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Truly competitive public procurement as a *Europe 2020* lever: what role for the principle of competition in moderating horizontal policies?

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ABSTRACT

Public procurement is a pillar in the *Europe 2020 strategy* and one of the core policies derived from the Single Market Acts I and II. Majoritarian views advocate for an interventionist approach and instrumental utilisation of procurement for the promotion of horizontal policies seen as deeply embedded in the *Europe 2020 strategy*. Conversely, public procurement can only make such a contribution by promoting the maximum degree of competition and being open to market-led innovation, instead of trying to mandate or ‘drive’ such innovation or ‘greening’ of procurement.

This paper takes the view that the principle of competition is the main tool in the post-2014 procurement toolkit and the moderating factor in the implementation of any horizontal (green, social, innovation) policies under the new rules. That is, that competition remains the main consideration in public procurement and that the pursuit any horizontal policies, including those aimed at delivering the *Europe 2020 strategy*, need to respect the requirements of undistorted competitive tendering. In other words, the paper argues that competition considerations should take precedence over national non-economic policies whose effects impair or jeopardise the goals set at EU level. To substantiate that claim, the paper focusses on the interpretation of Article 18(1) of Directive 2014/24, which consolidates the principle of competition, and proposes a strict proportionality test applicable to the promotion of horizontal procurement policies where such ‘strategic’ or ‘smart’ use of public procurement can generate market distortions.

KEYWORDS

Public procurement, competition, growth, Europe 2020, general principles, interpretation

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Introduction

Public procurement is a pillar in the *Europe 2020 strategy*² and one of the core policies derived from the Single Market Acts I³ and II.⁴ As the European Parliament stressed, “*if used effectively, public procurement could be a real driver*” for socially-responsible and sustainable growth.⁵ Indeed, public procurement reform and best practice could make significant contributions in terms of reducing administrative red tape, supporting innovation and green policies and, more generally, in boosting the competitiveness of EU businesses (particularly, SMEs), which are paramount goals of the *Europe 2020 strategy*.

Majoritarian views advocate for an interventionist approach and instrumental utilisation of procurement for the promotion of such horizontal policies (McCrudden,⁶ Arrowsmith,⁷ Kunzlik,⁸ Semple,⁹ as well as many others¹⁰). Conversely, it must be stressed that public procurement can only make such a contribution to economic development, including socially-responsible and sustainable growth, by promoting the maximum degree of competition and being open to market-led innovation, instead of trying to mandate or ‘drive’ such innovation, social orientation, or ‘greening’ of procurement.¹¹ The ‘strategic’ use of public procurement as a regulatory tool can well create barriers to the internal market, diminish incentives for business participation, and reduce the overall effectiveness of this essential mechanism for the proper functioning of the public sector. Consequently, only by avoiding distortions of market dynamics can procurement contribute to economic growth. Other policy goals are best left to specific regulatory regimes of general application, such as standardisation, labour, environmental or tax legislation.¹²

This point of departure is becoming increasingly recognised and, indeed, it has been recently stressed that the *‘starting point for achieving best value for money in government procurement is a regulatory framework that is based on the principle of competition and that submits public spending*

² Communication from the Commission of 3 March 2010, *Europe 2020 A strategy for smart, sustainable and inclusive growth*, COM (2010) 2020 final.

³ Communication from the Commission of 13 April 2011, *Single Market Act: Twelve levers to boost growth and strengthen confidence “Working together to create new growth”*, COM (2011) 206 final.

⁴ Communication from the Commission of 3 October 2012, *Single Market Act II: Together for new growth*, COM (2012) 573 final.

⁵ Resolution of 25 October 2011 on *modernisation of public procurement*, 2011/2048(INI), para. 13.

⁶ C McCrudden, *Buying Social Justice. Equality, Government Procurement and Legal Change* (Oxford, OUP, 2007).

⁷ S Arrowsmith and P Kunzlik, “Public procurement and horizontal policies in EC law: general principles”, in *ibid* (eds), *Social and Environmental Policies in EC Procurement Law. New Directives and New Directions* (Cambridge, CUP, 2009) 9 and ff. See also S Arrowsmith, “Horizontal Policies in Public Procurement: A Taxonomy” (2010) 10(2) *Journal of Public Procurement* 149.

⁸ P Kunzlik, ‘Green Public Procurement—European Law, Environmental Standards and ‘What to Buy’ Decisions’ (2013) 25(2) *Journal of Environmental Law* 173.

⁹ A Semple, *A Practical Guide to Public Procurement* (Oxford, OUP, 2015), ch 7 on Environmental and Social Responsibility.

¹⁰ See *e.g.* the contributions to R Caranta and M Trybus, *The Law of Green and Social Procurement in Europe*, vol. 2 European Procurement Law Series (Copenhagen, DJØF Publishing, 2010).

¹¹ Otherwise, it risks diminishing its own effectiveness and efficiency due to the incompatibility of such extraneous considerations; see SL Schooner, “Commercial Purchasing: The Chasm between the United States Government’s Evolving Policy and Practice” in S Arrowsmith and M Trybus (eds), *Public Procurement: The Continuing Revolution* (The Hague, Kluwer Law International, 2003) 137, 159 fn 105. This has been warned for a long time; see C Turpin, *Government Procurement and Contracts* (Essex, Longman, 1989) 67.

¹² For extended discussion and further references to this academic debate, see A Sanchez-Graells, *Public Procurement and the EU Competition Rules*, 2nd ed (Oxford, Hart, 2015) 101-04.

to the adherence to competitive procurement methods'.¹³ This competition-based approach to the design of public procurement rules can be traced back to the *Europe 2020 strategy* itself, which stresses that “[p]ublic procurement policy must ensure the most efficient use of public funds and procurement markets must be kept open EU-wide”.¹⁴

The Court of Justice of the European Union (CJEU) has also generally supported such an approach and repeatedly stressed the goal of keeping procurement markets open to competition,¹⁵ particularly to ensure that both the public sector and private undertakings can exploit competitive advantages and benefit from the economic efficiencies derived from the single market.¹⁶ Indeed, the CJEU has unambiguously declared that procurement ‘legislation contains fundamental rules of EU law ... intended to ensure the application of the principles of equal treatment of tenderers and of transparency in order to open up undistorted competition in all the Member States’,¹⁷ and repeatedly stressed that the purpose of the public procurement directives ‘is to develop effective competition in the field of public contracts’.¹⁸ Even if some of its recent case law in the area of procurement of social services may point towards a shift in approach¹⁹ and a relaxation of the competitive requirement in certain socially and politically sensitive sectors,²⁰ the need for procurement to contribute to budgetary efficiency and, ultimately, to the efficient use of public funds remains a key consideration in the interpretation of EU public procurement rules.²¹

Despite the clear intent to reconcile competition and economic efficiency with environmental and social considerations as part of the move towards a social market economy,²² and even bearing in mind the instrumental importance of procurement in the delivery of the *Europe 2020 strategy*,²³ such general approach to the design of a pro-competitive procurement setting as a tool to boost efficient public expenditure was also followed in the preparation of the new public procurement rules. The European Commission clearly stressed that “to increase the efficiency of public spending ... it is vital

¹³ UNCTAD, Intergovernmental Group of Experts on Competition Law and Policy, *Competition policy and public procurement* (2012), available at http://unctad.org/meetings/en/SessionalDocuments/ciclpd14_en.pdf, last accessed 31.07.2015.

¹⁴ *Europe 2020* (n 2) para 4.3.

¹⁵ A Sanchez-Graells, *The Principle of Competition Embedded in EC Public Procurement Directives* (2009), available at <http://ssrn.com/abstract=1928724>, last accessed 31.07.2015.

¹⁶ This was recently clearly stressed in *Bundesdruckerei*, C-549/13, EU:C:2014:2235. For related discussion, see K Jaehrling, ‘The state as a “socially responsible customer”? Public procurement between market-making and market-embedding’ (2015) 21(2) *European Journal of Industrial Relations* 149-64.

¹⁷ *Impresa Pizzarotti*, C-213/13 EU:C:2014:2067, para 63 (emphasis added), with reference to *Commission v Portugal*, C-70/06, EU:C:2008:3, para 40; *Mikhaniki*, C-213/07, EU:C:2008:731, para 55; *Commission v Cyprus*, C-251/09, EU:C:2011:84, paras 37 to 39; and *Manova*, C-336/12, EU:C:2013:647, para 28.

¹⁸ *Hochtief and Linde-Kca-Dresden*, C-138/08, EU:C:2009:627, para 47 (emphasis added), with references to *Fracasso and Leitschutz*, C-27/98, EU:C:1999:420, para 26; *Lombardini and Mantovani*, C-285/99 and C-286/99, EU:C:2001:640, para 34; *Universale-Bau*, C-470/99, EU:C:2002:746, para 89; and *Sintesi*, C-247/02, EU:C:2004:593, para 35.

¹⁹ *Azienda sanitaria locale n. 5 «Spezzino» and Others*, C-113/13, EU:C:2014:2440.

²⁰ For a critical assessment, see *Competition and State Aid Implications of the Spezzino Judgment (C-113/13): The Scope for Inconsistency in Assessing Support for Public Services Voluntary Organisations* (2015), available at <http://ssrn.com/abstract=2625166>, last accessed 31.07.2015.

²¹ Cfr. S Arrowsmith, ‘The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies’ (2011-2012) 14 *Cambridge Yearbook of European legal studies* 1. See also P Kunzlik, ‘Neoliberalism and the European Public Procurement Regime’ (2012-2013) 15 *Cambridge Yearbook of European legal studies* 283.

²² Generally, see D Schiek, U Liebert and H Schneider (eds), *European Economic and Social Constitutionalism after the Treaty of Lisbon* (Cambridge, CUP, 2011).

²³ Committee of the Regions, *Delivering on the Europe 2020 Strategy. Handbook for Local and Regional Authorities*, 2nd edn (2014) 23, available at <http://portal.cor.europa.eu/europe2020>, last accessed 31.07.2015.

to generate the strongest possible competition for public contracts awarded in the internal market”.²⁴ Not surprisingly, the resulting Directive 2014/24²⁵ included *competition* as one of the general principles of the redesigned EU public procurement system.

Following these cues, this paper takes the view that the principle of competition is the main tool in the post-2014 procurement toolkit and the moderating factor in the implementation of any horizontal (green, social, innovation) policies under the new rules—that is, that competition remains the main consideration in public procurement and that the pursuit any horizontal policies, including those aimed at delivering the *Europe 2020 strategy*, need to respect the requirements of undistorted competitive tendering. To substantiate that claim, the paper focusses on the interpretation of Article 18(1) of Directive 2014/24, which consolidates the principle of competition, and proposes a strict proportionality test applicable to the promotion of horizontal procurement policies where such ‘strategic’ or ‘smart’ use of public procurement can generate market distortions.

The principle of competition in Article 18(1) of Directive 2014/24 and its interpretation

The pro-competitive approach to the design of the EU public procurement system has resulted in Article 18(1) of Directive 2014/24, whereby ‘[t]he design of the procurement shall not be made with the intention ... of artificially narrowing competition’.²⁶ For the purposes of interpreting what the *general principle of competition* means in the public procurement setting, it is interesting to stress that Directive 2014/24 has aimed to codify the principles coined by the CJEU in its case law. In that regard, the principle of competition was already clearly embedded in the previous generations of public procurement Directives and, despite some terminological confusion and the fact that Advocates General were more prone to refer to it than the CJEU itself, it is possible to *decant* a relatively clear-cut content for this principle from the pre-2014 case law.

According to its most elaborated construction of the principle of competition in the procurement setting so far—developed by Advocate General Stix-Hackl in her Opinion in the *Sintesi* case²⁷—the competition principle embedded in the EU public procurement directives might seem to be multi-faceted and could potentially fulfil at least three protective purposes. First, it would be aimed at relations between undertakings themselves and would require that there exists parallel competition between them when they participate in the tendering for public contracts. Second, it would be concerned with the relationship between the contracting authorities and the tendering undertakings, in particular in order to avoid abuses of a dominant position—both by undertakings against the contracting authorities (*i.e.* through the exercise of market or ‘selling’ power) and, reversely, by contracting authorities against public contractors (through the exercise of buying power). Third, the principle of competition would be designed to protect competition as an institution.²⁸ Finally, as a

²⁴ Commission, *Green Paper on the modernisation of EU public procurement policy*, COM (2011) 15, p. 4.

²⁵ 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 [2014] OJ L 94/65.

²⁶ Some of the interpretative difficulties and challenges that the principle creates are not relevant for the purposes of this paper and, consequently, will not be discussed in detail. For discussion of this reform and an initial attempt to interpret the principle, see Sanchez-Graells (n 12) 207-14.

²⁷ Opinion of AG Stix-Hackl in *Sintesi*, C-247/02, EU:C:2004:399, paras 34-40.

²⁸ This same concept of ‘competition as an institution’ has been referred to as the goal of art 102 TFEU; see Opinion of AG Kokott in *British Airways*, C-95/04 P, EU:C:2006:133, para 125. See also Opinion of AG Ruiz-Jarabo Colomer in *GlaxoSmithKline*, C-468/06 to C-478/06, EU:C:2008:180, para 74 fn 49. This has its roots in an ordoliberal conception of competition law, see D Zimmer (ed), *The Goals of Competition Law* (Cheltenham, Edward Elgar, 2012) and KK Patel and H Schweitzer (eds), *The Historical Foundation of EU Competition Law* (Oxford, OUP, 2013). For extended discussion, see I Herrera Anchustegui, ‘Competition and Buyer Power Through an Ordoliberal Lens’ (2015) 2(2) *Oslo Law Review* forthcoming.

complement to the previous functions or as an expression of the competition principle, EU public procurement directives set particular rules that operationalise the competition principle in different phases of the public procurement process—such as transparency rules, rules on technical specifications, provisions on the selection of undertakings and on the criteria for the award of contracts, information disclosure rules, etc.

Even if the approach followed by Advocate General Stix-Hackl is to be shared in general terms and the competition principle embedded in the EU public procurement directives is to be conceived of as an independent principle,²⁹ and spelled out in broad terms, a closer examination seems to indicate that, of the three stated functions of the competition principle in the public procurement arena, only the latter is of distinguishing relevance. This is so because the other two stated functions of the competition principle are neither more nor less than the standard application of EU competition rules in the public procurement setting.³⁰ Therefore, *only what has been termed ‘protection of competition as an institution’ constitutes the proper content for the competition principle embedded in EU public procurement law.* By ‘protection of competition as an institution’, direct reference is made to the general objective of the TFEU of guaranteeing a system ensuring that competition in the internal market is not distorted and, more generally, to the ensuing general principle of competition.³¹

Such a reference should currently be interpreted in relation to Article 3(3) TEU, Article 3(1)(b) TFEU and Protocol (27) TFEU³²—ie, EU public procurement directives should be conceived of and configured as a body of rules developed on the basis of the principle of undistorted competition in the internal market. Or, more clearly, it is submitted that *the competition principle embedded in the EU public procurement directives is no more and no less than a particularisation, or specific enunciation, of the more general principle of competition in EU law.* In this way, the relevance of the competition principle in the field of public procurement is stressed, since its inclusion amongst the basic principles of public procurement regulation seems to imply the existence of a stronger link of this body of regulation to this general principle of EU law than in the case of other regulatory bodies.

Placing the principle of competition at the basis of the EU public procurement rules reinforces its importance. The justification for this emphasis or reinforcement of the principle of competition in the sphere of public procurement can be found in the fact that EU public procurement rules were developed right from the beginning on the basis of the clear finding that they were necessary to create competition in a setting that initially suffered from an almost complete lack of it. Therefore, the clear competition objective guiding public procurement rules (above) and the ensuing obligation of contracting authorities to *protect* competition as an institution—if not to *develop* competition in the public procurement field—was synthesised in the principle of competition embedded in EU public procurement directives, and now consolidated in Article 18(1) of Directive 2014/24.

It is worth emphasising that the competition principle embedded in EU public procurement directives has two dimensions. In its *positive dimension*, public procurement rules are guided by a

²⁹ Opinion of AG Léger in *ARGE*, C-94/99, EU:C:2000:330, para 95 fn 36.

³⁰ For detailed reasons, see Sanchez-Graells (n 12) 203-04.

³¹ The reasoning would be analogous to that maintained by the EU judicature in relation to the principle of equal treatment, which *‘has likewise explained that the principle of non-discrimination in public procurement is a specific enunciation of the eponymous general principle of Community law’*— Opinion of AG Sharpston in *Commission v Greece*, C-199/07, EU:C:2009:434, para 82. In that regard, see *Parking Brixen*, C-458/03, EU:C:2005:605, para 48; and *Überschär*, 810/79, EU:C:1980:228, para 16. Along the same logical lines, it is submitted that the principle of competition in public procurement is a specific enunciation of the eponymous general principle of EU law—see *Waste oils*, 240/83, EU:C:1985:591, para 9.

³² See: *British Airways*, C-95/04 P, EU:C:2007:166, paras 106 and 143.

fundamental competition principle in that they are designed to abolish protectionist purchasing practices by Member States that result in a segmentation of the internal market and, consequently, to foster transnational competition for public contracts, as well as increased domestic competition for the same contracts.³³ This has been the ‘classical’ or ‘narrow’ conception of the competition requirements and goals of EU public procurement rules—which has read the requirement to open public procurement up to competition as strictly requiring an increase in the number of bidders, mainly due to increased cross-border competition. This view is intrinsically related to non-discrimination requirements (particularly regarding discrimination on the grounds of nationality), and presents a strong link with the objective of market integration that has constantly informed the design and enforcement of EU public procurement directives. However, this positive approach to the competition principle does not comprise all its implications in the public procurement arena, since the principle requires promotion of undistorted competition in public procurement, not merely fostering bidders’ participation.

Possibly of a greater relevance—although so far less explored—is the *negative dimension* of the competition principle embedded in EU public procurement directives. From this perspective, competition requirements should be understood as determining that public procurement rules have to be designed and implemented in such a way that existing competition is not distorted.³⁴ In other words, it is submitted that public procurement rules cannot generate distortions in the dynamic competitive processes that would take place in the market in their absence. Or, even more clearly, public procurement rules must not distort competition between undertakings. This fundamental competition principle embedded in the public procurement directives could be defined or phrased in these terms: *public procurement rules have to be interpreted and applied in a pro-competitive way, so that they do not hinder, limit, or distort competition. Contracting entities must refrain from implementing any procurement practices that prevent, restrict or distort competition.*

This mandate must be considered a well-defined obligation to all Member States’ contracting authorities, and not a mere programmatic declaration of the EU public procurement directives. As has been rightly stressed, the evolution of the EU directives on public procurement has progressively reduced the area of discretion left to Member States,³⁵ and consequently the general principles and mandates contained in the EU public procurement directives should suffice to constrain effectively Member States’ purchasing behaviour, or to substantiate a declaration of their breach of EU law if they behave otherwise. Hence, from this negative perspective, public procurement rules and practices—including those aimed at the pursuit of environmental, social, innovation or any other horizontal or secondary policy goals—need to be measured with the yardstick of the competition principle to ensure that they do not result in restrictions of competition or, in other terms, that they do

³³ This is the part of the competition requirement accepted both by Arrowsmith (n 21) and Kunzlik (n 21) and, more generally, by procurement scholars in the EU and beyond. For discussion, see PA Trepte, *Regulating Procurement. Understanding the Ends and Means of Public Procurement Regulation* (Oxford, OUP, 2004) 15 and ff; S Brown, “APEC Developments - Non-binding Principles of Value for Money and Open and Effective Competition” (1999) 8(1) *Public Procurement Law Review* CS16; K Loader, “The Challenge of Competitive Procurement: Value for Money versus Small Business Support” (2007) 27 *Public Money & Management* 307; and LA Perlman, “Guarding the Government’s Coffers: The Need for Competition Requirements to Safeguard Federal Government Procurement” (2006-2007) 75 *Fordham Law Review* 3187.

³⁴ Again, as the CJEU has repeatedly declared, and AG Poiares Maduro stressed, the directives have the common aim of eliminating anti-competitive practices in public procurement; see Opinion in *Commission v Greece*, C-250/07, EU:C:2008:734, paras 11 and 17.

³⁵ See: S Arrowsmith, “The Past and Future Evolution of EC Public Procurement Law: From Framework to Common Code?” (2005–2006) 35 *Public Contract Law Journal* 337, 338 and 352 and ff.

not generate the effects that competition law seeks to prevent. In the end, as was clearly stated, ‘*the principle of competition is designed to protect competition as an institution*’.³⁶

In view of all the above, the consolidation of the principle of competition in Article 18(1) of Directive 2014/24 should be welcome. Regardless of the interpretative difficulties that its precise wording may create, in my view, it is the main tool in the post-2014 procurement toolkit and the moderating factor in the implementation of any horizontal (green, social, innovation) policies under the new rules. The principle of competition prohibits contracting authorities from engaging in practices that artificially narrow down competition and comes to establish a rebuttable presumption of competition-restrictive procurement based on a *reasonable objective assessment of the concurring circumstances*, so that the consequences and effects of the way in which the procurement procedure is designed and carried out by the contracting authority can determine their unlawfulness. In other words, the test to determine whether specific procurement practices are compliant with the principle of competition in Article 18(1) of Directive 2014/24 or not (and, in that case, need to be amended or abandoned by contracting authorities), requires an assessment of whether the restriction of competition created by the contracting authority can be *justified on objective grounds and whether the restriction of competition is strictly proportionate* to the alternative aim pursued by the contracting authority, always bearing in mind that the main goal of the procurement exercise is to create competition so that the contracting authority obtains the works, goods or services it requires in the best possible (market) conditions and that market agents can exploit any existing competitive advantages in the setting of the internal market.³⁷

As discussed in further detail in the next section, if requirements apparently derived from the pursuit of any horizontal (green, social, innovation) policies cannot be justified on objective grounds (*e.g.* are not linked to the subject-matter of the contract and/or a rational and disinterested contracting authority would not have taken the same decision), or are not strictly proportionate (*e.g.* impose demands that go beyond the scope of the procurement procedure and/or that create such a restriction of competition that the benefit for the purposes of the horizontal policy does not make up for it), they will be barred by the principle of competition. Given that the issue of objective justification is closely linked to general issues of public law, such as the duty to state reasons and other obligations derived from the duty of good administration that exceed the present discussion, they will not be assessed in detail here. The following section focusses on the strict proportionality test that results from the principle of competition consolidated in Article 18(1) of Directive 2014/24.

The strict proportionality test derived from the principle of competition

The discussion above shows how, in order to assess whether the pursuit of any horizontal (green, social, innovation) policies infringes the requirements derived from the competition principle or not, it is necessary to engage in policy considerations aimed at striking a balance between such competing interests. In that regard, generally, Member States may seem to retain substantial freedom to conduct trade-off and balancing analyses between competition and conflicting (non-economic) policy objectives and to adopt competition-distorting non-economic legislation and regulation, particularly in the field of public procurement, where horizontal policies receive special attention.³⁸

³⁶ Opinion of AG Stix-Hackl in *Sintesi*, C-247/02, EU:C:2004:399, para 36.

³⁷ *Bundesdruckerei*, C-549/13, EU:C:2014:2235, para 34.

³⁸ For discussion on trade-offs based on economic justifications, see S Arrowsmith, “Rethinking the Approach to Economic Justifications under the EU’s Free Movement Rules” (2015) *Current Legal Problems* forthcoming, available at <http://www.nottingham.ac.uk/pprg/publications/index.aspx>, last accessed 31.07.2015.

Nevertheless, such an exercise of balancing conflicting goals and policies is not completely unrestrained, and there are certain bounds within which Member States should conduct such assessment (however complex it might be), as well as general criteria that must inform the decisions to be made—which shall be subjected to a strict proportionality analysis.³⁹ In the end, the construction of the European economic system—and, to a large extent, of the whole European project—must necessarily have its foundations in a set of rules ensuring undistorted and free competition in an open market economy. Therefore, the balancing between economic and non-economic policies will necessarily need to respect all Treaty provisions—and particularly Articles 119 and 120 TFEU. As a point of departure, it is to be stressed that Article 120 TFEU clearly imposes on Member States the duty to conduct their economic policies with a view to contributing to the achievement of the objectives of the Union, and to act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources (according to the principles laid down in art 119 TFEU).⁴⁰ Few doubts can be cast, then, on the principle that *Member States' economic regulations must be guided by allocative efficiency considerations and promote free competition in the markets*.⁴¹ This requirement will be of special relevance in the case of public procurement rules, as a main exponent of economic regulation—or, in other words, 'core' EU economic policy.

From this perspective, and in essence, the issue of concurrent and conflicting EU and Member States' non-economic policies in the public procurement field—whether directly linked to the *Europe 2020 strategy*, or otherwise—raises the question whether the efficiency and free competition requirements for all economic policies must prevail or, on the contrary, if certain inefficiencies and distortions of competition must be allowed for in pursuance of non-economic policies and, if so, under which circumstances and to what extent.⁴²

Criteria for the Balancing of Conflicting Policy Goals and Effects

In my view, two main differences need to be drawn in order to analyse this complex issue properly—as a holistic analysis would make it difficult to strike the proper balance between conflicting goals and

³⁹ M Kohl, 'Constitutional Limits to Anticompetitive Regulation: Principle of Proportionality' in G Amato and LL Laudati (eds), *The Anticompetitive Impact of Regulation* (Cheltenham, Edward Elgar, 2001) 419, 425-30.

⁴⁰ *CIF*, C-198/01, EU:C:2003:430, para 47; and E Szyszczak, *The Regulation of the State in Competitive Markets in the EU* (Oxford, Hart Publishing, 2007) 6-7 and 30-31. On the implications of this principle of an open market economy with free competition and the paramount importance that it imbues in EU competition policy, D Hildebrand, *The Role of Economic Analysis in the EC Competition Rules*, 2nd edn (New York, Kluwer Law International, 2002) 8-16.

⁴¹ Indeed, the free market principle enshrined in art 119 TFEU is bound to dominate all policies of the EU; see E Szyszczak, 'State Intervention and the Internal Market' in T Tridimas and P Nebbia (eds), *European Union Law for the Twenty-First Century: Rethinking the New Legal Order* (Oxford, Hart Publishing, 2004) 217, 227.

⁴² Defending the supremacy of economic goals and competition principles over other principles and goals of the TFEU—and, notably, social goals, see J Baquero Cruz, *Between Competition and Free Movement: The Economic Constitutional Law of the European Community* (Oxford, Hart Publishing, 2002) 69-72. See also Opinion 1/91 on the draft EEA agreement [1991] ECR I-6079 41; *Eco Swiss*, C-126/97, EU:C:1999:269, paras 36-37; *Courage and Crehan*, C-453/99, EU:C:2001:465, paras 20-21; see also *Waste oils*, 240/83, EU:C:1985:591, para 9; and *Albako v BALM*, 249/85, EU:C:1987:245, para 16. In similar terms, the preponderance of the competition principle in EU law has been stressed by J Pelkmans, *European Integration. Methods and Economic Analysis*, 2nd edn (Harlow, Longman, 1997) 183; and RD Anderson and A Heimler, 'What has Competition Done for Europe? An Inter-Disciplinary Answer' (2007) 4 *Aussenwirtschaft* 419, 421-26. Contrary to the prevalence of the principle of free competition over other principles and goals of the TFEU—which is considered to pursue simultaneously and with equal intensity a wide range of goals, see Opinion of AG Mischo in *Finalarte*, joined cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, EU:C:2000:395, paras 45-46. Along the same lines, see W Sauter, *Competition Law and Industrial Policy in the EU* (Oxford, Clarendon Press, 1997) 225, who considers that there is no hierarchical order between the various intermediate objectives of the Treaty.

effects of juxtaposed and overlapping policies pursued at different levels of government. On the one hand, balancing the objectives and effects of EU policies amongst themselves needs to be differentiated from balancing the goals and effects of EU and Member States' domestic policies (*i.e.*, horizontal v vertical compatibility test).⁴³ On the other hand, balancing EU 'core' economic goals against non-economic goals (either of the EU or of the Member States) needs to be distinguished from balancing the latter and 'secondary or peripheral' EU economic policies (relevance of policies test).⁴⁴

As regards the first criterion—that is, the *horizontal or vertical consistency of policies' goals and effects*—the consistency of EU policies amongst themselves (a horizontal balancing of goals) seems to impose a stricter approach towards giving prevalence to economic goals than the assessment of the consistency of EU and Member States policies (a vertical analysis). Given that the TFEU aims to accomplish a broad set of objectives, there are indispensable trade-offs between competing goals that the European institutions need to assess when defining EU policies and setting regulatory goals. Therefore, it is for EU institutions to decide whether certain inefficiencies and 'instrumental' distortions of competition are desirable in the light of obtaining non-economic objectives for the ensemble of Member States and in favour of all European citizens, subject to the general principle of proportionality. Given the basic purpose and history of the EU, its policies are largely determined by economic concerns, and economic objectives dominate as decision-making criteria in most cases.⁴⁵ Nevertheless, in this horizontal perspective, it is for EU institutions to decide whether to depart or not from this fundamentally economic approach when making decisions in non-economic areas of European policy—subject also to the relevance of policies test described below. This seems rather clear in the *Europe 2020 strategy*, which ultimate objective is to promote economic growth and employment, even more so in the aftermath of the economic crisis that started in 2008,⁴⁶ which may well require a stress of the single market aspects more directly linked to 'core economic' policies in the years to come.⁴⁷ In that regard, the balance of economic and non-economic aspects linked to the *Europe 2020 strategy* in the specific area of procurement needs to be done within the framework of the applicable rules (mainly, Directive 2014/24) and, consequently, under the requirements derived from the general principle of competition therein embedded.

The circumstances are different when the non-economic decisions are to be made at a national level and consistency with EU economic policies determines the scope of Member States' discretion

⁴³ 'Horizontal' refers exclusively to the EU level. There is a different horizontal analysis to be conducted between Member States' domestic economic and non-economic policies. However, in this setting, the CJEU has granted Member States ample discretion to balance economic and non-economic goals by narrowing down the scope of art 120 TFEU in this 'second layer' of horizontal analysis; see *Échirolles*, C-9/99, EU:C:2000:532.

⁴⁴ Given the dynamism and incrementalism of the construction of the European project, secondary economic policies can be expected to gain importance in the future. However, the 'core' of EU economic policies has remained mostly unchanged during the first fifty years of European integration and is more than likely to remain largely unaltered in the future. Therefore, given their permanence and substantiality in the process, it is submitted that special emphasis is to be placed on the balancing of non-economic and 'core' economic goals when shaping future policy.

⁴⁵ See: C Joerges 'A Renaissance of the European Constitution?' in UB Neergaard et al (eds), *Integrating Welfare Functions into EU Law—From Rome to Lisbon* (Copenhagen, DJØF Publishing, 2009) 29, 43-52.

⁴⁶ Communication from the Commission of 19 March 2014, *Taking stock of the Europe 2020 strategy for smart, sustainable and inclusive growth*, COM (2014) 130 final/2.

⁴⁷ Along the same lines, A Renda, "The Review of the Europe 2020 Strategy: From austerity to prosperity?" (2014) *Centre for European Policy Studies Policy Brief No. 322*, 9, available at <http://www.ceps.eu/system/files/CEPS%20PB%20322%20AR%20on%20Europe%202020%20final.pdf> last accessed 31.07.2015.

in shaping their non-economic domestic policies—that is, in the case of a vertical analysis.⁴⁸ This is particularly important in public procurement because the horizontal (green, social, innovation) policies they aim to develop do not always have a clear EU origin or functional equivalent, sometimes even the opposite, particularly if they aim to foster regional development or to tackle specific social policies. The potential tension between the objectives and goals of EU economic regulations and the effects generated by Member States in pursuance of that type of non-economic goals often gives way to a conflict (of competences) that needs to be resolved by means of the analytical criteria offered by two of the most important principles for the interpretation and construction of EU law: the principle of supremacy (or primacy) and the principle of subsidiarity (art 69 TFEU and the corresponding Protocol on the application of the principles of subsidiarity and proportionality), as the issue is finally one of distribution of competences between the Union and Member States.

According to the principle of subsidiarity, if the decision on a given non-economic issue lies with the Member States, EU institutions either lack competence in that area or are not the best-situated decision-makers in that particular instance.⁴⁹ Therefore, non-economic aspects of decision-making should exclusively be determined by the corresponding national institutions—within the general limits imposed by the rules of the TFEU. At the same time, if the conflicting economic regulation has been designed and is enforced at the EU level (and for the same subsidiarity reasons, *a contrario*), EU institutions either have exclusive competence in the area according to the rules of the TFEU, or are the best-positioned authority to make that decision.⁵⁰ In this latter scenario, the principle of supremacy⁵¹ necessarily becomes the deciding factor, as the principle of subsidiarity cannot provide a satisfactory solution to the conflict of competences when both legal orders have exercised their powers appropriately, according to the relevant rules on division of powers. Given the *effet utile* of the TFEU and of all the secondary legislation instruments implementing EU policies, economic goals pursued at the EU level are to be considered preponderant, and conflicting national non-economic regulations whose effects jeopardise the attainment of EU economic goals will in principle

⁴⁸ As indicated, a conflict could also be devised between Member States' economic and EU non-economic policies. Given the more restricted competences of the European institutions in non-economic areas, the subsidiarity principle may suffice to resolve most of the conflicts. However, in general and abstract terms, these tensions between non-economic EU goals and domestic economic policy would need to be solved according to the same principles and logic developed here.

⁴⁹ On the principle of subsidiarity and its implications for the development of EU law, see A Estella, *The EU Principle of Subsidiarity and Its Critique* (Oxford, Oxford University Press, 2002) 74-179.

⁵⁰ As regards Member States' inferior position to fulfil the task of harmonising rights of state regulation (ie, non-economic goals) with rights of free trade and competition—which supports the finding that, according to the logic of the subsidiarity principle, those issues need to be regulated at the EU level; see EM Fox, 'State Action in Comparative Context: What if Parker v Brown were Italian' in B Hawk (ed), *International Antitrust Law and Policy*, Annual Proceedings of the Fordham Corporate Law Institute 2003 (Huntington, Juris Publishing, 2004) 463, 473; and Pelkmans (n 42) 185-86. Along the same lines, K Gatsios and P Seabright, 'Regulation in the European Community' (1989) 5 *Oxford Review of Economic Policy* 37, 59.

⁵¹ The principle of supremacy of EU law determines that wherever there is a conflict with national law, EU law takes precedence. It is a case law construction of the ECJ, that was mainly developed in Case 26/62 *Van Gend and Loos* [1962] ECR 1; Case 6/64 *Costa v ENEL* [1964] ECR 585; and Case 106/77 *Simmmenthal* [1978] ECR 629. As a result of the supremacy of EU law, conflicting national laws, of whatever status, will be inapplicable insofar as they are incompatible with EU law, of whatever status. See Case C-168/95 *Arcaro* [1996] ECR I-4705; and Joined Cases C-10 and 22/97 *IN CO GE '90* [1998] ECR I-6307. On the principle of supremacy, generally, see Lenaerts and van Nuffel (n 100) 16–67, 122–23, 268–71 and 665–73; R Gordon, *EC Law in Judicial Review* (Oxford, Oxford University Press, 2007) 48–53; TC Hartley, *The Foundations of European Community Law*, 6th edn (Oxford, Oxford University Press, 2007) 224–26; Craig and De Búrca (n 6) 344–78; FG Jacobs, *The Sovereignty of Law: The European Way* (Cambridge, Cambridge University Press, 2007) 40–42; and *ibid*, 'The State of International Economic Law: Re-Thinking Sovereignty in Europe' (2008) 11 *Journal of International Economic Law* 5, 8–10. See also C Joerges et al, *Rethinking European Law's Supremacy* (EUI Working Papers, LAW 2005/12), available at www.iue.it/PUB/law05-12.pdf.

need to be adjusted (ie, limited) to the point where they no longer detract from the effectiveness of the relevant EU economic regulation—or, at least, subjected to a very strict proportionality test that ensures that the benefits generated by the conflicting non-economic goals are commensurate with or exceed the negative effects they generate on the attainment of EU economic goals.⁵²

Therefore, *in general terms, EU economic goals will take precedence over Member States' non-economic goals when the pursuit of the latter generates negative effects on the former, unless the non-economic benefits generated overcome a strict proportionality test.*⁵³ Consequently, Member States shall refrain from pursuing conflicting non-economic policies that generate disproportionate negative effects or that raise unnecessary obstacles to the attainment of EU economic goals. This proportionality analysis should be developed taking into account the specific circumstances of the case and the actual effects of the conflicting domestic policies on the goals pursued at EU level—eg, the restrictions or distortions of competition that they generate.⁵⁴

As regards the second criterion, *the relevance of the EU economic policies in conflict will also have an impact on and largely determine the outcome of the balancing test between them and non-economic policies.* The more relevant an EU economic policy—and, hence, the more fundamental to the integration process—the more difficult it should be for a competing non-economic goal to gain precedence and for the negative effects generated in its pursuit to be acceptable under EU law. Put differently, the more relevant an EU economic policy, the higher the pressure for non-economic goals to be taken into consideration as leading decision-making criteria in resolving the conflict. In this sense, 'core' EU economic policies derive from the basic objective of creating and developing an internal market, and mainly comprise competition and free movement—and, among the latter, public procurement rules.⁵⁵ Hence, any limitation of the effectiveness of competition and public procurement rules needs to be more strongly justified by overriding non-economic considerations than a similar restriction of EU economic policies of a 'secondary or peripheral' nature.

According to the abovementioned criteria, it is submitted that, when evaluating a given domestic legislation or administrative practice of the Member States, *a particularly restrictive approach should be taken when the result or effect of such regulation is to detract from the effectiveness of 'core' EU economic goals*—and, particularly, from the effectiveness of the internal market policies, which include competition and free movement as their paramount expression. In that case, if the restriction to competition is aimed at pursuing domestic non-economic goals, a very stringent proportionality test (particularly regarding the existence of alternative solutions that generate minor competition distortions or restrictions to free movement) should be applied on the basis of the logic derived from the principles of subsidiarity and supremacy. On the other hand, even if the

⁵² In this reading, the concept of supremacy is probably used in a *weak form*, since a strict application of the principle of primacy would lead to the blunt rejection of the conflicting non-economic goals. See Kohl (n 39) 422. However, it seems desirable to leave some room for state generated restrictions of competition that, from an aggregate perspective, generate net social gains—ie, that compensate or exceed the social losses derived from the restrictions to competition that they generate, that would then become 'instrumental'.

⁵³ It goes without saying that, whenever national legislation in pursuance of non-economic goals generates neutral effects as regards the attainment of EU economic goals, no such conflict will arise and, consequently, the ability of Member States to pursue the policy goals that better suit their needs will remain unaffected. However, it should also be acknowledged that it is hard to envisage non-economic policies that remain completely neutral or that generate no impact on the pursuit of economic policies.

⁵⁴ For guiding criteria on this proportionality test, albeit formulated in more general terms, see G Amato and LL Laudati, 'Recommendations for the Reform of Regulation to Promote Competition—Draft Guidelines' in *ibid* (eds), *The Anticompetitive Impact of Regulation* (Cheltenham, Edward Elgar, 2001) 475, 477-84.

⁵⁵ Baquero (n 42) 65. Similarly, C Bovis, *Public Procurement in the European Union* (New York, Palgrave-Macmillan, 2005) 15-16.

restriction to competition is aimed at furthering a competing EU non-economic policy (as designed by EU institutions, but to be implemented by Member States), a similarly stringent approach should be followed and the validity of the anti-competitive regulation should be strictly scrutinised on the basis of a narrow construction of the EU non-economic policy that conflicts with a ‘core’ EU economic policy. Therefore, the analysis should not be based on a comparison between policy objectives, but shall be restricted to those cases in which the pursuit of non-economic goals (as a matter of domestic or EU policy) generate negative effects or diminish the effectiveness of ‘core’ EU economic goals. It clearly follows that, whenever the pursuit of those non-economic goals does not generate a negative impact on ‘core’ EU economic goals (ie, does not jeopardise their attainment), no assessment under the proposed test should be triggered.

The Impact of the Strict Proportionality Test on the Pursuit of Horizontal Procurement Policies

The application of the criteria proposed in the previous sub-section for the assessment of potentially conflicting policies could contribute to restricting certain types of public procurement rules—particularly those aimed at the pursuit of ‘secondary’ policies, or at regulatory uses of public procurement (such as contract compliance), and ultimately contribute to achieving a more competition-oriented public procurement system.

Generally, the pursuit of ‘secondary’ policies in the public procurement field could result in distortions of competition unless such policies are framed within the strict limits set by EU public procurement rules themselves.⁵⁶ Consequently, the pursuit of such ‘secondary’ policies or the use of public procurement as a regulatory tool by Member States will potentially conflict with EU competition rules and with their basic goals and objectives—since they will most often generate negative effects for the attainment of the ‘core’ economic goals of EU public procurement and competition law. Then, the establishment of national legislation in pursuance of such ‘secondary’ policies that generate anti-competitive effects should not be automatically allowed or deemed compatible with the requirements of the principle of competition embedded in Article 18(1) of Directive 2014/24. In these circumstances, an analysis should be conducted according to the aforementioned criteria and the ensuing strict proportionality test—with particular focus on the identification of potential distortions of competition—and, when possible, alternative means to pursue non-economic goals with a lower impact on ‘core’ economic objectives should be explored.⁵⁷

According to the analytical framework previously outlined, it should be determined whether the secondary policies pursued are ‘EU secondary policies’ or ‘domestic secondary policies’—ie, whether they pose a question of vertical or of horizontal consistency. In this regard, ‘EU secondary policies’ seem to be limited to taking into consideration social and environmental issues that are directly related to the object of the procurement process.⁵⁸ To be sure, Directive 2014/24 has increased the possibility of including as award criteria elements linked to the whole life-cycle of the goods or services being procured, which can be seen as expanding the scope for horizontal (particularly green) policies, but

⁵⁶ Generally, see J Arnould, ‘Secondary Policies in Public Procurement: The Innovations of the New Directives’ (2004) 13 *Public Procurement Law Review* 187. Indeed, a restrictive approach towards the pursuit of ‘secondary’ policies has been established by CJEU case law. See S Arrowsmith, *The Law of Public and Utilities Procurement. Regulation in the EU and the UK*, Vol. 1, 3rd edn (London, Sweet & Maxwell, 2014) 8 and 1256-93; and Trepte (n 33) 168-76.

⁵⁷ Along the same lines, see RD Anderson and WE Kovacic, ‘Competition Policy and International Trade Liberalisation: Essential Complements to Ensure Good Performance in Public Procurement Markets’ (2009) 18 *Public Procurement Law Review* 67, 92-93.

⁵⁸ For a review of these policies in EU legislation and case law, see Arrowsmith and Kunzlik (n 7).

there are still important limits to be respected.⁵⁹ In that regard, issues such as taking into consideration environmental and social requirements that present loose links to the object of the contract, imposing general corporate social responsibility requirements on interested bidders,⁶⁰ or the pursuit of any other non-economic issues (one of the most controversial amongst those non-economic elements will, needless to say, concern any assessment of local/social value of a given procurement⁶¹); should be considered ‘domestic secondary policies’—and, hence, subjected to a stricter proportionality analysis.

In the first instance (*ie* domestic rules or practice in line with clearly defined ‘EU secondary policies’), domestic public procurement rules should be shielded from further scrutiny, assuming the criteria to ensure consistency (*rectius*, proportionality) of conflicting EU goals are respected—*ie*, that the environmental or social aspects are closely related to the object of the contract and that they do not leave full discretion to the contracting authorities to award the contract (as the prime yardsticks of the principle of proportionality in this area).⁶² On the contrary, if the domestic legislation of the Member States goes further than allowed for by EU public procurement rules or pursues different goals—*ie*, pursues ‘domestic secondary policies’, their procurement policies should be analysed according to the abovementioned criteria of vertical consistency with EU competition goals (and, consequently, subjected to more stringent requirements).

Given the ‘core’ nature of competition as an EU economic policy and the orientation of public procurement as a tool to harvest its results, it is submitted that competition considerations should take precedence over national non-economic policies whose effects impair or jeopardise the goals set at the EU level (that is, policies which restrict or distort competition in the internal market).⁶³ Therefore, if the pursuit of ‘domestic secondary policies’ generates material distortions of competition in the public procurement setting that are not proportional to the alternative goals or that are unnecessary for their attainment—and, ultimately, jeopardises the general goal of undistorted competition in the internal market that is encapsulated in Article 18(1) of Directive 2014/24—these policies should be declared in breach of EU law. In more specific terms, when contracting authorities from Member States conduct procurement activities that generate restrictions or distortions of competition, the fact that their decisions are made in accordance with domestic legislation that pursues ‘secondary policies’ should be largely irrelevant in their assessment under EU law—*ie*, should not automatically be exempted. National public procurement legislation which generates effects that jeopardise or impair the attainment of undistorted competition conditions in the internal market should be subjected to a strict proportionality test and, failing to pass it, be declared in breach of EU law and be deemed unfit to justify the public procurement practices that artificially narrow down (or exclude) competition in contravention of Article 18(1) of Directive 2014/24—ultimately, by virtue of the requirements of the principle of supremacy.

⁵⁹ Sanchez-Graells (n 12) 378-91.

⁶⁰ *Commission v Netherlands*, C-368/10, EU:C:2012:284.

⁶¹ The issue is particularly controversial in the UK, as a result of the adoption of the *Public Services (Social Value) Act 2012*. For discussion, see P Henty, “Social Responsibility in Public Procurement: Public Services (Social Value) Act 2012” (2012) 21(4) *Public Procurement Law Review* NA193-196; and S Brunning, “United Kingdom - Cabinet Office provides advice to contracting authorities: Public Services (Social Value) Act 2012” (2013) 22(3) *Public Procurement Law Review* NA84-87.

⁶² *Beentjes*, 31/87, EU:C:1988:422, paras 28-32; *Commission v France*, C-225/98, EU:C:2000:494, paras 46-54; *Concordia Bus Finland*, C-513/99, EU:C:2002:495, paras 59-64; and *EVN and Wienstrom*, C-448/01, EU:C:2003:651, paras 66-71. More recently, *Commission v Netherlands*, C-368/10, EU:C:2012:284.

⁶³ Along the same lines, see *Bundesdruckerei*, C-549/13, EU:C:2014:2235.

Conclusion

This paper has taken the view that the only way in which public procurement can contribute to the goals of the *Europe 2020 strategy* in an effective way is by adopting a clearly pro-competitive framework. Directive 2014/24 has done so by consolidating the general principle of competition in its Article 18(1), which requires that contracting authorities avoid artificially narrowing down competition. In that regard, the paper has shown how competition is the main tool in the post-2014 procurement toolkit and the moderating factor in the implementation of any horizontal (green, social, innovation) policies under the new rules. The interpretation of Article 18(1) of Directive 2014/24 advanced here resulted in a stringent proportionality test applicable to the promotion of horizontal procurement policies where such ‘smart’ use of public procurement can generate market distortions.

Where the horizontal policy being pursued by the Member States derives from an EU policy—*ie* ultimately implements the *Europe 2020 strategy* for smart, sustainable and inclusive growth—this test will require that the environmental, innovative or social aspects included in the procurement decision-making process are closely related to the object of the contract and that they do not leave full discretion to the contracting authorities in the award the contract. Conversely, where Member States pursue strictly domestic secondary policies (such as promotion of local/social value), their procurement should be subjected to more stringent requirements. In these cases, admittedly, there will be limited scope for horizontal policies that generate appreciable distortions of competition.