and Excelsior Snc di Pedrotti Bruna & C. v Ente Autonomo Fiera Internazionale di Milano and Ciftat Soc. coop. arl.*, joined cases C-223/99 and C-260/99, EU:C:2001:259.

<sup>288</sup> *Ibid.*, para 15.

<sup>289</sup> *Ibid.*, para 25.

who attended, but also benefited the consumers.<sup>290</sup> The Court then found that the body in question was to be considered as ‘meeting the needs in the general interest’.<sup>291</sup>

The procedure laid out from the Court in *Agora* was laid out to establish whether the reasons for establishing the body in question were to meet the needs in the general interest.<sup>292</sup> If the Court finds that this is the case, it then moves on to analyse the commercial character of the activity.

In *BFI*,<sup>293</sup> the Court considered whether the term ‘needs in the general interest’ can include both situations that *can* be characterised as having an industrial or commercial character and situations that *cannot* be characterised as having an industrial or commercial character. The Court concluded that the [term ‘meeting the needs in the general interest’] *creates, within the category of needs in the general interest, a sub-category of needs which are not of an industrial or commercial character*<sup>294</sup> i.e. the fact that an activity has a commercial or industrial character does not mean that it is not capable of meeting the needs in the general interest. Or put in other words; ‘needs in the general interest’ can either have an industrial or commercial character or not have an industrial or commercial character.

The Court went even further by stating that needs in the general interest, and not having an industrial or commercial character, does not exclude needs which are or can be satisfied by private undertakings as well.<sup>295</sup> This means that, as a general rule, private undertakings are capable of performing a certain task in the need of the general interest. This makes sense, as it would otherwise be possible to circumvent the public procurement rules, for example if a contracting authority has entrusted a private undertaking under their control to award public contracts.<sup>296</sup>

The general rule that private undertakings are capable of performing tasks in the need of the general interest has been modified, however, as the Court clarified in *Agora*. The existence of ‘significant competition’ may cause the absence of a need in the general interest, not having an

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<sup>290</sup> *Ibid.*, para 33-34.

<sup>291</sup> *Ibid.*, para 33.

<sup>292</sup> *Ibid.*, para 28 read in conjunction with paras 33-34. See further C. Bovis, *EU Public Procurement Law*, Second Edition, (Edward Elgar Publishing 2012), 293.

<sup>293</sup> *Gemeente Arnhem and Gemeente Rheden v BFI Holding BV*, C-360/96.

<sup>294</sup> *Ibid.*, para 34.

<sup>295</sup> *Ibid.*, para 53 as later confirmed in *Agora*, joined cases C-223/99 and C-260/99, para 38.

<sup>296</sup> On the same note see C. Bovis, *EU Public Procurement Law*, Second Edition, (Edward Elgar Publishing 2012), 297.

industrial or commercial character.<sup>297</sup> Hereby, the Court indicates that it is necessary to look at the level of competition present at the relevant market in order to assess whether ‘needs in the general interest’ have been met. It also indicates that there are boundaries connected to the dividing line between tasks performed in the general interest and task performed for commercial reasons.

Based on the above, it can be concluded that the reasons and objectives for establishing a body should be taken into consideration when deciding whether a specific body meets the need in the general interest. Furthermore, both activities that *do not* have an industrial or commercial character and activities that *do* have an industrial or commercial character can meet the need in the general interest. Finally, it cannot be ruled that private undertakings could meet the needs of the general interest, but it must be considered whether ‘significant competition’ is present in the relevant market.

The case law analysed above can be interpreted to entail a rather broad definition of the concept of bodies governed by public law by including both activities that *do* have an industrial or commercial character and activities that *do not* have an industrial or commercial character.

Recital 10 of the preamble in the public procurement Directive gives some guidance on the applicability of the concept by stating that:

*“[...]it should be clarified that a body which operates in normal market conditions, aims to make a profit, and bears the losses resulting from the exercise of its activity should not be considered as being a ‘body governed by public law’ since the needs in the general interest, that it has been set up to meet or been given the task of meeting, can be deemed to have an industrial or commercial character.”*

Recital 10 is as a codification of the case law from the CJEU.

#### *(b) Legal personality: the second subsection*

The second subsection of Article 2(1) (4) concerns the question whether the body in question has a legal personality. A body must have legal personality in order to fall under the concept of a body governed by public law.

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<sup>297</sup> *Agorà*, joined cases C-223/99 and C-260/99, para 38.

The assessment of a body having legal personality does not depend on whether or not it forms part of the same group or concern. This was emphasized by the CJEU in *BFI*, where it held that:<sup>298</sup>

*“Since the status of a body governed by public law is not dependent on the relative importance, within its business as a whole, of the meeting of needs in the general interest not having an industrial or commercial character, it is a fortiori immaterial that commercial activities may be carried out by a separate legal person forming part of the same group or concern as it.”*

In *Commission v. Ireland*,<sup>299</sup> the Court considered whether a national body was to be considered a contracting authority. The Court concluded that the body in question could not be regarded as being the State or a regional or local authority, as it did not award public contracts on behalf of the State or a regional or local authority.<sup>300</sup> Rather, the CJEU considered whether the body in question could be considered a body governed by public law.<sup>301</sup> The specific case concerned whether the entity (Coillte Teoranta), who carried out business of forestry and related activities on a commercial basis, and who was set up as a private company under national law, could be considered to have legal personality.

The Court revealed that the decisive element of the term ‘body with legal personality’ depends on whether the State controls that body.<sup>302</sup> The Court elaborated on the scope of the requirements of control in the specific case. First of all, emphasis was put on the fact that the State had set up the body in question and could appoint members of the management of the body, and further, that the State had entrusted specific tasks to the body.<sup>303</sup> Then the Court highlighted, as a ground for control to be present in the specific case, the possibility for the State to instruct the body in question to comply with state policy on forestry (which was the ambit of the case) and to provide specified services or facilities. Finally, the Court emphasised the States’ control over the body’s economic activities.<sup>304</sup> These requirements were moderated though, as the Court stated that the State must exercise the control, *at least indirectly*<sup>305</sup>:

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<sup>298</sup> *Gemeente Arnhem and Gemeente Rheden v BFI Holding BV*, C-360/96, para 56.

<sup>299</sup> *Commission of the European Communities v Ireland*, C-353/96.

<sup>300</sup> *Ibid.*, para 32.

<sup>301</sup> *Ibid.*, para 33.

<sup>302</sup> *Ibid.*, para 34.

<sup>303</sup> *Ibid.*, para 37.

<sup>304</sup> *Ibid.*, para 38.

<sup>305</sup> *Ibid.*, para 39.

*“It follows that, while there is indeed no provision expressly to the effect that State control is to extend specifically to the awarding of public supply contracts by Coillte Teoranta, **the State may exercise such control, at least indirectly.**”*<sup>306</sup>

The above shows that the decisive elements for deciding whether a body has legal personality, and thus can be considered a contracting authority, are dependent on whether the State exercises control (at least indirectly) over the body.

*(c) Dependency on the State in terms of financing, or management, or by having an administrative, managerial or supervisory board appointed by the State, regional or local authorities, or by other bodies governed by public law or have: the third subsection*

The third subsection of Article 2(1) (4) can be divided into three alternative criteria. This means that the satisfaction of one of the criteria will be enough to fulfil the requirements of ‘dependency of the State’. The three alternative criteria share a common theme of close dependency between the body in question and the State.<sup>307</sup>

As a first alternative, the body in question could be financed, for the most part by the State or by regional or local authorities. In regard to the term ‘for the most part’, the Court has explained that this term should be understood as ‘more than half’.<sup>308</sup> This means that it is possible for the body in question to be financed, in part, by other sources than public funds and still fulfil the requirements of a ‘body governed by public law’, as long as ‘more than half’ of the financing stems from public sources.<sup>309</sup>

In *University of Cambridge*,<sup>310</sup> the Court expressed the view that the question of financing is not absolute; in the sense that not all financing from the State will have the effect of creating dependency on the State. The Court seems to express the view that there is a relationship between the specificity of the payment and the connection to the State: Payments, that support

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<sup>306</sup> Emphasis added.

<sup>307</sup> *The Queen v H.M. Treasury, ex parte The University of Cambridge*, C-380/98, EU:C:2000:529, para 20.

<sup>308</sup> *Ibid.*, para 30.

<sup>309</sup> *Ibid.*, para 35.

<sup>310</sup> *Ibid.*



activities without general considerations, i.e. payments, which are not intended for any specific purpose, are more likely to be considered public financing:<sup>311</sup>

*“Whilst the way in which a particular body is financed may reveal whether it is closely dependent on another contracting authority, it is clear that that criterion is not an absolute one. Not all payments made by a contracting authority have the effect of creating or reinforcing a specific relationship of subordination or dependency. Only payments which go to finance or support the activities of the body concerned without any specific consideration therefor may be described as public financing.”*<sup>312</sup>

The second alternative, which could satisfy the requirements of a ‘dependency on the State’, is that the body could be subject to management supervision by the State, regional or local authorities, or by other bodies governed by public law.

Regarding this alternative, the Court held in *Opac*<sup>313</sup> that the term ‘management supervision’ must give rise to dependence on the public authority equivalent to the requirements of dependence regarding the term ‘financed, by most part, by the public authority’ as described above.<sup>314</sup> Moreover, a decisive element seems to be whether the public authority is able to influence the decisions of the body in question, in relation to public contracts.<sup>315</sup> The requirement of influence seems quite strict, as Court states that management supervision could entail transfer of ‘significant’<sup>316</sup> and ‘permanent’<sup>317</sup> influence on the public authorities as well as the possibility for the public authority to ‘impose a specific course of management action’<sup>318</sup> on the body in question.

As a third alternative, the body could meet the requirements of a ‘dependency on the State’ by having an administrative, managerial or supervisory board, on which more than half of the members are appointed by the State, regional or local authorities, or by other bodies governed by public law. This alternative shares the common requirement of dependence on the public

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<sup>311</sup> *Ibid.*, para 21.

<sup>312</sup> Emphasis added.

<sup>313</sup> *Commission of the European Communities v French Republic*, C-237/99, EU:C:2001:70.

<sup>314</sup> *Ibid.*, para 49.

<sup>315</sup> *Ibid.*, para 48.

<sup>316</sup> *Ibid.*, para 52.

<sup>317</sup> *Ibid.*, para 56.

<sup>318</sup> *Ibid.*, para 57.

authority<sup>319</sup> by requiring a specific level (*more than half*) of the board in question to be appointed by the public authority.

In conclusion to the above, the third subsection of Article 2(1) (4) includes three alternative ways of satisfying the requirements of the term ‘dependency on the State’ which thereby possibly falls within the concept of ‘body governed by public law’. If the body in question is financed by more than half by the State, it will be enough to render that body within the scope of ‘body governed by public law’. Alternatively, the body could be subject to management supervision, e.g. by being dependent of the public authority in terms of influence. The requirement of influence seems rather strict, as it could entail transfer of both ‘significant’ and ‘permanent’ influence on the public authorities. As a final alternative, the body in question could meet the requirements of ‘dependency on the State’ by having an administrative, managerial or supervisory board, on which more than half of the members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

Accordingly, the following criteria for the definition of ‘bodies governed by public law’ can be deduced from the analysis above:

- The ‘objectives’ criterion: This concerns whether the reasons behind establishing the body in question meet the needs in the general interest (this relates to the first indent of Article 2(1)(4))
- The ‘control’ criterion: This concerns whether the body in question is controlled (at least indirectly) by the public authority (this relates to the second indent of Article 2(1) (4))
- The ‘dependency’ criterion: This concerns whether or not there is a close dependency of the body in question on the public authority (this relates to the third indent of Article 2(1) (4))

The fulfilment of at least one of the above identified criteria will thus be enough to satisfy the requirements of the term ‘body governed by public law’.

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<sup>319</sup> *Ibid.*, para 49.

### **3.1.4 Preliminary findings**

This section has accounted for the constituent elements of the concept ‘contracting authority’. This concept is crucial in order to define which entities are covered by the procurement rules. The concept of ‘contracting authority’ must be interpreted in functional terms, which arguably necessitates a flexible approach that develops over time. Article 2(1) of the procurement Directive defines contracting authorities as a) the State, b) regional or local authorities, c) bodies governed by public law, c) central government authorities d) sub-central contracting authorities and e) bodies governed by public law. The analysis has shown that the scope of the concept of contracting authority is rather broad.

## **3.2 The concept of ‘State’ under the State aid rules**

We now turn to analyse the personal scope of the State aid rules. The definition of the concept of the ‘State’ is crucial when assessing whether ‘contracting authorities’ under the procurement rules are capable of granting aid to economic operators.<sup>320</sup> In this section, the characteristics of the concept of State will be analysed in order to address when contracting authorities act in the capacity of State in accordance with Article 107(1) TFEU.

### **3.2.1 Direct or indirect transfer of State resources: The first sub-criteria**

Article 107(1) TFEU prohibits the granting of aid by Member States or through State resources as the first cumulative criterion for assessing whether a measure should be categorised as State aid within the meaning of the Treaty. In this respect, the concept of State resources is the most difficult to define. Consequently, this concept will be the subject for analysis in the following.

The criterion of State resources can be divided in two sub-criteria, namely: 1) whether there has been a direct or indirect transfer of State resources and 2) whether the measure in question can be considered to be imputable to the State. The two sub-criteria will be accounted for in the following.

The concept of ‘State resources’ has been interpreted repeatedly in the case law of the CJEU. In *Steinike & Weinlig*,<sup>321</sup> the CJEU emphasised for the first time that no difference exists between

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<sup>320</sup> The concept of economic operator is analysed in chapter 4 of this Thesis.

<sup>321</sup> *Steinike & Weinlig v Federal Republic of Germany*, Case 78/76.

aid granted by the State or through State resources. The CJEU held that no account should be given as to whether aid is granted directly by the State, or by public or private bodies appointed by the State to administer the aid.<sup>322</sup>

*“The prohibition contained in article 92 ( 1 ) [now 107(1)] covers all aid granted by a member state or through state resources without its being necessary to make a distinction whether the aid is granted directly by the state or by public or private bodies established or appointed by it to administer the aid . In applying article 92 [now 107] regard must primarily be had to the effects of the aid on the undertakings or producers favoured and not the status of the institutions entrusted with the distribution and administration of the aid.”*<sup>323</sup>

Instead, the Court emphasised that the crucial assessment is the effect the aid has on the undertakings or producers favoured by the aid, and not the legal status of the body in question.<sup>324</sup> With this, the Court applies a functional approach to the assessment of whether a body is capable of transferring ‘State resources’.

In *Van Tiggele*,<sup>325</sup> the Court established that a measure must entail a financial burden on the State’s resources in order to meet the requirements of the notion of State aid.<sup>326,327</sup>

In his opinion to the case, A.G. Capotorti elaborated on the above:<sup>328</sup>

*“It is clear that for a measure which has the effect of favouring certain undertakings to constitute an aid it must entail a financial burden for the State. This follows from the actual wording of Article 92 (1) [now 107(1)] in which reference is made to ‘any aid granted by a Member State or through State resources’. It is thus necessary that the State should grant*

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<sup>322</sup> *Ibid.*, para 21. Confirmed in *Commission of the European Communities v French Republic*, 290/83, EU:C:1985:37, para 14; *Hellenic Republic v Commission of the European Communities*, 57/86, EU:C:1988:284, para 12;

<sup>323</sup> Emphasis added.

<sup>324</sup> *Ibid.*, para 21.

<sup>325</sup> *Ministère public du Kingdom of the Netherlands v Jacobus Philippus van Tiggele*, 82/77, EU:C:1978:10.

<sup>326</sup> *Ibid.*, paras 24-25.

<sup>327</sup> See also J A Winter, ‘Re(de)fining the notion of State aid in Article 87(1) of the EC Treaty’, (2004) 41, *Common Market Law Review*, 475-504 and M. M. Slotboom, ‘State aid in Community law: a broad or narrow definition?’, (1995) 20 (3), *E.L. Rev.*, 289-301.

<sup>328</sup> Opinion of Mr. Advocate General Capotorti delivered on 13 December 1977 in *Ministère public du Kingdom of the Netherlands v Jacobus Philippus van Tiggele*, Case 82/77, EU:C:1977:205, point 8.

*certain undertakings, selected individually or by categories, an advantage entailing a burden on the public finances in the form either of expenditure or of reduced revenue.*<sup>329</sup>

The CJEU seemed to agree with this view, as it did not find that a ‘fixing by a public authority of minimum retail prices for a product at the *exclusive expense of consumers*’ could constitute aid granted by a State within the meaning of Article 107 TFEU.<sup>330</sup>

In a public procurement context, the limits of this requirement is important, as it could imply that a contracting authority does not fall under the notion of the State in situations, where the contracting authority does not impose a financial burden to the State. One example of a situation, as the one described above, could be award under the concession Directive. As held in chapter 2, one of the constituents of the definition of concession contracts is remuneration, which can consist either solely in the right to exploit the works that are the subject of the contract or in that right together with a payment. In this respect, it can be argued that contracts awarded under the concession Directive, where payment consist solely of the right to exploit the service in question, can never constitute a financial burden on the State, as no money is used to pay for the work or service performed under the contract.

*In Air France*,<sup>331</sup> the GC had to consider whether an investment amounted to an advantage granted directly or indirectly through State resources. The GC discussed whether the body in question (the ‘Caisse’) should be seen as a body forming part of the public sector. The GC concluded that the body in question formed part of the public sector,<sup>332</sup> even though the body ‘enjoyed legal autonomy from the political authorities of the State’.<sup>333</sup> The grounds for this conclusion was that the tasks carried out by the body in question were ‘governed by statutory and regulatory rules’ and also that the Director-General of the body was appointed by the President.<sup>334</sup> Therefore, the body in question should be seen as a ‘public-sector body whose conduct is attributable to the French State’.<sup>335</sup> Additionally, the GC emphasised the fact that the

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<sup>329</sup> Emphasis added.

<sup>330</sup> *Ministère public du Kingdom of the Netherlands v Jacobus Philippus van Tiggele*, 82/77, para 26.

<sup>331</sup> *Compagnie nationale Air France v Commission of the European Communities*, T-358/94.

<sup>332</sup> *Ibid.*, para 59.

<sup>333</sup> *Ibid.*, para 62.

<sup>334</sup> *Ibid.*, para 58.

<sup>335</sup> *Ibid.*, para 61.

funds in question were not at the permanent disposal of the body did not affect its status as aid, because the notion of aid covers aid granted ‘in any form whatsoever’.<sup>336</sup>

In *Nord Pas-de-Calais*,<sup>337</sup> the GC found that intervention by a member State or through State resources is not necessarily influenced by the central State authority, but may as well be affected by an authority situated below the national level.<sup>338</sup>

The above suggests that the concept of State resources is widely scoped, as it includes entities such as bodies that enjoy legal autonomy from the political authorities of the State, as well as authorities situated below the national level. The decisive criterion concerning transfer of State resources seems to be ‘public control’.<sup>339</sup> The CJEU has emphasised that the exercise of control cannot be automatically presumed.<sup>340</sup> The mere possibility of control will not be sufficient to fulfil the criterion of ‘public control’. The requirement of control seems quite strict, as it presupposes that the right of control is actually exercised.

In *Germany v Commission*,<sup>341</sup> the Court found that the term ‘any aid granted by a Member State or through State resources’ includes all aid financed from public resources. This also includes measures adopted by a State in a federation or by a regional authority, i.e. not by the federal or central power.<sup>342</sup> The term ‘aid financed from public resources’ has been interpreted by the GC to include intra-state entities, which means ‘decentralised, federated, regional or other’ entities.<sup>343</sup>

### **3.2.2 Imputability to the State: the second subsection**

The second sub-criterion concerns the assessment of whether the transfer of State resources can be imputed to the State.

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<sup>336</sup> *Ibid.*, para 65.

<sup>337</sup> *Commission of the European Communities v French Republic*, C-225/98.

<sup>338</sup> *Ibid.*, para 108.

<sup>339</sup> *Ibid.*, para 111.

<sup>340</sup> *French Republic v Commission of the European Communities (Stardust Marine)*, C-482/99, EU:C:2002:294, Para 52.

<sup>341</sup> *Federal Republic of Germany v Commission of the European Communities*, C-248/84, EU:C:1987:437.

<sup>342</sup> *Ibid.*, para. 17.

<sup>343</sup> *Diputación Foral de Álava, Ramondín, SA and Ramondín Cápsulas, SA v Commission of the European Communities*, joined cases T-92/00 and T-103/00, EU:T:2002:61, para 57.

In *Van der Kooy*,<sup>344</sup> the CJEU established for the first time that a measure has to be attributable to the State in order to constitute State aid. In this case, the CJEU had to decide whether the fixing of a tariff was the result of an action performed by the Netherlands State.<sup>345</sup> The CJEU answered the question by interpreting whether the body in question enjoyed full autonomy in the fixing of the tariff, and furthermore, whether the body acted under the control and instructions of the public authority. The CJEU concluded that it was not possible for the body in question to perform its task (fixing of the gas tariff) without taking account of the requirements of the public authority:<sup>346</sup>

*“Considered as a whole, these factors demonstrate that Gasunie in no way enjoys full autonomy in the fixing of gas tariffs but acts under the control and on the instructions of the public authorities. It is thus clear that Gasunie could not fix the tariff without taking account of the requirements of the public authorities.”*

Therefore, the Court found that the task performed by the body in question was the result of an action performed by the Netherlands State, which falls under Article 107 TFEU.<sup>347</sup>

The case law of the Court has confirmed that this criterion is separate from the assessment of whether the aid is granted ‘through State resources’. As held by the CJEU in *Stardust Marine*:<sup>348</sup>

*“However, for advantages to be capable of being categorised as aid within the meaning of Article 87(1) EC [now 107(1) TFEU], they must, first, be granted directly or indirectly through State resources [...] and, second, be imputable to the State[ ...]”*<sup>349</sup>

*Stardust Marine* provides clarification of the scope of the requirement of imputability and, consequently, this case will be analysed in the following.

The case concerned an application for annulment of a Commission Decision<sup>350</sup>. *Stardust Marine* (hereafter *Stardust*) was a company, whose main business is in the pleasure-boat market.

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<sup>344</sup> *Kwekerij Gebroeders van der Kooy BV and others v Commission of the European Communities*, joined cases 67, 68 and 70/85, EU:C:1988:38.

<sup>345</sup> *Ibid.*, para 31.

<sup>346</sup> *Ibid.*, para 37.

<sup>347</sup> *Ibid.*, para 38.

<sup>348</sup> *Stardust Marine*, C-482/99, para 24 and *Deutsche Bahn AG V Commission of the European Communities*, T-351/02, EU:T:2006:104, para 103.

<sup>349</sup> Emphasis added.

<sup>350</sup> Commission Decision 2000/513/EC of 8 September 1999 on aid granted by France to *Stardust Marine* OJ 2000 L 206/6.

Stardust was initially financed by way of loans and guarantees by the bank SBT-Batif, which is a subsidiary of Altus Finance (Altus), part of the Crédit Lyonnais group. In 1994, after several losses by Crédit Lyonnais, the French authorities decided to support Stardust financially.<sup>351</sup>

The French government put forward four pleas in their support. The first and second pleas, which will be subjects of further analysis immediately below, concerned the question of State origin of the funds supporting Stardust as well as an argument that the Commission made an obvious error of assessment in holding the conduct of SBT and Altus with respect to Stardust was imprudent to the State.<sup>352</sup>

Regarding the first plea, CJEU first held that no distinction should be made between State aid granted by the State and public or private bodies established in order to administer the aid, as such a distinction could risk the circumvention of EU law:<sup>353</sup>

*“It is settled case-law that **no distinction is to be drawn between cases where the aid is granted directly by the State and those where it is granted by public or private bodies which the State establishes or designates with a view to administering the aid [...]. Community[Union] law cannot permit the rules on State aid to be circumvented merely through the creation of autonomous institutions charged with allocating aid.**”*<sup>354</sup>

Then, the CJEU continued to emphasise that in order to fall within the scope of State aid rules a measure must be granted, directly or indirectly, through State resources<sup>355</sup>. They subsequently concluded that the funding in question were State resources because Crédit Lyonnais, Altus and SBT were under the control of the State and thus had to be regarded as public undertakings (something which the French government had already agreed upon).<sup>356</sup> Furthermore, the CJEU emphasised the requirement that the financial measure remains under public control:<sup>357</sup>

*“Second, it should be recalled that it has already been established in the case-law of the Court that Article 87(1) EC [now 107(1) TFEU] covers **all the financial means by which the public authorities may actually support undertakings, irrespective of whether or not those means are***

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<sup>351</sup> *Stardust Marine*, C-482/99, paras 2-3.

<sup>352</sup> *Ibid.*, para 15.

<sup>353</sup> *Ibid.*, para 23.

<sup>354</sup> Emphasis added.

<sup>355</sup> *Stardust Marine*, C-482/99, para 24.

<sup>356</sup> *Ibid.*, para 32 and 34 read in conjunction.

<sup>357</sup> *Ibid.*, para 37.



*permanent assets of the public sector. Therefore, even if the sums corresponding to the measure in question are not permanently held by the Treasury, **the fact that they constantly remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as State resources [...]***<sup>358</sup>

In the second part of the first plea, the French government argued that the Commission had misinterpreted the concept of imputability to the State and contended that the financial aid granted to Stardust by SBT and Altus were not imputable to the State.<sup>359</sup> The CJEU agreed with the arguments made by the French State and concluded that the Commission had indeed misinterpreted the criterion of imputability to the State.<sup>360</sup> The CJEU founded its conclusion on the following arguments. Firstly, the CJEU emphasised that the criterion of imputability cannot be presumed by the fact that the measure is taken by a public undertaking.<sup>361</sup> It held that:<sup>362</sup>

*“Even if the State is in a position to control a public undertaking and to exercise a dominant influence over its operations, **actual exercise of that control in a particular case cannot be automatically presumed.** A public undertaking may act with more or less independence, according to the degree of autonomy left to it by the State. That might be the situation in the case of public undertakings such as Altus and SBT. Therefore, **the mere fact that a public undertaking is under State control is not sufficient for measures taken by that undertaking, such as the financial support measures in question here, to be imputed to the State.** It is also necessary to examine whether the public authorities must be regarded as having been involved, in one way or another, in the adoption of those measures.”*<sup>363</sup>

The CJEU then went on to examine whether the measure in question could be imputed to the State. The CJEU held that:<sup>364</sup>

*“[...]the imputability to the State of an aid measure taken by a public undertaking **may be inferred from a set of indicators** arising from the circumstances of the case and the context in which that measure was taken. In that respect, the Court has already taken into consideration the fact that **the body in question could not take the contested decision without taking account of the requirements of the public authorities [...]** or the fact that, apart from factors of an organic nature which linked the public*

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<sup>358</sup> Emphasis added.

<sup>359</sup> *Stardust Marine*, C-482/99, paras 44-59.

<sup>360</sup> *Ibid.*, para 58.

<sup>361</sup> *Ibid.*, para 51.

<sup>362</sup> *Ibid.*, para 52.

<sup>363</sup> Emphasis added.

<sup>364</sup> *Stardust Marine*, C-482/99, paras 55-56.

*undertakings to the State, those undertakings, through the intermediary of which aid had been granted, had to take account of directives issued by a [Interministerial Committee]*

***Other indicators might, in certain circumstances, be relevant in concluding that an aid measure taken by a public undertaking is imputable to the State, such as, in particular, its integration into the structures of the public administration, the nature of its activities and the exercise of the latter on the market in normal conditions of competition with private operators, the legal status of the undertaking (in the sense of its being subject to public law or ordinary company law), the intensity of the supervision exercised by the public authorities over the management of the undertaking, or any other indicator showing, in the particular case, an involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved, having regard also to the compass of the measure, its content or the conditions which it contains.***<sup>365</sup>

Accordingly, the CJEU developed a test regarding the imputability to the State of an aid measure taken by a public undertaking. The central assessment seems to be the degree of control which the State exercises over the public undertaking (referred to as the organic criterion<sup>366</sup>). Furthermore, the following criteria<sup>367</sup> can be deduced:

- Are the resources at the permanent disposal of the State?
- Is the measure required by law?
- Is there a recourse to the general budget of the State?

In a recent case, namely the case of *Commission V TV2/Danmark*<sup>368</sup>, the Court made an important clarification regarding the question when financing may be considered to fall inside the scope of State resources. In the appeal the Commission relied on a single ground of appeal, whereby it submits that the GC had misinterpreted the concept of State resources.<sup>369</sup> In the years 1995 and 1996, the advertising space on *TV2/Danmark* was sold - not by *TV2/Danmark* itself, but by a third company, *TV2 Reklame*, and the income from those sales was transferred to *TV2/Danmark* through the *TV2 Fund*.<sup>370</sup> In that regard, it was not disputed that, like *TV2/Denmark*, *TV2 Reklame* and the *TV2 Fund* were public undertakings owned by the Danish

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<sup>365</sup> Emphasis added.

<sup>366</sup> *Stardust Marine*, C-482/99, para 58.

<sup>367</sup> Referred to as the “Stardust criteria” in the literature, see L. Hancher, ‘The general framework’ in L. Hancher, T. Ottervanger and P.J. Slot (eds), *EU State Aids* (Sweet & Maxwell 2012) 72.

<sup>368</sup> *European Commission v TV2/Danmark A/S*, C-656/15 P, EU:C:2017:836.

<sup>369</sup> *Ibid.*, para 26.

<sup>370</sup> *Ibid.*, para 49.

State. And furthermore, that they had been awarded the task of administering the transfer, to TV2/Danmark, of the revenue derived from the sale of that advertising space.<sup>371</sup> Consequently, the question arose whether the revenue could be considered to fall within the scope of State resources.

The CJEU first examined the Stardust criteria, as deduced above, by concluding that:<sup>372</sup>

*“[...] the entire distribution channel of that revenue ending with its transfer to TV2/Danmark was **governed by Danish legislation**, under which public undertakings specially appointed by the State had the task of **administering that revenue**.*

*The revenue in question was, accordingly, **under public control and at the disposal of the State**, which could decide how it was to be used.*

*Consequently, [...] the revenue at issue constitutes ‘State resources’, within the meaning of Article 107(1) TFEU.”<sup>373</sup>*

Then the CJEU went on to discuss a dispute between the parties regarding the source of the resources concerned. In its judgment<sup>374</sup>, the GC had held that the revenue could not be considered as falling within the scope of State resources, since it originated from private sources. The Commission argued contrary to the view of the GC by holding that the initially private nature of the resources was of no relevance for the purposes of classifying the resources as ‘State resources’.<sup>375</sup>

To this point the CJEU held:<sup>376</sup>

*“As stated above in paragraph 48 of the present judgment, and contrary to what is stated in paragraph 211 of the judgment under appeal, **the fact that the source of that revenue, which came from advertisers, was private is of no significance in that regard and is irrelevant to the question whether that revenue was controlled by the Danish authorities.***

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<sup>371</sup> *Ibid.*

<sup>372</sup> *Ibid.*, paras 51-53.

<sup>373</sup> Emphasis added.

<sup>374</sup> *TV2/Danmark A/S v European Commission*, T-674/11, EU:T:2015:684, paras 208, 211-212.

<sup>375</sup> *European Commission v TV2/Danmark A/S*, C-656/15 P, para 28.

<sup>376</sup> *Ibid.*, para 55.

*Moreover, the General Court was wrong to hold, in paragraphs 208 and 212 of the judgment under appeal, that resources originating with third parties that are managed by public undertakings can constitute State resources only when they are voluntarily placed at the disposal of the State by their owners or abandoned by their owners and when the State has assumed the management of those resources.*

*Contrary to what is stated by the General Court, there is no basis for such a consideration in the Court's case-law.*<sup>377</sup>

Accordingly, the Court concluded that the appeal by the Commission could be upheld and that “the judgment under appeal must be set aside, to the extent that it annulled the contested decision in so far as the Commission had held that the advertising revenue for 1995 and 1996 paid to TV2/Danmark through the TV2 Fund constituted State aid.”<sup>378</sup>

The case of *Commission V TV2/Denmark* adds to the concept of State resources, as analysed above, insofar as it concludes that the origin of the resources is of no importance for the classification of a measure as State resources. Accordingly, resources originating from private funds are capable of fulfilling the requirements of State resources.

### **3.2.3 Preliminary findings**

The concept of State should, according to the above, be interpreted widely in the sense that the concept covers all measures transferred by the State or through State resources. The concept of State resources can be divided in two sub-criteria, namely: 1) whether there has been a direct or indirect transfer of State resources and 2) whether the measure in question can be considered to be imputable to the State. State resources cover a broad variety of units, e.g. bodies which enjoy legal autonomy from the political authorities of the State, as well as authorities situated below the national level. The decisive criterion concerning transfer of State resources seems to be ‘public control’. Furthermore, the concept of ‘imputability’ has been analysed. In this respect, a measure has to be attributable to the State in order to constitute State aid. The decisive element for the concept of imputability is the degree of control, which the State exercises over the public undertaking. Accordingly, the concept of State comprises all units and resources over which the State has a decisive or controlling influence or where the State is likely to have a decisive influence on how the resources are spent.

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<sup>377</sup> Emphasis added.

<sup>378</sup> *European Commission v TV2/Danmark A/S*, C-656/15 P, EU:C:2017:836, para 65.

### 3.2.4 Can procurement measures be imputed to the State?

In relation to the research question asked in this Thesis, it is relevant to discuss whether procurement measures can be imputed to the State *a priori*. In this respect, the connection between imputability and specific procurement measures has to be analysed in order to conclude whether specific State involvement is required in order to fulfil the requirement of imputability or whether the concept of imputability under State aid law implies State involvement *a priori*. This discussion is important for this Thesis' research question, as the analysis might influence the degree of which the award of public contracts constitutes State aid within the meaning of Article 107(1) TFEU. In other words, the analysis below will seek to conclude whether imputability in relation to procurement procedures requires the conduct of a specific test or whether the award of public contracts are always imputed to the State.

In section 3.1 above, it was concluded that the concept of contracting authority is broad in scope, as it entails the State, regional or local authorities bodies governed by public law, central government authorities, sub-central contracting authorities as well as bodies governed by public law. This conclusion implies that contracting authorities fall under the scope of State or State resources, as all measures taken by contracting authorities can be imputed to the State. In paragraph 23 of *Stardust Marine*, the CJEU held that the non-distinction between State and State resources in relation to public undertakings is made in order to prevent circumvention through the creation of autonomous institutions charged with allocating aid. In this respect, it can be argued that if the CJEU's findings in *Stardust Marine* applies to the State in general (as opposed to only for public undertakings), contracting authorities fall within the scope of State or State resources, as the opposite would allow for circumvention of the State aid rules.

Arrowsmith seems to disagree with the argument above:<sup>379</sup>

*“Thus for public undertakings a procurement measure can be imputed to the State either because of state involvement in the specific procurement [...] or because of general circumstances suggesting involvement in the entity's procurement policy. However, a procurement measure cannot be imputed to the State simply because it is a procurement measure of an undertaking subject to dominant state influence.”*

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<sup>379</sup> S. Arrowsmith *The Law of Public and Utilities Procurement: Regulation in the EU and UK*, 3rd edn. (Sweet and Maxwell 2014), 317.

In this respect, as held by the CJEU in paragraph 52 of *Stardust Marine* (cited above), the actual exercise of control in a particular case cannot be presumed. This implies that the relevant test for assessment of state imputability, as deduced above, should be conducted in each case.

However, building on the conclusions drawn above, it could be argued that since the concept of contracting authority under procurement law coincide with the concept of State under State aid rules, State imputability can be presumed when contracting authorities award public contracts. The opposite conclusion might risk circumvention of State aid rules. Hence, uniform conditions should apply to all contracting authorities in order to prevent circumvention.

### 3.3. Conclusions

State aid rules apply to a transfer of resources by the State (a public authority, public undertaking or part of the State administration) to undertakings. The *ratione personae* concerning public procurement rules are contracting authorities. The public procurement rules and State aid rules thus apply to the State.

The concept of State under the State aid rules and contracting authority under the procurement rules are both wide in scope and it is found that contracting authorities fall under the scope of State, under State aid rules. Hence, procurement rules and State aid rules share personal scope. The actions of a contracting authority are imputable to the State, which presupposes a close connection between the State and contracting authorities. This means that contracting authorities fall within the scope of the State and hence, contracting authorities are capable of transferring resources which fall under the ambit of the State aid rules.

It has been discussed whether the measures of contracting authorities can be imputed to the State *a priori*. In spite of the fact that the actual exercise of control in a particular case cannot be presumed, it is argued that State imputability can be presumed when contracting authorities award public contracts. The opposite conclusion might cause circumvention of State aid rules and hence, uniform conditions should apply to all contracting authorities in order to prevent circumvention.

## Chapter 4

### **4. Defining the concept of economic operator versus undertaking: When are economic operators regarded as undertakings under the State aid rules?**

The personal scope of the procurement rules and the State aid rules is examined in this chapter. As will be elaborated, the concept of economic operator applied under procurement law builds on the concept of undertaking under competition law. For this reason, the structure in this chapter deviates from the structure in the rest of this Thesis. Accordingly, the chapter starts by accounting for the concept of *undertaking* under State aid law in section 4.1 and then moves on to account for the concept of *economic operator* under procurement law in section 4.2. Then, section 4.3 discusses whether contracting authorities fall under the definition of undertaking. Finally, section 4.4 concludes on the arguments of this chapter.

Under State aid law, the requirement for the application of State aid rules is that the transaction concerns an undertaking which offers goods or services on the market. In procurement law the decisive criterion regarding what transactions fall under the procurement rules is whether the transaction is an economic activity performed by economic operators (Article 1 of the procurement directive presupposes an acquisition from economic operators). It is therefore relevant to discuss whether the concepts of undertaking and economic operator are coincident in order to answer the research question asked in this Thesis.

Arguably, the concept of economic operator coincides under the three award situations analysed in this Thesis. Consequently, the following will take the public procurement Directive as the point of departure for the analysis.

#### 4.1 The concept of ‘undertaking’ under the State aid rules

Article 107(1) TFEU prohibits any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain *undertakings* or the production of certain goods. Thus, the aid recipient must be an undertaking.

The Treaty does not contain a definition of an ‘undertaking’. Rather, this concept has been developed through the case law of the CJEU.<sup>380</sup>

As has been established in case law, the concept of an ‘undertaking’ is broad in scope:

In *Höfner*<sup>381</sup> the CJEU was asked to decide whether a public employment agency could be classified as an undertaking subject to the competition rules in the Treaty.

The case concerned a dispute concerning the compatibility of a recruitment contract concluded between a public employment agency (Messrs Hoefner and Elser), on the one hand, and a German company (Macrotron), on the other.<sup>382</sup> According to German law, employment in Germany is governed by the *Arbeitsförderungsgesetz* (Law on the promotion of employment, hereinafter referred to as "the AFG"). Paragraph 3 of the AFG entrusts the promotion of employment to the *Bundesanstalt für Arbeit* (Federal Office for Employment, hereinafter referred to as "the Bundesanstalt"), who's activity essentially consists of bringing prospective employees into contact with employers and administering unemployment benefits.<sup>383</sup> However, in spite of the exclusive right granted to the Bundesanstalt, specific recruitment and employment procurement activity has developed in Germany for business executives.<sup>384</sup> As required by the contract, Messrs Hoefner and Elser presented Macrotron with a candidate for the post of sales director. The candidate was a German national who, according to the recruitment consultants, was perfectly suitable for the job in question. However, Macrotron decided not to appoint that candidate and refused to pay the fees stipulated in the contract.<sup>385</sup> For this reason, Messrs Hoefner and Elser commenced proceedings against Macrotron before a German national Court in

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<sup>380</sup> See e.g. *Cassa di Risparmio*, C-222/04, para 107 and *Congregación de Escuelas Pías Provincia Betania v Ayuntamiento de Getafe*, C-74/16, paras 41-46 with references.

<sup>381</sup> *Klaus Höfner and Fritz Elser v Macrotron GmbH.*, C-41/90, EU:C:1991:161.

<sup>382</sup> *Ibid.*, para 1.

<sup>383</sup> *Ibid.*, para 3.

<sup>384</sup> *Ibid.*, para 8.

<sup>385</sup> *Ibid.*, para 11.



order to obtain the fees agreed upon. The national German court decided to refer four questions to the CJEU for a preliminary ruling. The CJEU formulated the questions as follows:<sup>386</sup>

*“In its first three questions and the part of its fourth question concerning Article 59 of the Treaty, the national court seeks essentially to determine whether the Treaty provisions on the free movement of services preclude a statutory prohibition of the procurement of employment for business executives by private recruitment consultancy companies. The fourth question is concerned essentially with the interpretation of Articles 86 and 90 of the Treaty, having regard to the competitive relationship existing between those companies and a public employment agency enjoying exclusive rights in respect of employment procurement.”*

In its reply, the CJEU held that the concept of an undertaking encompasses:<sup>387</sup>

*“It must be observed, in the context of competition law, first that **the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed** and, secondly, that employment procurement is an economic activity.”*<sup>388</sup>

Accordingly, every entity engaged in an economic activity, regardless of the legal status of the entity and the way it is financed, falls under the scope of the concept of ‘undertaking’.

#### **4.1.1 Economic activities**

As held above, the decisive criterion for the definition of undertakings is whether the entity in question performs an economic activity. No definition exists in the Treaty as to what constitutes an economic activity, but the CJEU has held that this assessment must be made on a case-by-case basis.

The concept of undertaking relies, in essence, upon whether an economic activity is performed by offering goods and services on the market.<sup>389</sup> This was established in *Italy v Commission*<sup>390</sup> where the CJEU held that:<sup>391</sup>

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<sup>386</sup> *Ibid.*, para 14.

<sup>387</sup> *Ibid.*, para 21.

<sup>388</sup> Emphasis added.

<sup>389</sup> See e.g. *Commission of the European Communities v Italian Republic*, C-35/96, EU:C:1998:303, para 36; *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten*, Joined cases C-180/98 to C-184/98, EU:C:2000:428 and *Cassa di Risparmio*, C-222/04, para 108.

<sup>390</sup> *Commission of the European Communities v Italian Republic*, Case 118/85, EU:C:1987:283.

<sup>391</sup> *Ibid.*, para 7.

*“the distinction provided for in the sixth recital flows from the recognition of the fact that the state may act either by exercising public powers or by carrying on economic activities of an industrial or commercial nature **by offering goods and services on the market** . In order to make such a distinction, **it is therefore necessary, in each case, to consider the activities exercised by the state and to determine the category to which those activities belong.**”<sup>392</sup>*

Accordingly, the decisive factor for the concept of undertaking under competition law is not the legal personality, but rather the function it fulfils. This approach implies that the concept of undertaking is functional.

As the concept of economic activities has no exhaustive definition, it is not possible to define a conclusive list of activities which are economic in nature *a priori*. However, the CJEU has elaborated on activities which *do not* constitute economic activities. Thus, the concept of economic activity is defined by a negative delimitation.

For the purpose of this Thesis, the most relevant non-economic activity relates to the exercise of public powers. In this connection, where the entity acts by exercising public powers or in the capacity of public authorities,<sup>393</sup> Article 107 TFEU does not apply. Thus, the activity is outside the scope of the competition rules if the activity performed is considered part of the essential functions of the State.

#### *4.1.1.1 Entities acting in the capacity of public powers*

In a line of case law the CJEU has dealt with the distinction between entities acting in the capacity of public powers or performing economic activities.

In *SAT*<sup>394</sup> the CJEU had to consider whether the European Organization for the Safety of Air Navigation (Eurocontrol) performed economic activities. This could result in Eurocontrol falling under the scope of the competition rules.

Eurocontrol is an international organisation, established by the Convention of 13 December 1960.<sup>395</sup> Eurocontrol's primary function is to establish and collect the charges of air navigation services on behalf of the contracting states (the Kingdom of Belgium, the French Republic, the

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<sup>392</sup> Emphasis added.

<sup>393</sup> *Commission of the European Communities v Italian Republic*, Case 118/85, para 7.

<sup>394</sup> *SAT Fluggesellschaft mbH v Eurocontrol*, C-364/92, EU:C:1994:7.

<sup>395</sup> *Ibid.*, para 3.

Federal Republic of Germany, the Greek Republic, Ireland, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Portuguese Republic and the United Kingdom of Great Britain and Northern Ireland, and the Cypriot Republic, the Hungarian Republic, the Maltese Republic, the Swiss Confederation and the Turkish Republic) and the non-member States (Austria and Spain) parties to the agreement.<sup>396</sup>

The case laid before the CJEU arose as a request for a preliminary ruling referred by a Belgian court. The dispute before the national Belgian court concerned the recovery of route charges, payable by SAT Fluggesellschaft mbH (a company governed by German law, hereafter referred to as SAT) to Eurocontrol. During the dispute before the national Belgian court, SAT claimed the right to refuse the payment. SAT argued that the procedures followed by Eurocontrol constituted an abuse of a dominant position within the meaning of Article 106 TFEU.<sup>397</sup> The grounds were based on the fact that Eurocontrol charged different rates for equivalent services and that the amounts varied from State to State and from year to year.

This claim led the Belgian court to ask the CJEU to decide whether Eurocontrol constituted an undertaking within the meaning of the Treaty.<sup>398</sup>

The CJEU considered the public character of Eurocontrol's activities and balanced them against their public authority characteristics<sup>399</sup>. They found that Eurocontrol carried out tasks in the public interest. In reaching this conclusion, the CJEU emphasised that Eurocontrol's activities, by their nature, their aim and the rules to which they are subject, are connected with the exercise of powers relating to the control and supervision of air space which are typically considered the powers of a public authority'.<sup>400</sup> Accordingly, Eurocontrol should be regarded as a public authority acting in the exercise of its powers.<sup>401</sup>

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<sup>396</sup> *Ibid.*, para 4.

<sup>397</sup> *Ibid.*, para 6.

<sup>398</sup> *Ibid.*, para 7.

<sup>399</sup> *Ibid.*, paras 19-26.

<sup>400</sup> *Ibid.*, para 30.

<sup>401</sup> *Ibid.*, para 28.

In the case of *Selex*<sup>402</sup>, the CJEU had to consider whether Eurocontrol was in breach of Article 82 and 86 EC [now 102 and 106 TFEU]. This case concerned activities performed by Eurocontrol in relation to assisting national administrations, which was not considered in *SAT*, as analysed above. In this case, the arguments of the GC are rather distinct from the arguments of the Court, and therefore both the conclusions from the GC in T-155/04 *Selex V Commission* as well as the conclusions from the Court in the appeal will be analysed in the following.

The case before the Court was an appeal seeking to set aside a judgment of the GC<sup>403</sup> stating that Eurocontrol could not be considered an undertaking.

In its judgment, the GC made a distinction between the various activities performed by Eurocontrol. Accordingly, the activities were divided into three types, namely; technical standardisation; research and development and assisting national administrations.<sup>404</sup> The GC emphasised that these activities should be considered individually. Accordingly, any activity, which can be severed from those in which it engages as a public authority, has to be assessed separately.<sup>405</sup>

Regarding the activity of technical standardisation, the GC found that the adoption of standards by the Eurocontrol was a legislative activity and therefore a public task. Thus, the preparation and production of technical standards could be separated from its tasks of managing airspace and developing air safety, but could not be deemed an economic activity, since the applicant had failed to demonstrate that this activity consisted in offering goods or services on a given market.<sup>406</sup>

Concerning the activity of research and development, the GC held that the acquisition of prototypes in the context of research and development activities and the related management of intellectual property rights did not involve the offer of goods or services on a given market. Consequently, the activity could not be considered economic in nature. On these grounds, the GC found that “[the] activity [was] ancillary to the promotion of technical development,

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<sup>402</sup> *SELEX Sistemi Integrati SpA v Commission of the European Communities and Organisation européenne*, C-113/07 P, EU:C:2009:191.

<sup>403</sup> *SELEX*, Case T-155/04, EU:T:2006:387.

<sup>403</sup> *SELEX*, Case T-155/04, EU:T:2006:387.

<sup>404</sup> *SELEX*, C-113/07 P, para 15.

<sup>405</sup> *SELEX*, Case T-155/04, paras 50-55.

<sup>406</sup> *SELEX*, T-155/04, paras 56-62.

*forming part of the aims of Eurocontrol's public service tasks and not being pursued in its own interest, separable from those aims".*<sup>407</sup>

With regard to the third activity, namely the activity of assisting the national administrations, the GC held that it was separable from Eurocontrol's tasks of airspace management and development of air safety, because the connection with air navigation safety was "*only a very indirect one*".<sup>408</sup> In connection with the technical assistance provided by Eurocontrol in the implementation of tendering procedures, the GC held that this was provided only on the request of the national administrations and was therefore in no way essential or indispensable when ensuring the safety of air navigation.<sup>409</sup> Furthermore, the GC held that the activity of assisting national administrations could be perceived as offering services on the market for advice.<sup>410</sup> In this respect, the GC emphasised that the fact that activities are normally entrusted to public authorities cannot affect the economic nature of the activity. They also stressed that "*the fact that the assistance provided is not remunerated may constitute an indication that it is not an economic activity, although it is not in itself decisive.*"<sup>411</sup> Consequently, the GC found that the activity of assisting national administrations constituted an economic activity and, accordingly, Eurocontrol was, in the exercise of that activity, an undertaking within the meaning of Article 102 TFEU.<sup>412</sup>

The Court did not agree with the view that Eurocontrol performed an economic activity in assisting the national administrations. The Court held:<sup>413</sup>

*"it can be inferred from the Convention on the Safety of Air Navigation that the activity of providing assistance is one of the instruments of cooperation entrusted to Eurocontrol by that convention and plays a direct role in the attainment of the objective of technical harmonisation and integration in the field of air traffic with a view to contributing to the maintenance of and improvement in the safety of air navigation. That activity takes the form, inter alia, of providing assistance to the national administrations in the implementation of tendering procedures for the acquisition of air traffic management systems or equipment and is intended to ensure that the common technical specifications and standards drawn up and*

<sup>407</sup> SELEX, T-155/04, paras 75-77. Citing SELEX, C-113/07 P, para 18.

<sup>408</sup> SELEX, T-155/04, para 86.

<sup>409</sup> Ibid.

<sup>410</sup> Ibid., para 87.

<sup>411</sup> Ibid., paras 88-91. Citing SELEX, C-113/07, para 20.

<sup>412</sup> Ibid.

<sup>413</sup> SELEX, C-113/07 P, para 76.

*adopted by Eurocontrol for the purpose of achieving a harmonised European air traffic management system are included in the tendering specifications for those procedures. It is therefore **closely linked to the task of technical standardisation** entrusted to Eurocontrol by the contracting parties in the context of cooperation among States with a view to maintaining and developing the safety of air navigation **and is thus connected with the exercise of public powers.***<sup>414</sup>

As a result, the Court found that the activity of assisting the national administrations was closely linked to the activities performed in the capacity of public powers and hence, no economic activity was performed.

In reaching this conclusion, the Court emphasised that the GC did not provide sufficient arguments to conclude that the relationship between the activity of assisting national administrations and the activities performed in the exercise of public powers were only indirect. The Court held in this respect:<sup>415</sup>

*“the fact that the assistance provided by Eurocontrol is optional and that, as the case may be, only certain Member States have recourse to it cannot preclude such a connection or alter the nature of the activity. Moreover, **in order for there to be a connection with the exercise of public powers, it is not necessary for the activity concerned to be essential or indispensable to ensuring the safety of air navigation, since what matters is that the activity is connected with the maintenance and development of air navigation safety, which constitute public powers.**”*

According to the above, the Court seems to accept that even activities that do not play a vital role can form part of the activities performed in connection with the exercise of public powers. Or put in other words, it can therefore be argued that the demand for connectivity is not very strong.

#### **4.1.2 The concept of undertaking for the purpose of Article 107(1) TFEU: Deviation from the concept of undertaking under competition law?**

As has been accounted for in chapter 2 of this Thesis, State aid law is distinguished from the competition rules in a number of aspects and therefore it is relevant to analyse whether the

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<sup>414</sup> Emphasis added.

<sup>415</sup> *SELEX*, C-113/07 P, para 79.

concept of undertaking, within the meaning of State aid law, differs from the concept applied with respect to competition rules. This will be done in the following.

As will be explained, the CJEU has emphasised a close connection between the concept of undertaking in Article 107(1) TFEU and the rest of the competition rules.

In *Steinike & Weinlig*<sup>416</sup>, the CJEU was asked to conclude ‘whether the expression ‘undertakings or the production of certain goods’ in Article 107 TFEU was restricted to private businesses or whether it also included non-profit-making institutions governed by public law.’<sup>417</sup> The CJEU replied that:<sup>418</sup>

*“Article 90 ( 1 ) [now 106(1)] of the treaty provides : ‘ in the case of public undertakings and undertakings to which member states grant special or exclusive rights , **member states shall neither enact nor maintain in force any measure contrary to the rules contained in this treaty , in particular to those rules provided for in article 7 [now 12]and articles 85 to 94[now 101 to 109]** . Article 90 ( 2 ) [now 106(2)] provides : ‘ undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this treaty , in particular to the rules on competition , in so far as the application of such rules does not obstruct the performance , in law or in fact , of the particular tasks assigned to them . The development of trade must not be affected to such an extent as would be contrary to the interests of the community ’.*

*From this it follows that **save for the reservation in article 90 ( 2 )[now 106(2)] of the treaty , article 92 [now 107]covers all private and public undertakings and all their production .***<sup>419</sup>

This conclusion was reiterated in *Banco Exterior de España*<sup>420</sup>, where the CJEU held that:

*“[...] it must be recalled that it follows from Article 90 [now 106] of the Treaty that, **save for the reservation in Article 90(2) [now 106(2)], Article 92 [now 107] covers all private and public undertakings and all their production.***<sup>421</sup>

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<sup>416</sup> *Steinike & Weinlig v Federal Republic of Germany*, Case 78-76, EU:C:1977:52.

<sup>417</sup> *Ibid.*, para 16.

<sup>418</sup> *Ibid.*, paras 17-18.

<sup>419</sup> Emphasis added.

<sup>420</sup> *Banco Exterior*, C-387/92.

Furthermore, AG Mischo has explained that the concept of undertaking has the same meaning regardless of whether the undertaking concerned is private or public.<sup>422</sup>

*“since, like Articles 85[now 101] and 86 [now 102], Article 90 [now 106] is contained in Part 3, Title I, Chapter 1, Section 1 of the Treaty, entitled "Rules applying to undertakings", and since, subject to paragraph 2 thereof, it makes public undertakings subject to all the rules laid down in the Treaty which apply also to private undertakings ( judgment of 6 July 1982 in Joined Cases 188 to 190/80 [...]), it **may logically be concluded that the term "undertaking" has the same meaning, independently of whether the undertaking concerned is private or public.**”*<sup>423</sup>

The above implies a close connection between the concept of undertaking in Article 107(1) TFEU and the rest of the competition rules. However, as will be elaborated on below, the concept of undertaking for the purpose of Article 107(1) TFEU differs from that of the Treaty competition rules.

In *ACEA-Electrabel*<sup>424</sup>, the CJEU was asked to decide whether the identification by the GC of the aid recipient was correct in a case concerning alleged aid to a joint venture.

The case concerned an appeal by AceaElectrabel (an Italian joint venture set up by ACEA SpA (hereafter ‘ACEA’) and Electrabel Italia, who is an active player in the electricity and gas sectors) to set aside a judgment from the GC dismissing an action for annulment of a Commission Decision<sup>425</sup>. ACEA has a controlling stake of 59.41% in AceaElectrabel and Electrabel Italia owns a stake of 40.59%. The agreements on the constitution of the joint venture provided that ACEA was to transfer two thermoelectric production installations and five hydroelectric power plants to AEP, while Electrabel was to provide a number of projects for the construction of installations.<sup>426</sup>

In its judgment, the GC took the view that *“the Commission was entitled to classify the aid at issue as State aid, since the local nature of the urban heating network concerned did not*

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<sup>421</sup> Emphasis added.

<sup>422</sup> Opinion of Mr. Advocate General Mischo delivered on 4 November 1986 in *Commission of the European Communities v Italian Republic*, Case 118/85, EU:C:1986:413, point 2.

<sup>423</sup> Emphasis added.

<sup>424</sup> *AceaElectrabel Produzione SpA v European Commission*, C-480/09 P, EU:C:2010:787.

<sup>425</sup> Commission Decision 2006/598/EC of 16 March 2005 concerning State aid that Italy (Regione Lazio) intends to grant for the reduction of greenhouse gas emissions OJ 2006 L 244/8.

<sup>426</sup> *AceaElectrabel Produzione SpA v European Commission*, C-480/09 P, para 5.



*preclude either competitive relationships with other energy products or any adverse effect on trade between Member States”.*<sup>427</sup>

According to the Commission, ACEA and AEP form an economic unit and thusly, ACEA and AEP were considered as beneficiaries of the aid.<sup>428</sup> In the appeal, AEP argued that the GC was incorrect in holding that ACEA and AEP formed one economic unit.<sup>429</sup>

According to AEP, it is not possible to claim that AEP formed an economic unit together with ACEA, since ACEA holds a stake of less than 30% in AEP. Hence, according to AEP, “[when] an undertaking is controlled by a joint venture, which itself is controlled by two separate groups, it cannot be inferred from that case-law that the Commission is entitled to conclude that there is an economic unit between the controlled undertaking and one of the two companies which control the joint venture.”<sup>430</sup>

Furthermore, AEP held that the GC erred in concluding<sup>431</sup> that AEP did not have genuine operational independence vis-à-vis ACEA and Electrabel, due to the fact that it was jointly controlled by those companies.<sup>432</sup> AEP further claimed that “the Commission would never have adopted such an approach in other areas of competition law, even though that law applies the same concepts in all areas covered by it. Contrary to view taken by the General Court, the concepts applicable to concentrations or restrictive practices can be transposed to the field of State aid, except in certain specific situations in which a different interpretation is justified.”<sup>433</sup>

In its reply, the Court first emphasised that, from an economic point of view, AEP; Electrabel and ACEA can “form an economic unit, inter alia, where the restructuring carried out constitutes an indivisible whole, from an industrial and economic point of view.”<sup>434</sup> In this respect, the Court explained that an entity that owns controlling shareholdings in a company must be regarded as taking part in the economic activity carried on by the controlled undertaking insofar as the entity actually exercises control by involving itself directly or indirectly in the

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<sup>427</sup> *Ibid.*, para 20.

<sup>428</sup> Commission Decision 2006/598/EC of 16 March 2005 concerning State aid that Italy (Regione Lazio) intends to grant for the reduction of greenhouse gas emissions OJ 2006 L 244/8, points 50-60.

<sup>429</sup> *AceaElectrabel Produzione SpA v European Commission*, C-480/09 P, paras 25 and 33.

<sup>430</sup> *Ibid.*, para 34.

<sup>431</sup> *AceaElectrabel Produzione SpA v Commission of the European Communities*, T-303/05, EU:T:2009:312, para 142.

<sup>432</sup> *AceaElectrabel Produzione SpA v European Commission*, C-480/09 P, para 37.

<sup>433</sup> *Ibid.*, para 35.

<sup>434</sup> *Ibid.*, para 48.

management of the entity.<sup>435</sup> The Court then concluded that the Commission and the GC were correct in concluding that ACEA and AEP formed an economic unit with regard to the received aid.<sup>436</sup> The Court further stressed that:<sup>437</sup>

*“First, it must be concluded that, in the light of the above analysis, the arguments relating to, first, the Commission’s finding in its assessment of the concentration that AEP was operationally independent of ACEA and, second, the concept of an economic unit as applied in the field of restrictive practices and concentrations, cannot be accepted. Indeed, as the General Court correctly held at paragraphs 135, 137 and 138 of the judgment under appeal, **the concept of an economic unit in State aid matters can differ from that applicable in other areas of competition law.***

*In any event, neither any operational independence on the part of AEP nor the concept of an economic unit applicable in the field of restrictive practices and concentrations is capable of altering the fact that in the light, in particular, of ACEA’s power to block decisions for the most important matters concerning the management of AEP, the General Court was entitled, in the circumstances, to confirm the Commission’s finding that ACEA exercised joint control over AEP and that the latter formed part of an indivisible whole.”<sup>438</sup>*

This case serves to show that the concept of undertaking in relation to State aid rules is different from the concept of undertaking under competition rules. Thus, the level of required control seems to be more lenient under State aid law than under competition law. The Court has explained this difference with the aim of making sure that entities, which benefit from aid, cannot be excluded from the scope of Article 107(1) TFEU, because they do not live up to the formal requirements under the competition rules. In this respect, it can be argued that the concept of undertaking for the purpose of Article 107(1) TFEU relates to the protection against distortions of competition in the Internal Market, which is one of the key aims of the State aid rules.<sup>439</sup>

However, it cannot be concluded that the concept of undertaking under State aid law is completely independent from the concept of competition under competition law. As emphasised

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<sup>435</sup> *Ibid.*, para 49.

<sup>436</sup> *Ibid.*, para 63.

<sup>437</sup> *Ibid.*, paras 66-67.

<sup>438</sup> Emphasis added.

<sup>439</sup> The aims and objectives of the State aid rules are analysed in chapter 2 of this Thesis.

by the Court in *ACEA-Electrabel*, the purpose of defining ACEA and AEP as indispensable units should be seen in the wider context of avoiding circumvention of State aid rules.

#### **4.1.3 Preliminary findings**

As held above, the concept of undertaking in relation to competition rules implies the performance of economic activity. As no definition exists in the Treaty as to when an activity is economic, no exhaustive definition exists. Consequently, the concept of undertaking is functional in the sense that the concept is based on an assessment of the effects caused, rather than the form. Furthermore, the CJEU has not provided a definition of the concept of economic activity and therefore the analysis above has focused on when an activity is *not* economic. For the purpose of this Thesis, the most relevant non-economic activity relates to the distinction between the exercise of public powers and the exercise of economic activity. The former activity excludes an entity from exercising economic activities, and is therefore defined as an undertaking within competition law.

Since the rules on State aid deviate from the competition rules in a number of areas, it has been relevant to discuss whether the concept of undertaking under competition law coincide with the concept of undertaking for the purpose of State aid law. As held by the CJEU in *ACEA-Electrabel*, the concept of an economic unit in State aid matters can differ from what is applicable in other areas of competition law. However, it has been concluded that the purpose of defining the concept of undertaking under State aid law should be seen in the wider context of avoiding circumvention of State aid rules. Consequently, the concept of undertaking under State aid law is not completely independent from the concept of competition under competition law.

#### **4.2 The concept of ‘economic operator’ under the procurement rules**

The concept of ‘economic operator’ relates to the ‘supply’ side of the procurement market insofar as the concept covers any persons and entities which offer the execution of works, products or services on the market. The definition of ‘economic operator’ is relevant to define, as the scope of the procurement rules can be affected according to which contracting parties are part of the transaction in question. Hence, contracts between contracting authorities and

economic operators fall within the scope of the procurement rules, whereas an in-house award is not governed by the directives.<sup>440</sup>

Article 2(10) of the public procurement Directive defines economic operators in the following way:

*“‘economic operator’ means any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market”*

Furthermore, the concept of economic operator covers tenderers and candidates. Thus, Article 2(11) defines tenderers as:

*“[...] an economic operator that has submitted a tender”*

Whereas the concept of candidates, cf. Article 2(12), covers:

*“[...] an economic operator that has sought an invitation or has been invited to take part in a restricted procedure, in a competitive procedure with negotiation, in a negotiated procedure without prior publication, in a competitive dialogue or in an innovation partnership”*

This implies that the concept of ‘economic operator’ is broad. This is confirmed by recital 14 of the preamble to the public procurement Directive:

*“it should be clarified that the notion of ‘economic operators’ **should be interpreted in a broad manner** so as to include any persons and/or entities **which offer the execution of works, the supply of products or the provision of services on the market, irrespective of the legal form under which they have chosen to operate.** Thus, firms, branches, subsidiaries, partnerships, cooperative societies, limited companies, universities, public or private, and other forms of entities than natural persons should all fall within the notion of economic operator, whether or not they are ‘legal persons’ in all circumstances.”<sup>441</sup>*

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<sup>440</sup> An in-house award occurs where the contracting authority chooses to make, rather than buy the good or service from the market. In such situations, no contract is awarded in the sense of the public procurement Directives. See further G S Ølykke and C F Andersen, ‘A state aid perspective on certain elements of Article 12 of the new Public Sector Directive on in-house provision’, 2015, 1, *P.P.L.R.*, 1-15.

<sup>441</sup> Emphasis added.

According to the above, the legal form of the entity is irrelevant.<sup>442</sup> In this respect, public entities can constitute economic operators for the purpose of the Directives.<sup>443</sup>

Accordingly, the decisive element for the concept of economic operator is the offer of goods or services on the market.

#### **4.2.1 Execution of works, the supply of products or the provision of services on the market**

As held above, the decisive criterion for the concept of economic operator is whether the entity in question offers the execution of works, the supply of products or the provision of services on the market.

As will be elaborated on, the concept of economic operator for the purpose of procurement law builds on the concept of undertaking, as analysed above in section 4.1.

In *CoNISM*<sup>444</sup> the CJEU was asked to conclude whether a national provision, after which a consortium of universities (CoNISM) was excluded from a procedure of a public services contract, was in breach of directive 2004/18/EC (now 2014/24/EU). The CJEU rejected that the concept of economic operator entailed the possibility of excluding CoNISM because it was governed by public law.<sup>445</sup> The CJEU emphasised in this connection that one of the primary objectives of the procurement rules is the widest possible opening up to competition.<sup>446,447</sup>

The CJEU further held that the concept of economic operator encompasses entities that offer services (this was the specific ambit of the case) on the market:<sup>448</sup>

*“However, if and to the extent that such entities are entitled to offer certain services on the market, the national legislation transposing Directive 2004/18 into domestic law cannot prevent them from taking part in public procedures for the award of contracts for the provision of those*

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<sup>442</sup> See e.g. *Frigerio Luigi & C. Snc v Comune di Triuggio*, C-357/06, EU:C:2007:818, where the CJEU held in para 21 that it is not possible to exclude candidates or tenderers solely on the grounds that their legal form does not correspond to a specific category of legal persons. See also *Commission of the European Communities v Federal Republic of Germany*, C-126/03, EU:C:2004:728.

<sup>443</sup> See e.g. *CoNISM*, C-305/08, para 28.

<sup>444</sup> *CoNISM*, C-305/08.

<sup>445</sup> *Ibid.*, para 42.

<sup>446</sup> *Ibid.*, para 37.

<sup>447</sup> The concept of competition in a procurement context is further analysed in chapter 2, section 2.3.1.

<sup>448</sup> *CoNISM*, C-305/08, para 49.

*services. Such a prohibition would be incompatible with the provisions of Directive 2004/18, as interpreted in connection with the examination of the first question referred.*”<sup>449</sup>

Accordingly, the case of *CoNISMa* establishes a connection between the concept of undertaking for the purpose of competition law and the concept of economic operator for the purpose of procurement law. This was established in *Ordine*:<sup>450</sup>

*“[...] whether the conclusion of an agreement between public authorities is not contrary to the principle of free competition where one of the authorities concerned can be regarded as an economic operator, a classification which encompasses any public body proposing services on the market, regardless of whether it has a primarily profit-making objective, whether it is structured as an undertaking or whether it has a continuous presence on the market. [...] From that perspective, provided that the University has the capacity to take part in a procurement procedure, the contracts concluded with it by contracting authorities fall within the scope of European Union public procurement rules where they relate, as in the case in the main proceedings, to research services which do not appear to be incompatible with the services mentioned in categories 8 and 12 of Annex II A to Directive 2004/18.*”<sup>451</sup>

#### 4.2.2 Preliminary findings

The concept of economic operator is defined directly in the public procurement Directive and covers any natural or legal person; public entity or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works, the supply of products or the provision of services on the market. Furthermore, the concept covers “candidates” and “tenderers”. This implies that the concept of ‘economic operator’ is broad, . This also appears from recital 14 of the preamble to the public procurement Directive.

It has been argued that the concept of economic operator builds on the concept of undertaking under competition law. Thus, it can be concluded that the concepts of economic operator and undertaking are coincident insofar as the decisive element for both the definition of economic operator and undertaking depends on whether or not the entity in question offers the execution of works, the supply of products or the provision of services on the market.

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<sup>449</sup> Emphasis added.

<sup>450</sup> *Azienda Sanitaria Locale di Lecce and Università del Salento v Ordine degli Ingegneri della Provincia di Lecce and Others*, C-159/11, EU:C:2012:817, para 20.

<sup>451</sup> Emphasis added.

### 4.3 Do contracting authorities perform economic activities on the market?

As held above, the concept of economic activities is rather broad. Furthermore, since no positive definition exists regarding the scope of economic activities, this concept has instead evolved in case law through a negative approach. This means that the CJEU has, at least indirectly, defined the concept by concluding what is *not* an economic activity. In this respect, it is relevant to analyse whether the activities of contracting authority can be regarded as economic for the purpose of State aid law. The conclusion to this analysis has wide implications, as it affects the applicability of State aid rules to the contracting authorities.

The leading case in this respect is the case of *FENIN*<sup>452</sup>, where the CJEU was asked to conclude whether a contracting authority performed economic activities for the purpose of Article 102 TFEU and thereby whether the contracting authority could fall under the scope of the competition rules. Since the concept of undertaking for the purpose of State aid rules coincides with the concept of undertaking in relation to the competition rules, this case also has implications for the research question asked in this Thesis. In this respect, the following will discuss whether the contracting authority can be considered to perform economic activities for the purpose of Article 107(1) TFEU.

*FENIN* concerned an appeal brought by the Federación Española de Empresas de Tecnología Sanitaria (hereafter FENIN) to set aside a judgment by the GC<sup>453</sup> holding that FENIN is an association of undertakings that market medical goods and equipment, particularly medical instruments, used in Spanish hospitals. The members of FENIN primarily sell their products to the Spanish hospital sector, and more specifically, to bodies and organisations that run the Spanish, national health system (hereafter referred to as SNS). The dispute before the GC concerned an allegation from FENIN that SNS was guilty of abusing their dominant position on the market, cf. Article 102 TFEU, as SNS took on average 300 days to pay their debts to the members of FENIN.<sup>454</sup>

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<sup>452</sup> *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v Commission of the European Communities*, C-205/03 P, EU:C:2006:453. This case is also analysed in chapter 8 in relation to the Market Economy Investor Principle (MEIP).

<sup>453</sup> *Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental (FENIN) v Commission of the European Communities*, T-319/99, EU:T:2003:50

<sup>454</sup> *Ibid.*, para 1.

The GC concluded that the plea from FENIN could not be upheld, as SNS could not be considered an undertaking and consequently fell outside the scope of Article 102 TFEU. The GC held in this connection:<sup>455</sup>

*“[...] it is the activity consisting in offering goods and services on a given market that is the characteristic feature of an economic activity [...] not the business of purchasing, as such. Thus, as the Commission has argued, it would be incorrect, when determining the nature of that subsequent activity, to dissociate the activity of purchasing goods from the subsequent use to which they are put. The nature of the purchasing activity must therefore be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity.”*<sup>456</sup>

Thus, according to the GC, purchasing activities cannot be classified as economic activities *a priori*. Rather, the nature of the activity should be determined according to the subsequent use. As emphasised by the GC:<sup>457</sup>

*“[...] an organisation which purchases goods — even in great quantity — not for the purpose of offering goods and services as part of an economic activity, but in order to use them in the context of a different activity, such as one of a purely social nature, does not act as an undertaking simply because it is a purchaser in a given market. Whilst an entity may wield very considerable economic power, even giving rise to a monopsony, it nevertheless remains the case that, if the activity for which that entity purchases goods is not an economic activity, it is not acting as an undertaking for the purposes of Community competition law and is therefore not subject to the prohibitions laid down in Articles 81(1) EC [now 101(1) TFEU] and 82 EC [now 102 TFEU].”*<sup>458</sup>

The Court agreed with the arguments of the GC. It held:<sup>459</sup>

*“The Court of First Instance rightly deduced, in paragraph 36 of the judgment under appeal, that there is no need to dissociate the activity of purchasing goods from the subsequent use to which they are put in order to determine the nature of that purchasing activity, and that the*

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<sup>455</sup> *Ibid.*, para 36.

<sup>456</sup> Emphasis added.

<sup>457</sup> *Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental (FENIN) v Commission of the European Communities*, T-319/99, para 37.

<sup>458</sup> Emphasis added.

<sup>459</sup> *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v Commission of the European Communities*, C-205/03 P, para 26.



*nature of the purchasing activity must be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity.”*

The *FENIN* case has been confirmed by the Court in *Selex*<sup>460</sup>, as analysed above in section 4.1.1.1.<sup>461</sup>

According to the above, purchasing activities are not considered economic in nature, unless the subsequent use amounts to an economic activity. The Court did not elaborate further on the requirements for when the subsequent use can be dissociated from the purchasing activity, but it can be discussed whether the subsequent use of the purchase can be dissociated from the purchasing activity at all.

In a procurement context, it can be argued that the purchase made by contracting authorities is, for the most part, used for a public purpose and, consequently, the purchase cannot be classified as economic. However, no requirement exists under procurement rules that the purchase in question should be made for a public purpose. In this respect, Article 1(2) of the public procurement Directive explicitly states that the Directives apply whether or not the works, supplies or services under the contract are intended for public purposes:

*“Procurement within the meaning of this Directive is the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, **whether or not the works, supplies or services are intended for a public purpose.**”*<sup>462</sup>

In this respect, it can be argued that the legal consequence derived from Article 1(2) of the procurement Directive, read in conjunction with *FENIN*, is the following; Since no requirement exists in the procurement directives that the purchase should be intended for a public purpose, and since the nature of the activity is determined according to the subsequent use, then if no public purpose lies behind the purchasing activity, the activity is economic in nature. The consequences of this conclusion will be further analysed in chapter 8 of this Thesis. For the purpose of this chapter, it is sufficient to conclude that purchasing activities cannot be

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<sup>460</sup> *SELEX*, C-113/07 P.

<sup>461</sup> The case of *Selex* will be analysed in chapter 8.

<sup>462</sup> Emphasis added.

considered economic in nature, unless the subsequent use of the purchase is considered economic.

#### **4.4 Conclusions**

This chapter has analysed the concept of undertaking for the purpose of State aid law and procurement law. The analysis has aimed at concluding whether the two concepts coincide and thus, whether economic operators fall under the concept of undertaking for the purpose of competition law. The analysis has shown that the concept of undertaking is broad, as it entails every entity engaged in an economic activity, regardless of the legal status of the entity whether the way it is financed falls under the scope of the concept of undertaking. No definition exists in the Treaty as to when an activity is economic in nature. For this reason, the CJEU has defined the concept of economic activity indirectly, which means that the concept is defined according to when an activity is *not* economic in nature. For the purpose of this Thesis, the most relevant non-economic activity relates to the distinction between the exercise of public powers and the exercise of economic activity. The former activity excludes an entity from exercising economic activities, and is therefore defined as an undertaking within competition law.

Furthermore, it has been discussed whether the concept of undertaking under competition law coincides with the concept of undertaking for the purpose of State aid law. It has been concluded that the concept of an economic unit under State aid law can differ from what is applicable in other areas of competition law. However, the purpose of defining the concept of undertaking under State aid law should be seen in the wider context of avoiding circumvention of State aid rules. Consequently, the concept of undertaking under State aid law is not completely independent from the concept of competition under competition law.

It has been held that the concept of economic operator, as defined in the public procurement Directive, is broad in scope, as it covers any natural or legal person; public entity or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works, the supply of products or the provision of services on the market.

It has been argued that the concept of economic operator builds on the concept of undertaking under competition law. Thus, it can be concluded that the concepts of economic operator and the

concept of undertaking are coincident insofar as the decisive element for both the definition of economic operator and undertaking is whether or not the entity in question offers the execution of works, the supply of products or the provision of services on the market. Consequently, economic operators are capable of receiving State aid, as they fulfil the constituent element under Article 107(1) TFEU that relates to transfer by the State or through State resources to undertakings.

Finally, it has been discussed whether purchasing activities are included in the definition of undertaking. It has been held that purchasing activities are not considered economic in nature unless the subsequent use amounts to an economic activity.

## Chapter 5

### **5. Does the award of public contracts fulfil the requirements for the existence of Aid: An analysis of the cumulative criteria set out in Article 107(1) TFEU**

Having analysed the personal scope of the State aid rules and public procurement rules separately in chapters 3 and 4, I now turn to look at the interface between the two sets of rules in terms of assessing whether public contracts are able to satisfy the cumulative criteria set out in article 107(1) TFEU with regard to measures which *distort or threaten to distort competition*, measures which *favour certain undertakings or the production of certain goods* and measures which *affect trade between Member States*.

In chapter 3, it was concluded that the concepts of ‘contracting authority’ under the procurement rules coincide with the concept of ‘State’ under the State aid rules. Accordingly, the contracting authority is, in theory, capable of fulfilling the requirement in article 107(1) TFEU of *aid being transferred by the State or through State resources*. Furthermore, chapter 4 concluded that the concept of ‘economic operator’ under the procurement rules coincide with the concept of ‘undertaking’ under the State aid rules. Consequently, economic operators are capable of receiving State aid as they fulfil the constituent element under Article 107(1) TFEU that relates to ‘transfer by the State or through State resources to undertakings’. This means that the requirement in article 107(1) TFEU that the recipient of the aid is an ‘undertaking’ is also fulfilled.

Chapters 3 and 4 thereby partly contribute to answering the research question in the Thesis by concluding that contracting authorities fall under the personal scope of the State aid rules and thereby, *a priori*, are capable of granting aid to tenderers when they award public contracts.

This chapter will now analyse the constituent elements of article 107(1) TFEU that relate to the requirement of measures which ‘distort or threaten to distort competition’ (part 5.1); measures that ‘favour certain undertakings or the production of certain goods’ (part 5.2) and finally, measures that ‘affect trade between Member States’ (part 5.3). The three parts are outlined as follows:

Part 5.1 discusses measures which ‘distort or threaten to distort competition’ relating to the award of public contracts. The analysis in this part partially draws on the conclusions made in chapter 2 where it was argued that competition is a common denominator for the procurement rules and the State aid rules, although the means to achieving competition are different under the two sets of rules. Hence, part 5.1 analyses how the award of public contracts distorts or threatens to distort competition for each of the award situations identified in chapter 1.<sup>463</sup>

Part 5.2 analyses measures that *favour certain undertakings or the production of certain goods*. This part will first account for the concept of selectivity under State aid law in general and then discuss what the relevant test for assessment of selectivity is in a procurement context. In this respect, it will be discussed whether the award of public contracts is selective *a priori*, or if this assessment should rather be made on a case-by-case basis. It is argued that a functional approach should be taken in this respect which means that the assessment of selectivity in a procurement context should be made individually rather than as a theoretical assumption. Finally, part 5.2 discusses the concept of selectivity relating to the three award situations identified in chapter 1.<sup>464</sup> This approach is chosen because the assessment of selectivity is different for each of the identified award situations and this arguably affects the conclusion with regard to whether selectivity is present.

Part 5.3 analyses measures that affect trade between Member States. This section starts by accounting for the requirement of effect on trade under Article 107(1) TFEU and then moves on to discuss how the requirement of effect on trade relates to procurement law.

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<sup>463</sup> See chapter 1, section 1.2.1.

<sup>464</sup> See chapter 1, section 1.2.1.

## 5.1 Measures which distort or threaten to distort competition

Measures which are transferred from the State or through State resources are only prohibited if they distort or threaten to distort competition. This part analyses the constituent element of article 107(1) TFEU relating to measures which distort or threaten to distort competition.

In chapter 2, it was concluded that competition is a mutual aim of the procurement rules and the State aid rules.<sup>465</sup> The following section builds on the conclusions in chapter 2 by discussing how the different ways of achieving competition under the two sets of rules support the obligation under Article 107(1) TFEU in prohibiting measures which distort or threaten to distort competition.

### 5.1.1 General remarks on distortion of competition

Both measures which distort competition and measures which threaten to distort competition are covered by Article 107(1) TFEU. Accordingly, the wording of Article 107(1) TFEU implies a broad scope of application of measures that either distort or simply threaten to distort competition. The cases analysed below are illustrative to this point.

In *Philip Morris*,<sup>466</sup> the CJEU emphasised that distortion of competition can be said to occur where the measure is *liable* to improve the competitive position of the recipient undertaking compared to other undertakings with which it competes:<sup>467,468</sup>

*“When state financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-community [Union] trade the latter must be regarded as affected by that aid. [...] On the other hand the aid is said to have reduced the cost of converting the production facilities and has thereby given the applicant a competitive advantage over manufacturers who have completed or intend to complete at their own expense a similar increase in the production capacity of their plant.*

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<sup>465</sup> See chapter 2, section 2.3.

<sup>466</sup> *Philip Morris Holland BV v Commission of the European Communities*, Case 730/79. The case of *Philip Morris* is also analysed in chapter 2, see section 2.3.1.2.

<sup>467</sup> *Ibid.*, paras 11-12.

<sup>468</sup> See also *Italian Republic v Commission of the European Communities*, C-66/02, EU:C:2005:768, para 111; *Italian Republic v Commission of the European Communities*, C-372/97, EU:C:2004:234, para 44 and *Congregación de Escuelas Pías Provincia Betania v Ayuntamiento de Getafe*, C-74/16, para 78 with references.

*These circumstances, which have been mentioned in the recitals in the preamble to the disputed decision and which the applicant has not challenged, justify the commission's deciding that the proposed aid would be likely to affect trade between member states and would threaten to distort competition between undertakings established in different member states.*<sup>469</sup>

The requirement of distortion of competition has been examined by the CJEU on many occasions.<sup>470</sup> The case of *Germany v Commission*<sup>471</sup> is illustrative to the point that the actual effects of a measure do not have to be proven. Thus, as will be elaborated below, CJEU confirmed in this case that the Commission is not required to demonstrate the actual impact of the aid on competition.

In this case, the CJEU had to consider whether a tax advantage was at risk of distorting competition in so far as the measure had the effect of reducing the costs of certain charges for the undertakings in question.<sup>472</sup> The case before the CJEU was an application for annulment of a Commission Decision<sup>473</sup>. The measure at issue was a special tax concession introduced by Germany which, according to the Commission, was intended to “*strengthen the market in holdings in companies in the new German Länder and West Berlin, and thus to increase their equity capital*”.<sup>474</sup>

Regarding the distortive element of the measure, the Commission held in its Decision that “*the scheme threatens to distort competition, since it favours undertakings with their registered office and central administration in the relevant region as compared with those in the rest of Germany and in other Member States.*”<sup>475</sup> Germany contested this finding by stating that the Commission had merely stated that an effect of distorting competition was possible without

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<sup>469</sup> Emphasis added.

<sup>470</sup> See e.g. *Association Vent De Colère! Fédération nationale and Others v Ministre de l'Écologie, du Développement durable, des Transports et du Logement and Ministre de l'Économie, des Finances et de l'Industrie*, C-262/12, EU:C:2013:851, para 15; “EasyPay” AD and “Finance Engineering” AD v *Ministerski savet na Republika Bulgaria and Natsionalen osiguritelni institut*, C-185/14, EU:C:2015:716, para 35; *European Commission v Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, para 40.

<sup>471</sup> *Federal Republic of Germany v Commission of the European Communities*, C-156/98.

<sup>472</sup> *Ibid.*, para 29.

<sup>473</sup> Commission Decision 98/476/EC of 21 January 1998 on tax concessions under Paragraph 52(8) of the German Income Tax Act (the Einkommensteuergesetz), OJ 1998 L 212, p. 50.

<sup>474</sup> *Ibid.*, p. 50, part I.

<sup>475</sup> *Ibid.*

setting out any precise evidence in support of that view<sup>476</sup>, and therefore asked the CJEU to consider whether the measure in question was liable of distorting competition.<sup>477</sup>

The CJEU replied by taking the view that measures which are intended to release an undertaking from costs which it would normally have had to bear in its day-to-day management or normal activities<sup>478</sup> distort the conditions of competition.<sup>479</sup> Furthermore, the CJEU held that:<sup>480</sup>

*“The Commission therefore rightly considered that the aid provided for by the measure at issue **threatened to distort competition**.”*<sup>481</sup>

Hence, according to the CJEU, the distortive effects of a measure must therefore be assessed with regard to whether the measure has the effect of reducing the costs of certain charges for the undertakings in question in the relevant Member State.

According to the above, the condition that a measure must distort or threaten to distort competition is thus normally met with ease since the actual effects of a measure do not have to be proven.<sup>482</sup> In this respect, it is sufficient that the measure is likely to have an effect on competition.

### **5.1.2 Award of public contracts as a possible distortive measure of competition**

In chapter 2, it was argued that ‘competition’ is a common concept for the State aid rules and the procurement rules. In this respect, it was concluded that the aims of achieving and protecting competition are not mutually exclusive under the two sets of rules.<sup>483</sup> Building on the conclusion in chapter 2, this section will analyse how the award of public contracts can be seen as a distortive measure of competition under State aid law.

It could be argued that the assessment of whether competition has been distorted when public contracts are awarded is two-fold: Firstly, the contracting authority is obliged to make sure that

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<sup>476</sup> *Ibid.*, p. 50, part III.

<sup>477</sup> *Federal Republic of Germany v Commission of the European Communities*, C-156/98, para 17.

<sup>478</sup> This is analysed further in chapter 6, see section 6.2.

<sup>479</sup> *Federal Republic of Germany v Commission of the European Communities*, C-156/98, para 30.

<sup>480</sup> *Ibid.*, para 31.

<sup>481</sup> Emphasis added.

<sup>482</sup> On the same note, see L. Hancher, ‘The general framework’ in L. Hancher, T. Ottervanger and P.J. Slot (eds.), *EU State Aids* (Sweet & Maxwell 2012) 103.

<sup>483</sup> See chapter 2, section 2.3.3.



competition for the contract is not artificially narrowed, e.g. due to lack of compliance with the general principles of the Treaty.<sup>484</sup> Secondly, the contracting authority is also obliged to ensure that no competitive advantage is conferred on the economic operator. The concept of advantage will be analysed further in chapter 6 of this Thesis. For now, it is sufficient to emphasise that this dual obligation rests on the contracting authority to make sure that competition is not distorted when public contracts are awarded.

### **5.1.3 Preliminary findings**

A measure which distorts or threatens to distort competition is prohibited under Article 107(1) TFEU. It has been argued that the requirement of distortion of competition under State aid law is easily met, and thus measures which are likely to distort competition fall under the scope of Article 107(1) TFEU. Furthermore, no obligations exist to prove the actual effects on competition of the measure.

Furthermore, it has been argued that the obligation for the contracting authority to ensure that competition is not distorted is twofold. Firstly, the requirement embedded in the public procurement Directives to ensure that competition is not artificially narrowed should be followed by the contracting authorities when they award public contracts. Secondly, there is an obligation for the contracting authority to make sure that no competitive advantage is conferred on the recipient when public contracts are awarded. The concept of advantage will be analysed in more detail in chapter 6 of this Thesis.

## **5.2 Measures which favour certain undertakings or the production of certain goods – the selective nature of a tender**

The selectivity criterion under Article 107(1) TFEU relates to measures that favour certain undertakings or the production of certain goods. Measures which are general – that is to say they do not support any specific industry or group of undertakings – will therefore not be caught by article 107(1) TFEU. The driving argument behind this framework is that if a measure is general, no individual aid is granted, and hence it is not only available to certain undertakings.

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<sup>484</sup> The role of the general principles in the Treaty in regard to public procurement law was analysed in chapter 2, section 2.1.2.1.

For the purpose of the research question asked in this Thesis, it is relevant to discuss when and how the award of public contracts favours certain tenderers. Arguably, the prohibition against selectivity under State aid law is reflected in the obligation to ensure equal treatment and to avoid discrimination under procurement law. Thus, as will be elaborated below, measures which have the effect of benefitting only certain tenderers could be argued to be selective if they breach the obligations flowing from the general principles of the Treaty in the form of equal treatment and non-discrimination.

Before turning to this discussion, some general remarks will be made regarding the concept of selectivity under State aid law.

### 5.2.1 General remarks on the concept of selectivity

No specific definition of ‘general measures’ exists in the case law from the CJEU. However, in *Adria Wien Pipeline*<sup>485</sup> the CJEU qualified a general measure as:<sup>486</sup>

*“a State measure which benefits all undertakings in national territory, without distinction.”*

The statement from the CJEU in *Adria Wien Pipeline* should be understood to mean that if a measure can benefit the entire economy, it does not create a selective benefit, and thus the measure will not fulfil the cumulative criteria in article 107(1) TFEU.

However, the GC has pointed out that the fact that a measure is not aimed at specific recipients in advance and is formulated in general and objective terms does not preclude the measure from being regarded as a selective measure.<sup>487</sup>

*“[...]The fact that the aid is not aimed at one or more specific recipients defined in advance, but that it is subject to a series of objective criteria pursuant to which it may be granted, within the framework of a predetermined overall budget allocation, to an indefinite number of*

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<sup>485</sup> *Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH v Finanzlandesdirektion für Kärnten*, C-143/99, EU:C:2001:598.

<sup>486</sup> *Ibid.*, para 35. See further, M. Ebner and E. Gambaro, ‘The Notion of State aid and Derogations’ in A.S. Maria, ‘*Competition and State Aid – An Analysis of the EU Practice*’, (Wolters Kluwer 2015 2<sup>nd</sup> edn.), 45.

<sup>487</sup> *Confederación Española de Transporte de Mercancías (CETM) v Commission of the European Communities*, T-55/99, EU:T:2000:223, para 40. See also B. Kurcz and D. Vallindas ‘Can general measures be ... selective? Some thoughts on the interpretation of a state aid definition’ *C.M.L. Rev.*, (2008) 45 (1), 159-182, 166.

*beneficiaries who are not initially individually identified, cannot suffice to call in question the selective nature of the measure and, accordingly, its classification as State aid within the meaning of Article 92(1) [now 107(1)] of the Treaty. At the very most, that circumstance means that the measure in question is not an individual aid. It does not, however, preclude that public measure from having to be regarded as a system of aid constituting a selective, and therefore specific, measure if, owing to the criteria governing its application, it procures an advantage for certain undertakings or the production of certain goods, to the exclusion of others.*<sup>488</sup>

Accordingly, the selectivity assessment seems broad in scope as it even entails situations which do not distinguish between undertakings and which are directed at an indefinite number of beneficiaries.

In this respect, the CJEU has consistently held that the selectivity of a measure should be assessed on the basis of the actual effects caused by the measure as opposed to the intentions behind the measure.<sup>489</sup> Hence, the CJEU seems to apply an ‘effects-based’ formula, which was spelled out for the first time in *Italy v Commission* where the CJEU held that:<sup>490</sup>

*“the aim of article 92 [now 107] is to prevent trade between member states from being affected by benefits granted by the public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or the production of certain goods.*

*Accordingly, article 92 [now 107] does not distinguish between the measures of state intervention concerned by reference to their causes or aims but defines them in relation to their effects.*

*Consequently, the alleged fiscal nature or social aim of the measure in issue cannot suffice to shield it from the application of article 92[now 107].*<sup>491</sup>

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<sup>488</sup> Emphasis added.

<sup>489</sup> See e.g. *Gasunie*, C-56/93, para 79; *Kingdom of Belgium v Commission of the European Communities*, C-75/97, para 25; *Kingdom of Spain v Commission of the European Communities*, C-409/00, para 46; *France Télécom SA v European Commission*, C-81/10 P, EU:C:2011:811, para 17.

<sup>490</sup> *Italian Republic v Commission of the European Communities*, case 173-73, para 13.

<sup>491</sup> Emphasis added.

The effects-based formula thus requires a measure to be assessed according to the effects it causes. In a procurement perspective, this could be argued to imply that all measures imposed by the contracting authorities are likely to fall under the scope of Article 107(1) TFEU.

### 5.2.2 The (non)selective nature of a tender

Having established the material content of measures *favouring certain undertakings or the production of certain goods* under article 107(1) TFEU, I now turn to discuss whether the award of a public contract can be said to fulfil the requirements of the selectivity criterion under the State aid rules. Before turning to the possible presence of selectivity under the three award situations, it is first necessary to discuss whether selectivity can be excluded *a priori* when contracting authorities award public contracts.

This section will first account for two arguments that both support the finding that a tender procedure will, by definition, never fulfil the requirements for selectivity. Then, the two arguments are discussed, and arguments are put forward that reject the finding that a tender procedure, by definition, never fulfils the requirements of selectivity.

So far, no case law exists which concludes whether a procurement procedure is selective *a priori*. However, the selective nature of a tender procedure has been discussed in academic literature with differing arguments and conclusions.<sup>492</sup> Disagreement seems to exist as to whether the award of public contracts is selective by nature.

Graells<sup>493</sup> argues that:<sup>494</sup>

*“the award of public contracts is necessarily selective, as it only favours a given tenderer or grouping of tenderers at one time.”*

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<sup>492</sup> See in particular; A.S. Graells, ‘Public procurement and state aid: reopening the debate?’ (2012) 6, *P.P.L.R.*, 205-212; P. Nicolaides and I.E. Rusu, ‘Competitive Selection of Undertakings and State Aid: Why and When Does It Not Eliminate Advantage?’, (2012), 7, (1), *E.P.P.P.L.*, 5-29, 6; B. Kurcz and D. Vallindas, ‘Can general measures be... selective? Some thoughts on the interpretation of a state aid definition’ (2008) 45(1), *C.M.L.R.*, 159-182; P.A. Baistrocchi, ‘Can the award of a public contract be deemed to constitute state aid?’ (2003) 24(10), *E.C.L.R.*, 510-517; M. Stempowski and M. Dischendorfer, ‘The interplay between the EC Rules on public procurement and state aid’, (2002) 3, *P.P.L.R.*, 47-52.

<sup>493</sup> A.S. Graells, ‘Public procurement and state aid: reopening the debate?’ (2012) 6, *P.P.L.R.*, 205-212.

<sup>494</sup> *Ibid.*, 207.

The reasoning behind such a statement seems to be that the award of the contract itself should be based on the assessment of selectivity, as opposed to on measures relating to the tender procedure prior to the award.

Insofar as this argument is accepted, two possible situations arise. The first possible outcome is that the cumulative criterion entailed in article 107(1) TFEU that a measure must favour certain undertakings or the production of certain goods will always be fulfilled when contracting authorities award public contracts. This situation would imply that the selective nature of an award of a public contract is presumed, and hence the test of selectivity would never be conducted. The second possible outcome finds support in this reasoning; the award of a contract to one specific undertaking (the winning tenderer) will implicitly favour certain undertakings or the production of certain goods, but these situations will always be justified because of the fact that selectivity is inherent in the nature of the system (the award of a contract will always result in a selective measure). This line of reasoning would follow the ‘logic of the system’ test<sup>495</sup> as applied by the CJEU in *Sloman Neptun*<sup>496</sup> and *Ladbroke v Commission*<sup>497 498</sup>.

In *Sloman Neptun*, the CJEU had to consider whether (lower) working conditions and rates of pay that were applicable to certain Member States constituted State aid within the meaning of Article 107(1) TFEU. The case concerned a reference for a preliminary ruling in a dispute between a German shipping company (Sloman Neptun) and the Seafarers Committee (Seebetriebsrat)<sup>499</sup> concerning working conditions and rates of pay for workers not covered by national German law on shipping. According to German law, foreign shipping companies were allowed to employ workers on less favourable terms than the ones applying to German residents, concerning pay and social protection, if the workers in question were not members of the German shipping register.<sup>500</sup> According to German law, (the Law on the introduction of an additional shipping register for ships flying the federal German flag in international trade (ISR)), ship owners who registered their vessels in the ISR were relieved of certain financial burdens for

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<sup>495</sup> This term is used by L. Hancher, ‘The general framework’ in L. Hancher, T. Ottervanger and P.J. Slot (eds.), *EU State Aids* (Sweet & Maxwell 2012) 84.

<sup>496</sup> *Firma Sloman Neptun Schiffahrts AG v Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts AG*, joined cases C-72/91 and C-73/91, EU:C:1993:97.

<sup>497</sup> *Tiercé Ladbroke SA v Commission of the European Communities*, C-353/95 P, EU:C:1997:596.

<sup>498</sup> For a critique of the ‘logic of the system’ test, see J. Winter, ‘Re(de)fining the notion of state aid in article 87(1) of the EC Treaty’, *C.M.L.R. Rev.*, (2004), 42 (2), 475-504, 482.

<sup>499</sup> *Sloman Neptun*, joined cases C-72/91 and C-73/91, para 2.

<sup>500</sup> *Ibid.*, paras 3-4 and 7.

workers whose contracts of employment were not governed by German law.<sup>501</sup> The national court in Germany argued that the less favourable rates of pay and social protection constituted State aid in so far as it permitted partial non-application of German employment law and social security law.<sup>502</sup>

The CJEU held that the social security contributions and tax revenues, determined on the basis of the lower working conditions and rates of pay, did not constitute State aid because such measures were inherent in the system, and were thus not a means of granting a particular advantage to the undertakings concerned.<sup>503</sup>

*“The system at issue does not seek, through its object and general structure, to create an advantage which would constitute an additional burden for the State or the abovementioned bodies, but only to alter in favour of shipping undertakings the framework within which contractual relations are formed between those undertakings and their employees. **The consequences arising from this**, in so far as they relate to the difference in the basis for the calculation of social security contributions, mentioned by the national court, and to the potential loss of tax revenue because of the low rates of pay, referred to by the Commission, **are inherent in the system and are not a means of granting a particular advantage to the undertakings concerned**”*<sup>504</sup>

Thus, according to the CJEU, the measure in question could be exempted from the scope of Article 107(1) TFEU since the consequences arising from the measure were inherent in the system and therefore did not grant an advantage to a particular undertaking.

In *Ladbroke v Commission*,<sup>505</sup> the CJEU had to consider an appeal from a Belgian book-maker firm (Ladbroke) against a judgment from the GC<sup>506</sup> concluding that an agreement between a French and a Belgian non-profit organisation did not constitute State aid. The case concerned an agreement made by a French and a Belgian non-profit organisation (The French and the Belgian PMU) under which the French PMU on behalf of the Belgian PMU was authorised to take bets in France on Belgian horse-races.<sup>507</sup> The applicant (Ladbroke) argued that the agreement

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<sup>501</sup> *Ibid.*, para 16.

<sup>502</sup> *Ibid.*, para 14.

<sup>503</sup> *Ibid.*, para 21.

<sup>504</sup> Emphasis added.

<sup>505</sup> *Tiercé Ladbroke SA v Commission of the European Communities*, C-353/95 P.

<sup>506</sup> *Ibid.*

<sup>507</sup> *Ibid.*, para 2.

entailed the provision by France of unlawful State aid to the Belgian PMU in so far as the amount of the levy retained for bets on French races was lower than the levy retained for Belgian races, and thus it favoured the Belgian PMU over the French PMU.<sup>508</sup>

The CJEU assessed the nature of bets on Belgian races and what differentiates them from bets on French races<sup>509</sup> and concluded that since the measure accords with the general system of Belgian races, it did not therefore constitute a measure which derogates from the scheme of the general system but “*on the contrary accords with that general system*”.<sup>510</sup>

‘The logic of the system’ test as applied by the CJEU in *Sloman Neptun and Ladbroke v Commission* seems to imply that the benchmark for assessing whether a measure constitutes aid is the system in place where the measure applies. If the CJEU finds that the measure in question derogates from the system in place, it is possible that the measure constitutes aid in the meaning of article 107(1) TFEU, but if, on the contrary, the measure accords with the general system it can be justified on reasons of ‘the logic of the system’.

If the framework of ‘the logic of the system’ test is transferred to the award of public contracts, it could thus be argued that the award of public contracts will always be justified and thus never meet the requirements of selectivity.

The two outcomes as discussed above rely on the same assumption, namely that the award of a public contract is selective *a priori*. In the latter situation, however, the selective nature of the award will always be justified because of the nature of the system. This finding is opposite what Graells argues as his argumentation seems to imply that the award of public contracts will necessarily be selective.

The opposite conclusion to Graells is reached by Baistrocchi<sup>511</sup> who submits that the requirement of selectivity will never be fulfilled as the public procurement rules will always ensure that no specific undertaking is favoured. Baistrocchi submits that if the contracting authorities follow the procedures set out in the public procurement Directives, the requirement of selectivity will not be fulfilled as the requirement of transparency under the public

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<sup>508</sup> *Ibid.*, para 9.

<sup>509</sup> *Ibid.*, para 33.

<sup>510</sup> *Ibid.*, para 29.

<sup>511</sup> P.A. Baistrocchi, ‘Can the award of a public contract be deemed to constitute state aid?’ (2003) 24(10), *E.C.L.R.*, 510-517.

procurement regime renders it difficult for the contracting authorities to favour a specific undertaking.<sup>512</sup> Baistrocchi argues that the transparency requirement entailed in the procurement Directives reduces the risk of selectivity as transparent procedures will make it difficult for the public authority to favour certain parties (tenderers).<sup>513</sup>

From the discussion above, two criteria can be deduced. Firstly, by applying the ‘the logic of the system’ criterion, the *prima facie* selective nature of the award of public contracts is justified on the grounds that it is inherent in the system that the winning tenderer will always be favoured by winning the contract. Then, according to the ‘requirement of transparency’ criterion, the public procurement framework will always entail that selectivity does not occur as the requirement of transparency under the procurement Directives renders it difficult for the contracting authority to favour a certain undertaking.

The ‘the logic of the system’ criterion and the ‘requirement of transparency’ criterion each apply their own different logic, but eventually reach the same conclusion, namely that the award of a public contract does not fulfil the requirement of selectivity *a priori*. The arguments put forward by Graells imply the opposite, namely that the award of public contracts is necessarily selective.

In conclusion to the above, one common denominator can be deduced from the two arguments put forward, namely that the selective nature of the award of public contracts (whether the outcome) can be decided by definition, as opposed to on a case-by-case assessment.

However, this line of reasoning would seem to contradict the effects-based approach as discussed above, in which the actual effect of a measure should be assessed, as opposed to the intentions behind the measure. I therefore submit that the arguments put forward above are insufficient for concluding whether an award procedure is selective. I support this view on the basis of the following arguments.

Firstly, as discussed above, the CJEU has consistently held that a measure should be assessed on the basis of the actual effects rather than the intentions behind the measure. This finding from the CJEU contradicts the arguments above that the selectivity of a measure can be assessed by definition or that the general procurement framework will always ensure that no undertaking or

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<sup>512</sup> *Ibid.*, 517.

<sup>513</sup> *Ibid.*



production of certain goods is favoured. Secondly, as submitted above, the effects-based criterion is wide in scope and applies in spite of generally objective reasons. Hence, I do not find support in the case law from the CJEU, as discussed above, to support the argumentation that the selective nature of award of public contracts can be defined *a priori*.

Finally, the argumentation that the award of a public contract by definition does not meet the requirements of selectivity seems to contradict previous case law from the CJEU, in which the selectivity criteria is generally easily met.<sup>514</sup>

In conclusion, I submit that the assessment of whether the award of a public contract can be deemed to be selective must be based on a case-by-case evaluation, and furthermore, that the selective nature of the award of a contract must be assessed at all phases of the procurement process, as opposed to only at the outcome when a contract has been awarded, and is hence selective. Although the requirements of selectivity could be said to be easily met, it would be insufficient to conclude by definition whether the award of a public contract is selective. On this note, it is therefore necessary to assess the selective nature of the award of public contracts in relation to the chosen procedure. For this reason, the following section will analyse how and when the award of public contracts can be deemed to be selective when public contracts are awarded under the public procurement Directive, the concession Directive and in relation to the direct (legal and illegal) award of contracts.

#### *5.2.2.1 Non-selectivity as an expression of equal treatment*

As held above, it is unsettled in case law how the concept of selectivity applies to procurement measures. Furthermore, avoiding the granting of State aid is not an aim of the procurement Directive, and thus no specific procedural safeguards have been put in place which specifically aim at making sure that the selectivity requirement under State aid law is met. The prohibition in article 107(1) TFEU against favouring certain undertakings or the production of certain goods is thus not repeated directly in the procurement Directives.

However, the principles of equal treatment and non-discrimination could be argued to resemble the selectivity criterion under State aid law in several ways.

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<sup>514</sup> On the same note see L. Hancher, 'The General Framework' in L. Hancher, T. Ottervanger and P.J. Slot (eds.), *EU State Aids* (Sweet & Maxwell 2012) 79.

Firstly, the principle of non-discrimination under the procurement rules aims at preventing discrimination on the grounds of nationality. Article 18 of the public procurement Directive states in relation to the principles of non-discrimination and equal treatment:

*“Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.*

*The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.”*

In this respect, it could be argued that the requirement of equal treatment resembles the prohibition of selectivity in so far as both concepts aim at preventing that specific entities (undertakings or economic operators) are favoured.

In *Arge*,<sup>515</sup> the CJEU considered the interplay between State aid rules and procurement rules. The case does not concern the question of whether State aid was granted by the contracting authority to the tenderer. Rather, the CJEU had to consider whether the fact that one of the tenderers had received State aid conferred an advantage to the subsidised tenderer over the rest of the participants in the competition for award of the contract.<sup>516</sup> As will be elaborated below, the case serves to show that the concept of selectivity is connected to the principle of equal treatment, and thereby that an obligation (or at least an opportunity) exists for the contracting authority to avoid conferring selective measures when public contracts are awarded.

The case was a request for a preliminary ruling referred by the federal procurement office in Austria (Bundesvergabeamt) in a case between an association of undertakings and civil engineers (ARGE Gewässerschutz, hereafter ARGE) and the Federal Ministry of Agriculture and Forestry (Bundesministerium für Land- und Forstwirtschaft).<sup>517</sup> The fact that subsidised bodies took part in a tender procedure alongside strictly private tenderers gave rise to a case before a national Austrian court, which referred several questions for a preliminary ruling.

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<sup>515</sup> *ARGE Gewässerschutz v Bundesministerium für Land- und Forstwirtschaft*, C-94/99, EU:C:2000:677.

<sup>516</sup> The ARGE judgment is also known for dealing with the concept of abnormally low tenders, see e.g. G.S. Ølykke, ‘*Abnormally Low Tenders – With an Emphasis on Public Tenderers*’ (DJØF Publishing Copenhagen 2010), 194.

<sup>517</sup> *ARGE Gewässerschutz v Bundesministerium für Land- und Forstwirtschaft*, C-94/99, para 2.

Among others, the CJEU was asked to clarify whether undertakings receiving State aid were allowed to participate in a tender procedure in competition with unsubsidised tenderers.<sup>518</sup>

In its reply, the CJEU emphasised that the principle of equal treatment does not preclude contracting authorities from allowing subsidised tenderers to participate in a tender procedure, and furthermore that the procurement Directives do not entail an explicit requirement to exclude subsidised tenderers from participating in the tender procedure.<sup>519</sup>

*“[...] the mere fact that contracting authorities allow bodies which receive subsidies enabling them to submit tenders at prices appreciably lower than those of the other, unsubsidised, tenderers, to take part in a procedure for the award of a public procurement contract does not amount to a breach of the principle of equal treatment.*

*If the Community legislature had intended to require contracting authorities to exclude such tenderers, it would have stated this explicitly.*”<sup>520</sup>

However, the CJEU did not completely reject the possibility of excluding subsidised tenderers from tender procedures.<sup>521</sup>

*“[...] a tenderer may be excluded from a selection procedure where the contracting authority considers that it has received aid incompatible with the Treaty and that the obligation to repay illegal aid would threaten its financial well-being, so that that tenderer may be regarded as unable to offer the necessary financial or economic security.*”<sup>522</sup>

Accordingly, the contracting authority can choose to exclude a tenderer from the procedure (“a tenderer may be excluded”) if the tenderer has received incompatible State aid.<sup>523</sup>

In chapter 2, it was concluded that the aim of the procurement Directives is to ensure equal access to public contracts. Furthermore, it was argued that the aim of the State aid rules was to avoid giving preference to some undertakings over others in comparable situations. In this

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<sup>518</sup> *Ibid.*, para 19.

<sup>519</sup> *Ibid.*, paras 25-26.

<sup>520</sup> Emphasis added.

<sup>521</sup> *ARGE Gewässerschutz v Bundesministerium für Land- und Forstwirtschaft*, C-94/99, para 30.

<sup>522</sup> Emphasis added.

<sup>523</sup> It is outside the scope of this Thesis to discuss the concept of compatible or incompatible aid as well as lawful or unlawful aid. For the purpose of this chapter, suffice it to mention that incompatible aid can be either lawful or unlawful, depending on whether exemptions apply. For a more detailed definition of these concepts, see L. Hancher, ‘Article 107(2) and Article 107(3)’ in L. Hancher, T. Ottervanger and P.J. Slot (eds.), *EU State Aids* (Sweet & Maxwell 2012) 138ff.

respect, it could be argued that the CJEU observes the principle of equal treatment as well as the concept of selectivity by allowing contracting authorities to exclude subsidised tenderers from tender procedures if the tenderer has received incompatible aid. The chosen wording by the CJEU in the citation above must be assumed to mean that incompatible aid (which includes selective aid) can justify that a tenderer is excluded from the tender.

The connection between the principle of equal treatment and selectivity was also emphasised by the AG in his opinion in *Arge*:<sup>524</sup>

*“The questions raised by the invitation to tender at issue concern the principle of equality in two ways.*

*It is necessary to establish whether the fact that subsidised bodies were allowed to submit tenders is likely to infringe the principle of non-discrimination on the ground of nationality or, at the very least, to create an obstacle to the freedom to provide services, since all the bodies concerned are Austrian.*

*Even assuming that no restriction on trade can be identified, it is important to determine whether the advantage over the other tenderers which these bodies are able to enjoy as a result of the public funding they are accorded is compatible with the aim of securing effective competition pursued by Directive 92/50/EEC. (1)*

*The first three questions for a preliminary ruling relate, as I have said, to the principle of equality, in terms of both discrimination on grounds of nationality (the second and third questions) and discrimination between tenderers in receipt of subsidies and the other tenderers (the first question).”*<sup>525</sup>

According to AG Léger, the principle of non-discrimination and equality are thus connected with the concept of advantage in the present case.

Arguably, the case of *Arge* thus established a link between the principle of equal treatment and the concept of selectivity by allowing contracting authorities to exclude tenderers which have

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<sup>524</sup> Opinion of Mr Advocate General Léger delivered on 15 June 2000 in *ARGE Gewässerschutz v Bundesministerium für Land- und Forstwirtschaft*, C-94/99, EU:C:2000:330, points 3 and 15.

<sup>525</sup> Emphasis added.

received incompatible State aid. The reason for this should most likely be found in the fact that allowing the exclusion of lawful aid would infringe the principle of equal treatment. As emphasised by AG Léger:

***“If Community law accepts that some State aid is lawful, then, in my view, operators in receipt of that aid must have the right to carry on their activity in the same way as other operators.***

*What point would there be in according undertakings aid lawfully if, at the same time, they were barred from engaging in normal economic activity or even merely from certain contracts on the pretext that the latter were regulated. Moreover, that interpretation would hardly be compatible with the concept of compensation which justifies some kinds of aid, because aid in the form of subsidy or logistical assistance would soon be eliminated as a result of the restrictions on an undertaking's activity.*

***The fact that State aid may be legal therefore implies that economic entities in receipt of lawful aid cannot be precluded from participating fully in the market. As the market is not restricted to unregulated contractual relations but also includes public contracts, there is no reason why such operators should be excluded from public contract award procedures.***<sup>526</sup>

According to the above, even though no express obligation exists in the procurement Directives to exclude subsidised tenderers, this opportunity exists where the tenderer has received incompatible aid. In this respect, the chosen wording of the CJEU has to be emphasised. As elaborated above, a tenderer *may* be excluded from the selection procedure when the tenderer has received incompatible aid. Consequently, there is no express obligation for the contracting authority to exclude subsidised tenderers, but the possibility does exist.

The above applies to situations that relate to award under the public procurement Directive. However, award of public contracts by the concession Directive is covered as well. As stated in chapter 2 of the Thesis, Article 3 of the concession Directive contains a similar obligation of ensuring equal treatment as the one flowing from the public procurement Directive.<sup>527</sup> For this reason, the concession Directive arguably contains a similar link between the concept of selectivity and the principle of equal treatment as the one described above.

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<sup>526</sup> Emphasis added.

<sup>527</sup> See chapter 2, section 2.1.2.1.

### **5.2.3.3 Selectivity in relation to direct award of public contracts**

Having established that the concept of selectivity is linked to the obligations flowing from the general principles in the Treaty, including the principles of equal treatment and non-discrimination, the following will discuss how the (legal and illegal) direct award of public contracts might meet the concept of selectivity.

Legal direct award of public contracts is possible under certain circumstances. One possible way of direct award is accounted for in Article 32 in the public procurement Directive. According to Article 32(1), contracting authorities may award public contracts by a negotiated procedure without prior publication in specific circumstances:

*The negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts in any of the following cases:*

*(a) where no tenders or no suitable tenders or no requests to participate or no suitable requests to participate have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of the contract are not substantially altered and that a report is sent to the Commission where it so requests.*

*A tender shall be considered not to be suitable where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the contracting authority's needs and requirements as specified in the procurement documents. A request for participation shall be considered not to be suitable where the economic operator concerned is to be or may be excluded pursuant to Article 57 or does not meet the selection criteria set out by the contracting authority pursuant to Article 58;*

*(b) where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons:*

*(i) the aim of the procurement is the creation or acquisition of a unique work of art or artistic performance;*

*(ii) competition is absent for technical reasons;*

*(iii) the protection of exclusive rights, including intellectual property rights;*

*The exceptions set out in points (ii) and (iii) shall only apply when no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement;*

*(c) in so far as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with. The circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting authority.*

Accordingly, the public procurement Directive allows for the direct award of contracts when it is probable that competition for the contract is absent, e.g. because no tenderers have requested to participate in the competition for award or where the works, supplies or services can be supplied only by a particular economic operator. In such situations, it could be argued that if the contracting authority is able to substantiate the decision of awarding the contract directly cf. the mentioned situations in Article 32, no selectivity occurs because the competition for the contract is not defined in a way that favours certain economic operators.

However, award of public contracts cf. Article 32 may be assumed to occur only in specific situations. Hence, Article 32 should be interpreted strictly.<sup>528</sup>

The possibility of direct award also exists for concession contracts. Cf. Article 31(1) of the concession Directive, the point of departure is that contracting authorities are obliged to announce their intention to award a concession:

*“Contracting authorities and contracting entities wishing to award a concession shall make known their intention by means of a concession notice.”*

However, derogations from the above are set out in Article 31(4) and (5):

*“4. By way of derogation from paragraph 1, contracting authorities or contracting entities shall not be required to publish a concession notice where the works or services can be supplied only by a particular economic operator for any of the following reasons:*

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<sup>528</sup> On the same note, see P. Nicolaides and S. Schoenmaekers, ‘The Concept of ‘Advantage’ in State Aid and Public Procurement and the Application of Public Procurement Rules to Minimise Advantage in the New GBER’, (2015), 14 (1), *EStAL*, 143-156, 146.

*(a) the aim of the concession is the creation or acquisition of a unique work of art or artistic performance;*

*(b) the absence of competition for technical reasons;*

*(c) the existence of an exclusive right;*

*(d) the protection of intellectual property rights and exclusive rights other than those defined in point (10) of Article 5.*

*The exceptions set out in points (b), (c) and (d) of the first subparagraph only apply when no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the concession award.*

*5. By way of derogation from paragraph 1, the contracting authority or contracting entity shall not be required to publish a new concession notice where no applications, no tenders, no suitable tenders or no suitable applications have been submitted in response to a prior concession procedure, provided that the initial conditions of the concession contract are not substantially altered and that a report is sent to the Commission, where it so requests;*

*For the purposes of the first subparagraph, a tender shall be considered not to be suitable where it is irrelevant to the concession, being manifestly incapable, without substantial changes, of meeting the contracting authority or contracting entity's needs and requirements as specified in the concession documents.*

*For the purposes of the first subparagraph, an application shall be considered not to be suitable:*

*(a) where the applicant concerned shall or may be excluded pursuant to Article 38(5) to (9) or does not meet the selection criteria set out by the contracting authority or the contracting entity pursuant to Article 38(1);*

*(b) where applications include tenders which are not suitable within the meaning of the second subparagraph."*

Accordingly, as is the case under the public procurement Directive, the concession Directive allows for direct award of contracts when it is probable that competition for the contract is absent or if the concession can only be supplied by one particular economic operator.

The specific possibilities to award public contracts directly may not fulfil the selectivity requirement under Article 107(1) TFEU and especially not in cases where the procurement Directives provide an express derogation from the requirement of conducting a tender procedure. Furthermore, if the general principles flowing from the Treaty, including the principle of equal treatment and non-discrimination, are adhered to, it is likely that no selectivity occurs when the contract is awarded.



The above might not apply for situations concerning illegal direct award. In such situations, it might be argued that the general principles in the Treaty are not adhered to and consequently, the possibility of selectivity is likely to occur. In this respect, the CJEU has confirmed that illegal direct award of a contract is the most serious breach of EU law in the field of public procurement on the part of a contracting authority:<sup>529</sup>

*“[...] Such an option could lead to the most serious breach of Community [Union] law in the field of public procurement on the part of a contracting authority [...] and would interfere with the objectives pursued by Directive 92/50 [now 2014/24], namely the objectives of free movement of services and open and undistorted competition in this field in all the Member States.”*

In this respect, where no tender procedure has been conducted, and if the direct award cannot be substantiated by way of derogation, there is a presumption that distortion of competition is a risk.<sup>530</sup>

### **5.2.3 Preliminary findings**

This section has analysed the constituent element of Article 107(1) TFEU that relates to measures which favour certain undertakings or the production of certain goods.

As has been accounted for, general measures that benefit the entire economy are not selective and will not be caught by Article 107(1) TFEU. When assessing whether a measure is selective in nature, an effects-based formula is applied. This means that the effects of the measure are decisive, rather than the causes or aims of the measure.

Furthermore, it was discussed how the requirement of selectivity applies to procurement situations. It is unsettled in the case law from the CJEU how the concept of selectivity applies to procurement measures; however, it was argued that the requirement of selectivity cannot be determined *a priori*, and thus the assessment of whether the award of public contracts are selective must be determined on a case-by-case basis.

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<sup>529</sup> *Stadt Halle and RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna*, C-26/03, para 37.

<sup>530</sup> On the same note, see P. Nicolaides and S. Schoenmaekers, ‘The Concept of ‘Advantage’ in State Aid and Public Procurement and the Application of Public Procurement Rules to Minimise Advantage in the New GBER’, (2015), 14 (1), *EStAL*, 143-156, 147.

Finally, this section has analysed the requirement of selectivity in relation to the three award situations identified in chapter 1 of this Thesis.<sup>531</sup> In this respect, it was argued that the principles of equal treatment and non-discrimination as embedded in the procurement rules resemble the concept of selectivity under State aid law. In relation to direct legal award of contracts it was concluded that in so far as the general principles of the Treaty are adhered to, it is likely that no selectivity occurs. However, it was found that the same conclusion did not apply to illegal direct award of contracts, especially in situations where the general principles of the Treaty are not adhered to.

### 5.3 Measures which affect trade between Member States

In order to fall within the scope of Article 107(1) TFEU, a measure must have an effect on competition and trade.

The actual effect on trade is not a necessary requirement.<sup>532</sup> Rather, the decisive benchmark is whether the aid is liable to affect trade.<sup>533</sup>

This was e.g. stated in *Libert and others*<sup>534</sup> where the CJEU held:<sup>535</sup>

*“[...] for the purpose of categorising a national measure as State aid, it is necessary, not to establish that the aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition”*

The actual effects are thus not decisive. Rather, what should be taken into account is whether the aid strengthens the position of an undertaking compared with other undertakings in the Union.<sup>536</sup> It is not required that the aid beneficiary is actually involved in cross-border trade:<sup>537</sup>

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<sup>531</sup> See chapter 1, section 1.2.1.

<sup>532</sup> *Giuseppe Atzeni and Others (C-346/03)*, *Marco Scalas and Renato Lilliu (C-529/03) v Regione autonoma della Sardegna*, Joined cases C-346/03 and C-529/03, EU:C:2006:130.

<sup>533</sup> See e.g. *Eventech*, C-518/13; *Unicredito Italiano SpA v Agenzia delle Entrate, Ufficio Genova 1*, C-148/04, EU:C:2005:774, para 54; *Cassa di Risparmio*, C-222/04, para 140.

<sup>534</sup> *Eric Libert and Others v Gouvernement flamand and All Projects & Developments NV and Others v Vlaamse Regering*, Joined Cases C-197/11 and C-203/11, EU:C:2013:288.

<sup>535</sup> *Eric Libert and Others v Gouvernement flamand and All Projects & Developments NV and Others v Vlaamse Regering*, Joined Cases C-197/11 and C-203/11, para 76. See also *Unicredito Italiano SpA v Agenzia delle Entrate, Ufficio Genova 1*, C-148/04, EU:C:2005:774, para 141.

*“[...] it is not necessary that the beneficiary undertaking itself be involved in intra-Community trade. Where a Member State grants aid to an undertaking, internal activity may be maintained or increased as a result, so that the opportunities for undertakings established in other Member States to penetrate the market in that Member State are thereby reduced. Furthermore, the strengthening of an undertaking which, until then, was not involved in intra-Community trade may place that undertaking in a position which enables it to penetrate the market of another Member State”*

Accordingly, the requirement of effect on trade seems wide in scope as it entails measures that are only likely to have an effect on trade. Furthermore, the aid recipient is not required to be involved in cross-border trade.

However, the effect on trade cannot be merely hypothetical. Thus, it is necessary to establish whether the measure is liable to have an effect on trade between Member States.<sup>538</sup>

When establishing an effect on trade, it is not necessary to define the market or to analyse the impact that the measure has on the competitive position of the beneficiary and its competitors. This was held by the GC in *Italy v Commission*:<sup>539</sup>

*“[...] the Commission was not obliged to show that competition was undermined ‘permanently’, or to carry out a more detailed investigation of the substantial impact of the measures at issue on the competitive position of the recipients, and even less so by viewing this in the context of their turnover. **The case-law does not require** the distortion of competition, or the threat of such distortion, and **the effect on intra-Community trade to be significant or substantial** [...]*

*Moreover, as already stated at paragraph 87 above, with regard to aid that has not been notified to the Commission, the decision declaring that aid incompatible with the common market need not necessarily demonstrate the real effect of that aid on competition or trade between Member States.*

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<sup>536</sup> *Eric Libert and Others v Gouvernement flamand and All Projects & Developments NV and Others v Vlaamse Regering*, Joined Cases C-197/11 and C-203/11, para 77.

<sup>537</sup> *Ibid.*, para 78.

<sup>538</sup> *Associazione Italiana Tecnico Economica del Cemento and British Cement Association and Blue Circle Industries plc and Castle Cement Ltd and The Rugby Group plc and Titan Cement Company SA v Commission of the European Communities (AITEC and others)*, Joined cases T-447/93, T-448/93 and T-449/93, EU:T:1995:130, para 141.

<sup>539</sup> *Italian Republic v Commission of the European Communities*. T-211/05, EU:T:2009:304, paras 157-160.

*Furthermore, contrary to the Italian Republic's claims, nor did the fact that certain recipient undertakings could operate on markets which were only of national interest impose an obligation on the Commission to carry out an in-depth analysis.*

*[...] the Commission may confine itself to examining the general characteristics of the scheme without being required to examine each particular case in which it applies in order to establish whether the scheme involves elements of aid. The fact that, in some circumstances, it also benefits recipients which operate only on markets of national interest does not call into question that finding, which is sufficient for Article 87(1) EC [now 107(1) TFEU] to apply to an aid scheme”<sup>540</sup>*

### **5.3.1 A requirement of cross-border interest under public procurement law**

The question regarding whether a cross-border interest exists is an element that is included in the assessment of whether a measure falls under the scope of Article 107(1) TFEU. However, a similar requirement cannot necessarily be detected in relation to public procurement law. The following section will discuss how the requirement of cross-border interest is relevant in relation to the different award situations

The public procurement Directive and the concession Directive set out predefined thresholds. Accordingly, Article 4 of the public procurement Directive and Article 8 of the concession Directive set out applicable thresholds for procurements above a certain value. This means that the question of applicability of the procurement Directives is directed by how great the value of the contract is. The reasons behind requiring certain thresholds for the applicability of the procurement rules are twofold: Firstly, the administrative costs in connection with conducting a tender procedure should be outweighed by the benefits of conducting the tender.<sup>541</sup> Secondly, the thresholds in the procurement Directives are defined in order to identify contracts for which there will likely be competition from undertakings operating across borders.<sup>542</sup>

Accordingly, the thresholds in the Directives could be argued to have the objective of ensuring that competition is created for the contracts.

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<sup>540</sup> Footnotes omitted. Emphasis added.

<sup>541</sup> S. Arrowsmith *The Law of Public and Utilities Procurement: Regulation in the EU and UK*, 3th edn. (Sweet and Maxwell 2014), 448.

<sup>542</sup> *Ibid.*

On the basis of the above, the following will discuss how cross-border interest is relevant for the different award situations identified.

Firstly, cross-border interest is not a relevant benchmark for the applicability of the procurement rules when the award of the contract is made pursuant to a tender procedure under the procurement Directives. However, in order to fall within the scope of the State aid rules, effect on trade is one of the constituent elements that must be considered. Accordingly, the assessment of whether the award of public contracts constitutes State aid within the meaning of Article 107(1) TFEU relies both on the relevant threshold and on the assessment of cross-border interest.

Secondly, in situations where the award of the contract is made outside the procurement Directives as a legal direct award,<sup>543</sup> e.g. because the value of the contract is below the thresholds, the abovementioned thresholds are not relevant either. In this case, the requirement of effect on trade is irrelevant for the applicability of the procurement rules,<sup>544</sup> but not for the application of the State aid rules. Accordingly, in situations where the award of the public contract is made pursuant to legal direct award, the requirement of cross-border interest is relevant in the assessment of whether the award constitutes State aid.

Thirdly, in situations where the award is made pursuant to illegal direct award, the thresholds of the procurement Directives are irrelevant as the award is made without the conduct of a tender procedure. In the situation of illegal direct award, it can therefore be argued that the assessment of effect on trade becomes relevant, as the only way to make sure that competition is secured is by way of an assessment of whether trade has been affected by concluding whether the award of contract has a cross-border interest.

Conclusively, the assessment of whether the award of a public contract has a cross-border interest and thus whether the award affects trade is important when the contract is awarded directly either legally or illegally.

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<sup>543</sup> The term legal direct award is explained in chapter 1, section 1.2.1.

<sup>544</sup> However, as held in chapter 2, cross-border interest is a relevant criterion for the assessment of whether the general principles of the Treaty apply to the award. See chapter 2, section 2.1.2.1.

### 5.3.2 Preliminary findings

Measures which have an effect on competition and trade fall within the scope of Article 107(1) TFEU. In this respect, the requirement of effect on trade and competition is wide in scope, and it has been argued that it is easily met. When establishing whether a measure has an effect on trade, it is sufficient to establish that the measure is likely to fulfil the requirements set out above.

In a procurement context, the requirement of effect on trade is not relevant as the procurement Directives set out predefined thresholds to be applied when determining whether an award falls under the scope of the Directives. In this respect, it has been argued that the thresholds set out in the procurement Directives aims at creating competition, and therefore, the requirement of cross-border interest becomes irrelevant for public contracts awarded under the Directives. However, when the contract is awarded directly, either by way of legal direct award or by way of illegal direct award, the assessment of cross-border interest is relevant to ensure that trade and competition is not distorted.

## 5.4 Conclusions

This chapter has analysed the constituent elements of Article 107(1) TFEU that relate to measures which *distort or threaten to distort competition*, measures which *favour certain undertakings or the production of certain goods* and measures which *affect trade between Member States*.

In section 5.1, it was argued that the requirement of distortion of competition under State aid law is easily met. Thus, measures which are likely to distort competition fall under the scope of Article 107(1) TFEU. Furthermore, no obligations exist to prove the actual effects on competition of the measure. The obligations for the contracting authority to ensure that competition is not distorted are embedded in the public procurement Directives by way of an obligation for the contracting authority to ensure that competition is not artificially narrowed when public contracts are awarded.

Section 5.2 analysed measures which favour certain undertakings or the production of certain goods. General measures that benefit the entire economy are not selective and will not be caught

by Article 107(1) TFEU. It was argued that the assessment of whether a measure is selective in nature is based on an effects-based approach. This means that the effects of the measure are decisive, rather than the causes or aims of the measure. Furthermore, it was discussed how the requirement of selectivity applies to procurement situations. It was held that it is unsettled in the case law from the CJEU how the concept of selectivity applies to procurement measures. However, arguably, the requirement of selectivity cannot be determined *a priori*, and thus it must be determined on a case-by-case basis whether the award of public contracts is selective.

Then, the requirement of selectivity was analysed in relation to the three award situations identified in chapter 1 of this Thesis. In this respect, it was argued that the principles of equal treatment and non-discrimination as embedded in the procurement rules resemble the concept of selectivity under State aid law. It was found that no selectivity occurs in relation to legal direct award of contracts in so far as the general principles of the Treaty are adhered to. However, it was found that the same conclusion did not apply for illegal direct award of contracts, especially in situations where the general principles of the Treaty are not adhered to.

Finally, section 5.3 analysed measures which affect trade. It was found that the requirement of effect on trade and competition is wide in scope and thus easily met. Then, the requirement of effect on trade was analysed in a procurement context. It was assessed that the requirement of effect on trade is not relevant when the award of contract is made pursuant to a tender procedure under the procurement Directives as the Directives set out predefined thresholds to be applied when determining whether the award falls under the scope of the Directives. In this respect, it was argued that the thresholds set out in the procurement Directives aim at creating competition, and therefore, the requirement of cross-border interest becomes irrelevant for public contracts awarded under the Directives. However, when the contract is awarded directly, either by way of legal direct award or by way of illegal direct award, the assessment of cross-border interest is a relevant assessment for ensuring that trade and competition is not distorted.

## PART II

### Award of contracts as a means to conferring State aid?

In this part of the Thesis I will discuss how and when contracting authorities confer State aid when they award public contracts. In this respect, the concept of advantage will be analysed in general under the State aid rules and also, with a specific emphasis on procurement situations. The assessment of whether advantage has been conferred is a crucial benchmark for the assessment of aid. In this respect, I will discuss whether the conduct of a tender procedure is sufficient to rule out the presence of aid.



## Chapter 6

### 6. In search of the constituents of market price

After analysing the constituent elements of Article 107(1) TFEU that relates to conditions which ‘distort or threaten to distort competition’;<sup>545</sup> measures that ‘favour certain undertakings or the production of certain goods’;<sup>546</sup> and measures that ‘affect trade between Member States’<sup>547</sup> in chapter 5, I now turn to the concept of *advantage*.

The analyses previously made in chapters 2-5 of the Thesis all contribute to the conclusion that the awarding of public contracts is capable of fulfilling the requirements of Article 107(1) TFEU. Besides the cumulative criteria in Article 107(1) TFEU analysed in chapters 2-5, a measure must confer a benefit or advantage to the recipient in order to fall within the scope of Article 107(1) TFEU.

The purpose of this chapter is to analyse the concept of advantage under Article 107(1) TFEU. The prohibition against the granting of an advantage to the recipient undertaking cannot be derived directly from the wording of Article 107(1) TFEU. Rather, the notion of advantage is developed through the case law of the CJEU, which has dealt with the concept of advantage in numerous cases.<sup>548</sup>

The case law chosen for analysis in this chapter relates to the overall research question of whether State aid is present when public procurement contracts are awarded. The cases analysed in this chapter are State aid cases and the chapter thus seeks to deduce the concept of advantage under State aid law. However, the cases are all related to situations that are relevant in a procurement context. The assessment of how advantage is conferred when public contracts are awarded is conducted in chapter 7.

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<sup>545</sup> See chapter 5, section 5.1.

<sup>546</sup> See chapter 5, section 5.2.

<sup>547</sup> See chapter 5, section 5.3.

<sup>548</sup> See for instance, *Steenkolenmijnen*, case 30-59; *Italian Republic v Commission of the European Communities*, Case 173/73, EU:C:1974:71; *Kingdom of Belgium v Commission of the European Communities (Tubemeuse)*, C-142/87, EU:C:1990:125; *Altmark*, C-280/00; *Kingdom of Belgium and Forum 187 ASBL v Commission of the European Communities*, C-182/03 and C-217/03, EU:C:2006:416; *European Commission v Électricité de France (EDF)*, C-124/10 P, EU:C:2012:318; *Land Burgenland, Grazer Wechselfeitige Versicherung AG and Republic of Austria v European Commission*, C-214/12 P, C-215/12 P and C-223/12 P, EU:C:2013:682; *Kingdom of Spain v European Commission*, T-461/13, EU:T:2015:891.

## 6.1 The criterion of normal market conditions

Any economic benefit which an undertaking could not have obtained under normal market conditions can amount to an advantage within the meaning of Article 107(1) TFEU. In the assessment of whether the undertaking receives an advantage for the purpose of Article 107(1) TFEU, it is therefore decisive whether the State support has been received under circumstances corresponding to normal market conditions.<sup>549</sup>

The criterion of whether a measure corresponds to normal market conditions originates from the principle of equal treatment between private and public undertakings which follows from Article 345 TFEU.<sup>550</sup> Article 345 TFEU reads as follows:

*“The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership”*

Article 345 TFEU presupposes equality between public and private operators, and the point of departure is thus that it is possible for a Member State to invest in commercial operations without infringing Article 107(1) TFEU if the Member State in question seeks to earn a normal market return for the investment.<sup>551</sup>

The decisive assessment of whether an economic benefit occurs is the competitive position between competitors in the Internal Market. This was held by the CJEU for the first time in *Italy v Commission*,<sup>552</sup> where the CJEU held that:<sup>553</sup>

*“[...] it should be observed that, in the application of article 92 ( 1 ) [now 107(1)], the point of departure must necessarily be the competitive position existing within the Common Market [Internal Market] before the adoption of the measure in issue.”*

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<sup>549</sup> The criterion of normal market conditions is discussed in academic literature in connection with the Market Economy Operator Principle (MEOP): See in this regard M. Cyndecka, *The Market Economy Investor Test in EU State Aid Law: Applicability and Application* (Wolters Kluwers 2016) or separate from the MEOP: see in this regard M. Ebner and E. Gambaro ‘The Notion of State Aid and Derogations’ in A. S. Maria (ed.) *Competition and State aid. An analysis of the EU practice* (Wolters Kluwer 2015); R. Barents *Directory of EU Case Law on State Aids* (Wolters Kluwer 2016) and P. W. Jessen, ‘State aid’, in P. W. Jessen, B. G. Mortensen, M. Steinicke and K. E. Sørensen (eds.) *Regulating Competition in the EU* (Kluwer Law International 2016). The MEOP will be discussed in relation to the public procurement rules in chapter 8.

<sup>550</sup> On the relationship between Article 345 and 107(1) TFEU, see M. Cyndecka, *The Market Economy Investor Test in EU State Aid Law: Applicability and Application* (Wolters Kluwers 2016), p. 15ff. Article 345 TFEU is further discussed in relation to the Market Economy Operator Principle in chapter 8, section 8.1.

<sup>551</sup> On the same note, see E. Szyszczak, *The Regulation of the State in Competitive Markets in the EU* (Hart publishing 2007) 186.

<sup>552</sup> *Italian Republic v Commission of the European Communities*, case 173-73.

<sup>553</sup> *Ibid.*, para 17.

Capital placed by the State is not necessarily regarded as State aid for the purpose of Article 197(1) TFEU; In *Italy v Commission (ENI-Lanerossi)*,<sup>554</sup> the CJEU had to consider whether State support to an undertaking was contrary to the principle of equal treatment between public and private undertakings.

This case concerned aid to undertakings in the textile and clothing sector. Prior to the case before the CJEU, the Commission had held in a Decision<sup>555</sup> that injections of capital to an undertaking (in this case ENI-Lanerossi) constituted aid within Article 107(1) TFEU.<sup>556</sup> The Italian Republic brought an action for annulment following the Decision. In 1962, the State-owned company ENI took over Lanerossi, who had suffered losses in the years up to the takeover, and created the undertaking ENI-Lanerossi consisting of several subsidiaries.<sup>557</sup> ENI continuously suffered losses after the takeover, and this led the Commission to express doubts as to whether aid could continue to be paid to ENI through Lanerossi “*without interfering with the orderly function of the common market [Internal Market]*”.<sup>558</sup> The Italian Government argued before the CJEU that aid was not present, as ENI “*must operate on the basis of its own resources, obtained from cash flow and from the national and foreign capital markets, without drawing on the capital funds allocated to it by the State*”.<sup>559</sup> The Italian Government further argued that the Decision from the Commission was contrary to the principle of equal treatment between public and private undertakings. According to the Italian Government, it was quite normal to find transfers of funds between companies in order to make up losses suffered by one of the members of the group.<sup>560</sup>

This led the CJEU to state that:<sup>561</sup>

*“it follows from that principle of equal treatment that **capital placed by the State, directly or indirectly, at the disposal of an undertaking in circumstances which correspond to normal market conditions cannot be regarded as State aid.**”*

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<sup>554</sup> *Italian Republic v Commission of the European Communities(ENI-Lanerossi)*, C-303/88, EU:C:1991:136

<sup>555</sup> Commission Decision 89/43/EEC of 26 July 1988 on aids granted by the Italian Government to ENI-Lanerossi..

<sup>556</sup> *Italian Republic v Commission of the European Communities(ENI-Lanerossi)*, C-303/88, para 2.

<sup>557</sup> *Ibid.*, para 4.

<sup>558</sup> *Ibid.*

<sup>559</sup> *Ibid.*, para 10.

<sup>560</sup> *Ibid.*, para 17.

<sup>561</sup> *Ibid.*, para 20.

It follows that capital placed by the State, directly or indirectly, at the disposal of an undertaking, in circumstances which correspond to normal market conditions cannot be regarded as State aid.<sup>562</sup>

The assessment of normal market conditions entails a comparison with market terms. In *Belgium v Commission (Gasunie)*,<sup>563</sup> the CJEU held that a tariff on gas, which was made available to large industrial users of gas, could be explained by market terms.

The case concerned an application by the French Government for annulment of a Commission Decision<sup>564</sup> stating that a preferential tariff system introduced by a Dutch gas supply company (Gasunie), which was controlled by the State, did not constitute State aid. The case is relevant for the research question asked in this Thesis, as it explains the reasons behind when a measure can be explained by market terms.

The measure in question was a new tariff (tariff F), introduced by Gasunie to certain undertakings, corresponding to the tariff available to large industrial customers less a variable rebate. The tariff was made available to very large industrial users provided that they met certain requirements such as the quantity of gas consumed.<sup>565</sup> Prior to the application for annulment in the present case, the Commission had on two occasions<sup>566</sup> found that the measure in question did not constitute State aid. The first Decision by the Commission was appealed by several French nitrate fertilizer producers (Compagnie française de l' azote (Cofaz) SA, Société CdF Chimie azote et fertilisants SA and Société chimique de la Grande Paroisse SA (Cofaz et al.)) in a case,<sup>567</sup> in which the CJEU annulled the first Commission Decision on the grounds that the Commission had committed a manifest error in its assessment of the facts in the case.<sup>568</sup> The Commission subsequently re-examined the compatibility of tariff F and, once again, found that

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<sup>562</sup> *Ibid.*

<sup>563</sup> *Gasunie*, C-56/93.

<sup>564</sup> Commission notice pursuant to Article 93 (2) of the EEC Treaty to other Member States and other parties concerned regarding a preferential tariff system applied to the Netherlands for supplies of natural gas to Dutch nitrate fertilizer producers, 92/C 344/03.

<sup>565</sup> *Gasunie*, C-56/93, para 3.

<sup>566</sup> Commission Decision of 17 April 1984 and Commission Decision of 29 December 1992.

<sup>567</sup> *Société CdF Chimie azote et fertilisants SA and Société chimique de la Grande Paroisse SA v Commission of the European Communities*, C-169/84, EU:C:1990:301.

<sup>568</sup> *Kingdom of Belgium v Commission of the European Communities (Gasunie)*, C-56/93, paras 5-6.

the tariff was compatible with the Internal Market.<sup>569</sup> The present case reached the Court as an application for annulment of the second Commission Decision.

In its second Decision, the Commission explained that the background for introducing the reduced tariff was to “*resist competition on the nitrate fertilizer market from ammonia produced in other countries, notably non-Community countries*” and found that the introduction of the tariff was actually to prevent ammonia-producing factories from shutting down with the result that ammonia would then have to be purchased outside the Union. However, the Commission found that there is a distinction between applying a measure as an ordinary economic agent and using it to confer a financial advantage on certain undertakings by forgoing the profit which it would normally realise.<sup>570</sup> The Commission found that Gasunie behaved according to commercial behaviour, judged on the grounds that it could be considered standard practice for an undertaking to grant a price reduction in cases where it is deemed financially sound if it is commercially necessary, and thus held that “*there is no evidence that, in supplying gas at tariff 'F' to the Dutch nitrate fertilizer producers, Gasunie behaved any differently than a private undertaking under the relevant market conditions.*”<sup>571</sup>

The CJEU agreed with the above conclusions by the Commission in its second Decision by stating that the Commission was correct in finding that the application of tariff F was a normal and financially sound commercial policy.<sup>572</sup> Further, the CJEU concluded that tariff F should be considered a measure which was necessary in order to withstand competition on the ammonia market.<sup>573</sup>

In conclusion, it is possible to introduce a measure to the extent that it can be justified by financial reasons, e.g. the need to withstand competition on the market in question.

#### **6.1.1 The benchmark for assessment of normal market conditions: payment of market price**

The assessment of whether a measure accords to normal market conditions essentially concerns the question of whether market price has been paid.

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<sup>569</sup> *Ibid.*, para 6.

<sup>570</sup> Commission notice pursuant to Article 93 (2) of the EEC Treaty to other Member States and other parties concerned regarding a preferential tariff system applied to the Netherlands for supplies of natural gas to Dutch nitrate fertilizer producers, 92/C 344/03.

<sup>571</sup> *Ibid.*

<sup>572</sup> *Gasunie*, C-56/93, para 20.

<sup>573</sup> *Ibid.*, para 39.

In *GEMO*,<sup>574</sup> the CJEU had to consider a request for a preliminary ruling from a national appellate court in Lyon, France (Administrative Court of Lyon). The question arose in a case between the French Ministry for Economic Affairs, Finance and Industry and GEMO seeking an annulment of a judgment delivered by the Administrative Court of Dijon granting GEMO SA (a supermarket which markets meat and meat-based products) a refund of the tax on meat purchases paid between 1 January 1997 and 31 August 1998.<sup>575</sup> The case concerned a French law establishing a public service for the collection and disposal of animal carcasses and slaughterhouse waste unfit for human and animal consumption. The contract for the performance of the service was awarded after a tender procedure. The service was mainly financed by way of a tax imposed on meat retailing supermarkets.<sup>576</sup> According to national legislation (Law No. 96-1139), GEMO was liable to pay the above-mentioned tax.

The case before the Administrative Court of Dijon was an appeal against a decision from the French tax authorities refusing to reimburse GEMO for the tax sums paid. In the appeal, the Administrative Court of Dijon held that the arrangements established under Law No. 96-1139, consisting of remuneration for services relating to carcass disposal, constituted State aid and thereby confirmed the decision from the French tax authorities. Following the decision from the Administrative Court of Dijon, the French Ministry for Economic Affairs, Finance and Industry appealed the decision to the Administrative Court of Lyon who initially found that the arrangements under Law No. 96-1139, consisting of remuneration for services relating to carcass disposal did not constitute State aid. However, the Administrative Court of Lyon was in doubt as to whether the remuneration for services relating to carcass disposal was liable to relieve a sector from a burden which it would normally have to bear, and on this ground, it referred a request for a preliminary ruling to the CJEU.<sup>577</sup>

The CJEU formulated the question referred by the French court as follows:<sup>578</sup>

*“In the light of the referring judgment, the question should be understood as asking essentially whether Article 92(1) [now 107(1)] of the Treaty must be interpreted as meaning that a system such as that at issue in the main proceedings, which provides farmers and slaughterhouses with*

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<sup>574</sup> *Ministère de l'Économie, des Finances et de l'Industrie v GEMO SA*, C-126/01, EU:C:2003:622.

<sup>575</sup> *Ibid.*, para 2.

<sup>576</sup> See the opinion of AG Jacobs delivered on 30 April 2002, point 1.

<sup>577</sup> *Ministère de l'Économie, des Finances et de l'Industrie v GEMO SA*, C-126/01, paras 12-17.

<sup>578</sup> *Ibid.*, para 18.

*the free collection and disposal of animal carcasses and slaughterhouse waste, must be considered to be State aid.”*

The CJEU began by observing that the measure in question was set up under national law to ensure that the collection and disposal of animal carcasses and slaughterhouse waste found unfit for consumption was a mandatory service free of charge to users of the service. It further noted that the service was obligatory for the users.<sup>579</sup>

Relating the question referred by the French court, the CJEU reiterated its previous findings that *“the notion of aid can thus encompass not only positive benefits such as subsidies, loans or direct investment in the capital of enterprises, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which therefore, without being subsidies in the strict sense of the word, are of the same character and have the same effect”*<sup>580</sup>, and then emphasised that:<sup>581</sup>

*“given that, in this case, the service for the collection and disposal of animal carcasses and slaughterhouse waste is provided free of charge, it must be ascertained whether that benefit may be considered to relieve undertakings of an expense which should properly be covered by their budget.”*

On this question, the CJEU argued that the undertakings concerned were responsible for the activities relating to the disposal of the animal waste.<sup>582</sup>

Therefore, the costs arising from handling the disposal of the waste should be considered inherent in the economic activities of the undertakings concerned.<sup>583</sup> On these grounds, the State intervention should be considered to relieve the undertakings concerned from financial burdens with the result that an economic advantage was granted.<sup>584</sup> Accordingly, the CJEU found that the measure in question constituted State aid within the meaning of Article 107(1) TFEU.

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<sup>579</sup> *Ibid.*, para 19-20.

<sup>580</sup> *Ibid.*, para 28.

<sup>581</sup> *Ibid.*, para 30.

<sup>582</sup> *Ibid.*, para 32.

<sup>583</sup> *Ibid.*, para 31.

<sup>584</sup> *Ibid.*, para 33.

Thus, the above case shows that State aid may be granted under Article 107(1) TFEU in situations where the State decides to relieve the undertaking in question from economic burdens and thereby confer an economic advantage.

In a procurement context, this distinction is important. It shows that the charges which are normally incumbent on the private part, e.g. the economic operator, cannot be transferred to the contracting authority as this might constitute State aid within the meaning of Article 107(1) TFEU.

In his opinion<sup>585</sup> on the *GEMO* case, AG Jacobs made some interesting comments regarding the link between the concepts of normal market conditions and normal market price. According to the AG:<sup>586</sup>

*“[...] where for example the State purchases goods or services from an undertaking, **there will be aid only if and to the extent that the price paid exceeds the market price.**”*

This statement corresponds to the argument made by AG Fennelly in his opinion<sup>587</sup> on a previous case, namely the case of *France v Commission*,<sup>588</sup> where he noted that when it has to be decided whether or not aid is granted through public resources, the negotiation between the parties that has led to the agreement should be assessed as a whole. Further, the AG stated that the relevant benchmark when deciding whether aid has been granted when public authorities purchase goods and services from the market is whether market price is paid. According to AG Fennelly:<sup>589</sup>

*“It is, of course, the case that public authorities may enter into many kinds of bargains with undertakings without giving rise to a grant of State aid, provided that they act as would a normal economic agent. At its simplest, public authorities may purchase goods and services from undertakings, including those which are provided to the public on those authorities' behalf. **The purchasing authorities must, of course, pay the market price.**”*

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<sup>585</sup> Opinion of Mr. Advocate General Jacobs delivered on 30 April 2002 in *Ministère de l'Économie, des Finances et de l'Industrie v GEMO SA*, C-126/01, EU:C:2002:273.

<sup>586</sup> *Ibid.*, point 122.

<sup>587</sup> Opinion of Mr. Advocate General Fennelly delivered on 26 November 1998 in *French Republic v Commission of the European Communities*, C-251/97, EU:C:1998:572.

<sup>588</sup> *French Republic v Commission of the European Communities*, C-251/97, EU:C:1999:480.

<sup>589</sup> Opinion of Mr. Advocate General Fennelly delivered on 26 November 1998 in *French Republic v Commission of the European Communities*, C-251/97, EU:C:1998:572, point 19.



This statement from AG Fennely implies that public authorities are free to negotiate with undertakings when they purchase goods and services, but the decisive benchmark, for assessing whether State aid is granted, is whether the market price has been paid.<sup>590</sup>

### **6.1.2 Preliminary findings**

To assess whether an undertaking receives an advantage for the purpose of Article 107(1) TFEU, it is necessary to establish whether the State support has been received in circumstances corresponding to normal market conditions. State support which does not correspond to normal market conditions may result in the conferral of an economic benefit and thus amount to State aid according to Article 107(1) TFEU. The point of departure for this assessment is the competitive position between competitors in the Internal Market.

The cases chosen for analysis demonstrate that the assessment of whether an economic benefit occurs shows that State support might not violate Article 107(1) TFEU, if the measure is justified based on economic reasons, e.g. the need to withstand competition on the market in question.

The assessment of whether a measure corresponds to normal market conditions essentially concerns the question of whether market price has been paid. The payment of market price in turn concerns whether the undertaking in question has been relieved from expenses which should be covered by their budget. Hence, State aid might be granted according to Article 107(1) TFEU in situations where the State decides to relieve the undertaking in question from financial burdens and thereby confer an economic benefit on it.

The above implies that a concept of ‘avoided costs’ has to be considered when assessing whether market price has been paid. The following section will analyse this concept in more detail.

## **6.2 The concepts of ‘avoided costs’**

As held above, the payment of market price is a decisive factor for the assessment of whether a transaction is in accordance with normal market conditions. Building on this conclusion, the

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<sup>590</sup> This, of course, does not answer the question of when market price is paid when public contracts are awarded. Chapter 7 will analyse this question in detail.

following section will deduce the presumptions for the payment of market price under State aid law and discuss them in a procurement context.

In a procurement context, it is relevant to discuss which obligations are incumbent on the contracting authority with regard to respecting the concept of avoided costs under State aid law. This question essentially concerns what costs the contracting authority can undertake without infringing the concept of avoided costs. As no case law exists to help clarify this question, the discussion below will instead be based on theoretical assumptions derived from the chosen State aid cases.

### 6.2.1 A broad definition of ‘aid’: relief of economic burdens

Any State measure which has the effect of granting economic benefits to an undertaking and improving its financial position, falls under the scope of Article 107(1) TFEU.<sup>591</sup>

Accordingly, in order to determine whether a State measure constitutes aid, it is necessary to establish whether the recipient undertaking receives an economic benefit.<sup>592</sup> When assessing whether a benefit has been granted to the recipient, an effects-based approach<sup>593</sup> applies. This means that the relevant criteria when assessing whether a measure falls within the scope of Article 107(1) TFEU is the effect of the measure, as opposed to the form<sup>594</sup>; the legal nature or aim<sup>595</sup>; or whether the measure is compulsory or voluntary in nature<sup>596</sup>.

The notion of advantage as defined in the case law from the CJEU covers not only granting of positive economic benefits, but also the relief from economic burdens in a broader sense: This was held in *Steenkolenmijnen*<sup>597</sup> where the CJEU for the first time also defined the terms

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<sup>591</sup> *Ladbroke Racing Ltd v Commission of the European Communities*, T-67/94, EU:T:1998:7, para 78.

<sup>592</sup> *Syndicat français de l'Express international (SFEI) and others v La Poste and others*, C-39/94, EU:C:1996:285, para 60.

<sup>593</sup> *Italian Republic v Commission of the European Communities*, case 173-73, para 13. See chapter 5, section 5.2.1

<sup>594</sup> *Gasunie*, C-56/93.

<sup>595</sup> *Italian Republic v Commission of the European Communities*, case 173-73, para 13.

<sup>596</sup> Opinion of AG Fennelly in *French Republic v Commission of the European Communities*, C-251/97, EU:C:1999:480, para 26.

<sup>597</sup> *Steenkolenmijnen*, case 30-59. The case of *Steenkolenmijnen* is also known for initiating the teleological interpretation of the Treaty provisions, see chapter 1, section 1.4.3.1.

‘subsidy’ and ‘aid’, which are concepts that are not expressly defined in the Treaty. The CJEU gave the following definition of the terms ‘subsidy’ and ‘aid’:<sup>598</sup>

*“A subsidy is normally defined as a payment in cash or in kind made in support of an undertaking other than the payment by the purchaser or consumer for the goods or services which it produces. An aid is a very similar concept, which, however, places emphasis on its purpose and seems especially devised for a particular objective which cannot normally be achieved without outside help. The concept of aid is nevertheless wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, **but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking** and which, without, therefore, being subsidies in the strict meaning of the word, are similar in character and have the same effect.”*<sup>599</sup>

The statement above from the CJEU shows that the definition of ‘aid’ is broad in scope as it covers both positive benefits as well as measures which relieve the recipient from charges that are normally included in the budget of an undertaking. Furthermore, the concept of aid entails situations where the measure in question has the effect of mitigating the charges that are normally included in the budget of an undertaking.

In the case of *Steenkolenmijnen*, the CJEU had to determine whether a bonus granted to miners amounted to State aid. The case concerned the award of a bonus to miners, which was financed by the German Federal Government. The Federal Minister for Economic Affairs explained that the miners’ bonus was necessary to ensure measures that could “*forestall serious fluctuations in the labour force in the mines, and to make a career in mining once more attractive for young men*”<sup>600</sup>. The Minister further emphasised that the existing capacity in the coal industry could not be fully used due to the shortage of miners, which consequently led to lower productivity in the sector. Therefore, the Minister argued that the output of the German coal industry could be considerably enhanced, as the bonus would attract more workers which in turn would result in greater productivity.<sup>601</sup> The CJEU replied that under the circumstances as described by the German Federal Government, the bonus to miners financed from public funds would in fact amount to an artificial reduction in accountable production costs, which would place the coal

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<sup>598</sup> *Steenkolenmijnen*, case 30-59, 19.

<sup>599</sup> See also chapter 2, section 2.2 where this citation is used to discuss the definition of aid.

<sup>600</sup> *Steenkolenmijnen*, case 30-59, 28.

<sup>601</sup> *Ibid.*

industry in a privileged competitive position compared to undertakings in the coal industry in other countries, who have to bear all their production costs themselves.<sup>602</sup>

Although the CJEU did not directly state this, the statement implies that such a privileged competitive position amounted to an advantage for the undertakings concerned.

The case of *Steenkolenmijnen* serves to show that the concept of advantage inherent in Article 107(1) TFEU includes direct payments as well as charges from which the undertakings are relieved due to measures introduced by the State. The findings of the CJEU in *Steenkolenmijnen* are still referred to as a valid definition for the concept of ‘aid’.

In another early case on the concept of the relieve of charges, namely the case of *Italy v Commission*,<sup>603</sup> the CJEU found that charges which normally burden the budget of an undertaking amount to State aid if they are “*intended partially to exempt undertakings from the financial charges arising from the normal application of the general system of compulsory contributions imposed by law*”.<sup>604</sup>

Accordingly, the point of departure is that measures which exempt undertakings from the charges arising from the normal application of the general system are capable of conferring an advantage on the recipient.

More than a decade later, the CJEU delivered a judgment<sup>605</sup> which revealed that preserving market forces is an aim that must be taken into consideration when assessing whether the measure in question is relieving the undertaking from charges. The case serves to show that the broader aim of preserving a competitive market was an overlying goal of the prohibition of relieving undertakings from charges they would normally have to bear.<sup>606</sup>

The case concerned an assessment of the financial assistance from the French authorities to a French producer of textiles, clothing and paper products in the form of capital contributions,

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<sup>602</sup> *Ibid.*, 29.

<sup>603</sup> *Italian Republic v Commission of the European Communities*, case 173-73.

<sup>604</sup> *Ibid.*, Paras 15 and 16 read in conjunction.

<sup>605</sup> *French Republic v Commission of the European Communities*, C-301/87, EU:C:1990:67.

<sup>606</sup> The concept of competition as a goal of public procurement rules as well as State aid rules is discussed in chapter 2 of this Thesis, see section 2.1.3.

loans at reduced rates of interest and reductions in social security charges.<sup>607</sup> The case reached the Court as a request for annulment of a Commission Decision<sup>608</sup> stating that the measures granted by the French authorities constituted aid.<sup>609</sup> Furthermore, the Commission found that the measure improved the financial position of the recipient and reduced other costs, which implied a competitive advantage over other manufacturers who had completed or intended to complete similar actions as the ones imposed to the French producer by the State, at their own expense.<sup>610</sup>

The CJEU supported the findings of the Commission by stating that the measures enabled the recipient to “*avoid having to bear costs which would normally have had to be met out of the undertaking's own financial resources, and thereby prevented market forces from having their normal effect*”.<sup>611</sup>

This case could imply that as long as market forces are preserved, the room for manoeuvre is broad for the contracting authority in order to impose measures which mitigate the tenderers from charges they would normally have to bear. However, the case could also imply that if the contracting authority imposes measures which relieve the tenderers of charges they would normally have to bear, distortion of market forces are presumed. The latter situation would imply that relieve of charges is never permitted.

One of the first explicit references to *Steenkolenmijnen* as analysed above was made in *Banco Exterior de España*,<sup>612</sup> where a Spanish tribunal had made a reference for a preliminary ruling regarding the legality of a tax exemption to a public undertaking. In assessing whether the tax exemption could fall within the prohibition in Article 107(1) TFEU, the CJEU connected its finding in *Steenkolenmijnen*, as cited above, that the concept of ‘aid’ should be understood in a broad sense with the fact that the aim of Article 107(1) TFEU is to prevent the trade between Member States from being affected by advantages granted by public authorities.<sup>613</sup> Thus, the broad notion of ‘aid’ should be seen in connection with the broader aim of preventing trade from being affected.

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<sup>607</sup> *Ibid.*, para 38.

<sup>608</sup> Commission Decision 87/585/EEC.

<sup>609</sup> *Ibid.*, point III.

<sup>610</sup> *Ibid.*, point IV.

<sup>611</sup> *French Republic v Commission of the European Communities*, C-301/87, para 41.

<sup>612</sup> *Banco Exterior*, C-387/92, para 13. See further, J.J. Piernas López, ‘The Concept of State Aid Under EU Law – From internal market to competition and beyond’, (Oxford University Press 2015), 67.

<sup>613</sup> *Banco Exterior*, C-387/92, para 12.

In a procurement context, the judgments from the CJEU in *Steenkolenmijnen* and *Banco Exterior de España* are important as the background for the broad notion of ‘aid’ implies that State aid rules influences the charges from which the contracting authority can relieve the tenderers.

The concept of ‘relieve of charges’, which can be derived from *Steenkolenmijnen*, is interesting as situations might arise where the contracting authority upholds charges which would normally accrue to the undertakings, and thereby relieve them from charges they would normally have to bear, resulting in the conferral of an advantage on the undertaking in question.<sup>614</sup>

### 6.2.2 Unconditional State support? The concept of ‘gratuitous advantage’

The concept of advantage entails an integrated requirement of gratuitousness. In *Steinike & Weinlig*,<sup>615</sup> the CJEU formulated the concept of gratuitous advantage for the first time.<sup>616</sup>

The concept of gratuitous advantage implies that the aid in question is conferred to the recipient in the sense that an undertaking receives a benefit it would not normally have enjoyed from its own commercial endeavours.<sup>617</sup> The term *gratuitous* indicates that the advantage conferred on the recipient is given unconditionally i.e., with nothing in return.

According to Khan and Borchardt:<sup>618</sup>

*“As the word is generally understood, ‘aid’ implies that a donor confers a benefit without any obligation or expectation of receiving something in return, which in turn implies that if State resources are conferred on an undertaking as one side of a bilateral agreement, with the undertaking obliged to provide something of equivalent value in return, the State’s action does not amount to ‘aid’.”*<sup>619</sup>

In this respect, if the term ‘gratuitous’ should be taken literally, it would imply that any procurement situation where the public authority does receive something in return would fall

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<sup>614</sup> Such situations will be analysed further in chapter 7.

<sup>615</sup> *Steinike & Weinlig v Federal Republic of Germany*, Case 78-76.

<sup>616</sup> *Ibid.*, para 22.

<sup>617</sup> *Banco Exterior*, C-387/92, paras 12-13. See further, L Hancher, ‘The general framework’ in L. Hancher, T. Ottervanger and P.J. Slot (eds.), *EU State Aids* (Sweet & Maxwell 2012) 54.

<sup>618</sup> N. Khan and K.-D. Borchardt, ‘The Private Market Investor Principle: Reality Check or Distorting Mirror?’, in *Liber Amicorum Francisco Santaolalla Gadea* (Wolters Kluwer 2008), 110.

<sup>619</sup> Footnotes omitted.

outside the scope of an advantage. This situation could possibly lead to the legal consequence that public contracts awarded under the concession Directive fall outside the concept of advantage, and hence never under the scope of Article 107(1) TFEU. However, as will be elaborated below, the concept of gratuitousness under State aid law does not necessarily imply that any procurement situation where the public authority receives something in return falls outside the scope of the concept of advantage. The following section will first account for the concept of pecuniary interests under procurement law and then analyse the concept of gratuitous advantage under State aid law, before turning to whether the concept of pecuniary interest falls outside the scope of the State aid rules.

#### 6.2.2.1 *The concept of pecuniary interest under procurement law*

Under procurement law, a contract must be of a pecuniary nature to fall within the scope of the procurement Directive. In Article 2(1)(5) of the public procurement Directive, ‘public contracts’ are defined as:<sup>620</sup>

*“Contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services.”*

Thus only contracts for pecuniary interest fall under the scope of the procurement Directive.

In *Ordine*<sup>621</sup>, the CJEU held that:<sup>622</sup>

*“It must be pointed out that the pecuniary nature of the contract relates to the consideration due from the public authority concerned in return for the execution of the works which are the object of the contract referred to in Article 1(a) of the Directive and which will be at the disposal of the public authority.”*

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<sup>620</sup> The concept of ‘public contract’ is further analysed in chapter 4.

<sup>621</sup> *Ordine degli Architetti delle province di Milano e Lodi, Piero De Amicis, Consiglio Nazionale degli Architetti and Leopoldo Freyrie v Comune di Milano, and Pirelli SpA, Milano Centrale Servizi SpA and Fondazione Teatro alla Scala*, C-399/98, EU:C:2001:401.

<sup>622</sup> *Ibid*, para 77.

The concept of pecuniary interest under procurement law thus entails a requirement of exchange with something in return for the purchase made. This state of law would be in conflict with the requirement of ‘gratuitousness’ under State aid law, as implied above.

#### 6.2.2.2 The concept of ‘gratuitous advantage’ under State aid law

The concept of gratuitous advantage indicates that the advantage conferred on the recipient is given unconditionally, i.e. with nothing in return.

In the case of *France v Commission (Kimberly Clark)*,<sup>623</sup> the CJEU determined whether measures demanding an additional effort for the undertaking in exchange for the State support can be considered aid. In other words, whether the additional costs incurred by the undertaking would ‘neutralise’ the prohibition of mitigating the charges, which is normally borne by undertakings, and thereby no longer fall inside the scope of ‘gratuitous’.

The case concerned an action for annulment of a Commission Decision<sup>624</sup> brought by the French Republic. In the contested Decision, the Commission held that a measure consisting of an agreement under which the French authorities (FNE) undertook to fund part of the costs of a social plan adopted by a French company (Kimberly Clark) was State aid in the sense of Article 107(1) TFEU.<sup>625</sup> The social plan consisted of a number of measures which partly related to actions of redeployment for workers who had lost their jobs as well as training-leave agreements.<sup>626</sup>

The French authorities made several claims supporting their view that the agreements did not constitute aid. First, the French authorities argued that the agreements had a purely social objective and that they were measures of a general nature.<sup>627,628</sup> Second, the French authorities emphasised the fact that the social plan was compulsory. Thus, in the view of the French authorities, the State support did not mitigate the charges borne by undertakings “*since their implementation does not help undertakings to meet their legal obligations and calls for*

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<sup>623</sup> *Kimberly Clark*, C-241/94.

<sup>624</sup> Commission Decision SG(94) D/8907 of 27 June 1994 concerning aid to the company Kimberly Clark Sopalin.

<sup>625</sup> *Kimberly Clark*, C-241/94, para 5.

<sup>626</sup> *Ibid*, para 10.

<sup>627</sup> *Ibid*, para 16.

<sup>628</sup> General versus selective measures are discussed in detail in chapter 5, section 5.2.



*additional efforts on their part over and above the cost to them of strictly complying with the requirements of the ordinary law”.*<sup>629</sup>

The French authorities thereby argued that the State support was only used to finance charges that related to additional costs, which arose out of the measure imposed on the undertaking, and not voluntary costs by the undertaking.

The Commission argued that the fact that the State support covered expenses incurred by the beneficiary by choice was not sufficient to exclude the possibility that it constituted aid in so far as “*since [Kimberly Clark] was required to bear, in addition to compulsory expenses in the strict sense (severance payments, and so on), the additional costs of implementing the social plan (under the supervision of the court), the FNE assistance covered a variable proportion of a body of costs which were, to an indeterminate extent, compulsory; it could therefore cover compulsory costs.*”<sup>630</sup>

The CJEU never replied directly to the claim from the Commission that the State support mitigated charges which the undertaking would normally have to bear. Instead, the CJEU reiterated its finding in *Banco Exterior de España* by stating that:<sup>631</sup>

*“it must [ ... ] be observed that the concept of aid encompasses advantages granted by public authorities which, in various forms, mitigate the charges which are normally included in the budget of an undertaking”.*

The CJEU found that due to its size, Kimberly Clark was under an obligation to draw up a social plan, and that the plan included several aspects of involvement from FNE in regard to both employees who were not laid off and employees who were laid off.<sup>632</sup> Further, the CJEU emphasised that it could be concluded that the initial number of intended lay-offs was reduced due to the State support. Consequently, according to the CJEU, the Commission was correct in

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<sup>629</sup> *Kimberly Clark*, C-241/94, para 26. Emphasis added.

<sup>630</sup> *Ibid*, para 30.

<sup>631</sup> *Ibid*, para 34.

<sup>632</sup> *Ibid*, para 35.

assessing that Kimberly Clark had received State aid within the meaning of Article 107(1) TFEU.<sup>633</sup>

It must thus be concluded that the state of law derived from *Banco Exterior de España* was not fully confirmed in *France v Commission (Kimberly Clark)*.

However, in his opinion to *France v Commission (Kimberly Clark)*, AG Jacobs gives some guidance on the matter as he emphasises the fact that the legal obligation of a measure is not decisive. Rather, according to AG Jacobs, it should be assessed whether the charges that are normally borne by an undertaking are mitigated. AG Jacobs argues that if an agreement is entirely optional, it must be assumed that the undertaking will somehow draw benefit from it, which in return suggests that aid is granted.<sup>634</sup> As expressed by AG Jacobs:<sup>635</sup>

*“It is perhaps worth noting that the fact that contributions under FNE agreements may be conditional on specified steps to be taken by the undertakings concerned does not preclude their being aid. Although in defining State aid the Court has used the term 'gratuitous advantage', that reflects the wording of the question referred by the national court in the case in question. The Court has since accepted as falling within the scope of the Treaty provisions on State aid financial assistance to a restructuring involving commitments by the undertaking to take specific steps (in that case, conversion to a specific type of production).”*<sup>636</sup>

This statement from the AG implies that the optional character of a measure, and thereby additional charges put on the undertaking, is no guaranty that aid is not granted. Although the CJEU does not state this directly, it could be argued that this State of law can be derived from *France v Commission (Kimberly Clark)*.

In another *France v Commission* case,<sup>637</sup> the CJEU delivered a judgment that is relevant in a procurement context for several reasons. As will be elaborated below, first, it can be derived from this case that the question of whether a measure confers an advantage must be assessed on

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<sup>633</sup> *Ibid*, para 37.

<sup>634</sup> As held by AG Jacobs in his opinion in *France v Commission (Kimberly Clark)*, C-241/94, EU:C:1996:195, para 54.

<sup>635</sup> *Ibid*.

<sup>636</sup> Footnotes omitted.

<sup>637</sup> *French Republic v Commission of the European Communities*, C-251/97.

an individual basis, i.e. for each measure imposed by the State. Accordingly, a scheme cannot be ‘neutralised’ by the fact that it also entails measures which do not confer an advantage. Second, the case shows that no distinction should be made between measures which are extended from regulation and measures which are the result of free negotiation between the parties.

In the case, the CJEU had to consider an action for annulment regarding a Decision from the Commission<sup>638</sup> stating that a State measure on the degressive reduction of an employer’s social security contributions to the undertakings in the textile, clothing, leather and footwear industries amounted to State aid.

The case concerned a French law which authorised the French State to grant the mentioned sectors a reduction in social security contributions in addition to the general measure of a reduction applicable to all sectors of the economy.<sup>639</sup> The French Government argued that the reduction of social security contributions was only allowed in exchange for the undertakings taking actions in favour of the employees if the form of collective agreements regarding employment terms and the reorganisation and reduction of working time.<sup>640</sup> According to the French Government, the effects of the measure of reduction of social security contributions were thus financially neutral for the recipient undertakings<sup>641</sup>, something which the Commission found could not be proven.<sup>642</sup> Furthermore, the French Government argued that the collective agreements could not be regarded as charges normally included in the budgets of the undertakings concerned, as the agreements were optional.<sup>643</sup> The Commission argued that the financial reductions facilitated the establishment of economic reforms as the collective agreements resulted in gains in competitiveness,<sup>644</sup> and the measure of reduction of social security contributions thus conferred an economic benefit on the recipients by placing the recipients in a more favourable position than their competitors.<sup>645</sup>

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<sup>638</sup> Commission Decision 97/811/EC of 9 April 1997 concerning aid granted by France to the textile, clothing, leather and footwear industries, OJ L 334.

<sup>639</sup> *French Republic v Commission of the European Communities*, C-251/97, EU:C:1999:480, para 3.

<sup>640</sup> *Ibid*, para 6.

<sup>641</sup> *Ibid*, para 17.

<sup>642</sup> *Ibid*, para 31.

<sup>643</sup> *Ibid*, para 20.

<sup>644</sup> *Ibid*, para 29.

<sup>645</sup> *Ibid*, para 25.

The CJEU replied to these arguments by first referring to its previous ruling in *Italy v Commission*,<sup>646</sup> where it had found that “*a partial reduction of social charges devolving upon undertakings of a particular industrial sector constitutes aid within the meaning of Article 92(1) [now 107(1)] of the Treaty if that measure is intended partially to exempt those undertakings from the financial charges arising from the normal application of the general social security system, without there being any justification for this exemption on the basis of the nature or general scheme of this system*”<sup>647</sup> and thus found that the measure of reduction of social security contributions falls within the scope of Article 107(1) TFEU.<sup>648</sup>

The CJEU then went on to discuss the argument put forward by the French Government that the collective agreements were financially and economically neutral for the recipient undertakings. The CJEU stated that:<sup>649</sup>

*“It should be recalled that the costs for undertakings, to which the French Government draws attention, arise from collective agreements, concluded between employers and trade unions, which undertakings are bound to observe, **either because they have acceded to those agreements** or because those agreements have been **extended by regulation**. Such costs are included, by their nature, in the budgets of undertakings”*

On this ground, the CJEU concluded that:<sup>650</sup>

*“Agreements concluded by both sides of industry form a whole and cannot be evaluated by taking account, out of context, of only some of their positive or negative aspects for one or other party [...]”*

Accordingly, the fact that the accuracy of the final costs of the collective agreements was impossible to evaluate<sup>651</sup> did not exclude such agreements from being categorised as aid within the meaning of Article 107(1) TFEU.<sup>652</sup>

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<sup>646</sup> *Italian Republic v Commission of the European Communities*, case 173-73.

<sup>647</sup> *Ibid*, para 15.

<sup>648</sup> *French Republic v Commission of the European Communities*, C-251/97, EU:C:1999:480, para 38.

<sup>649</sup> *Ibid*, para 40.

<sup>650</sup> *Ibid*, para 46.

<sup>651</sup> *Ibid*, para 46.

<sup>652</sup> *Ibid*, para 47.

This case illustrates that it is irrelevant for the assessment of advantage whether the recipient is in a position to affect the presence of State aid, i.e. whether, as in this specific case, the State measure on the degressive reduction of an employer's social security contributions is compulsory for the undertaking in that it could not avoid or refuse it, since only the effect of the measure should be taken into account.

The conclusions from the CJEU regarding the financial and economic neutrality are important in a procurement perspective for two reasons. First, a measure must be evaluated separately as opposed to as a whole. This means that it is not possible for the State/contracting authority to 'neutralise' a measure which confers an advantage by the fact that the scheme also entails measures which do not confer an advantage. Rather, the assessment of advantage must be taken in isolation for each measure in question. This conclusion implies that in situations where the measure imposed confers an advantage, in a specific case, State aid is likely to occur under Article 107(1) TFEU.

Second, the CJEU emphasised that not only agreements which are extended from regulation, i.e. as a consequence of regulation, are capable of mitigating the charges which an undertaking would normally have to bear, but agreements to which undertakings have acceded can also fall within the scope of measures which relieve an undertaking from charges it would normally have to bear. With this, the CJEU accepts that agreements which are entered into as a result of party autonomy can have the effect of relieving an undertaking from charges, or put in other words – not only measures which obliges undertakings through legislation can have the effect of transferring an advantage to the recipient. In a procurement context, this could be of relevance as this widens the scope for the potential application of State aid rules to the award of public contracts.

#### *6.2.2.3. Does the concept of pecuniary interest under procurement law fall outside the scope of State aid rules?*

According to the above, an advantage should not be assessed according to whether the tenderer could have avoided the measure conferring an advantage. A situation like the one described above occurs if the measure conferring an advantage arises in relation to elements in the tender procedure that are to be considered constant, i.e. they are not possible to change. An example of

this situation is the selection and award criteria in the tender procedure which cannot be changed.<sup>653</sup>

It thus makes no difference for the assessment of an advantage whether the State receives something in return for the State support, for instance if the undertaking makes certain commitments in return for conditions it has to fulfil. In this respect, it can be concluded that the concepts of ‘gratuitousness’ under State aid law does not imply that any procurement situation where the public authority does receive something in return falls outside the scope of an advantage.

### 6.3 Conclusions

The analysis above has shown that the concept of advantage within Article 107(1) TFEU is broad in scope as it entails direct transfers of State support as well as charges relieved from the undertakings. Furthermore, the concept of advantage entails a benchmark against ‘normal market conditions’ which is a concept that is developed by the CJEU to assess whether State support can escape the prohibition in Article 107(1) TFEU on the grounds that the support equals market terms. The benchmark for assessment of normal market conditions is whether market price has been paid.

The case law from the CJEU seem to imply that when State intervention is not given according to market conditions, market price is not paid, and hence an advantage is conferred within Article 107(1) TFEU. Therefore, according to AG Jacobs in *GEMO* and AG Fennelly in *France v commission*, in cases where the State purchases goods and services, there will be aid only if the price paid exceeds the market price. On this basis, chapter 7 will analyse when the price paid exceeds market price in a procurement context.

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<sup>653</sup> In *European Commission v Kingdom of the Netherlands (Max Havelaar)*, C-368/10, EU:C:2012:284, para 55 the CJEU held that the essential conditions, including technical specifications and the award criteria cannot change during the procedure. This will be discussed further in chapter 7.

## Chapter 7

### **7. When does the award of public contracts constitute State aid?**

The procurement Directives do not include specific rules to prevent public contracts from involving State aid. This does not mean, however, that the contracting authorities are exempt from acting in order to prevent an economic benefit from being granted when public contracts are awarded. The State aid rules are addressed to Member States, and as the concept of contracting authority coincides with the concept of State under the State aid rules,<sup>654</sup> the contracting authorities have an obligation, by way of the State aid rules, to prevent (procurement) measures which confer an advantage to the recipient.

This chapter will analyse the notion of advantage in relation to the award of public contracts and discuss how and when an advantage occurs when public contracts are awarded. So far, the CJ has not delivered any cases which directly concern the question of whether the award of a public contract constitutes State aid within the framework of Article 107(1) TFEU. The GC has dealt with this question a few times, and the Commission has delivered Decisions on this question several times. For the purpose of discussing how and when an advantage is conferred on the economic operator when public contracts are awarded, cases have been chosen for analysis in which the award of a contract has been made following a tender procedure, or in which a tender procedure should arguably have been held. The cases chosen for analysis thus represent the analytical framework of the Thesis.

As has been accounted for in chapter 2 of this Thesis, State aid law and public procurement law share the common aim of preventing distortions of competition in the Internal Market.<sup>655</sup> However, the means to achieving this common goal are different for the two areas of law; the State aid rules are aimed at preventing undertakings from receiving an undue advantage which can be used to strengthen their position on the market *vis-à-vis* competitors, whereas the procurement rules aim at opening the market for public contracts by ensuring that undertakings compete for public contracts in a transparent and equal manner.

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<sup>654</sup> See chapter 2.

<sup>655</sup> See Chapter 2, section 2.3.

The prohibition against conferring an advantage under State aid law is satisfied by adhering to the concept of normal market conditions. However, it can be discussed whether the State aid rules prohibiting an advantage being conferred coincides with the procedural rules in the procurement Directives.

The question of whether an advantage occurs when public contracts are awarded has been debated rather intensely<sup>656</sup> in academic literature. In this respect, it has been stated that when a public procurement procedure has been held, no advantage is conferred on the economic operator because, in principle, the economic operator would have been able to win the same contract on the private market.<sup>657</sup>

It could thus be argued that under the procurement regime, if the competitive selection adheres to the procurement rules, normal market conditions are presumed. Put in other words, it could be argued that as long as the procedural rules in the procurement directives are adhered to, compliance with State aid rules can be presumed. However, as it will be elaborated in the following sections, such a presumption cannot be confirmed in a case law analysis.

First, section 7.1 analyses to which extent an advantage occurs following an illegal direct award of public contracts. Then, section 7.2 discusses the notion of advantage in relation to the award of contracts following the negotiated procedure. Section 7.3 also discusses award following the negotiated procedure, however, as it will be elaborated, whether advantage is conferred following awards by the negotiated procedure depends on the specific circumstances to the award procedure. Finally, section 7.4 analyses the notion of advantage in relation to two situations of award, namely legal direct award and award by concession. Section 7.5 compiles

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<sup>656</sup> See e.g., U. Schnelle, 'Unconditional and Non-Discriminatory Bidding Procedures in EC State Aid Surveillance over Public Services' (2002), 1, (2), *EStAL*, 195-205; J. Hillger, 'The award of a public contract as state aid within the meaning of Article 87(1) EC', (2003), 3, *P.P.L.R.*, 109-130; P. Nicolaides and I.E. Rusu, 'Competitive Selection of Undertakings and State Aid: Why and When Does It Not Eliminate Advantage?', (2012), 7, (1), *E.P.P.P.L.*, 5-29; A.S. Graells, '*Public Procurement and the EU Competition Rules*' (2<sup>nd</sup> edn. Hart publishing 2015)124ff.; P. Nicolaides and S. Schoenmaekers, 'The Concept of 'Advantage' in State Aid and Public Procurement and the Application of Public Procurement Rules to Minimise Advantage in the New GBER', (2015), 14 (1), *EStAL*, 143-156; G.S. Ølykke, 'The Notice on the Notion of State Aid and Public Procurement Law' (2016), 15, (4), *EStAL*, 508-526; G.S. Ølykke, 'Commission Notice on the notion of state aid as referred to in article 107(1) TFEU – is the conduct of a public procurement procedure sufficient to eliminate the risk of granting of state aid?', (2016), 5, *P.P.L.R.*, 197-212; P.E. Hasselgård, 'The Use of Tender Procedures to Exclude State Aid: The Situation under the EU 2014 Public Procurement Directives' (2017), 12, (1), *EPPPL*, 16-28. See further Chapter 6, (fn 36).

<sup>657</sup> P. Nicolaides and I.E. Rusu, 'Competitive Selection of Undertakings and State aid: Why and When Does It Not Eliminate Advantage?', (2012), 7, (1), *E.P.P.P.L.*, 5-29, 7.



the conclusions made in the previous sections. Finally, section 7.6 contains a conclusion to the analysis.

## 7.1 BAI

The *BAI* judgments<sup>658</sup> had their beginning in 1992, when the Commission received several complaints regarding a Spanish aid scheme which concerned support for a new freight and passenger ferry service between Bilbao, Spain, and Portsmouth, UK.<sup>659</sup> Arguably, the case illustrates a situation of illegal direct award, since the purchase concerned a value above threshold.<sup>660</sup>

### 7.1.1 Background of the case

The case concerned a purchase of travel vouchers made by the Basque authorities. The purchase of travel vouchers was predetermined for a period of three years with an agreed price, which was to be paid even for journeys that were not made.<sup>661</sup> The Ferry service agreement consisted of an agreement in the form of a declaration of intent between Ferries Golfo de Vizcaya SA (hereafter abbreviated FGV), a company created by Vapores Suardiaz of Spain, and P&O European Ferries (hereafter P&O Ferries) of the United Kingdom. The agreement was entered into by FGV and the District Council of Bizkaia and Department of Trade and Tourism of the Basque Government (together referred to as the State users). The agreement consisted of a predetermined number of vouchers, which were sold to the State users. The vouchers were used to low-income groups and others under a defined social and cultural policy. The voucher recipients could exchange the vouchers for tickets to use the FGV in off-peak seasons. In the contract, the State users imposed a number of conditions for FGV in order to maintain full service throughout the year, except for three weeks where service was carried out on the ferries.

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<sup>658</sup> Cases; *Bretagne Angleterre Irlande (BAI) v Commission of the European Communities*, T-14/96, EU:T:1999:12; *P & O European Ferries (Vizcaya), SA (T-116/01) and Diputación Foral de Vizcaya (T-118/01) v Commission of the European Communities*, Joined cases T-116/01 and T-118/01, EU:T:2003:217 and *P & O European Ferries (Vizcaya) SA (C-442/03 P) and Diputación Foral de Vizcaya (C-471/03 P) v Commission of the European Communities*, Joined cases C-442/03 P and C-471/03 P, EU:C:2006:356.

<sup>659</sup> Commission communication pursuant to Article 93(2) of the EC Treaty to the other Member States and interested parties concerning aid in favour of Ferries Golfo de Vizcaya SA, State aid C 32/93 (ex NN 40/93), OJ C 95, 1.12.1995, 4-5.

<sup>660</sup> See e.g. *Bretagne Angleterre Irlande (BAI) v Commission of the European Communities*, T-14/96, para 74.

<sup>661</sup> *Bretagne Angleterre Irlande (BAI) v Commission of the European Communities*, T-14/96, para 6.

### 7.1.2. Award of contract

The agreement in question was concluded directly between the Basque government and the private company FGV. Thus, no call for tender was published prior to the conclusion of the agreement. It is uncertain whether the purchase should have been made following a tender procedure, and this question is not discussed by the Commission or the CJEU. However, it is discussed, whether commercial risks have been eliminated for the private part with respect to renegotiation of the contract.<sup>662</sup> Since the purchase concerned a value above threshold, the case is used as an example of illegal direct award for the purpose of this Thesis.

### 7.1.3 Commission Decision

The Commission suspected that elements of State aid might be provided to FGV as a result of the agreement, and as a consequence, they initiated procedures under Article 93(2) [now 108(3)].

The Commission especially considered the following aspects an indication of possible aid:<sup>663</sup>

- I) *the State users' commitment to purchase a set number of vouchers over a three-year period, rather than on the basis of objectively established needs,*
- II) *the payment to be made for vouchers, which was higher than the advertised brochure price,*
- III) *the commitment to pay for vouchers even if travel did not take place or the vessel was diverted, and*
- IV) *the arrangement that the State users would:*
  - *receive a pay-back if FGV made a profit, or*
  - *absorb certain commercial losses if FGV suffered a deficit during the first three years of operation of the new service.*

Following the Commissions initiation of procedures, the agreement between the parties was suspended and, subsequently, a new agreement, which entailed modifications, was entered into. In the new agreement, the parties made the following modifications in order to meet the concerns of the Commission:

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<sup>662</sup> See Commission Decision 2001/247/EC of 29 November 2000 on the aid scheme implemented by Spain in favour of the shipping company Ferries Golfo de Vizcaya, OJ L 89.

This is further discussed immediately below this section.

<sup>663</sup> Commission communication pursuant to Article 93(2) of the EC Treaty to the other Member States and interested parties concerning aid in favour of Ferries Golfo de Vizcaya SA, State aid C 32/93 (ex NN 40/93), OJ C 95, 1.12.1995, 5.

- I) *information has been provided on the number of vouchers to be purchased, based on estimated take-up of the offer by defined low income groups and those covered by social and cultural programmes, including school groups and young people and the elderly. This takes into account experience of other similar social programmes. In addition, those evacuated to the United Kingdom during the Spanish Civil War have shown a keen interest to return to visit their places of temporary exile,*
- II) *the payment to be made for vouchers, when the system comes into operation, will be lower than the advertised brochure price for the period concerned ; this reflects the normal market practice of volume discounts for large users of commercial services, the remaining elements of the original agreement which caused concern have all been deleted from the revised agreement.*

In response to the modifications of the initial agreement, the Commission found that the new agreement did not constitute State aid.<sup>664</sup> The decision was based on the Commission's assessment of the commercial results of the FGV. The Commission emphasised that FGV was able to establish its business without any benefit from the State, and that the new agreement seemed to "*reflect a normal commercial relationship with arm's length pricing for the services provided*".<sup>665</sup>

Accordingly, the Commission based its conclusion on two elements: First, that the number of purchased vouchers was genuine, as it was based on a real need, and second, that the payment for the vouchers reflected standard market practice for volume discounts.

In this respect, according to the Commission, the advantage conferred on the recipient consisted of the aspects that concerned i) that the agreed price was higher than the commercial tariff, ii) that the vouchers had to be paid for even for journeys which were not made or were diverted to other ports, iii) that the agreement included an undertaking to absorb all losses during the first three years of operation of the new service, and iv) that the element of commercial risk was eliminated for Ferries Golfo de Vizcaya.

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<sup>664</sup> Commission communication pursuant to Article 93(2) of the EC Treaty to the other Member States and interested parties concerning aid in favour of Ferries Golfo de Vizcaya SA, State aid C 32/93 (ex NN 40/93), OJ C 95, 1.12.1995, 6.

<sup>665</sup> Ibid., 5.

#### 7.1.4 Findings of the General Court

Following the Commission's Decision, a French Company (Bretagne Angleterre Irlande (BAI)) made an application for annulment of the Decision before the GC.<sup>666</sup>

BAI held, in essence, that the Commission had misapplied Article 107 (1) TFEU in its Decision since “[the Commission] did not attempt to ascertain whether the massive purchases of travel vouchers by the Spanish authorities strengthened the market position of Ferries Golfo de Vizcaya as compared with that of its competitors”.<sup>667</sup>

The applicant, BAI, was a company that operated a shipping line between the ports of Plymouth, UK, and Santander, Spain. BAI held that the service offered by FGV competed directly with the service provided by BAI, and therefore it was likely to cause serious damage to their business.<sup>668</sup>

BAI made four main arguments to support its application for annulment of the Decision<sup>669</sup> of which the second, third and fourth essentially concerned the alleged infringement of Article 107(1) TFEU.<sup>670</sup> The CJEU regrouped the second, third, and fourth plea as it found that they all related to the question of infringement of Article 107(1) TFEU.<sup>671</sup>

The GC started by emphasising that:<sup>672</sup>

*“in determining whether an agreement whereby a public authority **undertakes to purchase certain services from a specific undertaking** for a number of years **falls within the scope of Article 92(1)[now Article 107(1)] of the Treaty**, it must be borne in mind that the aim of Article 92 [now Article 107(1)] is to prevent trade between Member States from being affected by advantages given by the public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or the production of certain goods [...] It follows that a State measure in favour of an undertaking, which takes the form of an agreement to purchase travel vouchers cannot be excluded in principle from the concept of State aid in the*

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<sup>666</sup> *Bretagne Angleterre Irlande (BAI) v Commission of the European Communities*, T-14/96.

<sup>667</sup> *Ibid.*, para 40.

<sup>668</sup> *Ibid.*, para 4.

<sup>669</sup> *Ibid.*, para 38.

<sup>670</sup> The first plea alleged breach of the right to a fair hearing.

<sup>671</sup> *Bretagne Angleterre Irlande (BAI) v Commission of the European Communities*, T-14/96, para 39.

<sup>672</sup> *Ibid.*, para 71.

*sense contemplated in Article 92 [now 107] of the Treaty, **merely because the parties undertake reciprocal commitments.***<sup>673</sup>

After concluding that the State aid rules apply to public authorities when they purchase, the GC commenced to discuss whether the aid elements had been excluded from the new agreement, as held by the Commission.<sup>674</sup>

In doing so, the GC found that not all aid elements were deleted from the new agreement between the parties:<sup>675</sup>

*“[...] certain elements, such as the payment by the authorities of a unit price for the vouchers higher than the published commercial price and the variation in the total subsidy depending on the company's positive or negative operating results, have been deleted from the text of the 1995 agreement. **However, as the applicant pointed out, the new agreement still provides for the purchase of a predetermined number of travel vouchers for several years and, in spite of the reduction in the reference unit price, it gives Ferries Golfo de Vizcaya an overall income which is not only equivalent, but even slightly higher than that stipulated in the original agreement.***<sup>676</sup>

Subsequently, the revision of this point in the agreement was, according to the GC, not sufficient for them to conclude that the agreement represented a normal commercial transaction.<sup>677</sup> Thus, since the effects on competition and trade between Member States were the same under the new agreement, the GC concluded that the Commission's conclusion that the new agreement did not constitute State aid could not be upheld.<sup>678</sup>

Regarding the reduced unit price, the GC held that this had been reduced as stated by the Commission. However, the new agreement still provided for the purchase of a predetermined number of travel vouchers which amounted to an overall income for Ferries Golfo de Vizcaya which was slightly higher than under the initial agreement<sup>679</sup> because the number of vouchers was increased from 26,000 to 45,500 in the new agreement.<sup>680</sup> Contrary to what the Commission

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<sup>673</sup> Emphasis added.

<sup>674</sup> *Bretagne Angleterre Irlande (BAI) v Commission of the European Communities*, T-14/96, para 72.

<sup>675</sup> *Ibid.*, para 74.

<sup>676</sup> Emphasis added.

<sup>677</sup> *Bretagne Angleterre Irlande (BAI) v Commission of the European Communities*, T-14/96, para 74.

<sup>678</sup> *Ibid.*, para 82.

<sup>679</sup> *Ibid.*, para 74.

<sup>680</sup> *Ibid.*, paras 48 and 76.

had concluded, the GC did not find that the increase in travel vouchers was determined according to actual needs felt by the authorities.<sup>681</sup> Consequently, the GC concluded that the advantage conferred on the recipient was not eliminated under the new agreement; that the agreement affected competition between Member States; and that the financial position of the recipient was strengthened in relation to its competitors.<sup>682</sup>

On these ground, the GC concluded that the Commission's assessment of the new agreement was incorrect as the agreement did in fact constitute aid.<sup>683</sup>

The Commission reopened the Decision and extended the initial Decision by including the new agreement in their assessment. The Commission agreed with the GC that the measure was not "*a normal and commercial transaction, but was designed to maintain at its original level the aid contained in the first Agreement [..]*"<sup>684</sup> The Decision was confirmed by the GC.<sup>685</sup> The judgment of the GC was appealed, but the CJEU refused to rule on the substance by referring to *res judicata*.<sup>686</sup>

### 7.1.5 Comments

With this case, for the first time, the GC concluded that purchasing activities by public authorities fall within the scope of the State aid rules.<sup>687</sup> However, the statement from the GC does not imply whether State aid rules apply when a tender procedure has been conducted. Rather, the statement from the GC should arguably be interpreted to mean that purchasing activities in general, with regard to both award under the procurement directives and (legal and illegal) direct award, fall under the scope of the State aid rules.

In this respect, it should be emphasised that the GC did not take the opportunity to state directly whether a tender procedure should have been conducted. The GC was given this opportunity in paragraph 63 of the judgment where it was held by (an intervener to) the Commission that:

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<sup>681</sup> *Ibid.*, paras 76 and 79.

<sup>682</sup> *Ibid.*, paras 77-78.

<sup>683</sup> *Ibid.*, para 82.

<sup>684</sup> Commission Decision 2001/247/EC of 29 November 2000 on the aid scheme implemented by Spain in favour of the shipping company Ferries Golfo de Vizcaya, OJ L 089.

<sup>685</sup> *P & O European Ferries*, joined cases T-116/01 and T-118/01.

<sup>686</sup> *P & O European Ferries*, joined cases C-442/03 P and C-471/03 P.

<sup>687</sup> See also, L. Hancher, 'The general framework' in L. Hancher, T. Ottervanger and P.J. Slot (eds.), *EU State Aids* (Sweet & Maxwell 2012) 116. This aspect of the case will be further analysed in chapter 8 of this Thesis.

*“if the applicant had offered a ferry service from the port of Bilbao, the **intervener could have competed with it** for the sale of vouchers to the provincial authorities. However, its ferry service is based on the port of Santander in another region.”*<sup>688</sup>

This argument indicates that if a competition for the contract had been held, BAI would not have succeeded in winning, as it did not provide ferry services from the port of Bilbao.

Unfortunately, the GC did not respond to this argument which could have been an opportunity to clarify further aspects of the relationship between the State aid rules and the procurement rules. However, the following comments can be made to argument against the above.

First, according to procurement law, artificial restrictions to competition are not allowed.<sup>689</sup> This means that a contracting authority cannot necessarily restrict an interested economic operator with the argument that it does not provide the service in question at the time of the call for tender.<sup>690</sup> In this respect, it must be emphasised that it is up to the economic operators to decide whether they want to participate in the competition for the contract.

Furthermore, the procurement Directives entail an obligation for the contracting authorities to create sufficient competition for the public contracts.<sup>691</sup> This means that there is an obligation for the contracting authorities to ensure that competition for the contract is not prevented e.g. by restricting interested parties from participating in the competition for the contract.

Another aspect of the case that should be discussed is the assessment of whether market price has been obtained. In this respect, it should be noted that market price was actually not the benchmark for assessment of whether the purchase represented a normal market transaction.<sup>692</sup> As held by the GC:<sup>693</sup>

*“The file produced before the Court does **not support the conclusion that the number of travel vouchers specified in the 1995 agreement was determined by an increase in the actual needs***

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<sup>688</sup> Emphasis added.

<sup>689</sup> This follows e.g. from Article 57 (4) (d) in the public procurement Directive.

<sup>690</sup> This argumentation has limitations insofar as the contracting authority is allowed to identify certain selection criteria, see e.g. Article 58 in the public procurement Directive.

<sup>691</sup> See Chapter 2, section 2.1.2.

<sup>692</sup> This aspect of the case will be further analysed in chapter 8. For the purpose of this chapter, suffice it to say that the benchmark of assessing whether the purchase represented normal market conditions is whether a genuine need exists. On the same note, see P. Nicolaides and I.E. Rusu, ‘Competitive Selection of Undertakings and State aid: Why and When Does It Not Eliminate Advantage?’, (2012), 7, (1), *E.P.P.L.*, 5-29, 11.

<sup>693</sup> *Bretagne Angleterre Irlande (BAI) v Commission of the European Communities*, T-14/96, para 76.

*felt by the authorities, which are claimed to have required the purchase of a total of 46 500 vouchers to be used on the Bilbao-Portsmouth route in the period 1995-1998, whereas originally there was only a need for a total of 26 000 vouchers for 1993-1996. Furthermore, the advantage capable of strengthening the competitive position of Ferries Golfo de Vizcaya is not eliminated merely because the recipient undertaking is required to supply a greater quantity of transport services in return for a relatively unchanged financial benefit. [...]*<sup>694</sup>

Accordingly, it can be deduced from this case that the assessment of whether normal market conditions are achieved is whether a genuine need exists. Arguably, BAI shows that market price is not the only parameter in the assessment of whether a measure represents normal market conditions. This conclusion is interesting as it may widen the obligations that the contracting authorities must fulfil in order not to breach State aid rules when they award public contracts.

## **7.2 London Underground:**

The question of whether an advantage is conferred on the winning tenderer has been dealt with by the Commission in several Decisions.<sup>695</sup>

One of the most comprehensive Decisions from the Commission in this area is a Decision from 2002 concerning the case of the London Underground Public Private Partnership.<sup>696</sup> This Decision from the Commission gives important guidance on the Commission's view on when State aid is present when public contracts are awarded under the procurement Directives.<sup>697</sup>

### **7.2.1 Background of the case**

The Decision concerned the assessment of whether certain arrangements to modernise the London Underground by way of a Public Private Partnership (PPP) scheme (hereafter the PPP scheme) were compatible with the Internal Market and the rules on State aid. In a letter dated 12 April 2002, the Government of the United Kingdom notified the Commission of certain

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<sup>694</sup> Emphasis added.

<sup>695</sup> Commission Decision of 2 October 2002 London Underground Public Private Partnership N 264/2002; Commission Decision of 20 July 2004 Project ALTLAS; Broadband infrastructure scheme for business parks N 213/2003 and Commission Decision of 30 May 2007 Welsh Public Sector Network Scheme N 46/2007.

<sup>696</sup> Commission Decision of 2 October 2002 London Underground Public Private Partnership N 264/2002.

<sup>697</sup> The case of London Underground has been analysed in academic literature, see e.g.: A. Brown 'The impact of the new Procurement Directive on large public infrastructure projects: competitive dialogue or better the you know? 2004 (4), *P.P.L.R.*, 160-177; A. Brown and C. Golfinopoulos 'The permissibility of post selection modifications in a tendering procedure: decision by the European Commission that the London Underground Public Private Partnership does not involve state aid' 2003(3), *P.P.L.R.*, 47-55.



arrangements to modernise the London Underground.<sup>698</sup> Prior to the notification from the British Government, a body called Transport for London (TfL), which was under the political control of the elected Greater London Authority (GLA), had submitted a complaint to the Commission claiming that the PPP scheme infringed the EU rules on State aid. Following several exchanges of information between the British authorities and the Commission, it was finally decided in a Decision dated 2 October 2002 that no State aid was involved in the PPP scheme.

According to the Commission's Decision, the objective of the PPP scheme was to develop a better Underground in London through an efficient public sector. The scheme was set up in the following way: the London Underground was divided into an operating company (London Underground Limited (LUL)) responsible for delivering services to the public, and three infrastructure consortia (Infracos) providing services under contract to the London Underground.<sup>699</sup> Each Infraco was responsible for a set of three groups of underground lines (point 9), and each Infraco was obliged to perform certain services in relation to modernisation of the undergrounds assets – i.e. modernisations of the rolling stock, tracks, signals, stations and escalators – and infrastructure during a 30-year period.<sup>700</sup>

The suppliers of the work and services related to the underground lines were chosen pursuant to a procurement process under the Utilities Directive 93/38, using the negotiated procedure. The 30-year contracts were subject to periodic reviews after 7½, 15 and 22½ years.<sup>701</sup>

The Infracos chosen to perform the agreed works and services were created in a transitory phase as entities within the public sector.<sup>702</sup> After the transitory phase expired, the Infracos would transfer to the private sector by way of private infrastructure companies.<sup>703</sup> Prior to the transfer to the private sector, each Infraco would “*aim at managing its business so as to meet the performance requirements of the Service Contracts and, to the extent practicable, at acting in accordance with the other terms of those Contracts*” (known as “Shadow Running”).<sup>704</sup>

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<sup>698</sup> *Ibid.*, point 1.

<sup>699</sup> The selected consortium for each Infraco is presented in a table in point 25 of the Decision, see also point 60ff.

<sup>700</sup> Commission Decision of 2 October 2002 London Underground Public Private Partnership N 264/2002, point 21

<sup>701</sup> *Ibid.*, point 41.

<sup>702</sup> *Ibid.*, point 22.

<sup>703</sup> *Ibid.*, point 23.

<sup>704</sup> *Ibid.*, point 22.

### 7.2.2 Award of contract

The winning tenderers were selected in accordance with a negotiated procedure that ran between March 1999 under the Utilities Directive 93/38, when a Periodic Indicative Notice (PIN) was published in the OJEC, and April 2002, when the final contracts were adopted.<sup>705</sup>

During the negotiations with the preferred bidders, several post-selection modifications were made to the initial documents. The changes related to refinements concerning various aspects of obligations for the parties, including changes in the timing and sequencing of the work, and in the amount of work to be done; changes to the performance regime and the methods of performance measurement; changes in risk allocation; and changes in the provision of the service contracts concerning the funding of the Infraco's obligations following a periodic review.<sup>706</sup>

### 7.2.3 Commission Decision

In the assessment of the existence of State aid, the Commission started by identifying which compensation measures of the PPP scheme could be problematic in relation to the rules on State aid. According to the Commission, these were: the infrastructure service charge (ISC); payments to be underpinned by a publicly owned company in favour of Infracos; non-legally binding comfort letters; possible additional compensation for extra work; the avoidance of certain charges, etc.).<sup>707</sup>

First, the Commission concluded that the measures in question related to State resources,<sup>708</sup> and that those measures were imputable to the State.<sup>709</sup> Then, the Commission proceeded to discuss whether each measure in question had taken place at undervalue, or if market price was paid. The commission explained that *"if these arrangements would take place at an undervalue, for whatever reason, the Member State would forego the market price, i.e. resources which would*

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<sup>705</sup> See point 64 of Commission Decision of 2 October 2002 London Underground Public Private Partnership for a summary chronology of the tender process.

<sup>706</sup> Points 69 and 90. On the same note, see A. Brown and C. Golfinopoulos, 'The permissibility of post selection modifications in a tendering procedure: decision by the European Commission that the London Underground Public Private Partnership does not involve state aid', *P.P.L.R.*, 2003, 3, 47-55, 50-51.

<sup>707</sup> Commission Decision of 2 October 2002 London Underground Public Private Partnership N 264/2002, point 75.

<sup>708</sup> *Ibid.*

<sup>709</sup> *Ibid.*, point 76.

*normally accrue to and should accrue to the Member State would be foregone, and the measures would in that eventuality constitute State aid.*"<sup>710</sup>

This statement from the Commission implies that in assessing whether aid has been granted, it needs to be assessed whether market price has been paid for the contract, including whether the recipient undertaking has been relieved from charges it would normally have to bear.<sup>711</sup>

The Commission then stated that in the assessment of whether the PPP scheme entailed State aid, the crucial assessment was whether the arrangements were concluded after the observance of an open,<sup>712</sup> transparent and non-discriminatory procedure,<sup>713</sup> as the conduct of such a procedure would lead to the outcome of market price being paid. If this was the case, there was an assumption that, in principle, no State aid is involved.

Regarding the evaluation of whether an open, transparent and non-discriminatory procedure had been conducted, the Commission first stated that the conduct of the procedure according to the negotiated procedure under the Utilities Directive 93/38 was reasonable as the value of the service elements was greater than the value of the works or supply elements, and it was hence reasonable to categorise them as service contracts in accordance with the Utilities Directive.<sup>714</sup> Second, the Commission concluded that the call for competition by way of the PIN Notice and the OJEC Notice was sufficient for the purposes of an open tendering process.<sup>715</sup> Third, the Commission concluded that the evaluation of the offers on the basis of the most financially advantageous tender was fair to all bidders and applied in a consistent way with an appropriate methodology, and that the bidders selected therefore represented best value for money.<sup>716</sup>

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<sup>710</sup> *Ibid.*, point 77.

<sup>711</sup> This concept is analysed in chapter 6, section 6.2.

<sup>712</sup> At the time of the Decision on London Underground, the Commission used the wording ‘*open*, transparent and non-discriminatory’ procedure. This has later been changed, and the Commission now uses the wording ‘*competitive*, transparent, non-discriminatory and *unconditional*’ procedure. The Commission has explained that this change in wording is not substantive, but rather chosen to avoid confusion with any specific procedure under the procurement Directives, see Communication from the Commission, *Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU*, 2016. See also, G.S. Ølykke, Commission Notice on the notion of state aid as referred to in article 107(1) TFEU – is the conduct of a public procurement procedure sufficient to eliminate the risk of granting state aid?, *P.P.L.R.*, 2016, 5, 197-212, 202.

<sup>713</sup> Commission Decision of 2 October 2002 London Underground Public Private Partnership N 264/2002, point 79.

<sup>714</sup> *Ibid.*, point 82.

<sup>715</sup> *Ibid.*, point 84.

<sup>716</sup> On the aim of creating best value for money within the procurement regime, see chapter 2, section XX.

The Commission then proceeded to evaluate whether the modifications to the contract terms after the selection of the preferred bidders caused discrimination or unequal treatment.<sup>717</sup> The Commission held that the flexibility inherent in the negotiated procedure must entail a mechanism which provides for ongoing testing (for example to ensure that performance criteria remain appropriate and provide necessary incentives) or external factors (such as inflation).<sup>718</sup> In this conclusion, the Commission emphasised that in the present case, the possibility of changes to the contract was known to all tenderers in advance, and they further note that the introduction of changes was operated in an objective way. Thus, according to the Commission, in the present case, the number of modifications introduced did not cause discrimination.

Finally, the Commission emphasised that the post-selection changes derived from affordability constraints, shadow running, the development of an improved understanding of London Underground's own requirements, the passing of time and changes in circumstances.<sup>719</sup> Furthermore, the Commission found that the post-selection changes were not sufficiently substantial, individually or collectively, to be likely to have attracted prospective tenderers who did not consider tendering following publication of the original OJEC Notices<sup>720</sup>, and that the changes would not have changed the outcome of the tendering procedure.<sup>721</sup> Thus, the Commission found that *“it is compatible with Community legislation for contract details to be modified after the selection of preferred bidders without automatically vitiating the presumption that the final price is a market price.”*<sup>722</sup>

On these grounds, the Commission concluded that the tendering process conducted by London Underground was open, transparent and non-discriminatory, and that market price was obtained, and no State aid was present.<sup>723</sup>

#### **7.2.4 Comments**

When the Decision from the Commission is analysed, several comments can be made. Below, the relevant benchmarks for assessment of whether State aid is granted will be discussed and analysed in section 7.2.4.1. Then, it will be discussed how post-selection modifications to the

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<sup>717</sup> Commission Decision of 2 October 2002 London Underground Public Private Partnership N 264/2002, point 86.

<sup>718</sup> *Ibid.*, point 86.

<sup>719</sup> *Ibid.*, point 88.

<sup>720</sup> *Ibid.*, point 89.

<sup>721</sup> *Ibid.*, point 90.

<sup>722</sup> *Ibid.*, point 87.

<sup>723</sup> *Ibid.*, point 92.

contract are assessed by the Commission in section 7.2.4.2. It is submitted that the Commission's assessment of post-selection modifications can be perceived as erroneous, as the assessment is only based on public procurement law. However, as it will be elaborated below, when post-selection modifications are analysed from a State aid perspective, it changes the outcome of the conclusion. '

The first thing which must be emphasised is that the Commission's assessment of whether market price had been obtained was made pursuant to an analysis of whether an open, transparent and non-discriminatory tender procedure had been conducted. Correspondingly, according to the Commission, market price can be obtained in a procurement context if certain requirements in the tender procedure have been met, i.e. if the tender procedure is open, transparent and non-discriminatory. It follows that the Commission applied establishment of market price to assess whether the award of a contract under the procurement Directives was in breach of State aid law. This conclusion from the Commission corresponds to the findings in chapter 6, in which it was concluded that the relevant benchmark for advantage is whether the measure in question amounts to normal market conditions by obtaining market price.

Then, in the case of *London Underground*, the award of the contracts to the selected Infracos was made pursuant to a negotiated procedure with prior notification. The Commission explicitly emphasised that the prior notification in the OJEC was, in this specific case, sufficient to meet the requirements of an open procedure.<sup>724</sup> This finding coincides with the guidelines from the Commission in the Notice on the notion of State aid, in which the Commission states that the use of the negotiated procedure without publication of a contract notice will not necessarily be sufficient to establish a market price.<sup>725</sup> The Commission Notice on the notion of State aid will be introduced and discussed in the following section.

#### *7.2.4.1 A competitive, transparent, non-discriminatory and unconditional tender procedure: requirements for direct establishment with market conditions*

The requirement of a competitive, transparent, non-discriminatory and unconditional tender procedure for the establishment of market price is discussed by the Commission in the Notice on the notion of State aid, as referred to in Article 107(1) TFEU of the Treaty on the Functioning of the European Union (hereinafter referred to as the Notice on the notion of State aid or the

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<sup>724</sup> *Ibid.*, point 84.

<sup>725</sup> Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262, point 93.

Notice).<sup>726</sup> In the Notice, the Commission suggests the conduct of a competitive, transparent, non-discriminatory and unconditional tender procedure as one possible (direct) way of complying with market conditions and thereby achieving market price. The constituent elements for each of the requirements of the tender procedure, i.e. that the tender procedure is competitive, transparent, non-discriminatory and unconditional, are elaborated by the Commission in the Notice.

Accordingly, in order for the tender to be *competitive*, the contracting authority should allow all interested and qualified bidders to participate in the process.<sup>727</sup> Furthermore, the requirement of *transparency* entails that all interested tenderers are equally and duly informed at each stage of the tender procedure.<sup>728</sup> Furthermore, the Commission mentions access to information, sufficient time, clarity regarding the selection and award criteria and that the tender is sufficiently well-publicised as crucial elements of a transparent procedure. Finally, the Commission explains that, in its view, *non-discriminatory* treatment of all bidders as well as objective selection and award criteria specified in advance are indispensable conditions for ensuring that the transaction is in line with market conditions.<sup>729</sup>

The Commission does not elaborate on the requirements for an *unconditional* tender procedure. However, some guidance might be found in the Commission Communication on State aid elements in sales of land and buildings where the Commission explains that:<sup>730</sup>

*“An offer is ‘unconditional’ when any buyer, irrespective of whether or not he runs a business or of the nature of his business, is generally free to acquire the land and buildings and to use it for his own purposes, Restrictions may be imposed for the prevention of public nuisance, for reasons of environmental protection or to avoid purely speculative bids. Urban and regional planning restrictions imposed on the owner pursuant to domestic law on the use of the land and buildings do not affect the unconditional nature of an offer.”*

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<sup>726</sup> *Ibid.*, The Commission Notice on the notion of State aid is part of the State aid modernisation programme and aims to guide the Member States on how to avoid granting State aid when they provide public funding as well as to provide guidance on recent developments in case law, see further G.S. Ølykke, Commission Notice on the notion of State aid as referred to in article 107(1) TFEU – is the conduct of a public procurement procedure sufficient to eliminate the risk of granting state aid?, *P.P.L.R.*, 2016, 5, 197-212, 197.

<sup>727</sup> Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262, point 90.

<sup>728</sup> *Ibid.*, point 91.

<sup>729</sup> *Ibid.*

<sup>730</sup> See Commission Communication on State aid elements in sales of land and buildings by public authorities (97/C 209/03).

With regards to the requirements for the tender procedure for the establishment of market price, the Commission explains that:<sup>731</sup>

*“when public bodies buy assets, goods and services, any specific conditions attached to the tender should be non-discriminatory and closely and objectively related to the subject matter and to the specific economic objective of the contract. They should allow for the most economically advantageous offer to match the value of the market. The criteria therefore should be defined in such a way as to allow for an effectively competitive tendering procedure which leaves the successful bidder with a normal return, not more. In practice, this implies the use of tenders which put significant weight on the ‘price’ component of the bid or which are otherwise likely to achieve a competitive outcome (e.g. certain reverse tenders with sufficiently clear-cut award criteria)”*

This statement from the Commission reveals that in order for a measure to fall outside the scope of the State aid rules, the benchmark for assessment is whether the market value has been met, and further whether there has been genuine competition for the contract. In the view of the Commission, this aim cannot be achieved by way of the negotiated procedure without publication of a contract notice or in situations where only one bid is submitted, as this will not be sufficient to ensure a market price, unless either:<sup>732</sup>

- (i) there are particularly strong safeguards in the design of the procedure ensuring genuine and effective competition and it is not apparent that only one operator is realistically able to submit a credible bid or,*
- (ii) the public authorities verify through additional means that the outcome corresponds to the market price.*

The Commission does not give any specific guidance on or specifications for how or when the above situations can be deemed to occur. However, the following comments can be made.

First, one possible method to ensure market price by means of safeguards in the design of the procedure could be to conduct a preliminary market consultation, as described in article 40 of the public procurement Directive:

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<sup>731</sup> Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262, point 96.

<sup>732</sup> *Ibid.*, point 93.

*“before launching a procurement procedure, contracting authorities may conduct market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements. For this purpose, contracting authorities may for example seek or accept advice from independent experts or authorities or from market participants. That advice may be used in the planning and conduct of the procurement procedure, provided that such advice does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency.”*

The conduct of a preliminary market consultation can be used by the contracting authorities prior to the formal publication of the procedure as a method to consult with interested economic operators and make sure that a market for the product or service exists, or to ensure that the specifications and terms in the procedure are appropriate.<sup>733</sup> In this respect, preliminary market consultations could be used to ensure the safeguards as prescribed by the Commission in the Notice on the notion of State aid provided that the consultation is conducted in a manner that does not conflict with the requirements of transparency and non-discrimination.

Second, the Commission mentions, as an alternative way of ensuring market price, verifications through additional means. The term *additional means* is not specified by the Commission, but this formulation implies that the contracting authority is free to choose whatever method it finds appropriate to ensure market price. It must be presumed, however, that this method complies with the requirements of transparency and non-discrimination, as described above.

The analyses above show that, according to the Commission, the benchmark for assessment of whether advantage has been conferred is fulfilled through obtaining market price. As emphasised by the Commission in the Notice on the notion of State aid, market price is ensured by way of a competitive, transparent, non-discriminatory and unconditional tender procedure. The Commission emphasises that ensuring genuine competition for the contract is a decisive element in the establishment of market price. This aim can be achieved either by conducting a competitive, transparent, non-discriminatory and unconditional tender procedure, which in return can be achieved through the negotiated procedure with prior notification of a contract notice, or, if other procedures such as the negotiated procedure without publication of a contract notice are used, by i) ensuring strong safeguards in the design of the procedure or ii) through

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<sup>733</sup> See S. Arrowsmith *The Law of Public and Utilities Procurement: Regulation in the EU and UK*, 3th edn. (Sweet and Maxwell 2014), 650.



additional means. In relation to the former, it is submitted that a possible method to fulfil this requirement is by conducting a preliminary market consultation cf. Article 40 of the public procurement Directive. As regards the latter, this entails a rather free choice for the contracting authority, provided that the requirements of transparency and non-discrimination are fulfilled.

#### *7.2.4.2 Assessment of post-selection modifications in a State aid perspective: How does application of State aid law change the outcome of the assessment of post-selection modifications?*

In its Decision on *London Underground*, the Commission discusses whether post-selection modifications resulted in substantive changes which would have attracted prospective tenderers and changed the outcome of the tendering procedure, i.e. which would have changed the outcome of the award decision. The Commission found that for *London Underground*, that was not the case. Although it is not directly expressed, the Commission relies on case law derived from procurement law in the assessment of whether post-selection modifications are allowed.<sup>734</sup> The requirements for a new tender following post-selection modifications to the contract under procurement law is discussed in section 7.2.4.2.1 below. Then, an analysis of post-selection modifications in a State aid perspective is made in section 7.2.4.2.2.

##### *7.2.4.2.1 When do modifications to the contract require a new tender under the procurement rules?*

In Article 89 of the Utilities Directive from 2014, the situations in which modifications to the contract leads to a new procurement procedure are expressly stated. Article 89 is extensive, as it provides an exhaustive list of circumstances under which a new tender is or is not required. Thus, Article 89(1) reads “*Contracts and framework agreements may be modified without a new procurement procedure in accordance with this Directive in any of the following cases*”. Article 89 of the utilities Directive resembles Article 72 of the public procurement Directive. For this reason, the following analysis also applies to contracts awarded under the public procurement Directive.

Subsections 1-5 of Article 89 relate both to situations where there is *no* requirement for a new tender, and to situations that *do* require a new tender. Thus, sub-paragraphs 1-2 list situations where there is no need for a new tender (Article 89(1)) and situations, where there is no need for a new tender provided that the value of the modifications is below certain thresholds (Article 89

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<sup>734</sup> *Presstext Nachrichtenagentur GmbH v Republik Österreich (Bund), APA-OTS Originaltext-Service GmbH and APA Austria Presse Agentur registrierte Genossenschaft mit beschränkter Haftung*, C-454/06, EU:C:2008:351.

(2)). In contrast, Article 89(4) lists situations where modifications are considered to be substantial and therefore a new tender is required, and finally, Article 89(5) specifies that a new tender is required for modifications others than those specifically listed in subsections 1-2.

The necessity of clarifying the conditions under which modifications to a contract during its performance require a new procurement procedure is explained in the preamble to the Utilities Directive.<sup>735</sup>

*“It is necessary to clarify the conditions under which modifications to a contract during its performance require a new procurement procedure, taking into account the relevant case law of the Court of Justice of the European Union. A new procurement procedure is required in case of material changes to the initial contract, in particular to the scope and content of the mutual rights and obligations of the parties, including the distribution of intellectual property rights. Such changes demonstrate the parties’ intention to renegotiate essential terms or conditions of that contract. This is the case in particular if the amended conditions would have had an influence on the outcome of the procedure, had they been part of the initial procedure.*

*Modifications to the contract resulting in a minor change of the contract value up to a certain value should always be possible without the need to carry out a new procurement procedure. To this effect and in order to ensure legal certainty, this Directive should provide for de minimis thresholds, below which a new procurement procedure is not necessary. Modifications to the contract above those thresholds should be possible without the need to carry out a new procurement procedure to the extent they comply with the relevant conditions laid down in this Directive.”*

In the preamble, it is explained that it is necessary to clarify the conditions leading to the requirement of a new tender, taking the case law of the CJEU into account. Further, it is explained that material changes to the contract that demonstrate the parties’ intention to renegotiate essential terms or conditions, and which therefore would have an influence on the outcome of the procedure, will lead to a new tender. The formulation in the preamble to the Utilities Directive should be understood as a codification of *Pressetext*<sup>736</sup>, as analysed immediately below.

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<sup>735</sup> Point 113 of the preamble.

In *Presstext*, which is perceived as the leading judgment in relation to when contract changes constitute a new contract, the CJEU formulated three cumulative criteria which lead to the requirement for a new tender.<sup>737</sup> The case of *Presstext* concerned the assessment of changes after award of the contract:<sup>738</sup>

- i) *An amendment to a public contract during its currency may be regarded as being material when it introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted.*
- ii) *Likewise, an amendment to the initial contract may be regarded as being material when it extends the scope of the contract considerably to encompass services not initially covered.*  
[..]
- iii) *An amendment may also be regarded as being material when it changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the terms of the initial contract.*<sup>739</sup>

The first condition above refers to situations, where the modification of the contract would have given additional tenderers the possibility to participate in the competition for the contract, or where the modifications might change the outcome of the award. This situation was explicitly considered by the Commission in *London Underground*, in which case the Commission held that the post-selection changes were not so substantial, individually or collectively, as to be likely to have attracted other prospective tenderers.<sup>740</sup>

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<sup>737</sup> The subject of modification of public contracts has been debated in legal literature. See e.g. M A Simovart, 'Enforcement of Ineffectiveness of Unlawfully Modified Public Contracts' 2016 (1), *Juridica International*, 43-54; MA Simovart 'Old remedies for new violations? The Deficit of Remedies for Enforcing Public Contract Modification Rules' 2015 (1), *Upphandlingsrätlig Tidskrift*, 33-47; S Treumer 'Contract changes and the duty to retender under the new EU public procurement Directive' 2014 (3) *P.P.L.R.*, 148-155; K Hartlev and M W Liljenbøl 'Changes to existing contracts under the EU Public Procurement Rules and the Drafting of Review Clauses to Avoid the Need for a New Tender' 2013 (2), *P.P.L.R.*, 51-73; S T Poulsen, 'The possibilities of amending a public contract without a new competitive tendering procedure under EU law', 2012,5, *P.P.L.R.*, 167-187; The case of *London Underground* has been analysed in academic literature, see e.g.: A. Brown 'When do changes to an existing public contract amount to the award of a new contract for the purposes of the EU procurement rules? Guidance at last in Case C-454/06' 2008 (6), *P.P.L.R.*, 253-267.

<sup>738</sup> *Ibid.*, paras 10-11.

<sup>739</sup> *Ibid.*, paras 35-37. Emphasis added.

<sup>740</sup> See section 7.3.3 above.

The second condition, as formulated by the CJEU in *Presstext*, concerns situations where the amendments extend the scope of the contract and add additional measures – something which was also discussed by the Commission in *London Underground*.<sup>741</sup>

The third condition as mentioned by the CJEU in *Presstext* relates to an overall assessment of whether there has been a change in the economic balance of the contract. Arrowsmith describes this situation in the following way:<sup>742</sup>

*“this third situation [...] constituting a material change means, most obviously, that the price cannot be increased without the addition of corresponding obligations.”*

It follows that an increase in the value of the contract constitutes a requirement for a new tender in situations as the ones describes above. It could be argued that this constitutes a so-called ‘change in award’ test.

However, the scope of changes in relation to the negotiated procedure seems, on the basis of the findings in *London Underground*, to entail a more flexible approach to changes than what was seen in *Presstext*. Correspondingly, according to the Commission, possible changes to the contract had been notified in advance to all tenderers, and therefore, the changes could not be considered discriminatory.<sup>743</sup> The argument behind such a flexible approach seems to be that the complexity of the concluded contracts generally leaves more room for changes under the negotiated procedure.<sup>744</sup>

It follows from the above that in the case of *London Underground*, the Commission relied on sources of law from procurement law in the assessment of whether post-selection modifications amounted to State aid.

It can be submitted, however, that State aid case law can be relevant in the assessment of the impact of post-selection modifications. In the following, an assessment of post-selection

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<sup>741</sup> See section 7.2.4.2.2 below.

<sup>742</sup> S. Arrowsmith *The Law of Public and Utilities Procurement: Regulation in the EU and UK*, 3th edn. (Sweet and Maxwell 2014), 584.

<sup>743</sup> Commission Decision of 2 October 2002 *London Underground Public Private Partnership* N 264/2002, point 86.

<sup>744</sup> On the same note, see S. Arrowsmith *The Law of Public and Utilities Procurement: Regulation in the EU and UK*, 3th edn. (Sweet and Maxwell 2014), 1020ff.

modifications will therefore be made in the light of the ‘avoided costs’ test as developed in chapter 6.<sup>745</sup>

#### *7.2.4.2.2 Can post-selection modifications relieve an undertaking from charges it would normally have to bear?*

In chapter 6, it was concluded that measures which relieve an undertaking from charges it would normally have to bear can amount to State aid.<sup>746</sup> In relation to the conclusion above, it can be discussed, whether post-selection modifications can amount to charges which an undertaking would normally have to bear, and whether this would change the outcome of the conclusion. In other words, it should be discussed whether the application of the ‘avoided costs’ test<sup>747</sup> under State aid law would lead to a different outcome than the ‘change in award’<sup>748</sup> test, as applied under procurement law.

First, it must be pointed out that the scope of post-selection changes which is generally applicable under procurement law is rather narrow, as both Article 89 of the utilities Directive and Article 72 of the public procurement Directive list explicit situations which either lead to a requirement for a new tender or not. In relation to the case of *London Underground*, it must be noted, however, that the scope for changes in the contract ex-post is broader, because the award was made pursuant to the negotiated procedure with prior notification, and further, that the changes were made pursuant to a complex contract. If the post-selection changes to the contract in *London Underground* are assessed in relation to the ‘avoided costs’ test as described in chapter 6, the following comments can be made.

The assessment of post-selection modifications under State aid law relates to the question of whether an advantage has been conferred and, more specifically, whether the recipient has been relieved of charges which it would normally have to bear.<sup>749</sup>

First, it must be pointed out that no distinction should be made between measures which are extended from regulation and measures which are the result of free negotiation between the

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<sup>745</sup> See chapter 6, section 6.2.

<sup>746</sup> Chapter 6, section 6.2

<sup>747</sup> As deduced in chapter 6, section 6.2.3.

<sup>748</sup> As deduced in section 7.2.4.2.1 above.

<sup>749</sup> See chapter 6.

parties.<sup>750</sup> Accordingly, post-selection modifications could in theory confer an advantage under Article 107(1) TFEU. Second, it should be emphasised that the definition of ‘aid’ is broad in scope as it entails measures which mitigate the charges which are normally included in the budget of an undertaking.<sup>751</sup> Also, if the State refrains from revenue, the measure is capable of falling within the scope of Article 107(1) TFEU.<sup>752</sup> Finally, it should be emphasised that it makes no difference whether the State receives something in return for the State support, for instance if the undertaking makes certain commitments in return for conditions it has to fulfil.<sup>753</sup>

In *London Underground*, the Commission made a financial assessment of the changes in the contracts introduced after the selection of preferred bidders.<sup>754</sup> These financial assessments will in the following constitute the benchmark for discussion.

In examining the post-selection changes introduced in the contracts, the Commission made an assessment of each of the imposed measures. With regards to changes introduced for measures relating to removal of the cap on bonus payments for availability, snagging items and train declaration, the Commission concluded the following:<sup>755</sup>

*“[...] the most reasonable analysis is that the volume of work within individual sections of the contract increased after the selection of preferred bidders, **but the unit price of the work in question did not change significantly, and there are therefore no grounds for believing that there has been an increase in the rate of compensation**”*

With regards to changes introduced for measures relating to increased allowance for minor works; introduction of the concept of intermediate works; new penalties for engineering works that overrun into service hours; grace periods before the application of certain penalties; changes to the treatment of safety and law change costs; requests for changes of customer information; train ambience targets for individual lines; changes in liabilities; changes related to the PFI

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<sup>750</sup> *French Republic v Commission of the European Communities*, C-251/97, EU:C:1999:480.

<sup>751</sup> *Steenkolenmijnen*, case 30-59, see further chapter 6, section 6.2.1.

<sup>752</sup> See chapter 6, section 6.2.2.

<sup>753</sup> As held by AG Jacobs in his opinion in *France v Commission (Kimberly Clark)*, C-241/94, EU:C:1996:353, para 54. See further, chapter 6, section 6.2.2.

<sup>754</sup> Commission Decision of 2 October 2002 *London Underground Public Private Partnership* N 264/2002 point 4.1.2.2

<sup>755</sup> *Ibid.*, point 95 (a).

contracts; changes in the arrangements for periodic review and contract termination; and comfort letters, the Commission concluded the following:<sup>756</sup>

*“[...] any change in the value of the contract for the preferred bidders is marginal in scale in relation to the overall value of the contract”<sup>757</sup>*

Finally, for measures relating to graffiti clearing; temporary speed restrictions; change in how train ambience is measured; limits on London Underground’s use of contractual remedies; capability penalties for factors outside Infracos’ control; insurance; increased protection for contractors against the possibility of their strategic purchasing decisions being judged non-economic and efficient; new system of penalties for too-slow fault rectification; and changes to the agreed rate of return, the Commission found that the measures should be assessed as measures to create outcomes intended in the original contract documents.<sup>758</sup>

Subsequently, according to the Commission, *“none of these changes can reasonably be considered as materially improving the value of the contracts for the preferred bidders relative to how the contracts stood at the point where preferred bidders were selected”<sup>759</sup>* and hence, the post-selection changes represent market price.

The assessment of whether post-selection changes still represent market price is made pursuant to three arguments from the Commission. The first argument relies on the assumption that, even though there was an increase in the volume of work, the unit price did not change and hence, market price was paid. The second argument is that the change in value is marginal in scale in relation to the overall value of the contract. The third argument relates to established case law from the CJEU in *Pressetext*, as discussed above, and finds that the measures do not change the outcomes intended in the original contract.

I find that the argumentation from the Commission could be perceived as erroneous for two reasons.

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<sup>756</sup> *Ibid.*, point 95 (b).

<sup>757</sup> Emphasis added.

<sup>758</sup> Commission Decision of 2 October 2002 London Underground Public Private Partnership N 264/2002 point 95 (c).

<sup>759</sup> *Ibid.*, point 95.

First, as has been laid out by the GC,<sup>760</sup> the relevant assessment under State aid law is not whether the unit price is maintained. Rather, the crucial assessment is whether the overall income resembles the one stipulated in the original agreement.<sup>761</sup>

Second, it is established in case law that even measures of small value are capable of falling within the scope of Article 107(1) TFEU. This means that, under State aid law, the relevant assessment is whether an advantage has been conferred by relieving the undertaking in question from charges it would normally have to bear as opposed to the economic value of the measure. In this respect, the following should be noted: As held above, it is explained in the preamble to the Utilities Directive, that only material changes can result in the requirement for a new tender. Accordingly, modifications which only result in minor changes will therefore not require a new tender. Under procurement law, minor changes to the contract imply that the value of the modification is small. However, as has been concluded in chapter 6, the value of the measure is not decisive for the assessment of aid. Thus, measures that represent a moderate value are capable of breaching Article 107(1) TFEU.

Therefore, it can be concluded that, on this point, inconsistency exists between State aid law and public procurement law. Where the procurement Directives hold that modifications to the contract resulting in a minor change of the contract value do not lead to the conduct of a new tender, State aid law oppositely finds that the value of the measure in question is not relevant for the assessment of the existence of aid. In other words, the two areas of law do not coincide on this point.

This means that situations may arise, where the presence of State aid does not lead to the requirement of a new tender. In my opinion, these situations are inappropriate, as they may be likely to lead to conferral of disguised State aid, which in its nature is problematic.

In conclusion, the argumentation from the Commission relies on arguments which cannot be considered adequate to conclude whether market price is obtained. In a State aid perspective, the relevant assessment is whether the winning tenderer has been relieved from charges which it would normally have to bear, and thus whether an advantage has been conferred. In this respect,

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<sup>760</sup> *Bretagne Angleterre Irlande (BAI) v Commission of the European Communities*, T-14/96.

<sup>761</sup> *Ibid.*, para 74.



the value of the changes, or whether the unit price is maintained, is irrelevant in a State aid perspective.

### 7.3 SNCM

In a recent case, namely the case of *SNCM*<sup>762</sup>, the GC considered whether the award of a public contract constituted State aid within Article 107(1) TFEU. To my knowledge, this is the first case decided by the CJEU concerning alleged State aid on the basis of award of a public contract under the public procurement Directive. The case concerned, among other things, the classification of State aid as compensation for a public service and ultimately, whether the classification of the measure as a service of general economic interest (SGEI)<sup>763</sup> was correct.<sup>764</sup> The case is illustrative for the research question asked in this Thesis since the public service operator was chosen pursuant to a tender procedure which ultimately led to the award of a public service delegation for maritime transport services between mainland France and Corsica.<sup>765</sup> One particularly interesting aspect of the case is that the Commission and the GC finds that the service in question does not concern a SGEI, but nevertheless continues to consider whether a tender procedure should have been conducted. As will be elaborated below, this could imply that a link between procurement law and State aid law is established by the CJEU for other services than SGEIs. However, it is argued that the alleged link between public procurement law and State aid law is not established in this case.

#### 7.3.1 Background of the case

The background to the dispute was a complaint to the Commission from a French shipping company (Corsica Ferries) alleging the conferral of State aid to two shipping companies (SNCM and CMN) as a result of the award of a public contract. The contract in question was a public

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<sup>762</sup> *Société nationale maritime Corse Méditerranée v European Commission. (SNCM)*, T-454/13.

<sup>763</sup> On the concept of SGEI, see for example E. Szyszczak, *The Regulation of the State in Competitive Markets in the EU* (Hart Publishing 2007); M. Krajewski, U. Neergaard and J. van de Gronden (eds.), *The Changing Legal Framework for Services of General Interest in Europe - Between Competition and Solidarity* (TMC Asser Press 2009); N. Fiedziuk, 'Putting Services of General Economic Interest up for Tender: Reflections on Applicable EU Rules', (2013) 50(1) *Common Market Law Review* 87; W. Sauter, *Public Services in EU Law* (Cambridge University Press 2014); G.S. Ølykke and P. Møllgaard, 'What is a Service Of General Economic Interest?' (2016) 41(1) *European Journal of Law and Economics* 205. See also C.F. Petersen and G.S. Ølykke, 'The provision on services of general economic interest in the 2014 Directive – pure reiteration of the obvious?' in G.S. Ølykke and A.S. Graells (eds.) *Reformation or Deformation of the EU Public Procurement Rules* (Edward Elgar Publishing 2016), 193-214.

<sup>764</sup> It is outside the scope of this Thesis to go further into the discussion concerning the classification of the service as an SGEI. For this reason, the first part of the judgment relating to this question will only be discussed briefly.

<sup>765</sup> *Société nationale maritime Corse Méditerranée v European Commission. (SNCM)*, T-454/13, paras 9 and 15 read in conjunction.

service delegation contract (PSDC) relating to maritime services to be provided in Corsica. The services to be provided concerned a permanent ‘passenger and freight’ service to be provided throughout the year on all the routes concerned (‘the basic service’) and an additional ‘passenger’ service to be provided during peak periods on the Marseilles-Ajaccio, Marseilles-Bastia and Marseilles-Propriano routes (‘the additional service’).<sup>766</sup>

### 7.3.2 Award of contract

On 30 December 2006, a notice of call for tenders was published in the Official Journal of the European Union, as well as in two local newspapers on 4 January 2007. The call for tender concerned a public service delegation (PSD) for maritime services from the port of Marseilles to several Corsican ports.<sup>767</sup> On 9 February 2007, two bids were submitted: a joint bid by SNCM and CMN and a bid by Corsica Ferries.<sup>768</sup> A prior call for tenders was published on 27 May 2006, but this call was annulled on 15 December 2006.<sup>769</sup>

Following several negotiation phases, the SNCM-CMN group was awarded the PSD for the ferry service between the port of Marseilles and the Corsican ports in the period from 1 July 2007 to 31 December 2013.<sup>770</sup>

The decision to award the contract to the SNCM-CMN group was based in particular on the grounds that:<sup>771</sup>

*“[...] the SNCM-CMN group’s bid meets the requirements and criteria of the specific regulations of the call for tenders and the tender specifications for each of the five routes and, second, that Corsica Ferries is not able to set a firm and final date on which it would be able to operate the next [PSD] and, in this respect, the conditions which it sets out, relating to matters falling outside the [PSD]’s content, cannot be taken into consideration.”*

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<sup>766</sup> *Ibid.*, para 29.

<sup>767</sup> *Ibid.*, para 15.

<sup>768</sup> *Ibid.*, para 19.

<sup>769</sup> *Ibid.*, para 16.

<sup>770</sup> *Ibid.*, para 23.

<sup>771</sup> *Ibid.*, para 24.

### 7.3.3 Commission Decision

Following the award of the contract to the SNCM-CMN group, the Commission received a complaint from Corsica Ferries concerning alleged State aid. The Commission decided to open formal investigations which ultimately led to a Decision<sup>772</sup> (the contested decision).

In order to determine whether the compensation granted to SNCM and CMN constituted State aid and, in particular, conferred a selective advantage to the SNCM-CMN group, the Commission examined whether the cumulative criteria laid down by the CJ in *Altmark*<sup>773</sup> were satisfied, and in particular whether the first and fourth criteria were satisfied.<sup>774</sup>

In *Altmark*, the CJ formulated a number of criteria<sup>775</sup> which must be fulfilled when determining whether the compensation for delivery of a public service obligation (PSO) amounts to State aid.<sup>776</sup> According to the CJ, the criteria which must be fulfilled in order for compensation for the delivery of PSOs not to amount to State aid are: the PSO must be clearly defined; the calculation of the compensation must be laid down in advance in an objective and transparent manner', and no overcompensation may occur.<sup>777</sup> In the fourth criterion of the test, the CJ stated that if the choice of the provider of the PSO is not made pursuant to a public procurement procedure,<sup>778</sup> the public authority is obliged to make a benchmarking exercise to make sure that no State aid is granted. The fourth criteria in *Altmark* was formulated as follows:<sup>779</sup>

*“[...] where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those*

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<sup>772</sup> Commission Decision 2013/435/EU of 2 May 2013 on State aid SA.22843 (2012/C) (ex 2012/NN) implemented by France in favour of Société Nationale Maritime Corse-Méditerranée, OJ L 220.

<sup>773</sup> *Altmark*, C-280/00.

<sup>774</sup> *Société nationale maritime Corse Méditerranée v European Commission. (SNCM)*, T-454/13, para 44.

<sup>775</sup> *Altmark*, C-280/00, paras 89–92.

<sup>776</sup> *Ibid.*, paras 89–93.

<sup>777</sup> *Ibid.*, para 93.

<sup>778</sup> It is widely debated in the academic literature whether the provision of SGEIs falls within the scope of the public procurement directives, see C. F. Petersen and G. S. Ølykke, ‘The provision on services of general economic interest in the 2014 Directive – pure reiteration of the obvious?’ in G S Ølykke and A S Graells (eds) *Reformation or Deformation of the EU Public Procurement Rules* (Edward Elgar Publishing 2016), 193–214, 196 with references in footnote 16.

<sup>779</sup> *Altmark*, C-280/00, para 93.

*obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.*<sup>780</sup>

In its Decision in the case of *SNCM*, the Commission first considered whether the service in question amounted to a real public service need. The Commission found<sup>781</sup> that the classification of the service in question as a public service did not correspond to a real public service and consequently, according to the Commission, France had made a manifest error of assessment in classifying the service in question as an SGEI. Thereby, the first *Altmark* criterion was not fulfilled according to the Commission.

Additionally, the Commission considered whether the compensation provided to the SNCM-CMN group fulfilled the fourth *Altmark* criteria,<sup>782</sup> and essentially whether the selection of the SNCM-CMN group represented the selection of the tenderer capable of providing the services at the least cost to the community.<sup>783</sup> The Commission found that the fourth *Altmark* criterion was not fulfilled on the basis of a number of factors:<sup>784</sup>

- *the PSD was awarded following a negotiated procedure after publication of a notice of call for tenders, which procedure confers broad discretion on the contracting authority and may restrict the participation of the operators concerned;*
- *the only bid competing with that of the two concession holders, namely that of Corsica Ferries, was not assessed on the basis of its own merits (award criteria) but on the basis of a single selection criterion, namely the tenderer's ability to commence operations on 1 July 2007;*
- *the procedure thus did not allow the CTB to compare several bids in order to select the most economically advantageous one;*

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<sup>780</sup> Emphasis added.

<sup>781</sup> Commission Decision 2013/435/EU of 2 May 2013 on State aid SA.22843 (2012/C) (ex 2012/NN) implemented by France in favour of Société Nationale Maritime Corse-Méditerranée, OJ L 220, 17.8.2013, p. 20–45, recital 167.

<sup>782</sup> *Ibid.*, section 7.1.3.2.

<sup>783</sup> *Ibid.*, recital 169. See also Communication from the Commission on the application of the European State aid rules to compensation granted for the provision of services of general economic interest, adopted by the Commission on 20 December 2011, OJ C 8, 11.1.2012, p. 4.

<sup>784</sup> *Ibid.*, recitals 169–178.

- *the fact that two bids were actually submitted was not sufficient to guarantee effective competition*, inasmuch as the competing bid from Corsica Ferries, which gave 12 November 2007 as a start date for operations, was not able to provide a credible alternative;
- *the multiple sets of legal proceedings brought in the present case is not evidence in favour of the effectiveness of competition in the procurement procedure for the PSDC;*
- *the SNCM-CMN group had a **significant competitive advantage** as the incumbent operator that already had vessels adapted to the requirements of the PSDC's tender specifications;*
- *the very short time set between the date of awarding the PSD (ultimately awarded on 7 June 2007) and the date of commencement of services (1 July 2007) was likely to constitute a significant barrier to entry for new entrants;*
- *combined with the technical requirements related to the specific conditions of the ports involved, the condition concerning the age of the fleet and the unit capacities required by the PSDC's tender specifications, **this very short time frame was likely to limit participation in the call for tenders;***
- *the existence of numerous clauses providing for meetings associated with the freedom given to the CTB to decide upon exemptions to rules **may also have helped to dissuade tenderers from taking part in the call for tenders** by raising doubts about some technical and economic parameters that were critical to the preparation of a bid.*<sup>785</sup>

Accordingly, the terms of the tender procedure failed to enable a candidate to be selected who was capable of providing the services in question at the least cost to the community.<sup>786</sup>

Furthermore, the Commission held that the French authorities had failed to demonstrate that the compensation had been calculated by reference to a comparable undertaking, and thereby the measure also failed to fulfil the second limb of the fourth *Altmark* criteria.<sup>787</sup>

Consequently, according to the Commission, the fourth *Altmark* criterion was not satisfied either.<sup>788</sup>

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<sup>785</sup> Emphasis added.

<sup>786</sup> Commission Decision 2013/435/EU of 2 May 2013 on State aid SA.22843, recital 178.

<sup>787</sup> *Ibid.*, recitals 179-182.

### 7.3.4 Findings of the General Court

The GC agreed with the Commission in its assessment that the service in question did not constitute an SGEI and thus that the first *Altmark* criterion was not fulfilled.<sup>789</sup>

In relation to the question of whether the fourth *Altmark* criterion had been fulfilled, the GC first held:<sup>790</sup>

*“It is clear from a set of consistent indicia that **the tendering procedure conducted in the present case clearly did not result in effective and open competition** sufficient to make it possible to select the candidate capable of providing the maritime transport services **at the least cost to the community**.”*<sup>791</sup>

Accordingly, the GC found that the tender procedure did not result in effective and open competition and consequently, the GC agreed that the Commission was correct in finding that the chosen candidate was not capable of providing the services in question at the least cost to the community.

The GC especially based the conclusion above on the following three arguments. Firstly, the GC emphasised that the award of contract pursuant to a negotiated procedure with publication can satisfy the fourth *Altmark* criterion only in exceptional cases as the negotiated procedure confers a broad discretion on the contracting authority and may restrict the participation of interested operators.<sup>792</sup> Secondly, only two bids were submitted following the call for tenders.<sup>793</sup> Although the GC did not state so directly, this statement could be analysed to mean that since only two bids were submitted, the call for tenders did not create sufficient competition for the contract.

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<sup>788</sup> *Ibid.*, recital 183.

<sup>789</sup> *Société nationale maritime Corse Méditerranée v European Commission (SNCM)*, T-454/13, para 235. It is outside the scope of this Thesis to analyse the arguments of the CJEU in detail relating to the assessment of whether the classification of the measure as an SGEI was correct.

<sup>790</sup> *Société nationale maritime Corse Méditerranée v European Commission. (SNCM)*, T-454/13, para 240.

<sup>791</sup> Emphasis added.

<sup>792</sup> *Société nationale maritime Corse Méditerranée v European Commission. (SNCM)*, T-454/13, para 241.

<sup>793</sup> *Ibid.*, para 242.

Thirdly, and in extension of the second argument, the GC found that a series of factors<sup>794</sup> had discouraged or even prevented potential candidates from participating in the call for tenders.<sup>795</sup>

Therefore, the GC held that the Commission was correct in concluding that the fourth *Altmark* criterion was not fulfilled in the case.<sup>796</sup>

### 7.3.5 Comments

*SNCM* is an important case in relation to the research question asked in this Thesis. First, it confirms the link between public procurement law and State aid law by assessing whether the fourth *Altmark* criterion has been satisfied in a situation where the service provider has been chosen pursuant to a tender procedure.

Furthermore, the case shows that several circumstances might not fulfil the fourth criterion in *Altmark*. In this respect, what can be deduced from this case is that the negotiated procedure with prior publication is not sufficient to fulfil *Altmark* if sufficient competition has not been created, e.g. because only two bids is submitted or if factors exist which have prevented or discouraged potential candidates from participating. However, the *Altmark* case did not address the question whether and if so to which extent State aid can occur in procurement situations where the service does not concern a SGEI. This means, that there is great uncertainty when it comes to the question of when the award of public contracts constitute State aid. In this respect, the case of *SNCM* might establish a link between State aid rules and procurement rules for other services than SGEIs. Arguably, the fact that the Commission and the GC continued to assess the fourth *Altmark* criterion in spite of the fact that they concluded that the service in question was not an SGEI, could imply that the fourth *Altmark* criterion applies to non-SGEIs. However, it must be emphasised that such an interpretation would be a great extension of the boundaries between state aid law and procurement law. Therefore it could be argued that if the GC made such an extension, it would do so in more clear terms, i.e. by emphasising the established connection between the two areas of law. On this ground, I do not find that the case of *SNCM* can be considered to establish a link between State aid law and procurement law for non-SGEIs in situations where the award of contract is made pursuant to a tender procedure.

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<sup>794</sup> *Ibid.*, paras 244-254.

<sup>795</sup> *Ibid.*, para 243.

<sup>796</sup> *Ibid.*, para 262.

However, the above does not mean that the case of *SNCM* does not provide any guidance at all. In this respect, it must be emphasised that the Commission sets out clear guidance concerning when the award of the contract constitutes State aid. As held above, the GC confirms the conclusions from the Commission, including the factors that gave rise to the conclusion that the fourth *Altmark* criterion was not fulfilled. Thus, it could be argued that the following factors can give rise to State aid, in situations where the award of contract is made pursuant to a negotiated tender procedure:

- *The number of bidders must ensure effective competition for the contract – two bids are not sufficient to ensure effective competition*
- *The occurrence of a significant competitive advantage prior to the tender procedure can amount to State aid– the winning tenderer already had vessels which lived up to the requirements from the contracting authority*
- *Factors which can dissuade tenderers from taking part in the call for tenders - Short deadlines and the existence of numerous clauses*

#### **7.4 Greek airports**

In a recent Decision, the Commission considered whether the award of a public concession contract amounted to State aid.<sup>797</sup> The case is used to illustrate how the Commission assesses whether an advantage has been conferred on the winning tenderer when the award concerns legal direct award. As will be elaborated below, this case also illustrates how advantage is conferred regarding award of public contracts under the Concession Directive.

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<sup>797</sup> See also Commission Decision SA.41116 OJ C 400, 24 November 2017 concerning alleged aid to KGHM Polska Miedź S.A., point 51-90.



#### **7.4.1 Background of the case**

On 3 October 2016, the Greek authorities, for reasons of legal certainty, notified the Commission of two service concession contracts in accordance with Article 108(3) TFEU. The contracts granted the concession for the upgrade, maintenance, management and operation of seven regional airports located in Greece. The concession was grouped in two clusters, namely Cluster A encompassing the Cretan, Continental Greece and Ionian Sea regional airports, and Cluster B encompassing the Aegean regional airports (Rodoss, Kos, Santorini, Mikonos, Mitilini, Samos and Skiathos).<sup>798</sup>

#### **7.4.2 Award of contract**

On 3 April 2013, the Hellenic Republic Asset Development Fund (HRADF) launched a tender process for the award of concessions for the upgrade, maintenance, management and operation of 14 regional airports grouped in two clusters.<sup>799</sup> The concession was awarded on 25 November 2015 for both clusters to a consortium (Fraport AG-Slntel Ltd consortium) for a period of 40 years with a possible extension once for a period of up to 10 years upon the mutual agreement of the parties and provided that the extension does not give rise to any issues under the State aid rules.<sup>800</sup>

Since the contract was awarded at a time when the contract fell outside the scope of the concession Directive, the Greek authorities explained that the contract was instead awarded directly in accordance with the communication<sup>801</sup> to contract awards not or not fully subject to the provisions of the public procurement directives. The Greek authorities further explained to the Commission that the HRADF had complied with the general principles of the Treaty throughout the process, since the contract was likely to generate cross-border interest.<sup>802</sup>

The invitation to submit tenders was advertised on 3 April 2013 in several newspapers.<sup>803</sup> In response to the invitation, HRADF received 11 expressions of interests of which seven were

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<sup>798</sup> Commission Decision 2013/435/EU of 2 May 2013 on State aid SA.22843, point 1.

<sup>799</sup> *Ibid.*, point 4.

<sup>800</sup> *Ibid.*, point 6.

<sup>801</sup> 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, OJ C 179, 1.8.2006, p. 2-7.

<sup>802</sup> Commission Decision 2013/435/EU of 2 May 2013 on State aid SA.22843, point 8.

<sup>803</sup> *Ibid.*, point 9.

found compliant with the requirements for participating in phase 2.<sup>804</sup> Three final bids were received on 10 October 2014.<sup>805</sup>

### 7.4.3 Commission Decision

In assessing whether the concession agreements conferred an advantage on the concessionaire, the Commission reiterated its previous statement from the Notice on the notion of State aid<sup>806</sup> by emphasising that:<sup>807</sup>

*“The Commission considers that, if the sale and purchase of assets, goods and services are carried out following a competitive, transparent, non-discriminatory and unconditional tender procedure, it can be presumed that those transactions are in line with market conditions [...]. This also applies to other comparable transactions, such as the award of concessions for the operation of commercial assets, and therefore applies to the award of the concessions subject to the present decision.”*<sup>808</sup>

Accordingly, the Commission found that the requirements for a competitive, transparent, non-discriminatory and unconditional tender procedure also apply to concession contracts, and thus also to the award of the concessions subject to the present decision.

The Commission went on to state that a tender procedure is considered competitive, transparent, non-discriminatory and unconditional if the following conditions are fulfilled:<sup>809</sup>

- i. all interested and qualified bidders are allowed to participate in the process.*
- ii. the procedure is transparent to allow all interested tenderers to be equally and duly informed at each stage of the tender procedure. Information is accessible and sufficient time is given for interested tenderers, the selection and award criteria are clear and the tender is sufficiently well-publicised, so that all potential bidders can take note of it.*
- iii. non-discriminatory treatment of all bidders at all stages of the procedure and the selection and award criteria are objective and specified in advance of the process.*

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<sup>804</sup> *Ibid.*, point 11.

<sup>805</sup> *Ibid.*, point 18.

<sup>806</sup> Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262, point 93.

<sup>807</sup> Commission Decision 2013/435/EU of 2 May 2013 on State aid SA.22843, point 41.

<sup>808</sup> Emphasis added.

<sup>809</sup> Commission Decision 2013/435/EU of 2 May 2013 on State aid SA.22843, point 42.

*iv. the tender is unconditional, for example a potential buyer should not be required to assume special obligations for the benefit of the public authorities or in the general public interest, which a private seller would not have demanded - other than those arising from general domestic law or a decision of the planning authorities.*

Then, the Commission concluded that phase 1 of the tender procedure was transparent<sup>810</sup> and non-discriminatory.<sup>811</sup> Furthermore, the Commission found that phase 2 of the procedure did not restrict the scope of eligible bidders and that it was not discriminatory.<sup>812</sup>

The Commission also emphasised that the interested bidders were given sufficient time to provide the required documentation and subsequently, “*the Eligible Investors had therefore ample time to understand the Tender Process and the Concession Agreements, and to prepare fully-considered submissions.*”<sup>813</sup> Thus, the Commission therefore concluded that the bidders were given enough time and information was accessible.<sup>814</sup>

On these grounds, the Commission concluded that the tender to award the concessions was competitive, transparent, non-discriminatory and unconditional.<sup>815</sup>

Regarding the price of the bids, the Commission concluded that the Greek authorities awarded the concession to the highest bidder.<sup>816</sup>

#### **7.4.4 Comments**

This Decision confirms the Commission's approach regarding assessment of whether an advantage has been granted as laid down in Notice on the notion of State aid and as seen in the Decision regarding London Underground, as analysed above.

Thus, a tender procedure which is competitive, transparent, non-discriminatory and unconditional and which awards the contract to the highest bidder escapes the remit of Article 107(1) TFEU.

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<sup>810</sup> *Ibid.*, point 45.

<sup>811</sup> *Ibid.*, point 46.

<sup>812</sup> *Ibid.*, point 48.

<sup>813</sup> *Ibid.*, point 51.

<sup>814</sup> *Ibid.*, point 53.

<sup>815</sup> *Ibid.*, point 55.

<sup>816</sup> *Ibid.*

Furthermore, the Decision establishes a link between competitive, transparent, non-discriminatory and unconditional tender procedures in the Notice on the notion of State aid and concession contracts. With this, it can be concluded that the same requirements exist for public contracts awarded under the concession Directive as for public contracts awarded under the public procurement Directive.

In this case, the Greek authorities emphasised the fact that the contract had been awarded in respect of the general principles in the Treaty. The following comments can be made in this respect.

*7.4.4.1. How does the concept of advantage relate to the general principles of non-discrimination and transparency applicable under procurement law?*

In situations where the contracting authority awards contracts to undertakings directly, i.e. without the conduct of a tender procedure, either because the award is below threshold or because the subject matter of the contract is not covered by the procurement Directives, procurement rules do not apply. This does not mean, however, that the award can be made without respecting the Treaty. The CJEU has stated on numerous occasions that the general principles of the Treaty apply to the contracting authorities in situations where the procurement directives do not apply.<sup>817</sup>

In this regard, the rules of the Treaty have implications for the contracting authority in two respects. First, in a procurement context, the CJEU has held that the general principles flowing from the Treaty oblige the contracting authorities to act in a transparent and non-discriminatory way when they award public contracts. This implies that although the contract is outside the scope of the procurement rules, the contracting authority is not entirely free to choose how the contract is awarded. Second, as established in chapter 2, the State aid rules affect contracting authorities by way of the prohibition in Article 107(1) TFEU. This means that contracts awarded outside the scope of the procurement rules do not escape the prohibition laid down in Article 107(1) TFEU either.

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<sup>817</sup> For an analysis of the application of the general principles in the Treaty under procurement law, see chapter 2, section 2.1.2.1.

The Commission has published an Interpretative Communication<sup>818</sup> in which it gives guidance on how the Member States should apply the basic principles deriving from the case law from the CJEU when contracts are awarded directly. In the Communication, the Commission emphasises that when the contracting authority awards contracts directly to an undertaking, it must assess whether the contract in question is relevant to the Internal Market and if it is, the contracting authority has to award the contract “*in conformity with the basic standards derived from Community [Union] law*”.<sup>819</sup> According to the Commission, this assessment entails a number of factors which must be taken into account, including, advertising, contract award and judicial protection.

Since the direct award of contracts falls outside the scope of the procurement Directives, no specific requirements exist regarding how the contracting authority should advertise the contract. However, the requirements of advertising should ensure that the obligation of transparency is met. In this respect, the Commission emphasises that the contracting authorities are responsible for choosing the most appropriate medium for advertising their contracts.<sup>820</sup> According to the Commission, the choice should be “*guided by an assessment of the relevance of the contract to the Internal Market, in particular in view of its subject-matter and value and of the customary practices in the relevant sector.*”<sup>821</sup>

The Commission emphasises that contacting a number of potential tenderers would not be sufficient to satisfy the requirements of transparency, since such an approach is selective and cannot prevent discrimination against potential tenderers from other Member States and in particular new entrants to the market.<sup>822</sup> Likewise, what is referred to as ‘passive’ publicity in the form of omission of active advertising is, according to the Commission, capable of breaching the requirements of transparency.<sup>823</sup>

Furthermore, the content of the advertisement should include essential details of the contract to be awarded as well as the award method. Also, the advertisement should include “*as much*

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<sup>818</sup> ‘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] O.J. C179/2.

<sup>819</sup> *Ibid.*, point 1.3.

<sup>820</sup> *Ibid.*, point 2.1.2 for examples which means of publication can be seen as adequate means of publication.

<sup>821</sup> *Ibid.*, point 2.1.2.

<sup>822</sup> *Ibid.*, point 2.1.1.

<sup>823</sup> *Ibid.*, point 2.1.1.

*information as an undertaking from another Member State will reasonably need to make a decision on whether to express its interest in obtaining the contract.*”<sup>824</sup>

In this respect, publication of a sufficiently accessible advertisement prior to the award of the contract should be seen as a means to ensuring that the obligation of transparency is met. Also, sufficient advertisement prior to the award will ensure that the contract award is opened up to competition.

Specific situations might arise where the contracting authority is forced to award the contract without prior advertisement. Such situations include situations of extreme urgency due to unforeseeable events or contracts which can only be executed by one particular economic operator, i.e. for technical or artistic reasons. Such situations are cf. 32 of the procurement Directive suitable for award without prior publication of a contract notice. According to the Commission, the derogations in Article 32 of the procurement Directive may be applied to the award of contracts not covered by the directives, and hence contracts may be awarded directly in situations described in article 32.<sup>825</sup>

The above shows that the contracting authorities are obliged by a transparency requirement when they award contracts outside the scope of the procurement Directives. Furthermore, it should be discussed how the notion of advantage relates to the requirement of transparency.

The analysis in chapter 6 showed that the concept of advantage entails an obligation for the State – and thereby the contracting authorities – to ensure that market forces are preserved. Also, the contracting authority has an obligation, by way of the State aid rules, to ensure that the undertaking in question is not relieved from charges it would normally have to bear. It must be assumed that the obligations flowing from the State aid rules are applicable to the contracting authorities regardless of whether the purchase is made following a tender procedure or as a consequence of direct award of contract. Consequently, the contracting authority is obliged to ensure that market forces are preserved and that the undertakings are not relieved from charged they would normally have to bear.

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<sup>824</sup> *Ibid.*, point 2.1.3.

<sup>825</sup> *Ibid.*, point 2.1.4.

In *Coname*<sup>826</sup>, the CJEU held that the direct award of a contract could possibly amount to a difference in treatment, and thereby indirect discrimination, for interested undertakings in other Member States. In that respect, the requirement of transparency should ensure that interested parties have access to appropriate information regarding the contract and thus have the opportunity to express interest in the contract. Although this was not stated directly by the CJEU in *Coname*, it must be assumed that ensuring transparency when public contracts are awarded directly could help to make sure that market forces are preserved, since transparency could ensure that interested parties in other Member States can express interest in the contract with the result of opening up the market for the contract.

On the basis of the above, it can thus be concluded that an obligation exists for the contracting authorities to respect the general principles of the Treaty when they award public contracts outside the scope of the procurement Directives. Therefore, the Greek authorities were correct in taking the general principles of the Treaty into consideration when the contract was awarded.

### **7.5 Award of public contracts: establishment of market price as benchmark for assessment of market price?**

The above has shown that the decisive benchmark for assessing whether an advantage has been conferred and thus, whether the award of a public contract represents a normal market transaction relies on the specific circumstances of the contract. The conclusions made above can be summarised as follows:

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<sup>826</sup> *Coname*, C-231/03.

**Table I: Illustration of how advantage occurs under the identified award situations**

	Case/Decision	Benchmark for assessment of advantage	Satisfies the State aid rules?	Satisfies the procurement rules?
Award by public tender (negotiated procedure)	<i>London Underground</i>	- competitive, transparent, non-discriminatory and unconditional tender procedure - sufficient competition for the contract	Yes, (post-selection modifications)	Yes (Adherence to procedural rules)
Award by concession	<i>Greek airports</i>	- competitive, transparent, non-discriminatory and unconditional tender procedure - highest bidder	Yes	Yes
Legal direct award	<i>Greek airports</i>	- competitive, transparent, non-discriminatory and unconditional tender procedure - highest bidder	Yes (Assumption of breach)	Yes, if adherence to general principles in the Treaty
Illegal direct award	<i>BAI</i>	- Genuine need - Can market price be obtained?	No (No genuine need)	No (Breach of procedural rules and general principles)

In the case of *London Underground*, where the contract had been awarded following a negotiated tender procedure, the Commission concluded that the award did not confer an advantage on the winning tenderer since the award represented a competitive, transparent, non-discriminatory and unconditional tender procedure. Furthermore, the fact that there had been sufficient competition for the contract was a determining factor for the result that no advantage was conferred.

In the *Greek airports* case, the GC found that the award did not confer an advantage since it was competitive, transparent, non-discriminatory and unconditional. Furthermore, the Commission found that the Greek authorities had adhered to the general principles of the Treaty, and the measure thus did not constitute State aid. As argued above, this conclusion both applies for legal direct awards and for awards under the concession Directive.



*BAI* was arguably a case of illegal direct award. The benchmark for assessment in this case was not market price, but rather whether the purchase represented a genuine need for the authority. The reasons behind this conclusion from the GC will be further analysed in chapter 8 of this Thesis. For the purpose of this chapter, suffice it to conclude that in this case, whether or not market price had been obtained was not the decisive benchmark for the outcome.

Accordingly, market price is established through different means according to which procedure is analysed. However, it has to be emphasised that since the CJ has not yet taken the opportunity to rule on the question of whether State aid occurs when public contracts are awarded, the conclusions made in this chapter does not necessarily represent the final conclusion to this question. In other words, it remains to be seen whether the CJ will confirm the conclusions made above.

## **7.6 Conclusions**

The presence of advantage in relation to a public contract awarded following a tender procedure under the procurement Directives relates, in essence, to the question of whether the tender procedure, including the terms of the contract, reflects normal market conditions, and hence whether market price is obtained.

This chapter has analysed selected cases that represent legal and illegal direct award of public contracts, award by negotiated procedure and award of public contracts by concessions. As has been accounted for above, the question of whether the award of a contract under the procurement Directive amounts to State aid is unsolved in the case law from the CJ. Therefore, the analysis of this question has relied on judgments from the GC as well as Commission Decisions.

The analysis has shown that the benchmark for obtaining market price when public contracts are awarded is not unambiguous. Hence, it is necessary to take the concrete circumstances of the case into consideration when it is decided whether the award confers an advantage on the winning tenderer.

The Commission has given comprehensive guidance on its view. Subsequently, according to the Commission, the conduct of a competitive, transparent, non-discriminatory and unconditional tender procedure entails that market conditions are fulfilled and market price is paid.

From the Decision in *London Underground*, it can be derived that the Commission finds that the negotiated procedure with prior notification adheres to the requirement of competitive, transparent, non-discriminatory and unconditional tender procedure in so far as the call for competition, as well as the evaluation of the offers on the basis of the most economically advantageous tender, was fair to all bidders and applied in a consistent way with an appropriate methodology, and hence the procedures were sufficient for the purposes of an open tendering process. However, the analysis in section 7.2.4 shows that this conclusion could, in my opinion, be jeopardised, if State aid case law is taken into consideration. Accordingly, the assessment of whether market price is obtained differs when the assessment is made on the basis of the ‘avoided costs’ test, as accounted for in chapter 6, as opposed to the ‘change in award’ test, as applied by the Commission in the case of *London Underground*.

In the *Greek airports* case, the alleged advantage was also evaluated on the basis of whether the award was made pursuant to a competitive, transparent, non-discriminatory and unconditional tender procedure. Furthermore, adherence to the general principles in the Treaty was a contributing factor to the conclusion that no State aid was granted to the recipient.

In an analysis of the cases from the GC, it is uncertain whether the conduct of a competitive, transparent, non-discriminatory and unconditional tender procedure necessarily satisfies the requirements in Article 107(1) TFEU. The cases chosen for analysis do not provide a clear answer to this question. In *BAI*, the GC did not use market price as the benchmark for evaluation of whether the award represented normal market conditions. Rather, the decisive benchmark was whether a genuine need existed for the purchase.

In *SNCM*, the GC had to decide whether the award of a contract following a tender procedure could be classified as a SGEI. The case is interesting since it establishes a possible link between procurement law and State aid law for services that do not relate to SGEIs. Thus, the GC found that the service in question did not constitute a SGEI, but nevertheless assessed whether the fourth *Altmark* criterion was fulfilled – something which was unnecessary since the criteria set out in *Altmark* are cumulative. In this respect, it was discussed whether the fact that the GC

proceeded to consider the fourth *Altmark* criterion could be seen as an indication that the GC established a link between SGEIs and other services awarded under the procurement Directives. It was held that such a connection could not be established, and thus no connection between *Altmark* and services relating to non-SGEIs awarded under the procurement directives can be said to occur. However, it was concluded that the case gave important guidance regarding which factors could amount in State aid, including: The number of participants in the competition for the contract; the occurrence of a competitive advantage for the contract and factors which could dissuade interested tenderers from participating in the call for tenders, including short deadlines and numerous clauses.

In conclusion, this chapter has shown that the benchmark for assessment of whether State aid is granted when public contracts are awarded relies on the assessment of a number of indicators which are indicative for whether market price has been obtained.

## PART III

### The Market Economy Purchaser Principle (MEPP) as a possible benchmark for the assessment of advantage

This part discusses the applicability and application of the Market Economy Investor Principle (MEIP) to contracting authorities. The MEIP is used as a test to assess whether the actions of the State amounts to State aid. Under the MEIP, the actions of the State are compared to those of private operators in order to assess whether the private operator would have behaved as the State did. If the actions of the State cannot be compared to those of the private operator, State aid occurs. In this respect it will be discussed whether award of public contracts are comparable to a private operator. Furthermore, the MEPP will be introduced and discussed in order to assess the constituent elements of the test. This is done in order to discuss whether the MEPP provides a sufficient safeguard for the assessment of advantage when public contracts are awarded.

## Chapter 8

### **8. The benchmark for the assessment of advantage for purchasing activities: Introduction to the Market Economy Purchaser Principle (MEPP)**

This chapter analyses the benchmark for assessment of whether a transaction from the State involves an advantage for the recipient. As will be elaborated on below, it is not clear from the case law whether the benchmark applied to measures of State intervention in the form of investments (the Market Economy Investor Principle, hereafter MEIP) is applicable to contracting authorities when they purchase. On this basis, this chapter seeks to analyse how the assessment of advantage is conducted in relation to the award of public contracts.

Section 8.1 introduces the test used to assess whether public market participation confers an advantage on the recipient (the MEIP) and discusses the constituent elements of the principle. Then, section 8.2 discusses whether the MEIP is applicable to contracting authorities when it purchases from the market. It is submitted that the MEIP is not applicable to purchasing activities and thus not applicable to the awarding of public contracts. Finally, section 8.3 introduces an alternative test for assessment of whether an advantage has been conferred when public contracts are awarded. Section 8.3 also analyses how this test has been used by the CJEU.

#### **8.1 The Market Economy Investor Principle and other tests for market participation**

This section briefly introduces the Market Economy Investor Principle (MEIP), without going into too much detail with the concept. As the aim of the Thesis is to analyse in which situations the awarding of public contracts constitute State aid within Article 107(1) TFEU, this section will briefly discuss the MEIP in general before turning to analyse whether the MEIP is applicable to contracting authorities in section 8.2.

The MEIP is used as a possible benchmark for assessment of whether a transaction from the State involves an advantage for the recipient. In this respect, the MEIP is used as a test to assess whether the State has granted an economic advantage to an undertaking by not acting like a market economy operator. Thus, the decisive benchmark for the MEIP is whether the State has acted as a market economy operator would have acted in a similar situation. The reasoning

behind this comparison is that if the behaviour of the State can be compared to that of similar private economic operators operating under normal market conditions, then the economic transactions, carried out by the State, do not confer an advantage on the recipient.

The MEIP could be seen as a kind of ‘derogation’ from State aid rules, insofar as the MEIP allows Member States to provide State support without being subject to State aid control: if the transaction fulfils the MEIP, it is outside the scope of Article 107(1) TFEU. However, as held by Cyndecka, this aim is too narrow to comprise the concept of the MEIP:<sup>827</sup>

*“the MEIP aims to address the fact that the state acts both as a public authority and an entrepreneur. This ‘dual image of Janus’ results from Article 345 TFEU that encapsulates the principle of neutrality and equality of undertakings. They may thus freely decide on the size of the public and private sectors, set up, run and own public undertaking, privatize or nationalize them. Moreover, the Commission can neither favour nor discriminate public entrepreneurs because of their legal status. Yet, the principle of equality of public and private undertakings subject the former to competition law, thus also the State aid rules.”*<sup>828</sup>

As held above, the criterion of whether a transaction corresponds to normal market conditions originates from the principle of equal treatment between private and public undertakings provided in Article 345 TFEU:<sup>829</sup>

*“the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.”*

According to Article 345, TFEU neutrality exists with regard to national property law, and hence, state owned or controlled undertakings must be treated equally with private undertakings. The development of the MEIP has taken place in the context of the neutral position of the Treaty with regard to State ownership.<sup>830</sup>

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<sup>827</sup> M. Cyndecka, ‘The Market Economy Investor Test in EU State Aid Law: Applicability and Application’ (Wolters Kluwers 2016), 15.

<sup>828</sup> Footnotes omitted.

<sup>829</sup> See further chapter 6, section 6.1 of this Thesis.

<sup>830</sup> See also L. Hancher, ‘The general framework’ in L. Hancher, T. Ottervanger and P.J. Slot (eds), *EU State Aids* (Sweet & Maxwell 2012) 104.

The MEIP is often criticised for being inadequate or impracticable. As stated by Hancher:<sup>831</sup>

*“the major limitation to the test is that the state will inevitably be in a different position from any hypothetical private investor”*

One of the main criticisms of the MEIP is that it is difficult to compare the State to a private undertaking when it invests, because the State is in possession of different and more extensive resources than a private undertaking, e.g. in relation to the funds at its disposal.<sup>832</sup> This argument could imply that the State can never be compared to a private undertaking and thus, the MEIP is, by definition, inapplicable. However, there might be dangers in taking the comparison too far. As held by Khan and Borchardt:<sup>833</sup>

*“Clearly, in assessing any given situation, the position of the putative private investor has to be considered in relation to the same transaction, under the same conditions as that entered into by the State [...]. Less obvious however is the extent to which the putative private investor may be attributed with characteristics the actual State investor possesses by reason of being the State. The danger in carrying the parallel too far is that because the State is not subject to the constraints that inhibit the real private investor, the test may cease to be realistic.”*<sup>834</sup>

However, an alternative benchmark has not been developed, possibly because such an alternative is difficult to find.

The MEIP relates to situations in which the State makes a public investment in an undertaking. In this respect, investments, which a market operator would not have carried out under normal market economy conditions, amount to an advantage within Article 107(1) TFEU. The *Meura*<sup>835</sup> and *Boch II*<sup>836</sup> cases are known as the first cases in which the CJEU approved the MEIP.<sup>837,838</sup> In

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<sup>831</sup> L. Hancher, ‘The general framework’ in L. Hancher, T. Ottervanger and P.J. Slot (eds), *EU State Aids* (Sweet & Maxwell 2012) 105.

<sup>832</sup> As emphasized by AG Lenz in his Opinion in *Kingdom of Belgium v Commission of the European Communities (Meura)*, Case 234/84, EU:C:1986:302.

<sup>833</sup> See also N. Khan and K-D. Borchardt, ‘The Private Market Investor Principle: Reality Check or Distorting Mirror?’ in *EC State Aid Law, Liber Amicorum Francisco Santaolalla Gadea* (Wolters Kluwer 2008), 113.

<sup>834</sup> Footnote omitted. Keying mistake corrected.

<sup>835</sup> *Meura*, Case 234/84.

<sup>836</sup> *Kingdom of Belgium v Commission of the European Communities (Boch II)*, Case 40/85, EU:C:1986:305.

<sup>837</sup> On the same note see J. J. Piernas López, ‘*The Concept of State Aid Under EU Law – From internal market to competition and beyond*’, (Oxford University Press 2015), 75 and M. Cyndecka, ‘*The Market Economy Investor Test in EU State Aid Law: Applicability and Application*’ (Wolters Kluwers 2016), 23.

<sup>838</sup> The first sign of what later became the MEIP was introduced by the Commission in 1984 in a letter to the Member States concerning holdings by public authorities, see SG(84) D/11839 published in, ‘*Competition Law in the European Communities*, volume IIA, Rules applicable to State Aid (1999), 133. See also N. Khan and K-D.

*Meura* and *Boch II*, the MEIP was considered by the CJEU in two situations where the State had invested in unprofitable undertakings. In *Meura*, the CJEU held that:<sup>839</sup>

“an appropriate way of establishing whether such a measure is a state aid is to apply the criterion which was mentioned in the commission 's decision [...], of determining to what extent the undertaking would be able to obtain the sums in question on the private capital markets . In the case of an undertaking whose capital is held by the public authorities , the test is , in particular , whether in similar circumstances a private shareholder , having regard to the foreseeability of obtaining a return and leaving aside all social , regional-policy and sectoral considerations , would have subscribed the capital in question . ”

Neither in *Meura* nor in *Boch II* did the CJEU find that the State fulfilled the requirements of the MEIP, i.e. behaved like a private market operator acting in similar circumstances under normal market conditions.<sup>840</sup>

The CJEU has expanded the MEIP to other areas of State participation and has developed modified tests in other areas where the State is involved in market activities, including situations where the State acts as creditor;<sup>841</sup> seller;<sup>842</sup> guarantor;<sup>843</sup> reinsurer;<sup>844</sup> lender;<sup>845</sup> borrower;<sup>846</sup> vendor;<sup>847</sup> and supplier.<sup>848,849</sup>

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Borchardt, ‘The Private Market Investor Principle: Reality Check or Distorting Mirror?’ in *EC State Aid Law, Liber Amicorum Francisco Santaolalla Gadea* (Wolters Kluwer 2008), 112.

<sup>839</sup> *Meura*, Case 234/84, para 14.

<sup>840</sup> See Commission Decision 84/496/EEC of 17 April 1984 on aid which the Belgian Government has granted to an undertaking at Tournai manufacturing equipment for the food industry, OJ L 276, 19.10.1984, p. 34–36 and Commission Decision 85/153/EEC of 24 October 1984 concerning aid which the Belgian Government granted in 1983 to a ceramic sanitary ware and crockery manufacturer, OJ L 59, 27.2.1985, p. 21–23.

<sup>841</sup> The first judgment was the *Kingdom of Spain v Commission of the European Communities (Tubacex)*, C-342/96, EU:C:1999:210. The *Tubacex* case has been confirmed by the CJEU in later cases, e.g. *Hijos de Andrés Molina, SA (HAMSA) v Commission of the European Communities*, Case T-152/99, EU:T:2002:188; *Lenzing AG v Commission of the European Communities*, Case T-36/99, EU:T:2004:312; *Kingdom of Spain v Commission of the European Communities (GEA)*, Case C-276/02, EU:C:2004:521; *Kingdom of Spain v Commission of the European Communities*, Case C-525/04 P, EU:C:2007:698. For a recent judgment see, *Frucona Košice a.s. v European Commission*, C-73/11 P, EU:C:2013:32.

<sup>842</sup> See Commission Communication on State aid elements in sales of land and buildings by public authorities, (97/C 209/03) where the Commission states in point 1, that the conduct of a “well-publicized, open and unconditional bidding procedure, comparable to an auction” is a means to ensure that market value has, by definition, been met and consequently does not contain State aid. If a bidding procedure has not been held, the Commission has held that an independent expert evaluation prior to the sale can be used to ensure market terms. The CJEU has approved both the bidding procedure and the independent expert evaluation as a means to achieve market terms, see *Commission of the European Communities v French Republic*, C-214/07, EU:C:2008:619, paras 59-60.

<sup>843</sup> *Stardust Marine*, C-482/99.

<sup>844</sup> See *Servizi assicurativi del commercio estero SpA (SACE) and Sace BT SpA v European Commission*, T-305/13, EU:T:2015:435. The case has been appealed and is currently pending, see Case C-472/15 P, Appeal brought on 4



## 8.2 How does the MEIP apply to the State?

As held above, the aim underlining the applicability of the MEIP is to treat private and State owned or controlled undertakings in an equal manner. However, this point of departure comes with one important precaution, namely that the equal treatment of private and State owned or controlled undertakings only applies insofar as the State acts as an operator on the market.<sup>850</sup>

It has been held by the CJEU that a distinction should be made between the State acting by ‘exercising public power’<sup>851</sup> and the State acting ‘in the capacity as a public authority’.<sup>852</sup>

In *Commission v Italy*<sup>853</sup> the CJEU emphasised that the State can act either by exercising public powers or by carrying on economic activities of industrial or commercial nature by offering goods and services on the market:<sup>854</sup>

*“[...] the state may act either by exercising public powers or by carrying on economic activities of an industrial or commercial nature by offering goods and services on the market. In order to make such a distinction, it is therefore necessary, in each case, to consider the activities exercised by the state and to determine the category to which those activities belong.”*<sup>855</sup>

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September 2015 by Servizi assicurativi del commercio estero SpA (SACE) and Sace BT SpA against the judgment delivered by the General Court (Seventh Chamber) on 25 June 2015 in Case T-305/13 *SACE and Sace BT v Commission*.

<sup>845</sup> See cases *Région Nord-Pas-de-Calais (T-267/08)* and *Communauté d’agglomération du Douaisis (T-279/08) v European Commission*, joined cases T-267/08 and T-279/08, EU:T:2011:209; *Cityflyer Express Ltd v Commission of the European Communities*, T-16/96 and *DSG Dradenauer Stahlgesellschaft mbH v Commission of the European Communities*, T-234/95, EU:T:2000:174.

<sup>846</sup> See *Poste Italiane SpA v European Commission*, T-525/08, EU:T:2013:481. Not yet published.

<sup>847</sup> See *Bundesverband deutscher Banken eV v European Commission*, T-163/05, EU:T:2010:59.

<sup>848</sup> *Kwekerij Gebroeders van der Kooy BV and others v Commission of the European Communities*, joined cases 67, 68 and 70/85, EU:C:1988:38.

<sup>849</sup> See further M. Cyndeka, is ‘*The Market Economy Investor Test in EU State Aid Law: Applicability and Application*’ (Wolters Kluwers 2016), 225 ff. It is outside the scope of this Thesis to analyse all the subtypes applied by the CJEU.

<sup>850</sup> See e.g. *Kingdom of Spain v Commission of the European Communities*, Joined cases C-278/92, C-279/92 and C-280/92, EU:C:1994:325, para 22; *Federal Republic of Germany v Commission of the European Communities*, C-334/99, EU:C:2003:55, para 134. See also Opinion of Mr. Advocate General delivered on 14 January 2003 in C-280/00 *Altmark*, EU:C:2003:13, point 20.

<sup>851</sup> *Commission of the European Communities v Italian Republic*, C-118/85, EU:C:1987:283, paras 7-8.

<sup>852</sup> *Corinne Bodson v SA Pompes funèbres des régions libérées*, C-30/87, EU:C:1988:225, para 18.

<sup>853</sup> *Commission v Italy*, 118/85, EU:C:1987:283.

<sup>854</sup> *Ibid.*, para 7.

<sup>855</sup> Emphasis added.

Accordingly, it is necessary to distinguish between the different roles of the State and to assess, on a case-to-case basis, which category the activity belongs to.

In *EDF*<sup>856</sup> the CJ had to assess the State's dual role in relation to a State-owned electricity company (EDF). The facts giving rise to the case was a Decision<sup>857</sup> from the Commission which concluded that a capital injection following a reconstruction of EDF's accounts amounted to State aid.

In its Decision, the Commission argued that the MEIP was not applicable as a benchmark for assessment of aid, since the aid measure in question concerned a tax measure and consequently it was an exercise of public authority.<sup>858</sup> The Commission supported its argument on the fact that the measure was adopted by law, and thus, according to the Commission, it was an exercise of public powers by the French State. Following the Commission Decision, EDF brought an action for annulment before the GC<sup>859</sup>.

The GC disagreed with the Commission and held that the measure should not be regarded as an exercise of public powers but rather that it was an accounting measure with tax implications.<sup>860</sup> Accordingly, the GC found that the measure in question concerned an activity which could be compared to activities normally performed by private operators. Consequently, the GC found that the Commission was obliged to apply the MEIP in the case.<sup>861</sup> However, the conclusion from the GC did not concern whether the MEIP was actually fulfilled in the case, but merely regarded the fact that the MEIP was applicable to the case. The GC emphasised that the fact that the alleged aid measure was adopted by law was not a sufficient reason to allow the Commission to refuse to compare the measure to that of a private operator:<sup>862</sup>

*“[...] the mere fact that the claim held by the French State against that undertaking is fiscal in nature and **the sole fact that the French State used legislation do not allow the Commission to refuse to ascertain whether, in similar circumstances, a private investor could have been***

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<sup>856</sup> *European Commission v Électricité de France (EDF)*, C-124/10 P, EU:C:2012:318.

<sup>857</sup> Commission Decision 2005/145/EC of 16 December 2003 *on the State aid granted by France to EDF and the electricity and gas industries*, OJ L 49, 22.2.2005, p. 9–29.

<sup>858</sup> Commission Decision 2005/145/EC of 16 December 2003 *on the State aid granted by France to EDF and the electricity and gas industries*, OJ L 49, 22.2.2005, p. 9–29, points 89–97.

<sup>859</sup> *Électricité de France (EDF) v European Commission*, T-156/04, EU:T:2009:505.

<sup>860</sup> *Ibid.*, paras 243–245.

<sup>861</sup> *Ibid.*, paras 254 and 263.

<sup>862</sup> *Ibid.*, para 247.

*persuaded to inject the same amount of capital and, therefore, whether the capital was provided by the State in circumstances corresponding to normal market conditions.*”<sup>863</sup>

The Commission appealed the case and brought an action for annulment before the CJ.

In its judgment, the CJ discussed the applicability of the MEIP and emphasised that:<sup>864</sup>

*“[...] the roles of the State as shareholder of an undertaking, on the one hand, and of the State acting as a public authority, on the other, must be distinguished [...]*

***The applicability of the private investor test ultimately depends, therefore, on the Member State concerned having conferred, in its capacity as shareholder and not in its capacity as public authority, an economic advantage on an undertaking belonging to it.***”<sup>865</sup>

Accordingly, the applicability of the MEIP depends on whether the State in its capacity as shareholder (which was the specific ambit of the case) had conferred an advantage on the undertaking.

Regarding the applicability of the MEIP in the specific case, the CJ held:<sup>866</sup>

*“As regards the question **whether the applicability of the private investor test could be ruled out in the present case simply because the means employed by the French State were fiscal, it should be recalled that, under Article 87(1) EC [now 107(1) TFEU], any aid granted through State resources — in any form whatsoever — which, in terms of its effects, distorts or threatens to distort competition is incompatible with the common market in so far as it affects trade between Member States [...]***”<sup>867</sup>

In this respect, the MEIP is not an exception that applies where the Member States request it. Rather:<sup>868</sup>

*“[...] **where it is applicable, that test is among the factors which the Commission is required to take into account for the purposes of establishing the existence of such aid.***”<sup>869</sup>

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<sup>863</sup> Emphasis added.

<sup>864</sup> *European Commission v Électricité de France (EDF)*, C-124/10 P, EU:C:2012:318, paras 80-81.

<sup>865</sup> Emphasis added.

<sup>866</sup> *European Commission v Électricité de France (EDF)*, C-124/10 P, para 88.

<sup>867</sup> Emphasis added.

<sup>868</sup> *European Commission v Électricité de France (EDF)*, C-124/10 P, para 103.

When analysing the conclusion from the CJ, the following comments can be made.<sup>870</sup> Firstly, the case could be analysed to mean that the CJ is expanding the scope of applicability of the MEIP to entail situations in which the State exercises public powers. Furthermore, the case could be interpreted to blur the boundaries of the MEIP by including the test to situations of fiscal matters. However, the message from the CJ in *EDF* could also be interpreted to entail that the MEIP is not expanded. Thus, *EDF* should merely be seen as a reinsurance of the fact that a State measure should be assessed according to its effects rather than its form. Accordingly, the conclusion from the CJ leads to the legal outcome that State aid rules cannot be circumvented by the fact that a measure is disguised as a legislative act, if it, in fact, can be compared to an activity performed by a private operator.

In the cases cited above, the State acted as shareholder or investor. However, for the purpose of the research question asked in this Thesis, it is relevant to discuss how the MEIP applies to contracting authorities. This will be done in the following.

### **8.2.1 Applicability of the MEIP to contracting authorities**

When public contracts are awarded, the contracting authority purchases goods or services. When the State makes a purchase, which is the situation considered in this Thesis, the partaking in commercial activities is arguably different than from situations where the State invests, sells, or gives credit etc. Therefore, it is relevant to analyse whether the MEIP applies to contracting authorities when they purchase goods or services.

The assessment of whether aid is granted when the contracting authority purchases goods or services is not whether the transaction represents an undervalue, as i.e. is the case where the State sells assets or land. Rather, the assessment depends on whether the State has paid too much for the goods or services and, thus, whether the transaction represents an overvalue. Accordingly, in situations where the State awards public contracts for the purchase of goods or services, market price equals a situation where the contracting authority has not paid an excessive price.

This Thesis analyses when the award of public contracts constitutes State aid within Article 107(1) TFEU. Therefore, the following focuses on situations where contracting authorities

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<sup>869</sup> Emphasis added.

<sup>870</sup> See also A. Bartosch 'Case Note on *EDF v Commission*' 2010 (9) 3, *EStAL*, 679-683.

award public contracts for the purchase of goods and services within the scope of the procurement directives. Hence, the assessment of aid, as discussed below, relates to contracting authorities within the procurement directives.

One of the prerequisites of the applicability of the MEIP and its subtypes is that the State acts equivalent to a normal economic operator, e.g. through public ownership or shareholdings in commercial undertakings etc. The same situation applies for the contracting authority, which means that the MEIP only applies to contracting authorities insofar as it can be compared to a normal economic operator.

Hence, the applicability of the MEIP to contracting authorities relates, in essence, to the question of whether the contracting authorities act in the capacity of a public authority or in the capacity of an economic operator when they award public contracts. This question has been considered by the CJEU in several cases, which have implications for the applicability of the MEIP to contracting authorities.<sup>871</sup>

In this regard, it has to be discussed whether the MEIP is applicable to situations in which the State makes a purchase or whether a different benchmark exists. In this connection, the question arises whether the contracting authorities are always limited to performing non-economic activities, when they perform obligations under the procurement directives. Or put in other words; whether the contracting authority only acts in the capacity of public authority when they award public contracts.

#### 8.2.2.1 *FENIN*

The first case chosen for analysis is *FENIN*<sup>872</sup>. This case is relevant for the research question asked in this Thesis, as it deals with the possible dual role of the contracting authority when a purchase is made. Thus, in this case, the CJEU was asked to decide whether a public body could be considered an undertaking and hence fall within the scope of the competition rules in the Treaty.

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<sup>871</sup> These cases are considered immediately below.

<sup>872</sup> *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v Commission of the European Communities*, C-205/03 P. See also chapter 4, section 4.3

Essentially, the case concerns whether the purchasing activity of the contracting authorities is, in itself, an economic activity. *FENIN* has been discussed widely in academic literature,<sup>873</sup> and with good reason. As will be elaborated on below, the implications of the case are far-reaching and the conclusions reached by the CJEU are, to some extent, questionable.

The background of the case was the assertion of FENIN (a trade association operating in the medical goods and equipment sector) that SNS (26 public bodies which run the national health system in Spain) had breached competition law, and more specifically Article 102 TFEU,<sup>874</sup> by neglecting to pay their debt to the members of FENIN. According to FENIN, this was to be considered an abuse of SNS' dominant position under Article 102 TFEU.

The case arose before the CJ as an appeal against a judgment from the GC<sup>875</sup>, which held that the Commission was correct in concluding<sup>876</sup> that the bodies managing the SNS were not acting as undertakings when they purchased medical goods and equipment from the members of FENIN.

In the case under appeal, the GC emphasised that the definition of undertaking under EU competition law “*covers any entity engaged in an economic activity, regardless of the legal status of that entity and the way in which it is financed*”.<sup>877</sup> However, the GC emphasised that the nature of the purchasing activity should be determined according to whether or not the *subsequent* use of the purchased goods amounts to an economic activity:<sup>878</sup>

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

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<sup>873</sup> See e.g. contributions by L.B. Sierra, ‘Exclusive Rights and State Monopolies under EC Law, Article 86 (former Article 90 of the EC Treaty)’. (Oxford University Press 1999); V. Louri, ‘The FENIN Judgment: The Notion of Undertaking and Purchasing Activity.’ 2005, (32) 1, *Legal Issues of Economic Integration*, 87-97; M. Krajewski and M. Farley, ‘Non-economic activities in upstream and downstream markets and the scope of competition law after FENIN’ 2007, (32) 1, *E.L. Rev.*, 111-124; E. Szyssczak, ‘Modernising Healthcare: Pilgrimage for the Holy Grail?’ in M. Krajewski, U. Neergaard and J. van de Gronden (eds), *The Changing Legal Framework for Services of General Interest in Europe - Between Competition and Solidarity* (TMC Asser Press 2009), 191-213.

<sup>874</sup> *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v Commission of the European Communities*, C-205/03 P, para 7.

<sup>875</sup> *Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental (FENIN) v Commission of the European Communities*, T-319/99.

<sup>876</sup> As considered by the Commission in its Decision, Commission's decision of 26 August 1999 (SG(99) D/7.040).

<sup>877</sup> *Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental (FENIN) v Commission of the European Communities*, T-319/99, para 25.

<sup>878</sup> *Ibid.*, paras 36-37.

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

*Consequently, **an organisation which purchases goods** — even in great quantity — not for the purpose of offering goods and services as part of an economic activity, but in order to use them in the context of a different activity, such as one of a purely social nature, **does not act as an undertaking simply because it is a purchaser in a given market.** Whilst an entity may wield very considerable economic power, even giving rise to a monopsony, it nevertheless remains the case that, if the activity for which that entity purchases goods is not an economic activity, it is not acting as an undertaking for the purposes of Community competition law and is therefore not subject to the prohibitions laid down in Articles 81(1) EC [now 101(1) TFEU] and 82 EC [now 102 TFEU].”<sup>879</sup>*

In *FENIN*, the SNS purchased medical goods and equipment to be used in the public health care sector and this led the GC to conclude that the subsequent use of the procured goods was of a purely social nature, and could therefore not be considered economic.<sup>880</sup>

*FENIN* subsequently appealed the judgment from the GC. The CJ confirmed the conclusions from the GC and emphasised that the GC was correct in concluding that the activity of purchasing goods and services cannot automatically be dissociated from the subsequent use to which they are put.<sup>881</sup> Subsequently, the CJ dismissed the appeal and confirmed the conclusions of the GC.<sup>882</sup>

*FENIN* has been confirmed in *Selex*<sup>883</sup>, where the CJEU held that the development of technical standards was not considered an economic activity.<sup>884</sup>

#### 8.2.2.1.1 Comments

Arguably, the legal consequence of *FENIN* is that all purchasing activity is excluded from the definition of economic activity, and therefore, the concept of undertaking. The decisive element

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<sup>879</sup> Emphasis added.

<sup>880</sup> *Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental (FENIN) v Commission of the European Communities*, T-319/99, paras 35-37.

<sup>881</sup> *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v Commission of the European Communities*, C-205/03 P, para 26.

<sup>882</sup> *Ibid.*, paras 27-29.

<sup>883</sup> *SELEX*, C-113/07 P.

<sup>884</sup> This case is analysed in chapter 4, see section 4.3.

in the assessment of whether or not the activity performed is economic in nature is whether the subsequent use can be considered an economic activity. Thus, if the subsequent use of the purchased goods or services is connected to the role of public authority, the activity cannot be considered economic in nature. Neither the GC nor the CJ discussed when the subsequent use of the goods or services should be considered economic in nature<sup>885</sup> and therefore this question is unresolved in the case law. In this respect, it must be assumed that in order to fall within the concept of exercise of public powers, the subsequent use of the purchase must be for a public purpose.

However, it has to be emphasised that no requirement exists under procurement law as to whether the purchases made should be used for a public purpose. This might have an effect on the conclusions made above, as will be elaborated on in the following

#### 8.2.2.2.2 *Purchases not made for a public purpose*

The conclusion drawn from the above is that purchasing activities cannot be dissociated from the subsequent use *a priori*. Hence, if the subsequent use of the purchase is made for a public purpose, then the purchase is not considered an economic activity within the competition rules. However, as will be discussed below, no requirement exists under procurement law that the purchase made must be used for a public purpose. In this respect, it should be discussed how this affects the conclusions from *FENIN*.

No requirement exists under public procurement law as to whether the purchase made by the contracting authority is used for a public purpose. This can be seen from Article 1 (2) of the public procurement Directive:

*“Procurement within the meaning of this Directive is the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, **whether or not the works, supplies or services are intended for a public purpose.**”*<sup>886</sup>

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<sup>885</sup> This question arose when the case was brought before the GC, where it was argued that hospitals in Spain provide private care for foreigners and others not covered by the SNS. However, this plea was dismissed, because the argument was raised too late in the proceedings, see *Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental (FENIN) v Commission of the European Communities*, T-319/99, paras 41-45.

<sup>886</sup> Emphasis added.



The chosen phrasing in Article 1 (2) of the public procurement Directive should probably be seen as an attempt to widen the scope of application of the directive to cover a wide range of contracts.<sup>887</sup>

However, the formulation in Article 1 (2) of the public procurement Directive can arguably have the effect of blurring the conclusions derived from *FENIN*. In this respect, it could be argued that if there is no requirement under the procurement directives that the purchases made are for a public purpose, it cannot automatically be presumed that one specific purpose lies behind the purchase. This is important for the assessment of economic activity: in *FENIN* it was held that the subsequent use should determine whether the activity is economic in nature. Hence, if no public purpose lies behind the purchasing activity; the activity is economic in nature.

Consequently, it could be argued that unless the contracting authority can demonstrate the public purpose of the purchase, it can be presumed that the purchase is not made for a public purpose. On these grounds, it could be argued that where no explicit public purpose is accounted for, the purchase can be dissociated from the subsequent use. Thereby, the purchase can be deemed to be an economic activity.

The conclusion as to whether or not the contracting authorities perform non-economic activities, when they purchase goods or services, has implications for the applicability of the MEIP. As held above, the MEIP is only applicable to situations in which the State acts in accordance with a normal market operator. Consequently, the MEIP is not applicable as a benchmark for assessment of advantage in situations where the purchase made by the contracting authority cannot be dissociated from the subsequent use. To my knowledge, there are no examples of cases where the purchased goods or services have been dissociated from the subsequent use. However, as will be discussed below, the implications of *FENIN* need to be assessed in a wider perspective, taking other judgments into account. This could change the legal consequences that this case brought with it. The following will discuss a recent case from the GC which arguably has implications on the conclusions made above.

#### 8.2.2.3 *TenderNed*

In a recent case concerning the launch of an e-procurement platform, *TenderNed*<sup>888</sup>, the GC had to consider another aspect of the question whether contracting authorities act in the capacity of

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<sup>887</sup> The concept of public contracts is further analysed in chapter 2 in this Thesis.

public powers when they award public contracts. The question before the GC concerned whether obligations flowing from the procurement directives were to be considered economic in nature and thus falling within the scope of the competition rules in the Treaty.

Even though the subject matter of *TenderNed* initially seems equivalent to what the CJEU had already stated in *FENIN*, *TenderNed* possibly has implications for the assessment of whether contracting authorities act as public authorities when they award public contracts. As will be elaborated on below, the conclusions to be drawn from *TenderNed* are not clear-cut and this means that several possible legal consequences can be derived from the case. Firstly, section 8.3 will discuss the possibility that *TenderNed* is an attempt to correct the implications derived from *FENIN*. Secondly, the possibility that *TenderNed* could be seen as a confirmation of *FENIN* will be discussed. But first, this section will discuss and analyse the case.

The case of *TenderNed* concerned whether or not the financing provided by the Kingdom of the Netherlands for the creation and introduction of the electronic procurement (e-procurement) platform TenderNed constituted unlawful State aid. TenderNed was a platform providing a number of functionalities, made available to contracting authorities free of charge. The platform included:<sup>889</sup>

- *a publication module, which can be used for the publication of tender notices as well as associated tender documents ('the publication module');*
- *a tendering (submission) module, offering functionalities such as the exchange of questions and answers, and the uploading and downloading of tenders and bids. That module also includes a 'virtual company' section in which economic operators can introduce and manage their data ('the submission module')*
- *an e-guide, which supports interested parties in using TenderNed ('the e-guide').*

On the 6<sup>th</sup> of April 2012, four companies, which offered various services relating to e-procurement, lodged a complaint to the Commission seeking a declaration that the financing of the e-procurement platform constituted unlawful aid. In a preliminary letter, the Commission

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<sup>888</sup> *Aanbestedingskalender BV and Others v European Commission (TenderNed)*, T-138/15, EU:T:2017:675.

<sup>889</sup> *TenderNed*, T-138/15, para 3.

found that the measure in question did not involve State aid *a priori*.<sup>890</sup> Following the preliminary letter, the complainants requested the Commission for a formal Decision.

In its Decision,<sup>891</sup> the Commission argued, in essence, that the financing of TenderNed was related to the contracting authorities' activities in relation to their fulfilment of their obligations under the procurement directives. TenderNed's activities derived entirely from the need to support the public procurement activities of the contracting authorities and the obligations of the Kingdom of the Netherlands under the procurement directives'.<sup>892</sup> The Commission concluded that "*since contracting authorities acted in their capacity as public authorities when complying with the statutory obligations laid down by the Procurement Law, TenderNed should be regarded, by extension, as acting in a similar capacity, providing those authorities with the means to ensure that those obligations are complied with.*"<sup>893</sup>

Since TenderNed's activities fell under the capacity of public authorities, no economic activity was carried out and, thusly, the funding of the platform did not constitute State aid within the meaning of Article 107(1) TFEU.<sup>894</sup>

Following the Commission's Decision, the applicants brought an action before the GC, seeking annulment of the Decision.

The applicants held that the Decision was an infringement of Article 107(1) TFEU on the grounds that the Commission made a manifest error of assessment and an error of law by finding that the services provided by TenderNed could be regarded as non-economic services of general interest.<sup>895</sup>

The CJ emphasised that according to settled case law, any activity consisting in offering goods and services on a given market is an economic activity,<sup>896</sup> whereas the exercise of public powers are not of an economic nature. Thus, competition rules do not apply.<sup>897</sup>

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<sup>890</sup> *Ibid.*, para 10.

<sup>891</sup> Commission Decision C(2014) 9548 final of 18 December 2014 on State aid SA.34646 (2014/NN) (ex 2012/CP), The Netherlands E-procurement platform TenderNed.

<sup>892</sup> *TenderNed*, T-138/15, para 17.

<sup>893</sup> *Ibid.*, para 17.

<sup>894</sup> *Ibid.*

<sup>895</sup> *Ibid.*, para 27.

<sup>896</sup> *Ibid.*, para 32.

<sup>897</sup> *Ibid.*, para 33.

It follows that a contracting authority may be regarded as an undertaking performing economic activities for only a part of its activities.<sup>898</sup>

The CJ then emphasised that the assessment of whether or not TenderNed was performing an economic activity could not be made for each activity in isolation. Rather, “*the functionalities offered by TenderNed must therefore be understood as being linked to each other and forming different facets of the same activity*”.<sup>899</sup> Accordingly, the CJ examined whether TenderNed’s activities as a whole were connected with the exercise of public powers.

The CJ then held that when contracting authorities initiate a tender procedure and comply with the procurement rules, they are acting as public authorities.<sup>900</sup> Furthermore, the CJ emphasised that TenderNed were providing its services free of charge, which, according to the CJ, was a “*relevant, albeit not sufficient, factor for the purpose of determining whether or not an activity is of an economic nature*”.<sup>901</sup>

These arguments led the CJ to conclude that the activities of TenderNed were closely linked to the activity of public procurement by contracting authorities and are therefore connected to the exercise of public powers.<sup>902</sup>

The CJ emphasised that:<sup>903</sup>

*“according to the procurement directives, the Member States are required to ensure that an adequate system is in place on their territory so as to guarantee that public procurement is carried out electronically, but they are free to choose the means of achieving that objective [...]”*

#### 8.2.2.3.1 Comments

The *TenderNed* case touches on an important aspect of the different roles which the contracting authority fulfils when it awards public contracts. The case shows that the contracting authority carries out non-economic activities when they comply with their obligations under the procurement directives. Accordingly, this case shows that the activities of a contracting authority connected to the fulfilment of obligations under the procurement directives are to be

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<sup>898</sup> *Ibid.*, para 34.

<sup>899</sup> *Ibid.*, para 52.

<sup>900</sup> *Ibid.*, para 57.

<sup>901</sup> *Ibid.*, para 58.

<sup>902</sup> *Ibid.*, para 59.

<sup>903</sup> *Ibid.*, para 69.

considered as activities connected with the exercise of public powers. In the present case, the requirements of the directives were connected to an obligation for the Member States of ensuring that public procurement is carried out electronically. Thus, arguably, this case shows that general obligations flowing from the procurement directives should be considered as the exercising public powers with the result that competition rules do not apply to such activities.

### **8.2.3 Preliminary findings**

The conclusions from *FENIN* and *TenderNed* show that the activities performed by the contracting authorities are not considered economic in nature. Ergo, the MEIP is not applicable to situations where the contracting authority awards public contracts.

This conclusion has great implications, as it prevents the MEIP to be used as a benchmark for deciding whether State support, in the form of public contracts, confers an advantage on the recipient.

The following will analyse and discuss how the implications of the cases discussed above should be understood. In this respect, it is argued that *FENIN* and *TenderNed* could be seen as forming part of a doctrine, which is intended to separate purchasing activities from the non-economic activities performed by contracting authorities.

### **8.3. The doctrine of separability**

As stated above, *FENIN* was confirmed in *Selex*, where the CJEU held that the activities performed by Eurocontrol were not considered an economic activity.<sup>904</sup> Thus, when reading the cases of *FENIN*, *Selex* and *TenderNed*, it could be concluded that purchasing activities performed by contracting authorities are always non-economic in nature. However, the following will present and discuss a possible alternative to this conclusion, namely that the cases of *FENIN*, *Selex* and *TenderNed* could be seen as an emerging doctrine that allows for some of the contracting authorities' activities to be considered economic in nature.

The case of *Selex* reveals some interesting arguments made by the GC, which have implications for the assessment of economic activity. Consequently, the case of *Selex* will be discussed below with an emphasis on how the GC argued the case.

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<sup>904</sup> *SELEX*, C-113/07 P.

In *Selex*, the CJEU had to consider whether Eurocontrol was in breach of Articles 102 and 106 TFEU. The European Organisation for the Safety of Air Navigation (Eurocontrol) is an international organisation working in the field of safe air navigation. The question in the case was whether or not Eurocontrol could be considered an undertaking, performing economic activities and thus falling under the competition rules.

An interesting aspect of the *Selex* judgment was the conclusion made by the GC that some of the activities of Eurocontrol were economic activities. The GC held that the activity of assisting national administrations with technical advice in the process of preparing tendering procedures could be separated from Eurocontrol's non-economic activities<sup>905</sup>:

*“first of all, it should be pointed out that the activity of assisting the national administrations is **separable** from Eurocontrol's tasks of air space management and development of air safety. Although the assistance may serve the public interest by maintaining and improving the safety of air navigation, **that relationship is only a very indirect one**, since the assistance provided by Eurocontrol only covers technical specifications in the implementation of tendering procedures for ATM equipment and therefore only impacts on the safety of air navigation by means of those tendering procedures. **Such an indirect relationship does not imply that there is a necessary link between the two activities**. In that respect, the Court recalls that Eurocontrol only offers assistance in that field on the request of the national administrations. **The activity of assistance is therefore in no way an activity which is essential or even indispensable to ensuring the safety of air navigation.**”*<sup>906</sup>

Accordingly, the GC held that the activities related to assistance of technical advice were economic in nature, as they only represented an indirect relation to the activities constituted by the exercise of public powers.

The conclusion from the GC is interesting, as it implies that a distinction can be made between the activities performed by a contracting authority (State body). However, this finding was not upheld by the CJ, which found that the activities performed by Eurocontrol should be considered as a whole. Thusly, all of Eurocontrol's activities constituted activities connected with public powers.<sup>907</sup>

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<sup>905</sup> *SELEX*, T-155/04, para 86.

<sup>906</sup> Emphasis added.

<sup>907</sup> *SELEX*, C-113/07 P, paras 71-79.

In *TenderNed*, the GC argued that the activities of a contracting authority can be separated into individual activities. As held above, the GC concluded that the activity of ensuring that e-procurement is actually carried out forms part of exercising public powers.<sup>908</sup> Consequently, the GC found that activities connected to obligations flowing from the procurement directives should be considered non-economic.

*TenderNed* implies that a distinction should be made between purchasing activities and activities flowing from the procurement directives. In this respect, the conclusions from the GC could be interpreted to mean that the activities flowing from the procurement directives are linked to the performance of public authority. This could, in turn, be analysed to mean that activities, which are not performed as part of obligations flowing from the procurement directives, are not considered public authority tasks. This could imply that that GC is suggesting that other activities, such as purchasing activities, fall outside the scope of public authority. In this respect, *TenderNed* could be seen as building on the arguments from the GC in the case of *Selex*.

Arguably, the cases of *FENIN*, *Selex*, and *TenderNed* are signs of an iterative process leading to the formation of a doctrine of separability. The ‘doctrine of separability’ implies that the activities of the contracting authority are either linked to purchasing activities or activities in relation to obligations flowing from the procurement directives. At its present stage, purchasing activities cannot be assessed for each activity in isolation, as was suggested by the GC in *Selex*. Rather, activities related to purchasing activities should be assessed together as a whole.

### **8.3.3 The separability doctrine’s implications on the applicability of the MEIP to contracting authorities**

As stated above, the ‘doctrine of separability’ implies that a distinction needs to be made regarding the activities performed by contracting authorities when they award public contracts. Accordingly, a distinction needs to be made between activities in relation to purchasing (as was the legal consequence derived from *FENIN*) and activities in relation to the fulfilment of obligations under the procurement directives (as was the legal consequence derived from *TenderNed*).

In this respect, one possible conclusion to the doctrine could be that the contracting authorities act in the capacity of public authority with regards to all aspects of the activities flowing from

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<sup>908</sup> *TenderNed*, T-138/15, paras 48,59-60 and 70-71.

the procurement rules, i.e. with regards to general obligations flowing from the directives as well as the purchasing activity. This line of reasoning implies that *TenderNed* should be regarded as a confirmation of *FENIN*.

However, another possible conclusion needs to be discussed, namely the possibility that *TenderNed* should be seen as an attempt to diminish some of the legal consequences that *FENIN* brought with it. Under this scenario, *TenderNed* should be seen as an attempt to divide the activities of the contracting authorities, with the possible consequence that only activities in relation to the fulfilment of obligations under the procurement directives should be regarded as non-economic. This would imply that the purchasing activities could be seen as an economic activity. This interpretation would further take the different roles of the State, acting as either public authority or entrepreneur, into account.

The conclusion to the question above has implications for the applicability of the MEIP. If *TenderNed* is an attempt to diminish the legal consequences of *FENIN*, it could imply that the MEIP is applicable to the purchase of goods and services, whereas activities in connection with obligations flowing from the procurement directives (such as facilitating the aim of electronic procurement which was the subject of *TenderNed*) are not considered economic. Thus, they fall outside the scope of the MEIP.

However, if *TenderNed* is seen as a confirmation of *FENIN*, the conclusion is that all of the activities of the contracting authority, when it awards public contracts, are to be considered as activities in connection to the exercise of public authority. Accordingly, this situation would imply that the MEIP is not applicable, when it has to be decided whether purchasing activities performed by contracting authorities constitute an advantage.

In my opinion, the case of *TenderNed* shows that the GC is trying to modify or even limit the legal consequences of *FENIN* by concluding that activities related to obligations flowing from the procurement directives should be considered exercise of public powers. As stated above, this interpretation implies that *TenderNed* is seen as an attempt to divide the activities of the contracting authorities, with the possible consequence that only activities in relation to the fulfilment of obligations under the procurement directives should be regarded as non-economic.



However, it should be emphasised that the alleged ‘doctrine of separability’ has not (yet) been confirmed by the CJ. Thus, at the present stage, the cases of *FENIN*, *Selex*, and *TenderNed* lead to the result that the MEIP is inapplicable to all activities performed by contracting authorities under the procurement directives. In this respect, it is relevant to discuss which benchmark, if not the MEIP, ought to be used to assess whether an advantage is conferred when the contracting authorities perform purchasing activities. This will be done in the following.

#### 8.4 In search of the Market Economy Purchaser Principle (MEPP)

As discussed above, it is not absolutely clear what the constituent elements of the test of advantage are with regard to contracting authorities when they purchase, or what this test includes. Therefore, this section will first analyse how the CJEU has assessed the concept of advantage in relation to contracting authorities. Secondly, the requirement of genuine needs, as laid down in *T-14/96 BAI*, will be discussed. Finally, a critique of the test applied by the CJEU will be raised. It has been held in academic literature<sup>909</sup> that the private purchaser test has been laid down for the first time in *T-14/96 BAI*. The following will discuss and analyse the constituents of this test.

##### 8.4.1 The requirement of a genuine need

In *BAI*<sup>910</sup>, the GC formulated a requirement of genuine need. The requirement was first set out in *T-14/96 BAI*, where the GC assessed whether the purchase of travel vouchers represented an actual need:<sup>911</sup>

*“The file produced before the Court does not support the conclusion that the number of travel vouchers specified in the 1995 agreement was determined by an increase in the **actual needs felt by the authorities**, which are claimed to have required the purchase of a total of 46 500 vouchers to be used on the Bilbao-Portsmouth route in the period 1995-1998, whereas originally there was only a need for a total of 26 000 vouchers for 1993-1996. **Furthermore, the advantage capable of strengthening the competitive position of Ferries Golfo de Vizcaya is not eliminated merely because the recipient undertaking is required to supply a greater quantity of***

<sup>909</sup> See M. Cyndecka, ‘The Market Economy Investor Test in EU State Aid Law: Applicability and Application’ (Wolters Kluwers 2016), 252; L. Hancher, ‘The general framework’ in L. Hancher, T. Ottervanger and P.J. Slot (eds), *EU State Aids* (Sweet & Maxwell 2012) 116; M. Stempkowski and M. Dischendorfer, ‘The interplay between the EC Rules on public procurement and state aid’. 2002, 3, *P.P.L.R.*, 47-52; A Bartosch, ‘The Relationship between Public Procurement and State Aid Surveillance – The Toughest Standard Applies?’ 2002, 39, *Common Market Law Review*, 551-576, 573-574.

<sup>910</sup> This case is further analysed in chapter 7, see section 7.1.

<sup>911</sup> *Bretagne Angleterre Irlande (BAI) v Commission of the European Communities*, T-14/96, para 76.

*transport services in return for a relatively unchanged financial benefit. As the travel vouchers purchased by the Spanish authorities can be used only in the low season, the improved service supplied by the undertaking does not in principle entail significant additional costs for it and, consequently, the effects of the new agreement on competition and trade between Member States are the same as those which could be attributed to the 1992 agreement”*<sup>912</sup>

Thus, the requirement of actual needs was used to conclude whether an advantage had been conferred in the recipient. In this respect, according to the GC, the increase in vouchers should live up to an actual need felt by the authorities in order not to constitute an advantage.

In *P&O Ferries*,<sup>913</sup> the GC further refined the requirement of actual needs:<sup>914</sup>

*“it follows from the foregoing that **the mere fact that a Member State purchases goods and services on market conditions is not sufficient for that transaction to constitute a commercial transaction concluded under conditions which a private investor would have accepted, or in other words a normal commercial transaction, if it turns out that the State did not have an actual need for those goods and services.**”*<sup>915</sup>

The GC further emphasised that the requirements to demonstrate that the measure constitutes a normal commercial transaction are increased when the purchase has taken place without the conduct of a tender procedure:<sup>916</sup>

*“it is all the more necessary for a Member State to demonstrate that its purchase of goods or services **constitutes a normal commercial transaction where, as in the present instance, selection of the operator has not been preceded by a sufficiently advertised open tender procedure.** In accordance with the Commission's settled practice, the fact that such a tender procedure is conducted before a Member State makes a purchase is normally considered sufficient for the possibility that the Member State is seeking to grant an advantage to a given undertaking to be ruled out.”*<sup>917</sup>

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<sup>912</sup> Emphasis added.

<sup>913</sup> *P & O European Ferries*, joined cases T-116/01 and T-118/01.

<sup>914</sup> *Ibid.*, para 117.

<sup>915</sup> Emphasis added.

<sup>916</sup> *P & O European Ferries*, joined cases T-116/01 and T-118/01, para 118.

<sup>917</sup> Emphasis added.

The requirement of a genuine need has been criticised in academic literature.<sup>918</sup> It could be argued that the requirement of genuine needs places an excessive burden on the contracting authorities. Furthermore, as held by AG Tizzano in his opinion to *P&O Ferries*<sup>919</sup> it can be difficult to verify objectively whether a genuine need exists. As emphasised by AG Tizzano:<sup>920</sup>

*“I accept of course that it is not always easy to verify objectively the need for the public authorities to purchase certain goods or services; it is also true, however, that when it is possible to do so, the absence of any such necessity is a clear indication that the purchase in question does not constitute a normal commercial transaction.”*

However, AG Tizzano further explained that:<sup>921</sup>

*“in reality notification would be required only where the action taken, having regard to the specific circumstances, might result in economic benefits for the suppliers concerned which they could not have obtained from a private contracting party. **In other words, the public authorities must consider, case by case, whether or not the contract is based on market conditions.** But that assessment does not seem to me to be different from the one which they must make when, for example, deciding to make a capital investment in a company or to transfer to the private sector assets in public ownership.”*

This statement of AG Tizzano implies that the requirement of genuine needs is the benchmark of assessment of whether the purchase is based on market conditions.

The CJEU never elaborated on what conditions need to be fulfilled in order to live up to the requirement of genuine needs. As held by AG Tizzano, the transaction as a whole must conform to the logic of the market<sup>922</sup> which entails an obligation to account for “*the terms, conditions, and other circumstances surrounding the purchase.*”<sup>923</sup>

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<sup>918</sup> M Cyndecka, ‘*The Market Economy Investor Test in EU State Aid Law: Applicability and Application*’ (Wolters Kluwers 2016), 254.

<sup>919</sup> *P & O European Ferries*, joined cases C-442/03 P and C-471/03 P.

<sup>920</sup> Opinion of Mr. Advocate General Tizzano delivered on 9 February 2006 in *P & O European Ferries (Vizcaya) SA (C-442/03 P) and Diputación Foral de Vizcaya (C-471/03 P) v Commission of the European Communities*, Joined cases C-442/03 P and C-471/03 P, EU:C:2006:91, point 90.

<sup>921</sup> *Ibid.*, point 92.

<sup>922</sup> *Ibid.*, point 87.

<sup>923</sup> *Ibid.*

However, the GC emphasised in *T- 116/01 and T-118/01 P&O Ferries* what was considered *not* to be sufficient to establish genuine need, namely that:<sup>924</sup>

*“the mere fact that consideration has been supplied by an undertaking to a State body does not demonstrate, in itself, that the latter had an actual need for the services in question. Merely to argue that services were actually supplied by P&O Ferries to the Diputación is thus not sufficient to show an actual need on the part of the Diputación for the services in question.”*

Conclusively, according to the test of genuine need, the Member States need to prove that the terms and conditions as well as other circumstances surrounding the purchase live up to the logic of the market. However, it is not apparent what this requirement entails.

#### **8.4.2 What is a Market Economic Purchaser? The constituents of the Market Economy Purchaser Principle**

The above has discussed how the CJEU assessed the presence of advantage for the winning tenderer in the *BAI* case. This section will, on the basis of the above, discuss the content of the requirement of a genuine need and deduce the concept of the Market Economy Purchaser Principle (MEPP). The requirement of genuine need could be analysed in two different ways; both will be analysed below. Firstly, section 8.4.2.1 discusses the possibility that the MEPP consists of two conditions, which both have to be fulfilled in order for the MEPP to apply. Secondly, section 8.4.2.2 suggests that the MEPP, in effect, only relies on one condition.

##### *8.4.2.1 Two conditions for the fulfilment of the MEPP?*

Firstly, the concept of MEPP could be twofold when the States make a purchase. This line of reasoning would imply that in order for the contracting authority to comply with the MEPP and thus fall outside the scope of Article 107(1) TFEU, the measure should i) represent a normal commercial transaction and ii) represent a genuine need. This interpretation seems to be supported by Cyndecka who states that the private purchaser test relies on two conditions:<sup>925</sup>

*“The private purchaser test relies on two conditions. First, the state must pay a market price for goods or services it acquires. [...] The second condition under the private purchaser test is more problematic. It is a requirement of an ‘actual’ or ‘genuine’ need for the goods or services*

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<sup>924</sup> *P & O European Ferries*, joined cases T-116/01 and T-118/01, para 120.

<sup>925</sup> See M. Cyndecka, ‘*The Market Economy Investor Test in EU State Aid Law: Applicability and Application*’ (Wolters Kluwers 2016), 252.

*acquired by the state. Thus, the transaction may still constitute aid although the state paid the market price”*

The above seems to imply that under the MEPP, the assessment of whether market price is paid is separated from the assessment of an actual or genuine need felt by the contracting authority.

This interpretation cannot be supported. As concluded in section 8.2.3 above, the legal consequences of *FENIN* and *TenderNed* imply that all activities performed by the contracting authority under the procurement directives fall under the scope of public authority. Thereby, the benchmark of purchases to represent a normal commercial transaction is not applicable when the contracting authority makes a purchase. This conclusion implies that if the content of the MEPP is two-fold, i.e., i) represents a normal commercial transaction and ii) represent a genuine need MEPP is inapplicable to contracting authorities when they award public contracts.

Accordingly, the deduction of a new benchmark is required.

#### *8.4.2.2 Genuine need as the only decisive benchmark*

The second interpretation implies that the only benchmark for assessment of advantage when contracting authorities award public contracts is whether a genuine need exists. This line of reasoning would imply that the requirement of a genuine need is sufficient to render purchasing activities outside the scope of the State aid rules (with respect to the private purchaser test). Thus, there is no benchmark against a private operator. The latter explanation could be sufficient to solve the situation derived from *FENIN*, as analysed above, where the CJEU held that purchasing activities are not considered economic activities and thereby a priori fall outside the scope of the MEIP.

Consequently, the requirement under the MEPP is not whether the transaction is based on normal market conditions. Rather, the requirement of genuine needs is the benchmark of assessment of whether the purchase is based on market conditions.

#### *8.4.2.3 BAI as part of the doctrine of separability*

As stated above, the decisive element in the three cases of *FENIN*, *Selex*, and *TenderNed* seems to be whether the subsequent use of the purchased goods or services can be considered an economic activity. Furthermore, the *BAI* case implies that the requirement of a genuine need only applies to situations, where a market price cannot be established, i.e. where the contracting

authority awards public contracts by illegal direct award. This suggests that the requirement of a genuine need is used as the decisive benchmark for assessment of market price when public contracts are awarded directly (illegal).

In situations where a tender procedure has been conducted, market price is obtained if the requirements analysed in chapter 7 are fulfilled. In such situations, where the market price is obtained, there is no need for the contracting authority to prove that the purchase fulfills a genuine need.

Accordingly, the *BAI* judgment could be considered to form a part of the doctrine of separability, insofar as the legal consequence of *BAI* entails that if there is a genuine need for the subsequent use of the purchased goods or services, the activity is not considered an economic activity, and thus, MEPP is not applicable. If, however, it is found that no genuine need exists for the purchased good or service, the activity is considered economic and, thus, MEPP applies.

If the statement above is true, it can be concluded that the procedural rules in the procurement directives can be considered a safeguarding of the presumption that no advantage is conferred when a tender procedure has been conducted. Hence, a presumption for a genuine need exists. Thus, MEPP is satisfied *a priori* when a tender procedure has been conducted.

Finally, it has to be emphasised that in *BAI*, the contract should arguably have been awarded following a tender procedure, and thus the award of contract in *BAI* is considered illegal. For this reason, the above only applies to situations of illegal direct award. To my knowledge, the CJEU has not considered this question in any situations where the award was made as a direct legal award of contract. However, the GC and the Commission has considered the applicability of the MEPP following an award of a concession contract. In this respect, the following will account for how the MEPP applies to situations where the award concerns a concession contract.

#### **8.4.3 Applicability of the MEPP to award by concession**

In a recent Decision<sup>926</sup> the Commission had to consider whether the award of a concession for the prospection and exploration of polyhalite (potash) deposits in the area of Puck concerned State aid within Article 107(1) TFEU. On 25 February 2015, Darley Energy Poland Sp. z o.o. (hereafter DEP) submitted a complaint to the Commission alleging that Poland granted

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<sup>926</sup> Commission Decision SA.41116, 24 November 2017 concerning alleged aid to KGHM Polska Miedź S.A., OJ C 400.

incompatible State aid to an undertaking (KGHM). DEP held that Poland granted incompatible State aid to KGHM by awarding KGHM a concession for the prospection and exploration of polyhalite (potash) deposits without conducting an open, transparent, non-discriminatory and unconditional tender to the detriment of DEP, who was refused that concession despite submitting a better offer.<sup>927</sup>

Concerning the assessment of advantage the Commission emphasised that an economic transaction does not confer an advantage to the recipient if it is carried out in line with normal market conditions.<sup>928</sup> Then, the Commission held that:<sup>929</sup>

*“[...] Compliance with normal market conditions is normally assessed on the basis of the “market economy operator” (MEO) test, whose purpose is to determine whether with regard to a certain transaction the State acted as a private operator in a similar situation. **The MEO test is, however, not applicable in transactions where the State acts as a public authority rather than as an economic operator.**”<sup>930</sup>*

This statement from the Commission shows that contracting authorities act by exercising public powers when they award concession contracts. Thus, the market economy operator test is not applicable to contracting authorities when they award concession contracts.

The Commission continued to explain that, in the present case, the exploration and exploitation can be conducted only after obtaining the concession from the State and thus, the comparison to a market operator is not relevant since no market operator can be in a similar situation as the State in such situations:<sup>931</sup>

*“[...] the Commission notes that under Polish law deposits of potassium salt belong to the State and their exploration and exploitation can be conducted only after obtaining the concession from the State. **No market operator can grant any such or similar concession, and, therefore, no market operator can be in a similar situation as the State.** In addition, according to Polish law, **when evaluating applications for the concession, the State must take into account public interest, security, environmental protection and rational management of mineral deposits [...].***

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<sup>927</sup> *Ibid.*, point 10.

<sup>928</sup> *Ibid.*, point 47.

<sup>929</sup> *Ibid.*, point 47.

<sup>930</sup> Footnotes omitted. Emphasis added.

<sup>931</sup> Commission Decision SA.41116, point 48-49.

**These are legitimate considerations which are relevant for a public authority rather than for an economic operator** that is ultimately concerned only with profit maximisation and which, furthermore, are not prone to any meaningful quantifiable economic analysis.

More generally, ***the granting of concessions for exploration or exploitation of mineral deposits is, due to its regulatory nature, typically performed by the State in Member States of the Union and can be categorised as the exercise of public authority powers. In view of that, and contrary to the view of the Complainant, the Commission takes the view that in granting the concession for exploration, the State acted as a public authority and, consequently, the MEO test is not applicable.***<sup>932</sup>

This conclusion seems to be supported by the GC in the case of *SNCM*<sup>933</sup> where the GC held:<sup>934</sup>

***“As observed correctly by the Commission and Corsica Ferries, it is clear that the criterion of a private investor operating in a market economy is not applicable in a situation such as the one in the present case. Where a public authority presents itself as the organising and delegating authority of the public service, the applicability of that criterion is necessarily ruled out, since by definition it is acting as a public authority. Moreover, contrary to the view expressed by SNCM, nor can the French authorities’ conduct in the present case be equated with their procuring maritime transport services in exchange for the payment of a price. What is in fact at issue in this case is an agreement whereby a public authority entrusts economic operators with the management of a public service in return for financial compensation being paid to them. In such a situation, it is the four Altmark criteria which apply for the purpose of determining whether such compensation constitutes State aid and, in particular, confers a selective advantage.”***<sup>935</sup>

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<sup>932</sup> Footnotes omitted. Emphasis added.

<sup>933</sup> This case is analysed in chapter 7, section 7.3.

<sup>934</sup> *Société nationale maritime Corse Méditerranée v European Commission*. (SNCM), T-454/13, para 233.

<sup>935</sup> Emphasis added.



The above can be illustrated in the following way:

**Table II: Illustration of the benchmark for assessment of advantage**

	Benchmark for assessment of advantage?
Award by public tender	competitive, transparent non-discriminatory and unconditional tender procedure – market price is presumed
Award by concession	Competitive, transparent non-discriminatory and unconditional tender procedure – market price is presumed
Legal direct award	General principles of the Treaty
Illegal direct award	Actual and genuine need

Accordingly, the MEPP is constituted of the test of genuine needs, which applies to situations where the purchasing activity has been completed either through direct award, i.e. without the conduct of a tender procedure. Furthermore, purchasing activities completed through the conduct of a tender procedure<sup>936</sup> do not fall under the MEPP, as market price is assumed in these situations.

<sup>936</sup> See further chapter 7, section 7.2.

#### 8.4.4 Preliminary findings

Based on the above, it can be concluded that the MEPP, as applied by the CJEU, does not compare the contracting authority to a private purchaser. Rather, the MEPP constitutes a fictive benchmark of the necessity of the purchase, i.e. the requirement of a genuine need. Thus, the analysis above shows that where the contract has been awarded as an illegal direct award, the assessment of whether the award represents a normal market transaction relies on the assessment of whether the purchase represents a genuine need felt by the contracting authority.

It is not exactly clear from the case law of the CJEU which conditions should be fulfilled in order to prove that a genuine need exists. However, as stated by AG Tizzano in *T- 116/01 and T-118/01 P&O Ferries*, the purchase must conform to the logic of the market. which entails an obligation to account for the terms, conditions, and other circumstances surrounding the purchase.

#### 8.4.5 A critique of the MEPP

Following the conclusions above, a few critical remarks must be raised.

Firstly, as has been discussed in literature,<sup>937</sup> the MEPP could be criticised of limiting the Member States' freedom to act as entrepreneur. However, the requirement of justifying large-scale purchases, with the possible effect of distorting competition, seems to be justified in order to avoid disguised aid.

Furthermore, arguably, the MEPP test is not a sufficient way of proving whether an advantage has been conferred. As has been accounted for above, according to the MEPP the only assessment of whether the award of contract constitutes a normal market transaction is whether the purchase represents an actual or genuine need. Arguably, this requirement is not a very strong safeguard to the assessment of whether an advantage has been conferred. As discussed in chapter 7 of this Thesis, the assessment of advantage relating to contracts awarded under the procurement Directive is much stronger. Thus, chapter 7 concluded that the assessment of advantage relies on a number of factors including, the number of participants in the competition for the contract and the occurrence of a competitive advantage for the contract and factors which could dissuade interested tenderers from participating in the call for tenders, including short

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<sup>937</sup> M. Cyndecka, 'The Market Economy Investor Test in EU State Aid Law: Applicability and Application' (Wolters Kluwers 2016), 255.

deadlines and numerous clauses. All these factors seem to be irrelevant when the award is made pursuant to an illegal direct award of contract.

Furthermore, it is uncertain what the requirements of an actual or genuine need are. As held above, the contracting authority must prove that the terms and conditions, as well as other circumstances surrounding the purchase, live up to the logic of the market. However, it is not apparent what this requirement entails more specifically.

Therefore, at the present stage, the possibility to confer disguised aid on the winning tenderer, when a procurement procedure has been conducted, exists. One possible way of dealing with this situation could be to apply/revise the doctrine of separability, as deduced above.

## 8.5 Conclusions

In this chapter, I have assessed the applicability and the application of the MEIP concerning activities performed by contracting authorities under the procurement directives.

The cases of *FENIN*, *Selex*, and *TenderNed* imply that the MEIP is not applicable to contracting authorities when they perform purchasing activities or activities related to the obligations flowing from the procurement directives.

The emerging doctrine of separability suggests that this state of law could be changed in the future, as *TenderNed* could be an indication of willingness from the CJEU to separate the activities performed by the contracting authorities with the possible consequence that purchasing activities might - in the future - constitute economic activities. This reasoning implies that *TenderNed* is actually an attempt to correct *FENIN*, rather than a confirmation of this judgment.

On the basis of the above, I have presented arguments to support the view that, in essence, the MEPP only relies on the condition of a genuine need, as opposed to both the condition of genuine need and the benchmark with a private purchaser. This argumentation supports the conclusion that MEPP is in fact applicable to contracting authorities, despite the present state of law derived from *FENIN*, *Selex*, and *TenderNed*, because the CJEU does not benchmark against a private operator.

It has been concluded that the application of MEPP is only valid in situations where a tender procedure has not been conducted.

However, the MEPP has been criticised not taking into account that State aid issues might arise, even in situations where a tender procedure has been conducted. This argumentation is built on the conclusions in chapter 7 of this Thesis.

## 9. Conclusion

This Thesis seeks to answer the research question:

*“When does the award of public contracts constitute State aid within Article 107(1) TFEU?”*

The research question is answered through a legal dogmatic analysis, and the research of the Thesis thereby contributes to an understanding of *what law is*.

The Thesis sets out to investigate the interface between State aid law and public procurement law with an emphasis on analysing when the award of public contracts by contracting authorities constitutes State aid within the meaning of Article 107(1) TFEU. Article 107(1) TFEU prohibits any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, in so far as it affects trade between Member States. Award of public contracts is governed by procedural rules laid down in the public procurement Directives which lay out specific rules and procedures for the award of public contracts. Furthermore, public contracts can – under specific circumstances – be awarded directly without the conduct of a tender procedure. These situations are referred to as legal direct award of contract. A contract can be legally awarded without the conduct of a tender procedure, e.g. when the value of the contract is below the thresholds set out in the Directives. Finally, situations might occur where the award of a contract directly to an economic operator falls under the scope of the procurement Directives and thus should have happened through a tender procedure. Such situations are referred to as illegal direct award of contracts. This Thesis analyses the extent to which State aid rules apply in the abovementioned situations.

The Thesis is divided into four parts which all contribute to answering the research question.

### 9.1 Part I

Part I concludes that State aid rules apply to contracting authorities when they award public contracts. Thus, in theory, contracting authorities are fully capable of transferring State aid to

economic operators when they award public contracts. This conclusion applies for all three award situations identified in chapter 1, namely award under the public procurement Directive, award under the concession Directive and legal and illegal direct award.

The overall conclusion in part I is achieved by an analysis of the aims and objectives of the procurement rules and State aid rules as well as an analysis of the personal scope of the two sets of rules.

It is found that public procurement rules and State aid rules share the common objective of supporting the Internal Market by increasing and protecting competition: The procurement rules support an Internal Market by preventing protectionist purchasing and ensuring equal treatment between economic operators through the removal of discrimination and barriers that prevent entry into the public procurement market, and they further seek to implement competitive procedures in order to ensure transparency. The State aid rules support an Internal Market by way of prohibiting the transfer of advantages to the recipient undertaking and thus avoiding distortion of competition between competitors in the Internal Market.

The two sets of rules support this goal in different ways, but it is concluded that the different means are not mutually exclusive.

Aside from the achievement of an Internal Market, it has been argued that both the procurement rules and the State aid rules seek to ensure competition. In this respect, the concept of competition in relation to procurement rules aims at increasing the number of (potential) tenderers. Accordingly, the concept of competition in relation to procurement rules aims at creating more competition for the public contracts. Under State aid law, the concept of competition relates to the protection of existing competition in the Internal Market. In this respect, the concept of competition under State aid law implies an obligation for the State to ensure that already existing competition is not distorted. Thus, the concept of competition in relation to State aid rules aims at preserving or protecting existing competition.

Despite the fact that the two sets of rules seek to support competition in different ways, it is argued that these aims of increasing or preserving competition are not mutually exclusive.

The analysis of the personal scope of the procurement rules and State aid rules shows that convergent fields of application exist between the two sets of rules. Thus, the concepts of

‘contracting authority’ under the procurement rules coincides with the concept of ‘State’ under the State aid rules. In this respect, the actions of a contracting authority are imputable to the State, which presupposes a close connection between the State and contracting authorities.

Furthermore, the concept of ‘economic operator’ under the procurement rules coincides with the concept of ‘undertaking’ under the State aid rules. Consequently, economic operators are capable of receiving State aid as they fulfil the constituent element under Article 107(1) TFEU that relates to ‘transfer by the State or through State resources to undertakings’. This means that the requirement in Article 107(1) TFEU that the recipient of the aid is an ‘undertaking’ is also fulfilled.

Convergent personal scopes of the procurement rules and State aid rules are not sufficient to conclude whether award of public contracts constitute State aid within Article 107(1) TFEU. For this reason, it is analysed whether the contracting authority is capable of fulfilling the constituent elements of Article 107(1) TFEU that relate to measures which ‘distort or threaten to distort competition’, measures which ‘favour certain undertakings or the production of certain goods’ and measures which ‘affect trade between Member States’.

It is concluded that the obligations for the contracting authority to ensure that competition is not distorted are embedded in the public procurement Directives by way of an obligation for the contracting authority to ensure that competition is not artificially narrowed when public contracts are awarded.

Then, a measure which favours certain undertakings or the production of certain goods relates in essence to the assessment of whether the measure in question is selective in nature. Arguably, the requirement of selectivity cannot be determined *a priori*, and thus it must be determined on a case-by-case basis whether the award of public contracts is selective. Since it is unsettled in the case law from the CJEU how the concept of selectivity applies to procurement measures, the principles of equal treatment and non-discrimination as embedded in the procurement rules are used to consider whether the award of public contracts is selective. It is argued that no selectivity occurs in relation to legal direct award of contracts in so far as the general principles of the Treaty are adhered to. However, it is found that the same conclusion does not apply for illegal direct award of contracts, especially in situations where the general principles of the Treaty are not adhered to.

Finally, the requirement of effect on trade is not relevant when the award of contract is made pursuant to a tender procedure under the procurement Directives as the Directives set out predefined thresholds to be applied when determining whether the award falls under the scope of the Directives. In this respect, it is argued that the thresholds set out in the procurement Directives aim at creating competition, and therefore, the requirement of cross-border interest becomes irrelevant for public contracts awarded under the Directives. However, when the contract is awarded directly, either by way of legal direct award or by way of illegal direct award, the assessment of cross-border interest is relevant to ensuring that trade and competition is not distorted.

Accordingly, the contracting authority is in theory capable of fulfilling the requirement in Article 107(1) TFEU of aid being transferred by the State or through State resources.

Part I of this Thesis thereby partly contributes to answering the research question by concluding that contracting authorities fall under the personal scope of the State aid rules and that they are thereby, *a priori*, capable of granting aid to tenderers when they award public contracts.

## **9.2 Part II**

The analysis in part II comprises an assessment of when and how an advantage is conferred when contracting authorities award public contracts.

It is concluded that the concept of advantage under State aid law entails a benchmark against ‘normal market conditions’ which is a concept developed by the CJEU to assess whether State support can escape the prohibition in Article 107(1) TFEU on the grounds that the support equals market terms. The case law from the CJEU seem to imply that when State intervention is not given according to market conditions, market price is not paid, and hence an advantage is conferred within Article 107(1) TFEU.

The presence of advantage in relation to a public contract awarded following a tender procedure under the procurement Directives relates, in essence, to the question of whether the tender procedure, including the terms of the contract, reflects normal market conditions, and hence whether market price is obtained. However, the benchmark for obtaining market price when public contracts are awarded is not unambiguous. Hence, it is necessary to take the concrete



circumstances of the case into consideration when it is decided whether the award confers an advantage on the winning tenderer.

Since the question of whether the award of a contract under the procurement Directive amounts to State aid is unsolved in the case law from the CJ, it is necessary to rely on judgments from the GC as well as Commission Decisions.

From the Decision in *London Underground*, it can be derived that the Commission finds that the negotiated procedure with prior notification adheres to the requirement of a competitive, transparent, non-discriminatory and unconditional tender procedure in so far as the call for competition, as well as the evaluation of the offers on the basis of the most financially advantageous tender, is fair to all bidders and applied in a consistent way with an appropriate methodology.

However, this conclusion could, in my opinion, be jeopardised, if State aid case law is taken into consideration. Accordingly, the assessment of whether market price is obtained differs when the assessment is made on the basis of the ‘avoided costs’ test as accounted for in chapter 6, as opposed to on the basis of the ‘change in award’ test as applied by the Commission in the case of *London Underground*.

Where the award has not been made pursuant to a tender procedure, i.e. by legal direct award, the alleged advantage is also evaluated on the basis of whether the award adheres to the general principles in the Treaty. This conclusion is drawn on the basis of analysis of the *Greek airport* case.

Based on the analysis of the cases from the GC, it is uncertain whether the conduct of a competitive, transparent, non-discriminatory and unconditional tender procedure necessarily satisfies the requirements in Article 107(1) TFEU. The cases chosen for analysis do not provide a clear answer to this question. In *BAI*, the GC did not use market price as the benchmark for evaluation of whether the award represented normal market conditions. Rather, the decisive benchmark was whether a genuine need existed for the purchase.

In *SNCM*, the GC had to decide whether the award of a contract following a tender procedure could be classified as a SGEI. The case was chosen for analysis since it establishes a possible link between procurement law and State aid law for services that do not relate to SGEIs.

However, it is held that such a connection cannot be established, and thus no connection between *Altmark* and services relating to non-SGEIs awarded under the procurement directives can be said to occur. However, it is concluded that the case provides important guidance regarding which factors could amount to State aid, including the number of participants in the competition for the contract, the occurrence of a competitive advantage for the contract, and factors which could dissuade interested tenderers from participating in the call for tenders, including short deadlines and numerous clauses.

The analysis above is illustrated as follows:

**Table I: Illustration of how advantage occurs under the identified award situations**

	Case/Decision	Benchmark for assessment of advantage	Satisfies the State aid rules?	Satisfies the procurement rules?
Award by public tender (negotiated procedure)	<i>London Underground</i>	- competitive, transparent, non-discriminatory and unconditional tender procedure - sufficient competition for the contract	Yes, (post-selection modifications)	Yes (Adherence to procedural rules)
Award by concession	<i>Greek airports</i>	- competitive, transparent, non-discriminatory and unconditional tender procedure - highest bidder	Yes	Yes
Legal direct award	<i>Greek airports</i>	- competitive, transparent, non-discriminatory and unconditional tender procedure - highest bidder	Yes (Assumption of breach)	Yes, if adherence to general principles in the Treaty
Illegal direct award	<i>BAI</i>	- Genuine need - Can market price be obtained?	No (No genuine need)	No (Breach of procedural rules and general principles)

In conclusion, the benchmark for assessment of whether State aid is granted when public contracts are awarded relies on a number of factors which are indicative for whether market price has been obtained.

### 9.3 Part III

The main conclusion in part III is that the test used for benchmarking against a normal market operator does not apply to situations where the contracting authority makes a purchase. This conclusion is made following an analysis of several cases from the CJEU which held that a contracting authority only acts in the capacity of public authority when it awards public contracts.

On the basis of this conclusion it is discussed whether an emerging doctrine of separability can be detected from the case law of the CJEU. In this respect, two possible conclusions are discussed. The first analysis supports the conclusion that the benchmark against a normal market operator is not applicable to contracting authorities. The second analysis supports the view that the doctrine of separability shows emerging signs of separation of the activities performed by the contracting authorities. Thus, it is suggested that according to the doctrine, only activities in relation to the fulfilment of obligations under the procurement directives should be regarded as non-economic, and they thus fall outside the benchmarking test against a normal market operator. Accordingly, the doctrine of separability would imply that purchasing activities could in fact be compared to the activities of a normal market operator in the assessment of whether advantage has been granted. It is concluded that the ‘doctrine of separability’ has not (yet) been confirmed by the CJ and thus, at the present stage, purchasing activities performed by contracting authorities cannot be compared to the activities of a normal market operator.

On the basis of the above, it is therefore discussed what relevant benchmark, if not the market operator test, should be applied in the assessment of whether the award of public contracts confers an advantage on the recipient. This analysis is made on the basis of the *BAI* case which is known to be the first case where the CJEU established the so-called Market Economy Purchaser Principle (MEPP). The *BAI* case concerned an illegal direct award of contract, and thus the analysis of the MEPP is applicable to contracts which are awarded directly without the conduct of a tender procedure, but where a tender procedure should have been conducted.

The analysis of the *BAI* case shows that the benchmark of assessment of advantage under the MEPP only relies on one factor, namely whether the purchase made by the contracting authority represents an actual and genuine need. This approach is criticised for being insufficient to

proving whether an advantage has been conferred since such a requirement is not a very strong safeguard to the assessment of advantage. Furthermore, it is emphasised that the requirements of proving an actual or genuine need are very uncertain. Therefore, the possibility to confer disguised aid on the winning tenderer when a procurement procedure has been conducted following illegal direct award exists. In this respect it is emphasised that one possible way of dealing with this situation could be to apply the doctrine of separability since this would allow illegal direct award of a contract to be compared to a normal market operator.

It is emphasised that the assessment of advantage is much more comprehensive and therefore stronger relating to contracts awarded under the procurement Directive, awards made under the concession Directive and legal direct awards. Accordingly, the assessment of advantage in such situations relies on a number of factors, including the number of participants in the competition for the contract and the occurrence of a competitive advantage for the contract, and factors which have the objective of concluding whether interested tenderers have been dissuaded from participating in the call for tenders, including short deadlines and numerous clauses. All these factors seems to be irrelevant when the award is made pursuant to an illegal direct award of contract.

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