Competition within EU Public Procurement Regulation and Practice: When EU Competition Law Remains Silent, EU Competition Policy Speaks

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Abstract: *The economic importance of public procurement within the EU is undeniable, given its pre-eminent role in the overall economic performance of the Union. Its regulation is thus conceived as a priority. Further, the creation of an EU-wide level playing field for economic operators is submitted as indispensable to combat Member States' preferential treatment towards their domestic firms. In this scenario, the achievement of a Single Public Procurement Market, working under conditions of vigorous competition, is menaced by the immunity from competition constraints of some public behaviours. In this research we are going to analyse the different public activities that may distort the competitive dynamics of the market. First we are going to evaluate the adequacy of not submitting certain public activities to the EU Competition law. Then, some clarifications will be made and the material scope of the EU Competition law will be expanded as to cover public non-regulatory economic activities. Finally, with regard to public regulatory activities and public non-regulatory non-economic activities, it will be argued, with a view of achieving the Single Public Procurement Market, the imperative necessity of observing competition constraints and, consequently, of submitting such activities to EU Competition policy considerations.*

Keywords: *Single Public Procurement Market, Public Procurement, EU Law, EU Competition Law, EU Competition Policy*

JEL: *K12, K21, K33*

I. Introduction

Public procurement within the European Union (hereinafter, EU) represents an annual expenditure of around 14% of GDP on the purchase of services, works and supplies by over 250.000 public authorities[2].

In this scenario, the regulation of public procurement is conceived as a priority within the EU, because, given its economic importance, it plays a pre-eminent role in the overall

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[2] European Commission. *Growth – Internal Market, Industry, Entrepreneurship and SMEs*, European Commission website, http://ec.europa.eu/growth/single-market/public-procurement/index_en.htm, last accessed: 15.01.2016.

economic performance of the Union[3]. EU Public Procurement law aims at creating a level playing field for all firms, setting, through Directives that are transposed into national legislation, minimum harmonized public procurement rules, thanks to which suppliers and service providers are not excluded from the market of public purchases in other Member States[4]. Moreover, EU Public Procurement rules aim at preventing practices that may partition the EU market, such as Member States' preferential treatment in favour of operators from their own country[5].

The ultimate goal is thus the attainment of a Single Public Procurement Market that, working under conditions of vigorous competition, enables the creation of a legal environment that guarantees the access of all European firms to public contracts and an efficient spend of public funds[6]. All in all, an EU-wide procurement market and the most efficient use of public funds may only be preserved insofar as Member States fully harmonize their regulations and provide undertakings with the right environment to ensure equal opportunities, while avoiding being captured by national tendencies towards protectionism[7].

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[3] European Commission. *Green Paper on the modernisation of EU public procurement policy - Towards a more efficient European Procurement Market - Synthesis of replies*. Brussels, 2011, p. 2. On the economic importance of the regulation of public procurement, as a direct consequence of its identification as a significant non-tariff barrier, *vide* BOVIS, C.H. *EU Public Procurement Law*. Cheltenham, Edward Elgar Publishing, 2012, 2nd edition, pp. 1 and 5; UNCTAD. *Non-tariff measures to trade: economic and policy issues for developing countries*. Geneva, 2013, pp 1-2 and 106.

[4] Nowadays, Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, *Official Journal of the European Union*, L 94/1, 28 March 2014 (collectively, *Concessions Directive*); Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, *Official Journal of the European Union*, L 94/65, 28 March 2014 (collectively, *Public procurement Directive*); Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, *Official Journal of the European Union,* L 94/243, 28 March 2014 (collectively, *Special sectors Directive*). Their transposition period expires the 18 April 2016, but for some articles, related to electronic means of communication, whose transposition period is either until 18 October 2018 or 18 April 2018.

[5] Monti, M. *A new strategy for the Single Market - at the service of Europe's economy and society*. Report to the President of the European Commission, 9 May 2010, p. 76.

[6] In this line, public procurement and competition laws are considered instrumental to the achievement and maintenance of the Internal Market. *Vide*, European Commission. "The Single Market Act", in *Growth - Internal Market, Industry, Entrepreneurship and SMEs*, available at http://ec.europa.eu/growth/single-market/smact/index_en.htm (last consulted: 15.01.2016), p. 3.

[7] European Commission. *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions - Towards a Single Market Act: For a highly competitive social market economy - 50 proposals for improving our work, business and exchanges with one another*, COM(2010) 208 final/2, Brussels, 11 November 2010, p. 15; European Commission. *Communication from the Commission - Europe 2020: A strategy for smart, sustainable and inclusive growth*, COM(2010) 2020, Brussels, 3 March 2010, pp. 19 and 24.

In any case, whereas EU public procurement rules are deemed essential for the achievement and maintenance of the Internal Market, the design of healthy public procurement processes that allow the EU to continue growing at the pace it has been doing lately require the observance of the free competition principle, enshrined in the Treaties[8]. Furthermore, not only public tenders, but also the EU public procurement rules themselves need to be designed (and, if not directly applicable, transposed) in a way that is compliant with the requirements of a system operating under undistorted competition, in order to guarantee a competitively functioning Internal Market. This is so because Member States and the EU are required, pursuant to Articles 3(3) TEU, 3(1)(b) TFEU and Protocol 27, to refrain from any measure that could jeopardize the attainment of EU goals and, more specifically, they are obliged to conduct their activities in accordance with the principle of an open market economy with free competition, with the objective of building up a system ensuring that competition in the market is not distorted[9]. Otherwise, not only the achievement of a Single Public Procurement Market and an efficient expenditure of public funds could be endangered, but also the maintenance of the Internal Market might be risked, since, as expressed by the EU judicature, competition rules are fundamental provisions essential for the accomplishment of the tasks entrusted to the Union and, in particular, for the functioning of the Internal Market[10].

Notwithstanding, as we will analyse in the following sections, the submission to Competition law of any State measure to assess whether it restricts competition has not always been straightforward (Part II) and, still today, it is submitted that, in the realm of EU public procurement, as a result of the pre-emptive character of the competition concerns, the State Action Doctrine needs to be subject of a further redefinition (Part III).

II. The State Action Doctrine in the realm of public procurement, as developed by the EU judicature

Whether all actions performed by a public entity may fall under a competition scrutiny is debatable. Competition rules are intended to assess the performance of undertakings – be they public or private– in the market and, although it may seem paradoxical, they aim at promoting free competition through the control and interference with the freedom of

[8] Article 3(3) of the Treaty on the European Union (hereinafter, TEU); Article 119 of the Treaty on the Functioning of the European Union (hereinafter, TFEU) sets out the principle of an open market economy with free competition.

[9] Judgment of the Court of 13 February 1969, case 14/68, *Walt Wilhelm and others v Bundeskartellamt* [ECLI:EU:C:1969:4], § 4; Judgment of the Court of 10 January 1985, case 229/83, *Association des Centres distributeurs Édouard Leclerc and others v SARL "Au blé vert" and others* [ECLI:EU:C:1985:1], § 14.

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

conduct of undertakings[11]. Therefore, the lack of a clear cut response in the legal texts as to what extent an undertaking can be held liable for a conduct that has been promoted by a public authority or as to what extent a public authority itself can be blamed for foreclosing a market, has led to the necessity of interpreting those existing legal texts to adapt them to reality.

From a comparative perspective, several jurisdictions have resorted to the development of a jurisprudential answer in relation with the submission to Competition law of the actions carried out by the State[12]. The State Action Doctrine, originated in the US, leads to exempt from US antitrust rules, on one side, of some State measures, provided that the State engaged in *bona fide* exercise of its sovereign regulatory powers, and, on the other side, of some practices by private entities, adopted in furtherance of an State measure, as long as the measure is clearly articulated and affirmatively expressed as State policy and is actively supervised by the State itself[13]. Accordingly, the EU Courts have also been questioned about the submission to antitrust liability of practices that, even carried out by private undertakings, have been encouraged or forced by national laws[14]. This resort to a juridical answer is due to the absence of a specific set of rules with regard to competitive

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[11] Jones, A. and Sufrin, B. *EU Competition Law: text, cases and materials*. London, Oxford, 2014, 5th edition, p. 3. On the equal application of competition rules to private and public undertakings that carry on activities of an industrial or commercial nature, Judgment of the Court of 20 March 1985, case 41/83, *Italian Republic v Commission of the European Communities* [ECLI:EU:C:1985:120], §§ 16 to 20; Judgment of the Court (Sixth Chamber) of 23 April 1991, case C-41/90, *Klaus Höfner and Fritz Elser v Macrotron GmbH* [ECLI:EU:C:1991:161], §§ 21, 23 and 24; Judgment of the Court of 17 February 1993, joined cases C-159/91 and C-160/91, *Christian Poucet v Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon* [ECLI:EU:C:1993:63], §§ 17-19; Judgment of the Court of 16 March 2004, joined cases C-264/01, C-306/01, C-354/01 and C-355/01, AOK Bundesverband, Bundesverband der Betriebskrankenkassen (BKK), Bundesverband der Innungskrankenkassen, Bundesverband der landwirtschaftlichen Krankenkassen, Verband der Angestelltenkrankenkassen eV, Verband der Arbeiter-Ersatzkassen, Bundesknappschaft and See-Krankenkasse v Ichthyol-Gesellschaft Cordes, Hermani & Co. (C-264/01), Mundipharma GmbH (C-306/01), Gödecke GmbH (C-354/01) and Intersan, Institut für pharmazeutische und klinische Forschung GmbH (C-355/01) [ECLI:EU:C:2004:150], § 46; Judgment of the Court (Grand Chamber) of 11 July 2006, case C-205/03 P, *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v Commission of the European Communities* [ECLI:EU:C:2006:453], §§ 25-27; Judgment of the Court (Second Chamber) of 26 March 2009, case C-113/07 P, *SELEX Sistemi Integrati SpA v Commission of the European Communities and Organisation européenne pour la sécurité de la navigation aérienne (Eurocontrol)* [ECLI:EU:C:2009:191], §§ 82 and 85; Judgment of the Court (Third Chamber) of 12 July 2012, case C-138/11, *Compass-Datenbank GmbH v Republik Österreich* [ECLI:EU:C:2012:449], §§ 34-40.

[12] For a broader analysis, *vide* Van de Gronden, J. "Emerging Principles of International Competition Law: Do Public Services Matter?", in Krajewski, M. (Ed.) *Services of General Interest Beyond the Single Market. External and International Law Dimensions*, Erlangen, Springer, 2015, [pp. 161-188] pp. 169-175.

[13] Gerard, D. "EU Competition Policy after Lisbon: time for a review of the "State Action Doctrine?", in *SSRN*, http://dx.doi.org/10.2139/ssrn.1533842 (last consulted: 17.01.2016), 2010, pp. 3-4; Van de Gronden, J. "Emerging Principles of International Competition Law... *op. cit.*., pp. 169-170. On the exemption from EU competition rules of activities that fall within the exercise of public powers, since they are not of an economic nature, Judgment of the Court of 11 July 1985, case C-107/84, *Commission of the European Communities v Federal Republic of Germany* [ECLI:EU:C:1985:332], §§ 14 and 15; Judgment of the Court of 19 January 1994, case C-364/92, *SAT Fluggesellschaft mbH v Eurocontrol* [ECLI:EU:C:1994:7], § 30; Judgment of the Court (Grand Chamber) of 1 July 2008, case C-49/07, *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* [ECLI:EU:C:2008:376], § 24; Judgment of the Court of 12 July 2012, case C-138/11, *Compass-Datenbank*, *cit.*, § 36 and 51.dand, consequently, ve theion Laent Market; Public Procurement; EU Law; EU Competition law; EU Competition Policythe materaial e

[14] Temple Lang, J. "European Community Competition Law and Member State Action", in *Northwestern Journal of International Law and Business*, Vol. 10, Issue 1, Spring 1989, [pp. 114-132], p. 114.

distortions generated by public actors – but for those on State aid and exclusive or special rights (articles 106 to 109 of the TFEU), which have proven largely inadequate to assess the conduct of the public buyer in the sphere of public procurement[15].

In relation to public procurement, as it will be dealt with in the following sections, two types of public interventions must be differentiated: when the public actor drafts and passes a public procurement legislation or a regulation of general application (section 1); and when the public actor applies the procurement rules and conducts a tender process to purchase goods, works or services (section 2). Public actors may generate competitive distortions in both, but the differences in straightforwardness and incontestability when assessing whether they raise competitive concerns result in the need to conduct a separate analysis. Nonetheless, it may be anticipated that, from a Competition policy standpoint, the liability of a non-compliant or competition distorting public entity should be submitted to a competition scrutiny and, furthermore, should not be shielded behind an unpierced veil of sovereignty.

1. Public procurement regulation: Member States' regulatory measures that may impact the public procurement process

Legislation and the regulation of general application come as indispensable to the harmonized achievement of the objectives of the EU; however, any regulatory measure might amount to a restraint of competition[16]. Regulators, when exercising their public powers to pass rules, are, on one hand, vested with a high degree of sovereignty and, on the other hand, they are required to balance public interests with other social interests that

[15] Van de Gronden, J. "Emerging Principles of International Competition Law… *op. cit.*, p. 169. With regard to provisions on State aid (articles 107 to 109 of the TFEU), one must be aware of the fact that in many cases the procurement process does not imply that the contractor has obtained an undue economic advantage and, in the absence of an undue economic advantage, the award is not to be regarded as a State aid incompatible with the Internal Market. In relation to the granting of a special or exclusive right, the award of a public contract will be considered as such only under very specific circumstances: either when the award of the public contract constitutes the only option for companies active in the sector of reference to remain in business (article 106(1) of the TFEU); or when the object of the award is a Service of General Economic Interest (article 106(2) of the TFEU). Also, *vide* Sanchez Graells, A. *Public Procurement and the EU competition rules*. Portland, Hart Publishing, 2015, pp. 129-133.

[16] Kohl, M. "Constitutional limits to anticompetitive regulation: the principle of proportionality", in Amato, G. and Laudati, L.L. (Eds.) *The Anticompetitive Impact of Regulation*, Cheltenham, Edward Elgar, 2011, [pp. 419-441] pp. 419 and 425. In this section we will refer to 'regulation' with the meaning of legislation and regulation of general application – that is, rules pass by the legislative power or rules that, being passed by the executive power, are applicable *erga omnes*. Likewise, by 'regulator' we will refer to the authority empowered to adopt the piece of legislation or regulation – i.e., the Parliament or the Administration. By 'Administration' we refer to its organic meaning: « *L'Administration,* au sens organique*, ne désigne donc que l'ensemble des institutions qui composent le pouvoir exécutif en y associant, par extension, les collectivités locales. Ainsi conçu, le terme vise toutefois chacune de ces institutions, quelle que soit son activité. S'il est également indifférent que les services composant ces institutions soient dotés de la personnalité morale, il convient de souligner que le sens organique, ici présenté, implique que les institutions en cause soient elles-mêmes des personnes publiques (État, collectivités locales et établissements publics rattachés à eux)* ». *Vide*, SEILLER, B. «Acte administratif (I-Identification)», in *Répertoire des contentieux administratif*, Dalloz, January 2010 [last update: October 2014], §§ 15-17.

may be deemed worth to be pursued[17]. Courts are reluctant to scrutinize regulation due to the wide discretionary powers in the hands of the regulator when adopting economic regulation[18]. That explains why, as a general rule, regulatory measures adopted by the State are exempted from competition scrutiny – the State Action Doctrine –[19].

However, provided that the distortive activity of the regulator results in an anticompetitive practice concluded by an undertaking, the EU Courts have recognized certain liability on the side of the State. The Court of Justice of the EU (hereinafter, CJEU), based on article 4(3) of the TEU – the principle of sincere cooperation – and the Treaty provisions on competition – 'core' competition provisions are contained in articles 101 and 102 of the TFEU –, has derived the 'Useful Effect Doctrine', according to which EU Member States – i.e., national regulators – must refrain from (1) requiring or encouraging the adoption of restrictive agreements, decisions or concerted practices or from reinforcing their effects, and (2) delegating their powers to intervene on the market to private economic operators[20]. Otherwise, national rules may frustrate the useful effect of the EU competition rules applicable to undertakings, which take preference over state regulation by virtue of the principle of supremacy of EU law[21]. In conclusion, undertakings that, lacking any room for manoeuvre, act in accordance with relevant national legislation cannot be held competitively liable for their actions[22].

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[17] Regulators are particularly sensitive to the promotion of various goals with a view of attaining the public interest – i.e., innovation, environmental protection or employment, among others. *Vide*, Anderson, R.D. and Kovacic, W.E. "Competition Policy and International Trade Liberalisation: Essential Complements to Ensure Good Performance in Public Procurement Markets", in *Public Procurement Law Review*, vol. 18, 2009, pp. 67-101.

[18] In any case, as Prof. Kohl accurately recalls, the principle of the Rule of Law constitutes a limitation to the arbitrary use of public power. *Vide* Kohl, M. "Constitutional limits to anticompetitive regulation… *op. cit.*, p. 434. However, whereas the recourse to arbitrariness is specifically forbidden, regulators are provided with discretionary powers when passing rules and they are thus obliged to balance the different public interests at stake in order to make a decision among all the equally available options.

[19] Judgment of the Court (Second Chamber) of 17 October 1995, joined cases C-140/94, C-141/94 and C-142/94, *DIP SpA v Comune di Bassano del Grappa, LIDL Italia Srl v Comune di Chioggia and Lingral Srl v Comune di Chiogga* [ECLI:EU:C:1995:330], § 14. Also, *vide* Sanchez Graells, A. *Public Procurement and the EU competition rules, op. cit.*, p. 150.

[20] Judgment of the Court of 16 November 1977, case 13/77, *SA G.B.-INNO-B.M. v Association des détaillants en tabac (ATAB)* [ECLI:EU:C:1977:185], §§ 31-33; Judgment of the Court of 21 September 1988, case C-267/86, *Pascal Van Eycke v ASPA NV* [ECLI:EU:C:1988:427], § 16; Judgment of the Court of 17 November 1993, case C-185/91, *Bundesanstalt für den Güterfernverkehr v Gebrüder Reiff GmbH & Co. KG* [ECLI:EU:C:1993:886], § 14; Judgment of the Court (Sixth Chamber) of 9 June 1994, case C-153/93, *Bundesrepublik Deutschland v Delta Schiffahrts – und Speditionsgesellschaft mbH* [ECLI:EU:C:1994:240], § 14. Article 4(3) of the TEU states the following: «Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties». Also, *vide* Van de Gronden, J. "Emerging Principles of International Competition Law… *op. cit.*, pp. 170-171. On the reference to articles 101 and 102 of the TFEU as 'core' competition rules, *vide* Sanchez Graells, A. *Public Procurement and the EU competition rules, op. cit.*, p. 135.

[21] Judgment of the Court of 13 February 1969, case 14/68, *Walt Wilhelm, cit.*, § 5;

[22] Judgment of the Court of 16 December 1975, joined cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73, *Coöperatieve Vereniging "Suiker Unie" UA and others v Commission of the European Communities* [ECLI:EU:C:1975:174], §§ 65, 66, 71 and 72; Judgment of the Court of 11 November 1997, joined cases C-359/95 and C-379/95, *Commission of the European Communities and French Republic v Landbroke Racing Ltd.* [ECLI:EU:C:1997:531], § 33; Judgment of the Court of 9 September 2003, case C-198/01, *Consorzio Industrie Fiammiferi (CIF) v Autoritá Garante della Concorrenza e del Mercato* [ECLI:EU:C:2003:430], §§ 51-53.

This approach exposes a shortcoming that brings about some implications. If we analyse communitarian case-law we may conclude that it is required that the competitively distortive regulatory act results in or strengthens the effects of an anticompetitive practice by an undertaking; therefore, unilateral competition-distorting behaviour by national regulators is not captured[23]. It is undeniable that regulatory acts that lack sufficient material legitimacy do fall under the scope of competition law[24]. But, as far as unilateral competition-distortive regulatory measures are concerned, they fall outside the scrutiny of Competition law. In the absence of a legislative change, case law does not support a direct submission of state regulatory measures to EU Competition law. However, EU Competition policy does have a say.

From a Competition policy perspective, competition authorities are entitled to assess whether regulators have balanced the intended benefits and policy goals of their regulations with the anticompetitive effects that the concrete piece of regulation may bring along; in doing so, they establish a relationship between the means and ends of the regulatory measures by reference to external values and, by concluding such a structured assessment, they narrow regulators' discretion, while increasing transparency of the decision making[25].

2. Public procurement practice: Member States' non-regulatory measures within the public procurement process

EU antitrust rules are addressed to 'undertakings', a concept which is dependent on the prerequisite of performing an 'economic activity'. An economic activity, in its turn, involves the participation of an undertaking – any entity engaged in an economic activity – in the

[23] Prof. Sanchez Graells refers to it as 'derivative' state liability. *Vide* Sanchez Graells, A. *Public Procurement and the EU competition rules, op. cit.*, pp. 149-151. Judgment of the Court (Fifth Chamber) of 29 January 1985, case 231/83, *Henri Cullet and Chambre syndicale des réparateurs automobiles et détaillants de produits pétroliers v Centre Leclerc à Toulouse and Centre Leclerc à Saint-Orens-de-Gameville* [ECLI:EU:C:1985:29], §§ 17-18; Judgment of the Court of 28 February 1991, case C-332/89, *Criminal proceedings against André Marchandise, Jean-Marie Chapuis and SA Trafitex* [ECLI:EU:C:1991:94], § 23; Judgment of the Court of 17 November 1993, case C-245/91, *Criminal proceedings against Ohra Schadeverzekeringen NV* [ECLI:EU:C:1993:887], § 15; Judgment of the Court of 17 October 1995, joined cases C-140/94, C-141/94 and C-142/94, *DIP*, *cit.,* § 16; Judgment of the Court (Fifth Chamber) of 18 June 1998, case C-266/96, *Corsica Ferries France SA v Gruppo Antichi Ormeggiatori del porto di Genova Coop. arl, Gruppo Ormeggiatori del Golfo di La Spezia Coop. arl and Ministero dei Trasporti e della Navigazione* [ECLI:EU:C:1998:306], §§ 50 and 53.

[24] Regulations adopted by a public authority lower than the one that must have adopted them will be fully submitted to competition law since lower-than-ought levels of government are not entitled to develop (quasi) legislative or nearly regulatory functions. The approval of legislation or regulations of general application is in hands of the governments of the States, since those are imbued with a significant degree of legitimacy and are subject to an intense political review; on the contrary, decisions by lower instances –civil servants, government employees– show a different (lower) degree of legitimacy and are further isolated from public oversight. *Vide* Sanchez Graells, A. *Public Procurement and the EU competition rules, op. cit.*, pp. 180, 184 and 193.

[25] Competition policy is concerned with the formulation and enforcement of competition law and with competition advocacy, that is, the way in which public policies are shaped in order to reduce barriers to entry, facilitate deregulation, promote trade liberalisation and enhance competition, or, at least, ensure that competition will not be harmed by the government action. *Vide* Dabbah, M.M. *International and comparative competition law*. Cambridge, Cambridge University Press, 2010, pp. 12-13 and 60-62; Kohl, M. "Constitutional limits to anticompetitive regulation… *op. cit.*, p. 434.

market or the development of the activity in a market context[26]. Procurement activities, albeit being of clear commercial or economic nature, are not considered 'economic' activities in and by themselves; instead, the focus is placed on whether the subsequent use of the purchased object –good, work or service– amounts to an 'economic' activity[27]. Therefore, absent a downstream economic market – that is, if a contracting authority purchases a product to be used for the purposes of a non-economic activity, it is not acting as an 'undertaking' for the purposes of EU Competition law and, thus, 'core' EU competition rules are not applicable to scrutinise competition compliance[28].

It has been submitted that there is no justification for relieving all types of State actions within the realm of its procuring activities of all control; otherwise, it would imply an automatic extension of the consideration of an exercise of 'public powers' to every kind of public activity in relation to public procurement, even when the State is acting as a mere economic operator. Public powers are typically those of a public authority, those involving the exercise of sovereignty[29]. Further, the fact that private entities also develop a given activity is an indication that the activity does not imply the exercise of public powers[30]. In any case, the exercise of public powers does not imply an intervention in the market and, thus, impedes the consideration of the public entity as an 'undertaking', shielding it from competition scrutiny – i.e., the power of the State exercised in the political sphere is subject

[26] On the functional approach to the concept of 'undertaking', Judgment of the Court of 23 April 1991, case C-41/90, *Höfner, cit.,* § 21; Judgment of the Court (Fifth Chamber) of 22 January 2002, case C-218/00, *Cisal di Battistello Venanzio & C. Sas v Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL)* [ECLI:EU:C:2002:36], § 22; Opinion of the AG Mazák delivered on 18 November 2008, in the case C-350/07, *Kattner Stahlbau GmbH v Maschinenbau- und Metall- Berufsgenossenschaft* [ECLI:EU:C:2008:631], § 39. Also, *vide* Sanchez Graells, A. *Public Procurement and the EU competition rules, op. cit.*, p. 138 and 170.

[27] Judgment of the Court of First Instance (First Chamber, extended composition) of 4 March 2003, case T-319/99, *Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental (FENIN) v Commission of the European Communities* [ECLI:EU:T:2003:50], § 36, confirmed by Judgment of the Court (Grand Chamber) of 11 July 2006, case C-205/03 P, *FENIN, cit.,* § 26; Judgment of the Court of First Instance (Second Chamber) of 12 December 2006, case T-155/04, *SELEX Sistemi Integrati SpA v Commission of the European Communities* [ECLI:EU:T:2006:387], § 65, confirmed by Judgment of the Court of 26 March 2009, case C-113/07 P, *SELEX, cit.,* § 102. Also, *vide* Sanchez Graells, A. *Public Procurement and the EU competition rules, op. cit.*, who concludes that «procurement that is ancillary to a non-economic activity does not by itself qualify as 'economic activity' for the purposes of articles 101 and 102 [...] In relation to public procurement activities [...], they constitute a particular instance where the case law has departed from the functional approach», p. 140.

[28] Judgment of the Court of First Instance of 12 December 2006, case T-155/04, *SELEX, cit.,* § 68. Also, Judgment of the Court of 26 March 2009, case C-113/07 P, *SELEX, cit.,* § 10; Judgment of the Court of 12 July 2012, case C-138/11, *Compass-Datenbank, cit.,* § 41; Judgment of the General Court (Fifth Chamber) of 16 July 2014, case T-309/12, *Zweckverband Tierkörperbeseitigung in Rheinland-Pfalz, im Saarland, im Rheingau-Taunus-Kreis und im Landkreis Limburg-Weilburg v European Commission* [ECLI:EU:T:2014:676], §§ 84-85.

[29] Judgment of the Court of 19 January 1994, case C-364/92, *SAT Fluggesellschaft/Eurocontrol, cit.,* § 30; Judgment of the Court of 18 March 1997, case C-343/95, *Diego Cali & Figli Srl v Servizi ecologici porto di Genova SpA (SEPG)* [ECLI:EU:C:1997:160], § 23.

[30] Judgment of the Court of 23 April 1991, case C-41/90, *Höfner, cit.,* § 22; Judgment of the Court (Fifth Chamber) of 25 October 2001, case C-475/99, *Firma Ambulanz Glöckner v Landkreis Südwestpfalz* [ECLI:EU:C:2001:577], § 20. Also, Judgment of the Court of First Instance (Third Chamber) of 12 December 2000, case T-128/98, *Aéroports de Paris v Commission of the European Communities* [ECLI:EU:T:2000:290], § 124.

to democratic control; whereas Competition law is aimed at controlling the behaviour of economic operators acting on a market[31].

Having said that, a distinction shall be made between (a) whenever the public entity carrying out the public procurement process – i.e., the contracting authority – resorts to the market due to a mere need of complying with its operational needs –buyer – or (b) whenever the contracting authority resorts to the market to accomplish the tasks in the public interest it has been vested with – offeror –[32]. When the intention of the State is concluding a procurement process in order to offer the service procured from the undertaking winning the process in the market –offeror–, the contracting authority pursues a public interest. In such a case, it is carrying out a (social or equivalent) non-economic activity, which may be considered an exercise of its public powers. EU Competition law is not applicable as the public entity is not performing an economic activity and, likewise, is not acting as an undertaking. Still, EU Competition policy does have a say. On the contrary, when the State purchases goods, works or services in order to cover its operational needs, there is no economic reason to restrain the submission of such activities to competition scrutiny to cases where the object of the procurement process is ultimately assigned to the subsequent development of an economic activity[33]. While some Advocates General have petitioned for a less formalistic approach, placing the focus on whether the activities carried out by the public entity in the course of its procuring processes may lead to competitive distortions in the market and must be, thus, condemned, EU Courts have maintained the exclusion from the EU Competition law scrutiny[34]. However, one must admit that 'core' procurement activities –when the State acts as a buyer– may not be camouflaged behind a veil of sovereignty, since they do not entail the exercise of any public power; instead, they merely consist of narrowing down the ample discretion set by public procurement rules in order to select the tenderer that may most effectively comply with the operational needs of

[31] Opinion of the AG Poiares Maduro delivered on 10 November 2005, case C-205/03 P, *Federación Española de Empresas de Tecnología (FENIN) v Commission of the European Communities* [ECLI:EU:C:2005:666], § 26.

[32] One may differentiate cases where a contracting authority is acting as an ultimate offeror from those where a public undertaking is acting as an offeror. The latter are subject to EU Competition law scrutiny, since, as underlined above, the private or public nature of the undertaking does not affect its submission to EU Competition law.

[33] Case law quoted in the footnote 26. A comparative analysis will conclude that the internal competition laws of several Member States (such UK, Germany, the Netherlands, France and Spain) already sanction conducts concluded by public entities when they act as buyers, making competition law in such jurisdictions fully applicable to public procurement activities and to all activities of the public authorities. *Vide*, Sanchez Graells, A. *Public Procurement and the EU competition rules, op. cit.*, pp. 141, 159-161.

[34] Opinion of the AG Jacobs delivered on 13 September 2001, case C-218/00, *Cisal di Battistello Venanzio & C. Sas v Istituto nazionale per l'assicurazione contro gli infortune sul lavoro (INAIL)* [ECLI:EU:C:2001:448], § 71. And case law quoted in the footnote 26. A comparative analysis will conclude that the internal competition laws of several Member States (such UK, Germany, the Netherlands, France and Spain) already sanction conducts concluded by public entities when they act as buyers, making competition law in such jurisdictions fully applicable to public procurement activities and to all activities of the public authorities. *Vide*, Sanchez Graells, A. *Public Procurement and the EU competition rules, op. cit.*, pp. 159-161.

the contracting authority, at the best value for money[35]. In conclusion, it is submitted that public entities, when they purchase goods, works or services to fulfil their operational needs, are carrying out economic activities that qualify them as undertakings for the purposes of directly applying EU Competition law provisions; consequently, decisions must be based on purely economic efficiency grounds, since the pursuance of other public interests must be necessarily attained through regulation[36].

III. Towards the attainment of the Single Public Procurement Market: the imperative redefinition of the State Action Doctrine

The achievement and maintenance of the Single Public Procurement Market comes as indispensable to ensure an EU-wide public procurement market working under conditions of vigorous undistorted competition. However, as it has been put forward in the previous sections, EU Competition law provisions do not capture all the competitive restraints that may be caused by a public actor. Therefore, it is for the EU judicature to delineate, through its interpretation, the boundaries of the EU Competition law.

In doing so, the EU Courts have developed the State Action Doctrine, which, as a general rule, exempts State activity from competition scrutiny. Nevertheless, some specifications must be made regarding the State Action Doctrine and its development throughout the EU case law, in order to further redefine its contours.

Firstly, the State Action Doctrine turns out to be applicable when the State is acting in the exercise of its sovereign powers; therefore, purchasing activities of the State that do not qualify as an exercise of public power may be regarded as economic activities and, thus, directly subjected to the assessment of EU Competition law rules. Consequently, in the field of public procurement, only (a) the approval of legislation or regulations of general application and (b) procurement activities aimed at the direct provision of goods, works and services to comply with public interest tasks shield public entities' activities from EU Competition law scrutiny (*vide* Figure 1).

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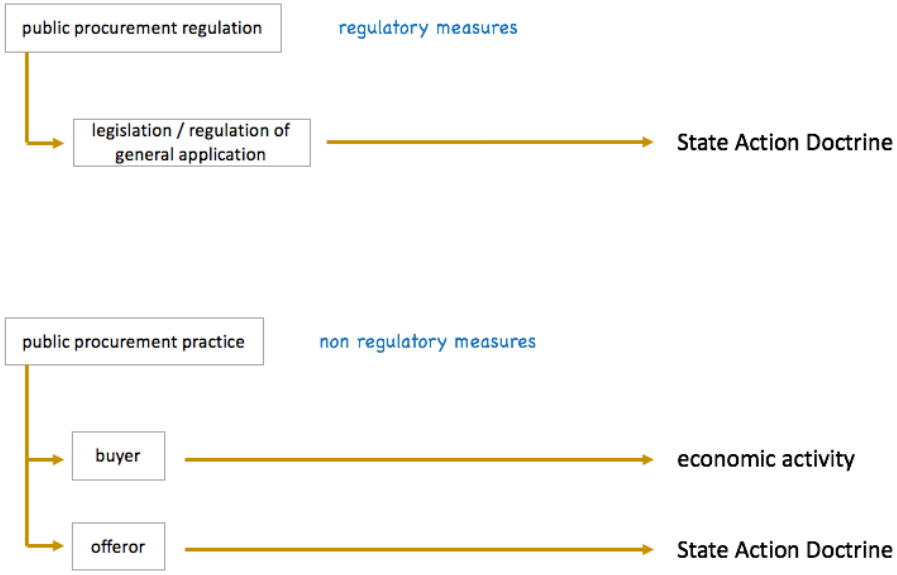
[35] Opinion of the AG Poiares Maduro, case C-205/03 P, *FENIN, cit.*, § 62 and 64: «[...] one of the criteria which is relevant for classifying an entity as an undertaking is its participation in the market. [...] Where public organisations carry out both economic activities, and activities of another kind, it is only demand which is linked to their economic activities which may fall within the scope of competition law. By contrast, purchases intended for non-economic activities are comparable to final demand by consumers and are not subject to competition law [...]».

[36] Gerard, D. "EU Competition Policy after Lisbon... *op. cit.*, p. 11. The balance of public interest grounds through regulation is desirable, as it provides with legal certainty – i.e., all entities will be treated equally. In contrast, the analysis conducted by a competition authority is applicable to the specific factual situation of a case – that is, the solution provided by a competition authority is based on a case-by-case assessment and it cannot be automatically applied to any other case; therefore, different solutions may be rendered in essentially identical cases.

Figure 1 – The submission to the State Action Doctrine of regulatory and non-regulatory measures within the field of EU public procurement



Source: Elaborated by the author.

Secondly, from our standpoint, regulations that have been passed circumventing the legal procedures established or public procurement processes conducted for the direct provision of a public interest task by a contracting authority different from the public entity legally vested with the accomplishment of the task may not benefit from such immunity. All in all, the State Action Doctrine is grounded in the recognition of sovereign powers to specific instances of the State – regulatory powers to the highest sovereign entity, in the case of the approval of regulation; and non-regulatory powers to specific public entities, in the case of acting as an offeror–, which, in turn, are subject to political review.

Finally, it follows that the referred political review includes the assessment of public restraints to the EU's Internal Market rules and, moreover, to general policies set by the TFEU. Among all, the respect to the principle of free competition, which aims at preserving a competitively functioning Internal Market, is to be thoroughly evaluated. Therefore, the EU Competition policy enters into play in order to assess whether a specific pure state action unduly restraints competition in the market. Competition authorities in charge of evaluating the potential restrictions of competition will examine the case in light of competition policy considerations, rather than applying Competition law provisions. They will raise no concerns, even if the public entity at stake takes into account interests other than pure economic efficiency, as long as the potential competitive restrictions amount to a justification and a proportionality test is come

through – that is, as long as the measure at stake is proportional to the objective pursued[37].

In conclusion, while the subjection of public bodies to competition constraints does not hinder the effective achievement of their redistributive objectives, it also comes as essential for the achievement of a competitively working Single Public Procurement Market[38]. However, in cases where the activity of the public entities is due to their exercise of public powers, such constraints are better tailored through its submission to EU Competition policy, which may be more adequately placed to balance public interests rather than just pure economic efficiency.

IV. Conclusion

In the sphere of EU public procurement, the occurrence of antitrust practices may negatively impact the competitive dynamics of the procuring process. Anticompetitive behaviours become especially harmful when they are publicly generated, mainly because Competition law instruments have proven to be ill-positioned to assess the compliance with competition rules of publicly-originated distortions.

The design of EU-wide competitive compliant public procurement processes comes as indispensable for the maintenance of the Internal Market. Moreover, the attainment of a Single Public Procurement Market, where no scope is left for preferential treatment in favour of national companies, unfailingly requires an outmost care for the competitive conditions under which the procurement processes are conducted. As a consequence, concern should also be placed on the approval of legislation and regulations of general applicability that do not stimulate the foreclosure of the market in any form whatsoever. All in all, public authorities have the duty of pursuing the objectives of the EU, no matter their acts are due to their exercise of sovereignty or due to the need of servicing their operational needs.

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[37] *Ibid.*, p. 11. Also, *vide* Sanchez Graells, A. *Public Procurement and the EU competition rules, op. cit.*, pp. 189 and 190. The principle of proportionality, codified in the article 5(4) of the TEU and recognised as one of the general principles of EU Law by the EU Courts, entails an analysis of whether the measure was necessary and appropriate to achieve the objective. *Vide* Craig, P. and De Burca, G. *EU Law: Texts, Cases and Materials*, Oxford, Oxford University Press, 2011, 5th edition, pp. 168-169.

[38] Sanchez Graells, A. *Public Procurement and the EU competition rules, op. cit.*, pp. 167 and 170.

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